# The George Washington Undergraduate Law Review

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The George Washington Pre-Law Student Association is a prominent student organization for all undergraduate students interested in pursuing a law degree and a career in the legal field. The organization aims to enhance the foundation of legal scholarship on campus, while providing members with the opportunity to network and develop legal writing skills. Additionally, the organization equips students with the tools most necessary for a future in law, including information regarding law school admissions.

The George Washington Undergraduate Law Review is a student-managed and published legal journal that analyzes current legal issues across a variety of specialties, including but not limited to environmental, criminal, immigration, and international law. The Undergraduate Law Review offers students the opportunity to explore legal research, enrich their writing and critical thinking skills, and make a valuable contribution to legal discussion during their undergraduate studies.

The writings published in the Undergraduate Law Review conform to the 19th Edition of The Bluebook legal citation system, while adhering to the academic integrity of The George Washington University. The Pre-Law Student Association is proud of the work of these student authors and editors and their efforts in producing this journal.

Sincerely,

Michael A. Fazio
President
Introduction

Going back all the way to our first meetings in September, the 2014 ULR Team was united behind a simple, straightforward goal for this year’s journal: Make this the best Undergraduate Law Review that the Pre-Law Student Association had ever published. We knew this would require expanding the presence of our journal so that the application process for writers would be highly selective, as well as making the publication process even more rigorous. Through our hard work setting up information sessions and advertising on campus early this year, the law review saw unprecedented interest from George Washington University students, and we received over sixty applications for twenty writing positions. We had clearly built up impressive momentum for the coming year by the fall, but I knew that reaching our goal would require—above all else—dedication and perseverance from our chosen writers in the months ahead.

The publication process for this year was incredibly demanding and challenging. Writers for the law review were required to submit legal proposals, outlines, first drafts, and second drafts to the ULR team—which included myself, two editors-in-chief, and nine editors. We provided extensive critiques of writers’ work at each stage in the process, and every draft was also sent to a legal professional for final edits, which included GW Law School professors, law students, and attorneys. I am incredibly proud of the eleven writers who made it through this yearlong process from start-to-finish, and I know many of them believe that their articles are the best piece of writing they have ever produced. So despite being an undergraduate journal, I can say with the confidence that the articles contained in this year’s law review all share compelling analysis, thorough research, and very strong writing on a diverse variety of legal topics.

I want to specially thank the PLSA’s Vice President, Chelsea Brewer, and the ULR’s two editors-in-chief, Kathleen Gilliland and Emma Spath. We spent countless meetings and hours together planning, editing, and writing for the law review, and I know that it was the strength and commitment of our team that made this year such a success. I also want to thank PLSA President Michael Fazio for his role in organizing and formatting the final manuscript, which was no easy endeavor. The responsibilities of this year were a profound learning experience, and I deeply appreciate the unique talents and abilities each of you brought to the table. And as we send this year’s journal off for publication, I have no doubt that—together—we accomplished our goal of making this year’s law review the best one our organization has ever published.

Sincerely,

Max G. Lesser
Law Review Director
Paradox or Permissible?
The Emergence of the Responsibility to Protect Doctrine in International Law

Katherine Wynne

Introduction

In the face of mass atrocity and inaction by the United Nations (UN), the leaders of the international community ask themselves: to act, or not to act? The question is not one of willingness; rather, it is a question of whether or not an individual state has the right to act.¹ When UN inaction leaves citizens vulnerable to domestic atrocities, the onus of protection may potentially pass to individual states. Debate has arisen as to whether the passing of this onus of protection from UN-led action to individual state-led action is legally permissible. From the vacuum of UN inaction arose the Responsibility to Protect Doctrine (R2P). As it currently stands, the Responsibility to Protect is two-fold. First, it asserts that each state has a responsibility to protect its populations from atrocities such as genocide, war crimes, ethnic cleansing, and crimes against humanity. Second, the international community has a responsibility to protect populations from these kinds of atrocities.²

The purpose of this article is to determine the current status of R2P in international law and the international legal community, its legal permissibility within the United Nations framework, and the legal permissibility for individual states to recourse to force using R2P as legal justification outside of a UN Security Council Resolution. This article will find that the R2P as justification for force is legal within the context of the UN framework, the UN Charter of Rights and Freedoms, and current customary international law. This review will not find, however, that the same applies to individual states justifying recourse to force through R2P outside of the UN-framework. This review will conclude by recommending that the United Nations deter member states from individual intervention and recourse to force outside the bounds of a UN Security Council Resolution. If R2P were to be continually or increasingly used as justification for state intervention, the overall potency and efficacy of the UN system

² Id.
would deteriorate. States would be less compelled to refrain from action parallel to or against Security Council resolutions.

Current laws considered Customary International Law, those approved as international law under the United Nations Charter of Rights and Freedoms, were created for the purpose of protecting the fundamental rights and freedoms of individuals regardless of race, sex, and nationality.³ The international community has affirmed these as customary international laws; however, these laws have insofar been insufficient to consistently protect such human rights.⁴ There is an emerging view held by scholars, including Yale’s Myres McDougal, that R2P is necessary to make pre-existing customary international law a holistic and effective approach to protecting these vital rights and freedoms.⁵ However, McDougal’s view is fundamentally flawed and will be examined forthwith.

Evolutionary Chronology of R2P in International Law

The permissibility of a state to intervene within the territory of another state has long been a contested issue. Notably, this permissibility is separate from mere state intervention for the purpose of self-interest. Humanitarian intervention is a doctrine stemming from tort law: it is a doctrine requiring an individual (or state) to take every action at hand to avoid an accident where peril to another human being (citizenry) is otherwise imminent.⁶ Black’s Law Dictionary defines intervention as: “such an interference between two or more states as may (according to the event) result in a resort to force…Intervention between a sovereign and his subjects is not justified by anything in international law.”⁷ Humanitarian intervention as a justification for recourse to force has been cited dating back to the religious wars of the sixteenth and seventeenth centuries; however, the practice of state intervention has yet to be formally considered customary international law.⁸ Varying interpretations of the issue remain unresolved, but has been

³ The George Washington University, Rutigliano, Jus ad Bellum: Legal Bases for the Use of Force (23 October 2012).
⁴ Id.
⁷ Henry Campbell Black, Black's Law Dictionary (St. Paul, Minn.: W. Publ'g 1990), Intervention.
renamed the ‘Responsibility to Protect’ (R2P). R2P has been used, at least in part, as justification for state intervention in India-Pakistan (1971); Tanzania-Uganda (1978-9); France-Central African Empire (1979); France, UK, US-Iraq (1991-93); and NATO-Yugoslavia (1999), among other conflicts harming civilian populations. Most recently, the international community considered the legal permissibility of state intervention in Syria, and now potentially Ukraine.

Pre-UN Charter

Considered the father of international law, Hugo Grotius was the first to make a statement on the principle of humanitarian intervention. According to Grotius, domestic jurisdiction over a population ends when outrage upon humanity begins. Grotius’s view suggests that sovereignty and right of governance are conditional upon a social contract between the state and its citizens. The social contract is one in which citizens hold faith that the state will protect its citizens from harm. Thus, the contract is broken when a state fails to protect the essential human rights of these citizens. This notion and rhetoric of a state’s right and responsibility to protect its nationals was then extended to include those citizens abroad. Emer de Vattel, a Swiss philosopher, diplomat, and legal expert, later laid the groundwork for international law in regards to intervention. In 1758, Vattel’s *Le Droit des Gens* stated:

> Whoever mistreats a citizen indirectly offends the state, which must protect this citizen. The sovereign thereof must avenge the injury, to obligate, if possible, the aggressor full reparation, or to punish him; otherwise the citizen would no longer have association with the state, and that of its safety.

Though neither Grotius nor Vattel explicitly referred to the use of force, the idea that a state is responsible for ensuring the human rights of its citizens both domestically and abroad became the bedrock for what would later become the R2P Doctrine. This extends to state action beyond diplomatic

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9 *Id.*


11 *Id.*

12 *Id.*

13 *Id.*


15 *Id.*
measures. The right to use force in another state thus evolved based on the foundations of the necessity-based rights to self-preservation and self-defense. This view held into the nineteenth century: in justifying the 1898 U.S. intervention in Cuba, U.S. President McKinley stated, “we owe it to our citizens in Cuba to afford them that protection and indemnity for life and property which no government there can or will afford, and to that end to terminate the conditions that deprive them of legal protection.”

Notwithstanding the emerging belief in the late nineteenth century that humanitarian intervention provided justification for a state to intervene with force in the affairs of another, belief in state sovereignty also grew in opposition to this view. The Manchuria Crisis is one such example. Though the League of Nations Council reaffirmed the clear right of a state to protect its citizens, the Council was limited at the same time by the hitherto unanswered question: is sovereignty a right or a privilege? The point at which humanitarianism supersedes a state’s inherent sovereignty rights was not clearly delineated prior to the UN Charter. There was no clear agreement on whether anything should ever supersede sovereignty rights. If the international community were to decide that sovereignty is an inherent right, there would be no grounding in international law that would justify recourse to force in another state.

The acceptance of sovereignty as an inherent right ebbed in the twentieth century with the emergence of the ‘sovereignty as a privilege’ view: states may lose the privilege of sovereignty by failing to protect essential human rights. It is at this point that third-party states, through the process of the United Nations Security Council, are justified in invoking R2P to recourse to force. Third-party states (often including the United States), now argue that R2P should be a justification for recourse to force with or without the UN Security Council. The danger therein is that the very stability of the multilateral system of peace and governance established by the UN becomes threatened.

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16 Id.
17 Id.
18 Id.
19 The George Washington University, Rutigliano, Jus ad Bellum: Legal Bases for the Use of Force (23 October 2012).
Post-UN Charter

In both twentieth and twenty-first centuries, states have intervened forcefully to protect foreign populations, using R2P as one of the main justifications for the use of force.21 Such justifications have been supported first by the International Commission on Intervention and State Sovereignty (ICISS) in 2001, followed by four major UN documents written on the topic between 2003 and 2009.22 The 2001 ICISS Report outlined the role of sovereignty as an ongoing process in which states have duties to those the state governs.23 In this report, the ICISS drafted the initial framework for the modern interpretation of Responsibility to Protect: all states have the responsibility to prevent crimes against humanity and other atrocities infringing upon basic human rights, the responsibility to react, and the responsibility to rebuild.24 To warrant forceful intervention into a state, the situation must meet a ‘just cause’ threshold, such as large-scale loss of life and/or ethnic cleansing.25 Black’s Law Dictionary defines just cause as a reason that is legally acceptable, sufficient, or a ‘good cause’.26 The use of recourse to force was, to the ICISS, to be the response for only the most egregious violations of human rights.27 The ICISS Report marked a “change in perspective, reversing the perceptions inherent in the traditional language [of the ‘right to intervene’].”28

The 2003 report, “A More Secure World: Our Shared Responsibility” by Kofi Annan’s High-level Panel on Threats, Challenges, and Change, marked the first time the UN specifically addressed the permissibility of R2P.29 This report largely echoed the 2001 ICISS report, outlining five factors the UN Security Council should consider for cases of intervention: the seriousness

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23 The George Washington University, Rutigliano, Jus ad Bellum: Legal Bases for the Use of Force (23 October 2012).
26 Henry Campbell Black, Black’s Law Dictionary (St. Paul, Minn. : W. Publ’g 1990), Just Cause.
28 The Protection of Human Rights under International Law, McDougal, 368.
29 The George Washington University, Rutigliano, Jus ad Bellum: Legal Bases for the Use of Force (23 October 2012).
of threat, whether intervention would be done for the proper purpose, if
intervention is the method of last resort, if intervention would be
proportional means, and an examination of balance of consequences.\textsuperscript{30} Let
it be noted that this report specified that any such action should happen only
with a Security Council Resolution, thus inherently disapproving of
individual state intervention lacking explicit UN consent.\textsuperscript{31} This document
also elevated the importance of collective action within the functions and
purpose of the UN itself.\textsuperscript{32}

The 2005 World Summit solidified the emerging views of Responsibility
to Protect, sovereignty, and recourse to force in its Summit Outcome
Document.\textsuperscript{33} Notably, this Outcome Document was unanimously adopted
in the UN General Assembly.\textsuperscript{34} The views expressed in the 2005 World
Summit Outcome Document, particularly paragraphs 138 and 139, are
representative of worldwide political and legal consensus in international law
in regards to:

\begin{quote}
[E]ach individual State has the responsibility to protect its
populations from genocide, war crimes, ethnic cleansing and
crimes against humanity. . . . The international community
should, as appropriate, encourage and help States exercise this
responsibility.\textsuperscript{35}
\end{quote}

and:

\begin{quote}
[T]he international community, through the United Nations,
also has the responsibility to use appropriate diplomatic,
humanitarian and other peaceful means, in accordance with
Chapters VI and VIII of the Charter, to help protect
populations from genocide, war crimes, ethnic cleansing and
crimes against humanity.\textsuperscript{36}
\end{quote}

This Summit Outcome Document’s scope and language did not explicitly go
as far as the American Interests and UN Reform report regarding the

\textsuperscript{30} United Nations, High-Level Panel on Threats, Challenges and Changes, A More

\textsuperscript{31} The George Washington University, Rutigliano, \textit{Jus ad Bellum: Legal Bases for the
Use of Force} (23 October 2012).

\textsuperscript{32} Jonah Eaton, An Emerging Norm? Determining The Meaning and Legal Status of

\textsuperscript{33} The George Washington University, Rutigliano, \textit{Jus ad Bellum: Legal Bases for the
Use of Force} (23 October 2012).

\textsuperscript{34} Id.

\textsuperscript{35} UNGA, The 2005 World Summit Outcome (24 October 2005), paragraph 138,
UNGA A/RES/60/1.

\textsuperscript{36} Id.
permissibility of action outside of UN-sanctioned intervention. However, this marked the first time the Responsibility to Protect had been made applicable into four distinct categories: protection against genocide, war crimes, ethnic cleansing, and crimes against humanity. This document is indicative of the ‘emerging norm’ in international law making it legal for states to intervene in order to confront gross human rights violations.

Though international consensus was achieved surrounding a state’s responsibility to protect its own populations, as well as the responsibility of the international community (using UN Mandates) to help protect populations, the coexistence of these two principles resonates with discord among the international community at times where a state fails in its responsibility to protect its own population. There is an altruistic consensus that states want to protect populations from such negligence and violations of human rights. However, opponents of R2P as an independent doctrine transcending the UN-mandate system hold that current laws in the UN Charter conflict with R2P and make R2P incompatible with current international law.

**Issue**

It is largely considered permissible for a state to intervene with force in another state in order to protect its own foreign nationals. However, there is not yet consensus among policymakers or lawmakers as to whether the same permissibility applies to a state intervening with force in another state to protect non-foreign nationals. Further, there is even less consensus as to whether it is permissible for a singular state or coalition of states, without the backing of a UN Security Council Resolution, to intervene with force in another state.

When the 2006 World Summit discussed the Responsibility to Protect, the original definition addressed the responsibility of states to protect their own populations against harm: attack, persecution, genocide, chemical weapons, et cetera. The original definition also addressed the responsibility

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40 *Id.*
41 *Id.*
to protect the universal human rights of its own citizens.\textsuperscript{42} Over 170 Heads of State and Government at the 2005 Summit extended the definition by agreeing that a third-party state is permitted to take action if\textsuperscript{43} under Chapters VI and VII of the UN Charter and in the event that a foreign state fails to protect the population of that third party.\textsuperscript{43} Chapter VI authorizes a UN-led peacekeeping force with a limited mandate to intervene, whereas Chapter VII’s mandate is more extensive and allows for recourse to force.\textsuperscript{44}

Since the Summit, the UN has allowed for Chapter VII to be enacted in certain instances where a state failed to protect their own populations against egregious human rights violations. Proponents of intervention assert that it is the duty of the international community to protect populations suffering from a state’s failure to protect its own citizens.\textsuperscript{45} These scholars argue that states are permitted to do so even without a UN Security Council resolution solely for the sake of humanitarianism.\textsuperscript{46} One such example of this interpretation of R2P is NATO’s Allied Force operation in Yugoslavia, which will be examined below for its incorrect usage of the R2P Doctrine. Opponents contest that intervention is not compatible with international sovereignty laws and would allow states to abuse the usage by using humanitarian intervention as justification for domestic goals.\textsuperscript{47} By allowing states to intervene in the affairs of another, opponents argue that such intervention erodes the power of the UN Security Council and the rules of the UN Charter protecting state sovereignty.\textsuperscript{48} Herein lies the divide between scholars on the permissibility of recourse to force according to current international laws.

The U.S. interpretation is not consistent with that of the 2005 World Summit Outcome. The 2005 American Interests and UN Reform report, released by a bi-partisan U.S. Congressional task force, extended the accepted definition of Responsibility to Protect beyond the purview of the Security Council.\textsuperscript{49} Kofi Annan’s 2003 Report had specified that recourse to force be exclusively the result of a Security Council resolution.\textsuperscript{50} The 2005

\begin{itemize}
  \item\textsuperscript{42} Id.
  \item\textsuperscript{44} United Nations, \textit{Charter of the United Nations}, 24 October 1945, 1 UNTS XVI, Chapter VI-VII.
  \item\textsuperscript{45} The George Washington University, Rutigliano, \textit{Jus ad Bellum: Legal Bases for the Use of Force} (23 October 2012).
  \item\textsuperscript{46} Id.
  \item\textsuperscript{47} Id.
  \item\textsuperscript{48} Id.
  \item\textsuperscript{49} Id.
  \item\textsuperscript{50} Id.
\end{itemize}
The Emergence of the Responsibility to Protect in International Law

American Interests and UN Reform report, however, stated, “The Security Council’s failure to act must not be used as an excuse by concerned members to avoid protective measures […] those engaged in mass murder must understand that they will be identified and held accountable.” This report implicitly steps outside the bounds of acting solely under UN-sanctioned mandates. The report holds that member states’ use of force, in cases meeting the ‘just cause threshold’ would be permissible even outside the UN framework. Specifically, “[If] the Security Council is derelict or untimely in its response, states-individually or collectively-would retain the ability to act.”

The 2005 American Interests and UN Reform report is consistent with both the ICISS and Kofi Annan’s 2003 reports in defining ‘sovereignty’ as a responsibility that may be forfeited in such instances where the government fails to protect its population. This represents a significant shift from previous definitions of ‘sovereignty’ as an inherent right of states. In cases where a government fails to protect its population, “it forfeits claims to immunity from intervention […] if such intervention is designed to protect the at-risk population.” This interpretation of sovereignty should be lauded. However, the fact that the American Interests and UN Reform report diverges from an explicit adherence to the UN-mandate system should be highly discouraged. In allowing individual states to define what constitutes a ‘just cause threshold’ separate from the UN Security Council, this invariably puts citizens at risk of abuse of the R2P Doctrine. Recourse to force without a UN Security Council resolution should be strongly discouraged in order to protect the multilateral system of safety and to prevent potential abuses of the R2P Doctrine.

Rule of Law

The heart of the R2P debate lies in whether or not states have the legal justification for recourse to force, which is more commonly referred to as

52 Id.
53 Id.
54 The George Washington University, Rutigliano, Jus ad Bellum: Legal Bases for the Use of Force (23 October 2012).
55 Id.
Laws pertaining to *jus ad bellum* are found in Articles 2(4), 41, 42, 39, and 51 of the UN Charter of Rights and Freedoms. Article 2(4) states, “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Article 2(4) rejects the age-old right of a state to resort to war or to recourse to force. One would presume then that this article, which protects state sovereignty, would be the presiding rule of the matter when examining issues of humanitarian intervention or recourse to force within another state’s boundaries. If one solely applies Article 2(4), such intervention would be considered unlawful.

There are, however, two exceptions to Article 2(4) outlined in the Charter: Articles 39 and 51. These exceptions lawfully enable nations abiding by the UN Charter to recourse to force for the sake of international peace and security, or even in their own defense. Article 39 states that the UN Security Council has an obligation to determine a threat to the peace, breach of the peace, or act of aggression to maintain or restore international peace and security in accordance with Articles 41 and 42. Notably, the impetus of determining a threat to the peace and the role of restoring international peace is placed upon the Security Council, not upon individual member states. Article 39 solely empowers the Security Council to determine the existence of any threat to the peace or act of aggression committed by a state.

Read in conjunction with Articles 41 and 42, Article 39 empowers the Security Council to take enforcement action, including the use of armed force against states, and is thus an exception to Article 2(4). Therefore, according to international law, it is permissible for the Security Council to sanction use of force that impedes upon a state’s sovereignty if a threat to the peace or act of aggression has been determined. This still does not

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63 United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Chapter VII.
64 *Id.*, art. 39.
resolve the permissibility of a state or group of states to determine a threat to the peace or act of aggression and whether it would be lawful for that group to violate Article 2(4) using R2P.

Article 51 states, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the UN until the Security Council has taken measures necessary to maintain international peace and security.”[^65] The “inherent right” of self-defense is considered customary international law.[^66] Although prior to the UN Charter it was not enshrined in a treaty, it has long existed as international custom and state practice.[^67] Therefore, a state’s sovereignty, though protected by Article 2(4), may be lawfully superseded by the prevailing rules of Articles 39 or by Article 51 that constitute jus ad bellum.[^68] It is possible, therefore, to reconcile state practice and state intervention with the UN Charter.[^69] That which constitutes an ‘armed attack,’ however, is not defined in the UN Charter. It is important to take note that ‘use of force’ and ‘armed attack’ are not synonymous. Therefore, states must turn to customary international law in deciding whether a state may invoke Article 51 and to determine when the right of self-defense arises.[^70]

### Humanitarian Intervention as Customary International Law

Whether R2P can be used outside or parallel to the UN-mandate system (acting without or against a UN Security Council Resolution) is debated among proponents of sovereignty and interventionists. In deeming whether R2P is legally permissible, it must be defined as customary international law. Customary international law is international law that does not have treaty base, but, rather, exists because of consistent practice and custom of states.[^71] If R2P is indeed customary international law, then it may be used also as an exception to Article 2(4).[^72] A norm has recently emerged in which

[^66]: The George Washington University, Rutigliano, Jus ad Bellum: Legal Bases for the Use of Force (23 October 2012).
[^68]: The George Washington University, Rutigliano, Jus ad Bellum: Legal Bases for the Use of Force (23 October 2012).
[^69]: Id.
[^70]: Id.
[^72]: The George Washington University, Rutigliano, Jus ad Bellum: Legal Bases for the Use of Force (23 October 2012).
humanitarian intervention has been deemed sufficient to qualify as an exemption to Article 2(4).\textsuperscript{73} Humanitarian intervention in this case is defined as one or more nations entering the territory of another to assist an indigenous population there on the basis of some humanitarian reason.\textsuperscript{74} The permissibility of humanitarian intervention has evolved to undermine the traditional view that states may treat their nationals according to their own discretion.\textsuperscript{75}

**Proponents of *opinio juris* in Accordance with the Responsibility to Protect**

The perspective upholding the legality of the Responsibility to Protect as customary international law asserts that individual states have *opinio juris*: a moral obligation and responsibility to act to restore international peace and security in light of a threat to the peace or a violation of essential human rights.\textsuperscript{76} In the event that the UN Security Council is unwilling or unable, states retain their *opinio juris* to intervene and protect those populations unprotected by their own state governments and left vulnerable by an inactive Security Council.\textsuperscript{77} This view puts the protection of human rights above the laws of sovereignty and the UN system itself. Scholars such as Alicia Bannon advocate this more liberal perspective of the permissiveness of the Responsibility to Protect. Bannon asserts that if nations lack the sovereign right to commit or passively permit atrocities against populations within their borders, then these states should not be able to object to intervention on sovereignty grounds.\textsuperscript{78}

Proponents of this view assert that the term ‘responsibility’ implies a prescriptive element to the R2P doctrine as well as a degree of duty of the international community.\textsuperscript{79} This is not to say, however, that R2P justification of individual state action should be used leniently. Proponents of individual state recourse to force still assert the necessity to use force as proportional, a ‘method of last resort,’ and in the hopes that the UN Security Council would mandate collective intervention in the first place.\textsuperscript{80} Thus, according to

\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
this perspective, individual states may lawfully act as a safe-stop ensuring the safety of humanity in the face of UN immobility.\textsuperscript{81} NATO used this justification for recourse to force during Operation Allied Force in Kosovo.\textsuperscript{82}

Though altruistic in intent, this perspective’s danger lies in its potential ramifications. Allowing states to use R2P as justification for recourse to force without a UN Security Council Resolution acts as a carte blanche for states to abuse the principle and use R2P beyond its intended purpose: failing to intervene with a ‘just cause’ and with the ‘right intention.’\textsuperscript{83} A UN refusal to intervene in a situation may be the acknowledgement that the issue at hand is a domestic one, or that other means of restoring peace and security other than by recourse to force (such as mediation, for example) are more appropriate courses of action.

The Westphalian Rejection of the Responsibility to Protect

The Westphalian school of thought understands sovereignty to be a right of states, and points to Article 2(7) of the UN Charter to enunciate the unlawfulness of intervention into state affairs.\textsuperscript{84} Article 2(7) states that nothing in the UN Charter

\begin{quote}
[s]hall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.\textsuperscript{85}
\end{quote}

According to this view, humanitarian intervention is a mechanism that allows for exceptions to sovereignty laws, but this is solely applicable under the UN-mandate system.\textsuperscript{86} When the UN decides to intervene, all other states must stop their current actions and conform to the decisions of the

\textsuperscript{81} Id.


\textsuperscript{83} United Nations Institute for Training and Research, Tom McGee, Student Paper, The Responsibility to Protect in the Context of the Syrian Civil War, 49 (2013).

\textsuperscript{84} The George Washington University, Rutigliano, \textit{Jus ad Bellum: Legal Bases for the Use of Force} (23 October 2012).

\textsuperscript{85} United Nations, \textit{Charter of the United Nations}, 24 October 1945, 1 UNTS XVI, Chapter I.

\textsuperscript{86} The George Washington University, Rutigiliano, \textit{Jus ad Bellum: Legal Bases for the Use of Force} (23 October 2012).
Thus, the UN assumes the position of overriding legal authority on the matter.

Taking into consideration both Articles 2(4) and 2(7), there is a strong case for the defense of Westphalian sovereignty principles. Opponents of R2P have voiced fears of giving individual states or groups of states legal justification for acting out of self-interest, merely using the R2P doctrine as a justification for the intervention in domestic affairs of other states. States intervening to pursue domestic policy goals, independent of a UN-sanctioned mandate, would not fall under opinio juris, because the intent of intervention is out of self interest, not out of a sense of legal obligation to humanitarianism.

The Westphalian view asserts that R2P as sufficient grounds for recourse to force outside the UN-mandate system is not yet customary international law; there has not been sufficient and consistent action by states in respect to intervention practices on the grounds of humanitarian intervention using the Responsibility to Protect as opinio juris for jus ad bellum. The interpretation whereby R2P is an independent prescriptive measure for the prevention of human rights violations, though altruistic in intent, is both conclusory and overreaching. If interpreted as a prescriptive measure for individual states to take the onus of international peace and security upon themselves, there will be an increase in outside intervention in the internal affairs of states, as well as a reduction of the political costs for violating the norm of non-intervention.

Furthermore, not all nations ascribe to the universality of the UN’s Universal Declaration of Human Rights. This poses an inherent problem for a prescriptive measure of R2P whereby states seek to protect peace, security, and human rights if there are varying interpretations of the universal set of human rights. The international community cannot therefore accept a prescriptive interpretation of R2P with varying interpretations on which rights ought to be protected. States using R2P as justification to protect

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89 Id.
90 The George Washington University, Rutigliano, Jus ad Bellum: Legal Bases for the Use of Force (23 October 2012).
human rights may act in ways not in the interest of the majority of nations who ascribe to those rights underlined in the Universal Declaration of Human Rights.

Continued practice outside the UN system would erode the authority of the UN itself, as well as minimize the efficacy of the international laws created and protected by the UN, thus reducing the motivation of states to abide by the rules of the UN. The erosion of this international system, safeguarded by the UN Charter, the Universal Declaration of Human Rights, in addition to scores of other major legal and humanitarian accomplishments of the UN, would arguably reduce international peace and security.

Application of the Law: The Legality of Operation Allied Force

When Britain and the America engaged in Operation Allied Force during the conflict in Kosovo, the R2P Doctrine was used as justification for the recourse to force. However, most legal experts reluctantly came to the conclusion that in terms of international law as it currently stands, the Americans and the British were wrong to claim the right of humanitarian intervention. Operation Allied Force represents the improper use of the R2P doctrine in illegitimately justifying *jus ad bellum* as well as *opinio juris*. Operation Allied Force also represents the danger of using the R2P doctrine outside of the UN-mandate system.

When the U.S. justified its recourse to force, the U.S. utilized Madeline Albright’s ‘Factors Approach’: This logic examined the fact that there were pre-existing UN Security Council Resolutions on the Kosovo issue pursuant to Chapter VII; there was recognition that the Kosovo crisis was a threat to regional security; there was abundant humanitarian concern for the Kosovar Albanian civilian population; NATO had a ‘special responsibility’ in FRY forces, giving NATO a special justification to act; the NATO mission would be a multilateral agreement among 19 NATO nations; there were long-documented Serbian law of war violations, including the January 1999 massacre of 40 Kosovar civilians; and there was a need to protect the Organization for the Security and Cooperation in Europe (OSCE) observers in Kosovo. The rationale for legality of the recourse to force was that the privilege of sovereignty was forfeited with the systematic abuse of nationals. The U.S. also claimed there was no UN Article 2(4) violation because the

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intervention sought neither territorial change nor a challenge for political independence.\(^{95}\)

It cannot be denied that an atrocious genocide was being committed against the Kosovars.\(^{96}\) However, it can be denied that Operation Allied Force met the necessary qualifications to resort to *jus ad bellum* using the R2P Doctrine as justification. The prevailing view that Operation Allied Force represents a shift in international acceptance towards recourse to force outside the UN-mandate system is a false one. Scholar Ved P. Nanda makes the important point that, “humanitarian intervention has indeed been abused in the past and many states with colonial experiences perceive it as undermining their sovereignty and suspect that it is likely to be abused by powerful states.”\(^{97}\)

Though humanitarian in intent, NATO’s actions outside the UN system were not permissible under international law. In order to use the Responsibility to Protect Doctrine, the recourse to force must be the last possible resort. Importantly, the force must meet two conditions: that of proportionality and that of necessity.\(^{98}\) Operation Allied Force is often critiqued for exceeding the proportionality condition, and for its recourse to force prior to the UN exhausting all possible options. NATO misused and abused the R2P concept, even though its intentions were humanitarian. Those member states in NATO should have instead operated under a UN Chapter VII mission in order to restore international peace and security, to end genocide, and to preserve the multilateral system of international law and peace of the United Nations.

**Conclusion**

There has not been a consistent trend occurring in international law that separates the Right to Protect from traditional intervention practices by the UN Security Council under Chapters VI and VII of the UN Charter of Rights and Freedoms. Additionally, there has been no emerging trend in current scholarship on the Responsibility to Protect Doctrine as a legal justification outside the UN system. Notwithstanding the instances in which

\(^{95}\) *Id.*  
The Emergence of the Responsibility to Protect in International Law

the Right to Protect Doctrine was used as justification for intervention and the recourse to force, as outlined in above sections, such justification is a misapplication of the R2P Doctrine and should be considered impermissible under international law.

Conclusions drawn from the examination of the illegality of NATO’s Operation Allied Force shows that there should be immense work done on the part of the United Nations to deter states from acting independent from, inconsistent with, or lacking a UN Security Council Resolution. Such deterrence would bolster the efficacy of the UN System and provide credibility to the international laws its member states have agreed upon. Though it would be deemed permissible if the UN Security Council deemed the Responsibility to Protect Doctrine as *opinio juris* for a UN-mandated Chapter VI or VII intervention, the same rationale would not apply to an individual state or group of states operating parallel or contrary to the UN system.

Cases will arise in international law where the question of whether states may intervene in the affairs of another will be debated. This debate should never center on whether or not the goal of the UN and its member states is to ensure the essential human rights of populations at risk, but rather whether a ‘just cause threshold’ has been met to warrant the *opinio juris* for the UN to recourse to force in order to protect at-risk or violated populations. In these cases, and only in these cases, should the Responsibility to Protect Doctrine should be used as justification for recourse to force. If the Doctrine is applied too leniently, or outside the bounds of the UN-system, the strength of laws and practices created by the UN system will weaken to the detriment of the safety of the international community.
Problems & Prospects: Patenting Biological Materials

Kathleen V. Gilliland

Introduction

The influential British scientist and writer, C.P. Snow, proclaimed that the whole of Western civilization’s intellectual life boiled down to the dichotomy between two polar groups: the liberal arts and the sciences. Rather than understanding one another, Snow suggested that the “two cultures” would develop along parallel planes and form “a gulf of mutual incomprehension.”¹ Ultimately, Snow postulated that the growing disparity between these disciplines would hinder progress. That rift, the obstacles of the “epistemological schism,”² is on display today as lawyers and researchers argue over the patenting of biological materials.

Even upon a superficial examination of case law addressing the patenting of biological materials, one can gather that legal reasoning and scientific discourse have grown at odds with one another. Over the years, courts have grappled with issues presented with the injection of molecular biology, and other hard sciences, into the increasingly specialized realm of patent law. This has resulted in the growth of inconsistent legal tests, rules, and exceptions for determining patentability of genetic manipulation and forms of life. As patent law develops into a labyrinth of doctrinal incoherence, judges are expected to rule on increasingly technical patent claims despite lacking expertise in the subject.

The research and business community’s splintered position on the usefulness of patents in protecting intellectual property has further complicated this issue. Some believe that the promise of exclusive monopolistic privileges is necessary to provide an incentive and a return on investment for the time and expense needed for innovation. Others argue for the relaxation of such privileges, which they find inhibit progress.

The Supreme Court’s recent decision in Association for Molecular Pathology v. Myriad Genetics is the culmination of this debate.³ In Myriad, the Court held that “a naturally occurring DNA segment” could not be considered patent eligible “merely because it had been isolated,” but that “synthetically created DNA,” otherwise known as complementary DNA (cDNA), was patent

¹ C. P. Snow, "The Two Cultures" (lecture, University of Cambridge, May 5, 1959).
³ Association for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107 (2013)
eligible because it was not naturally occurring. The *Myriad* case is representative of not only the doctrinal divergences within the research community and judiciary, but a generally lacking conceptual understanding between the polar intellectual disciplines.

This article examines how the courts and the field of genomics have impacted one another with regard to the current patent litigation regime in the realm of human gene patents. It begins with a brief overview of the development of the U.S. Patent System and the constitutional and statutory framework for patent protection, including the emergence of the complicated legal framework that currently governs patent claims. Next, the article examines patent litigation in the area of genetics and microbiology beginning with the landmark decision, *Diamond v. Chakrabarty*, the ensuing “gene rush,” and the outspoken anti-biological patenting movement that arose as a result. The article then tells the story of Myriad Genetics, which identified the genes that indicate a woman has a significantly higher risk of breast cancer and proceeded to exclude all others from offering such tests through asserting its patents. The next section considers the petitioner's challenge to Myriad's patents, followed by a discussion of the different outcomes in the trial court, Federal Circuit, and Supreme Court. Finally, the article examines the unorthodox ideas presented to the Supreme Court in an amicus brief by Dr. James D. Watson, a Nobel Prize winning biologist and outspoken critic of genetic patenting. The essay concludes that the relatively short, black-and-white reasoning in the legal world has produced a number of shortcomings and leaves many unanswered questions. The essay suggests that a more comprehensive approach be taken with regard to deciding patent disputes, especially as they pertain to life-threatening illnesses, and the greater patent law framework.

Ultimately, the growing enmeshment of science, commerce, and the law has produced a severely muddled, esoteric framework that must be reconciled before larger ethical dimensions become too obscured. The emphasis must shift from the fixation on minute details of whether a scientist working with a commercial entity sufficiently “tinkered with” genes to create a new product to ensuring that inventions and discoveries fulfill their main purpose: to provide for the general welfare of society and generate a more comprehensive understanding of our natural world.

**The Development of the U.S. Patent System and its Inherent Issues**

Patents, which can be traced back to medieval guild practices in Europe, extend exclusive property rights to contributors of new, useful innovations.
Our Founding Fathers were familiar with such European practices, particularly those from Britain, and incorporated patent precedent directly into the Constitution. The intellectual property clause, found in Article I, provides for the establishment of a patent system that empowers Congress to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Surviving records indicate that the framers of the Constitutions were intent on crafting a system centered “on the [promotion] of learning, technology, and commercial development, as well as create a repository of information on prior art.”

Congress adapted the patent system further in the 1790 and 1793 Patent Acts, which created a transparent, accessible system and involved an impersonal application process subject to routine administrative procedures. The 1793 Act, written by Thomas Jefferson, is significant because it defined patentable subject matter as “any new and useful art, machine, manufacture, or composition of matter, or any new or useful improvement thereof.” Except for the somewhat recent substitution of the word “process” for the archaic term, “art,” Jefferson’s syntactical framework remains at the core of Section 101 of Title 35 of the U.S. Code, otherwise known as subject matter eligibility.

Subject matter doctrine is “deceptively simple” when viewed broadly, but riddled with confusion and inconsistencies under closer examination. Similarly, Christopher Beauchamp describes the current state of subject matter doctrine as “messy, to say the least. A ‘swamp of verbiage …[a] murky

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6 See Khan and Sokoloff, supra Note 4.
7 Id. at 236.
10 Id.
11 Robert Merges, Selected Thoughts on a Myriad of Problems, SCOTUSBLOG, (Feb. 16, 2013).
Besides fulfilling the categorical requirement—process, machine, manufacture, or composition of matter—the invention must also avoid three exceptions in order for a patent to be granted: a law of nature, a natural phenomenon, and an abstract idea. These three exceptions are, of course, rather general and have arisen entirely from “judicial pronouncements,” which are “difficult to pin down with clear verbal formulations.”

In addition to the rather broad legal structure, American patent law and policy has grown increasingly specialized. The formation of the Patent Office (now the Patent and Trademark Office) in 1836 created a “bureaucracy dedicated to processing patent applications.” Examiner positions tended to be filled by legal clerks in the Patent Office’s early years; however, by the end of the nineteenth century, they were replaced by more “scientifically trained personnel.” The more specialized nature of the patent law domain has led to an increase in highly technical discussions and the development of a “particularly strong expertise barrier” that many find difficult to penetrate. Such challenges arise when judges without a specialized understanding of the issue at hand, such as molecular biology and gene patenting, are forced to “engage, understand, and ultimately pass judgment on complex technologies.”

The combination of a generalist jurisprudential tradition and the increasingly arcane nature of patent policy has led to fixations with “Court-created exceptions” that deviate into debates over the abstract, which are not necessarily helpful in advancing a coherent, digestible legal-scientific framework. Such debates result in what Professor Robert Merges describes as “the freshman seminar effect” where “endless hypotheticals designed to test the viability of various metaphysical principles” are presented, turning the courtroom into what looks like a freshman philosophy seminar. Particularly with respect to the natural phenomena exception Merges finds,

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13 Title 35 U.S.C. Section 101
14 See Beauchamp, *supra* note 12, at 263.
15 See Merges, *supra* note 9.
16 See Parthasarathy, *supra* note 8, at 270.
17 Id.
18 Id.
This effect is even more pronounced [...]: A newly discovered flower is not patentable per se. How about leaves from the flower? How about its seeds? How about parts of flowers (the stamen, say) or the inner part of its seeds? What about a mixture of ground-up seeds and water? What about one of its leaves that has been soaked in a solution that eliminates all but the fibers of the leaves? How about a chemical compound isolated from the leaves or stem of the plant? How about a new chemical altogether, made by assembling atoms isolated from elements found in the chemical compounds in the plants? While some may deem that these philosophical exercises are intellectually stimulating, the result yields very little in terms of “useful answers that are solid and satisfying” and can instead eclipse the larger issue at hand.

The Origins of Patented Life Forms and their Opposition

Diamond v. Chakrabarty stands as one of the first cases that questioned the patentability of living organisms. In 1980, the Supreme Court sought to address whether genetically engineered bacterium capable of breaking down crude oil was patentable under Title 35 U.S.C. Section 101. In a split-decision, the Court reached the conclusion that while natural laws, physical phenomena, and abstract ideas are not patent-eligible, the genetically engineered bacterium did not represent any of those exceptions, but rather, was “a product of human ingenuity [with] a distinctive name, character, [and] use.” Indeed, The patentee has produced a new bacterium with markedly different characteristics from any found in nature and one having the potential for significant utility. His discovery is not nature’s handiwork, but his own; accordingly it is patentable subject matter under § 101.

The Court’s subsequent “extension of patents to the life sciences created new classes of property rights in things that were previously outside the realm of what could be owned.” Following Diamond, a “gene rush” of patents ensued during the 1990s-2000s, with patent applications claiming human genes or fragmented

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22 Id.
23 Id.
26 Andrew Torrance, Nothing Under the Sun that is Made of Man, SCOTUSBLOG, (Feb. 7, 2013).
sequences, sometimes without even knowing what traits or mutations were represented in the isolated DNA structures.\textsuperscript{27} The results of several studies reveal that 20\% of human genes—\textemdash that is 4,382 of 23,688—\textsuperscript{28} listed “in the National Center for Biotechnology Information’s gene database are explicitly claimed as intellectual property” with roughly 63\% of the patented sequences “assigned to private firms.”\textsuperscript{29} In addition to the BRCA mutations at issue in the later case, Myriad, patents were extended to cover genes associated with numerous diseases, “both common and rare,” such as “Alzheimer’s disease, asthma, some forms of colon cancer, Canavan disease, hemochromatosis, some forms of muscular dystrophy, Long QT Syndrome, and many others.”\textsuperscript{30}

The flood of such patents brought criticism and opposition from many quarters, particularly the scientific and bioethics communities, the most outspoken of which was a group led by activist and “critic watchdog of biotechnology,” Jeremy Rifkin.\textsuperscript{31} In the Chakrabarty case, Rifkin’s group of environmental and developmental organizations, along with 14 others, submitted an amicus curiae brief. Despite being the only brief filed in opposition to the patentability of life forms, their document was unique in that it “focused on the ethical, social, and ecological implications of allowing such patents” and supported their arguments using non-traditional forms of “evidence, expertise, and reasoning” that otherwise did not exist in patent cases.\textsuperscript{32} The brief stressed the importance of considering the ethical implications of patenting life forms and suggested that policy makers adopt a “deontological approach” over the one that focused on the economic benefits that such life forms could bring.\textsuperscript{33}

The Rifkin coalition made a variety of other specific claims. First, Rifkin argued that the congressional authorization of the Plant Patent Act of 1930 and the Plant Variety Protection Act of 1970 “led to genetic and social impacts that were contrary to society’s best interests.”\textsuperscript{34} According to Rifkin, such patents negatively impacted biodiversity through the “systematic

\begin{itemize}
\item \textsuperscript{27} Id.
\item \textsuperscript{28} American Civil Liberties Union, \textit{BRCA FAQs}.
\item \textsuperscript{29} Kyle Jensen & Fiona Murphy, \textit{Intellectual Property Landscape of the Human Genome}, 310 SCI. MAG. 239-241. 239.
\item \textsuperscript{30} See American Civil Liberties Union, \textit{supra} note 28.
\item \textsuperscript{31} See Parthasarathy, \textit{supra} note 8, at 272.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Id. at 273.
\item \textsuperscript{34} Paul S. Naik, \textit{Biotechnology Through the Eyes of an Opponent: The Resistance of Activist Jeremy Rifkin}, VIRGINIA JOURNAL OF LAW & TECHNOLOGY, (Spring, 2000).
\end{itemize}
elimination of many plant crop varieties that were not patentable by virtue of being merely products of nature.”

Essentially, a number of plants could not be patented because they were outside the scope of patentable subject matter and were therefore unable to generate lucrative profits for corporations. As a result, companies shifted their focus to plant breeding of certain plant strains, which led to a severe “loss of genetic diversity [and] monoculturing becoming the dominant reality.” Not only was biodiversity adversely affected, but the staple crops of our food supply are now “concentrated in the hands of a small number of large multinational corporations.”

Second, Rifkin’s group argued that biotechnology posed a number of potential risks that worked against the best interests of society. According to their brief, the public would be endangered by the “irreversible pollution of the planetary gene pool in radically new ways” following the “proliferation of genetic engineering techniques and novel life forms.” Third, the patenting of “lower organisms,” such as bacteria, would inevitably lead to the patenting of “higher forms of life,” which raised concerns about genetically engineering humans in the future. This would undoubtedly elicit a moral and ethical dilemma regarding the “determination of ‘the very nature of life’ itself.”

Rifkin’s brief, which relied on the scholarship of American and French philosophers as well as bioethicists, was viewed as unorthodox—extraneous even—to patent law and, especially, the case at hand. The other briefs responded by reinforcing “the patent policy domain’s expertise barrier; the Rifkin coalition’s concerns, they argued, were irrelevant and betrayed a misunderstanding of how the system worked.” Unfortunately for the Rifkin coalition, the Supreme Court ultimately sided with the traditionalists, ruling “anything under the sun made by man,” including life forms, could be patented. Though the Court recognized that the coalition had raised a number of valid concerns, the Justices found that the legislative and executive branches were responsible for addressing and reconciling them.

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35 Id.
36 Id.
37 Id.
39 See Naik, supra 28.
40 Id.
41 See Parthasarathy, supra note 8, at 272.
42 Diamond, 447 U.S.
Though *Diamond v. Chakrabarty* was groundbreaking for litigation in the realm of patented life forms, as demonstrated by Rifkin, it also yielded a number of different opposition groups that fought relentlessly to curb the ability of firms to earn monopolistic privileges over natural, human elements. Concerns over the patentability of humans continued to develop, culminating with the *Myriad* decision. According to Professor Torrance, “a careful reading of the entrails of judicial decisions, Congressional bills, and executive branch pronouncements about patents claiming human-related inventions,” would prove such fears to be unfounded. In the spring term of 2013, the Supreme Court ruled in almost the exact manner Professor Torrance had anticipated, providing a partial victory for opponents of human gene patents.

**Myriad Genetics & the BRCA Story**

At the height of the aforementioned “gene rush,” Mary-Claire King, then a professor at the University of California, Berkeley, announced at a meeting in 1990 that there had been a discovery in a small region on chromosome 17 that could be linked to early onset-breast cancer. This shocking discovery was the result of fifteen years of research by King and her colleagues of the international group known as the Breast Cancer Linkage Consortium (BCLC) whose sole purpose was to “find the gene responsible for the high incidence of breast [and ovarian] cancer in some families.” The idea central to the consortium’s founding was that progress could be made more quickly with a number of scientists pooling their resources and data together than if each worked independently. Ultimately, a competitive race to discover and name the specific sequence responsible for the disease ensued.

In 1994, under the management of Mark Skolnick at the University of Utah, a group of scientists announced the discovery of a genetic sequence that strongly correlated with a predisposition to breast cancer. This gene was named “breast cancer 1,” or BRCA1. Skolnick and the University of Utah applied for and eventually received a patent for the sequence, which was then exclusively licensed to Myriad Genetics (Myriad), a molecular diagnostics

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43 See Torrance, supra note 26.
45 Id.
46 Stanford Medicine: Cancer Institute, *Hereditary Breast Ovarian Cancer Syndrome (BRCA1 / BRCA2).*
company that Skolnick and others had founded in 1991. The BCLC’s studies discovered evidence that suggested at least one other breast cancer gene existed and soon a region on chromosome 13 was uncovered. Two competing groups, one led by Skolnick and Myriad and the other by the Institute for Cancer Research in the United Kingdom, localized the genetic sequence. As the National Research Council describes in its study regarding intellectual property, innovation, and public health:

BRCA1 and BRCA2 (BRCA1/2) are both tumor suppressor genes whose protein products interact to control cell growth and division. Certain mutations in the BRCA1 or BRCA2 gene disrupt the regulation of growth in mammary cells, a critical step on the path to tumor formation.\(^47\)

In 1995, the two groups independently filed patent applications in their respective countries for the second sequence, BRCA2, which culminated in a contentious, three-year long legal battle over the rights to the BRCA1/2 patents. Ultimately, the dispute was settled in 1998 with Myriad purchasing the exclusive rights to the patents from an American company, OncorMed, which were not set to expire until 2014. Until that time, Myriad would enjoy monopolistic privileges over the BRCA 1/2 genes and the diagnostic testing procedure for patients interested in assessing their risk of developing breast and/or ovarian cancer.\(^48\)

In 1999, Myriad began to vigorously enforce its patent claims and managed to successfully eliminate competing research institutions, including Yale University and the University of Pennsylvania, from administering similar tests. Myriad claimed that “isolated BRCA 1/2 genes and methods of comparing mutated BRCA 1/2 with normal forms of genes” violated its patents.\(^49\) Myriad’s stringent enforcement of its patent claims angered a number of researchers and scientists because it restricted the ability of those other than Myriad to perform basic tests. Myriad’s claim that its isolation or extraction of the two genetic sequences prevented labs around the country from conducting full sequencing of the genes, even if they used “different testing methods other than the one employed by Myriad.”\(^50\)


\(^{48}\) Id.


\(^{50}\) See Brief for the ACLU, supra note 38, at 14.
After scaring off researchers and scientists who had independently developed their own tests—often times free of charge—Myriad became the sole testing provider, which made it possible for Myriad to charge over $3,000 per test. A fee of that gross scale for such a standard test garnered widespread criticism for a number of reasons. Namely, women who were unable to afford the high rate or whose insurance did not cover the test were left without access to a potentially life-saving testing option. Additionally, because Myriad was the only organization able to perform the tests, women who could afford the sequencing test on the BRCA genes had no way of verifying the results the diagnostic company uncovered or to undergo an alternative method of testing. Given the heightened risk of such deadly illnesses and the drastic steps that can be taken to eliminate them for the purposes of survival, such as undergoing a mastectomy or hysterectomy, it is unfathomable that Myriad was able to retain its stiff hold over the rights of the BRCA1/2 sequences for so long, particularly in light of its false negative rate, which was as high as 12% at one point.

Building a Case Against Myriad Genetics

After years of enjoying its restricted patent rights, the American Civil Liberties Union and the Public Patent Foundation assembled a class of more than twenty plaintiffs, which contested the patentability of Myriad’s genetic claims in May 2009. The class represented three groups:

i) women who wanted to get tested but believed they could not because of Myriad’s business practices, ii) laboratory physicians who wanted to order tests or conduct tests on behalf of patients at risk, and iii) health professionals and cancer advocacy organizations.

In their brief, the petitioners argued that Myriad’s patents must be rendered invalid because it only “identified two genes that exist in every person. It did not create, invent, or design the genes, by ‘isolating’ them.” Indeed, the petitioners compared the mere patenting of the two extracted genes from

51 See NAT’L RESEARCH COUNCIL (US) COMM. ON INTELLECTUAL PROP. RIGHTS, supra note 9.
52 "BRCA FAQs," American Civil Liberties Union.
53 Id.
54 Tom Walsh et al., 295 SPECTRUM OF MUTATIONS IN BRCA1, BRCA2, CHEK2, AND TP53 IN FAMILIES AT HIGH RISK OF BREAST CANCER, 1879-1388 (2006). 1386.
the body would be comparable to an outrageous attempt to patent a kidney or other human body part. As such, Myriad’s patents claimed products and laws of nature, which violated Section 101 of the U.S. Patent Code. Of course, Myriad believed otherwise, arguing that its isolated genetic sequences did not constitute products or laws of nature and were in line with Section 101.

The petitioners’ brief broke down Myriad’s arguments regarding the product of nature doctrine and the legality of its patent claims into three main points. First, Myriad claimed “isolated DNA has a different structure than DNA in the body,” but offered little in terms of an explanation on the “specific structural alteration” of the BRCA sequences except that “in separating a gene from its chromosome, a covalent bond is broken.” Of course, as the petitioners and amici demonstrated, the fragmented BRCA genes do in fact exist in nature. Myriad’s failure to establish a structural distinction between DNA and “isolated” DNA renders its first argument void.

Second, Myriad argued that its isolated DNA sequences function differently than DNA, i.e. Myriad is entitled to the patent rights of a product of nature because it established a “new use for it.” Using this same logic, Section 101 would not restrict an individual or a firm from patenting something like gold if a new use for it was discovered. The petitioners reasoned that this argument was not justified: nobody is entitled to patent rights for discovering a new use for a natural product, whether it is an isolated DNA sequence or gold. At most, an argument can be made for the process or method of extraction or even the use of the natural product (e.g. “if you find a new way of using gold to make earrings or a new way of using DNA, you may be entitled to a patent”), but not the natural product itself.

Third, Myriad contended that it was entitled to patent rights over the genetic sequences because its discovery added to the storehouse of scientific

56 See Brief for the ACLU, supra note 38, at 1.
57 Id. at 2.
58 Id. at 3.
60 See Brief for the ACLU, supra note 38, at 2.
61 Id. at 3.
62 Id.
63 Oyez, Oral Arguments for the Association for Molecular Pathology v. Myriad Genetics (2013)
knowledge. However, as the petitioners pointed out citing *Funk Bros. Seed Co. v. Kalo Inoculant Co.*[^64] and *Bilski v. Kappos,*[^65] “adding to the storehouse of knowledge is an insufficient basis for receiving a patent” and undermines the “cornerstone of the Section 101 doctrine.”[^66] Specifically “annotating” the human genome following the discovery of the nucleotides integral to the BRCA 1/2’s genetic composition therefore “does not satisfy Section 101.”[^67] Further, Myriad’s description of its supposed invention or accomplishment is problematic because it relies on a variety of expressions that are more generally associated with discovery, which do not qualify for Section 101 protection:

> The verbs Myriad uses to describe its work are “identify,” “define,” “locate,” or “characterize.” Einstein “identified,” “defined,” and “characterized” the relationship between matter and energy, but his discovery was not patentable.

Similarly, Myriad argues that the degree of human ingenuity or human intervention involved in identifying, defining, locating, or characterizing the sequences is grounds for determining patent-eligibility.[^68] In its own brief, Myriad asserts, “It is more judicious to determine patent-eligibility based on the presence of human ingenuity, rather than focus myopically on whether a natural law or product was somewhere involved.”[^69] Such a simplistic, irrelevant allegation is a gross reduction of Supreme Court precedent and

[^64]: “The qualities of these bacteria, like the heat of the sun, electricity, or the qualities of metals, are part of the storehouse of knowledge of all men. They are manifestations of laws of nature, free to all men and reserved exclusively to none. He who discovers a hitherto unknown phenomenon of nature has no claim to a monopoly of it which the law recognizes. If there is to be invention from such a discovery, it must come from the application of the law of nature to a new and useful end.” *Funk Brothers Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127 (1948).

[^65]: “Petitioners seek to patent both the concept of hedging risk and the application of that concept to energy markets […] Rather than adopting categorical rules that might have wide-ranging and unforeseen impacts, the Court resolves this case narrowly on the basis of this Court’s decisions in *Benson, Flook,* and *Diehr,* which show that petitioners’ claims are not patentable processes because they are attempts to patent abstract ideas. Indeed, all members of the Court agree that the patent application at issue here falls outside of §101 because it claims an abstract idea.” *Bilski v. Kappos*, 561 U.S. (2010).

[^66]: See Brief for ACLU, *supra* note 38, at 5.

[^67]: *Id.*

[^68]: See Brief for ACLU, *supra* note 38, at 15.

“more than 150 years of case law;” so the cost or difficulty involved in identifying, defining, locating, or characterizing compositions is not grounds for patent-eligibility.

Deciding Myriad: A Clash Between the Federal Circuit and the Supreme Court

After the U.S. District Court in the Southern District of New York determined that the petitioners had standing to sue and, more importantly, that Myriad’s patents did not qualify as patent-eligible subject matter under Section 101, Myriad challenged the ruling. The case went before the Federal Circuit where a three-judge panel, despite coming to a splintered result, agreed on three critical areas. They affirmed the District Court’s determination that the petitioners had standing, but rejected the trial court’s decision and instead held,

The challenged claims [were] drawn to patentable subject matter because the claims cover molecules that are markedly different—that is, have a distinctive chemical identity and nature—from molecules that exist in nature.71

To justify its rationale, the Federal Court emphasized that the isolation process, utilized by Myriad, required the severing of covalent bonds, which ultimately produced a molecule with an entirely “different chemical structure than the DNA found in nature.”72 The Federal Circuit Court affirmed the District’s Courts grant of summary judgment in relation to Myriad’s “method claims for ‘analyzing’ or ‘comparing’ mutated BRCA 1/2 sequences with normal BRCA 1/2 sequences,”73 and determined that such claims were invalid because they “recited nothing more than the abstract mental steps necessary to compare two different nucleotide sequences.”74

The Federal Circuit decision came down to a 2-1 split, with Judge Lourie and Judge Moore affirming the patent-eligibility of Myriad’s genetic sequences and Judge Bryson maintaining that Myriad’s claims were not patent eligible. Judge Lourie reasoned that the isolated molecule represented one that was “deliberately cleaved” from the chromosomal DNA. This

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70 See Brief for ACLU, supra note 38, at 11.
72 See Lauer, supra 49, at 183.
73 Id. at 184.
structural difference was enough to fulfill the requirements of patent-eligibility for the isolated BRCA 1/2 sequences.\textsuperscript{75} Judge Moore determined that Myriad’s isolation of the molecules and demonstration of how they could be used proved that Myriad invented something that “warranted a patent.”\textsuperscript{76} Integral to her separate, concurring opinion was the distinction she made between DNA and cDNA. While she found cDNA to be “markedly different” from naturally-existing human DNA and clearly eligible for a patent, she had some difficulty seeing isolated DNA in the same light; however, she ultimately concurred with the Judge Lourie.\textsuperscript{77}

Judge Bryson, on the other hand, was skeptical and vigorously dissented from his colleagues’ majority opinion:

> Although the DNA molecules may be isolated, the sequences correspond to molecules in nature in every meaningful sense. The differences between isolated and natural DNA’s are not material to the claimed uses. The isolated molecules are useful only to the degree that they faithfully copy the information stored and transmitted in naturally occurring DNA and, therefore, they are not “markedly different” in a way that should matter to the law.\textsuperscript{78}

He dismissed Judge Lourie’s rationale pertaining to the structural differences of the molecule, saying “there is no magic to a chemical bond that requires us to recognize a new product when a chemical bond is created or broken”\textsuperscript{79} and equated gene isolation as being “akin to snapping a leaf from a tree;” the result of which “would not turn [the plucked leaf] into a human-made invention.”\textsuperscript{80} Following Judge Bryson’s logic, the identification of literal chemical differences in isolated gene sequences does not make “any meaningful difference.” The mere identification of a literal difference is an insufficient basis for any legal decision. One must ask why the differences matter in the full doctrinal framework of the question, not just for gene sequences or even life science patents, but for patents as a whole.\textsuperscript{81}

\textsuperscript{75} See Cook-Deegan, \textit{supra} note 55.
\textsuperscript{76} \textit{Id.} at 746.
\textsuperscript{77} See Lauer, \textit{supra} note 49, at 183.
\textsuperscript{78} See Cook-Deegan, \textit{supra} 55, at 746.
\textsuperscript{79} \textit{Id.} at 747.
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} Robin Feldman, \textit{A Conversation Between the Supreme Court and the Federal Circuit}, SCOTUSBLOG, (Feb. 5, 2013).
In terms of Myriad, the issue before the Federal Circuit was whether human genes fall outside the realm of patentable subject matter because they are too closely linked to nature. According to Professor Robin Feldman, "The question [was] not whether there [were] any literal differences from nature, but whether there are any differences that matter." Feldman strikes at an enormous issue that has been referenced throughout the entirety of this paper: the fixation on esoteric distinctions, tests, and technicalities rather than the development of an underlying, coherent doctrinal framework. She finds the Federal Circuit’s approach to be “intellectually and operationally unsatisfying,” as it has the effect of producing weak precedent through its application of what she terms, “death by tinkering,” i.e. with each case, small distinctions are drawn until eventually the “entire area threatens to collapse on its own weight." As a result the Federal Circuit’s methodology “lacks a logical coherence and a general applicability,” particularly with questions regarding patentable subject matter.

Those challenging Myriad’s patents appealed the Federal Circuit’s decision, and in November 2012, the Supreme Court granted certiorari for the following spring term. In a landmark decision, the Supreme Court invalidated Myriad’s patent claims and determined that human genes were ineligible patented subject matter, and qualified as an exception to Section 101’s requirements. Justice Thomas, writing for the Court, maintained that the Court had long held that laws of nature, natural phenomena, and abstract ideas were not patentable because “they are the basic tools of scientific and technological work.” Without such exceptions, “there would be considerable danger that the grant of patents would ‘tie up’ the use of such tools and thereby ‘inhibit future innovation premised upon them;’” such a practice would be “at odds with the very point of patents, which exist to promote creation.” The Court ultimately found that human genes constituted products of nature, and are therefore outside the bounds of patentable subject matter.

Besides reaching a decision on the patentability of human genes, the Court was faced with another important question: did cDNA represent patentable subject matter as per Section 101, or did it represent yet another

82 Id.
83 Id.
84 Id.
86 Id.
exception? In their brief, the petitioners claimed that “[t]he key genomic DNA and cDNA is that the latter is complementary to natural mRNA, wherein the body has removed the non-coding regions.” Though Myriad manipulates the naturally-occurring mRNA in the laboratory, it ultimately relies on the “natural binding properties of nucleotides to assemble the DNA […], which natural properties [then] cause the [two] to link” resulting in the formation of cDNA. Because cDNA contains identical genetic sequences that naturally exist in every person, and Myriad’s role in the lab setting is nothing more than an instigator to a naturally-occurring process, the petitioners reasoned that cDNA was ineligible for patent protection because it amounted to a product of nature. The Court came to the opposite conclusion, finding that cDNA did not “present the same obstacles to patentability as naturally occurring, isolated DNA segments.” While the Court recognized that “the nucleotide sequence of cDNA is dictated by nature, not the lab technician,” they also determined that even so, “the lab technician unquestionably creates something new when cDNA is made.”

Myriad’s Unanswered Questions

While the Court’s brief, eighteen-paged opinion may seem clear-cut, the decision leaves unanswered questions and implications that patent holders will be grappling with in the coming years. Namely, the Court only dealt with the issue of human genes, but of course, DNA is present in all living things, human or non-human. Indeed, “the BRCA genes that [were] patented in ‘isolated’ form, are found in many other organisms, and are involved in fundamental processes of homologous recombination and double-stranded DNA repair.” According Dr. Heidi Ledford, the ruling “will probably be applied to other molecules such as proteins, as well as to other organisms—including agriculturally important plants.” Especially as advances are made in the fields of agricultural biotechnology, environmental biotechnology, the production of alternative fuels, etc., the world of patent litigation will only become more active as attorneys and judges attempt to carve out a coherent doctrinal framework.

87 See Brief for ACLU, supra note 38, at 9.
88 Id. at 9-10.
90 Id.
91 Robert Cook-Deegan, Questions that Will Remain Unanswered from the Myriad Case, SCOTUSBLOG, (Feb. 6, 2013).
Dr. Ledford also remarks on the Supreme Court’s ruling on “modified DNA” or cDNA, which has resulted in a kind of gray area that observers have found puzzling. While gene patent holders, such as Myriad, argued that the mere act of isolating DNA was enough modification to satisfy a patent claim, the Supreme Court disagreed, leading many attorneys to wonder “how much modification is enough.”

Echoing Feldman’s critique of the Federal Circuit Court’s fixation on technical details, William Simmons, a patent lawyer at the Sughrue Mion law firm in Washington DC, exclaimed, “They’ve created this bizarre rheostat about the amount of change that would need to take place chemically in order to justify a patent.” There are also a number of concerns about how the Court defined synthetic DNA, which appeared to refer to modified DNA. It explicitly granted patent protection to cDNA, which are “deemed more commercially valuable than patents on naturally occurring genes, in par because cDNA tends to be shorter and easier to work with than genes in their natural state.”

Ledford is quick to point out that patent eligibility for cDNA is beginning to diminish, as the practice has grown more common and will soon “be considered too obvious for a robust patent.” Scientists have increasingly sought to expand the definition of synthetic DNA to take molecules designed from scratch through the use of machines, which assemble “individuals of DNA into a given sequence.” Since the Court specifically dealt with cDNA and did not address its growing irrelevance in terms of patentable subject matter, scientists and patent attorneys alike are concerned about what molecular products are considered permissible as patentable subject matter.

From the sharp differences in opinion at the Court level between the District Court, the Federal Circuit Court, and the Supreme Court, to those of legal scholars, it is clear that the patentable subject matter, especially as it pertains to biotechnology and genetics, has steadily grown murky over the years. Some laws and decisions rendered by the courts advance precedents riddled with artificial technicalities and arcane legal jargon that may even be mistaken for a complex, though non-existent, scientific concept while others overly simplify the issues at hand and prescribe vague remedies that must later be clarified. Such shortcomings are reflective of a system that requires

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93 Id.
94 Id. at 282.
95 Id. 282.
96 Id.
some significant legal adjustments and perhaps a shift in focus, particularly as it applies to the intersection of human ethics and scientific discovery.

“In Support of Neither Party”

Activists, donors, patient-groups, scientists and others flooded the Supreme Court with amicus briefs in the Myriad case, but the most compelling submission was that of Dr. James D. Watson. Awarded the Nobel Prize in Physiology and Medicine in 1962, Dr. Watson’s career is marked by impressive achievements in the areas of recombinant DNA and genetic engineering, including co-discovery of the double helix structure of DNA. Dr. Watson became a tenured professor at Harvard University, serving as Associate Director of the Human Genome Project, before working in a number of high-level positions at the National Institute of Health. Most relevant, however, is that Dr. Watson has vehemently rejected the notion of gene patents as “pure lunacy,” and has served at the forefront of the anti-gene patenting movement for the last twenty years.

What Dr. Watson’s brief provides is a perspective attorneys, scholars, and judges often, and unfairly, dismiss or ignore. In addition to educating the Court with an exquisite summary on the function of DNA and its respective processes, his brief discusses the importance of the ethical and universal threats that gene patents, as well as misappropriations of scientific information for the purpose of profit, pose to our very humanity: “What the Court misses, I fear, is the fundamentally unique nature of the human gene […] Life’s instructions ought not be controlled by legal monopolies created at the whim of Congress or the Courts.”

Though the Human Genome project has estimated that 22,000 genes exist in our bodies, we have yet to fully comprehend the function of each individual gene. Such a deficiency in our understanding of newly established genetic discoveries is further reason why patent standards should be relaxed. Dr. Watson warns that an incomplete understanding of science, genetics especially, has yielded dark developments in our social history, such as the ill-fated eugenics movement of the twentieth century. During the Progressive Era in the United States, many believed that the answers to all

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98 Id. at 1.
99 Id. at 11.
100 Id. at 2.
101 Id. at 5.
society’s ills resided in the human genome. Such beliefs managed to infiltrate the 1927-landmark Supreme Court decision, *Buck v. Bell*, in which compulsory sterilization for the unfit, including the intellectually disabled was deemed permissible “for the protection and health of the state.” Rather than leading to advancements that benefit mankind, an incomplete understanding of fundamental scientific concepts could potentially cause more harm than good, as was the case with *Buck v. Bell*, which has yet to be overturned.

Additionally, Dr. Watson argues that it is unsound public policy for one individual or company to monopolize the legal right to valuable information encoded in the human gene, which was exactly what Myriad did. The commodification of information that exists naturally belongs to everyone and should be used to better humanity:

> A scientist does not—and should not expect to obtain a legal monopoly controlling the information encoded by human genes. The average scientist should not expect a windfall simply for revealing the sequence of DNA bases that encode various genes. Research on human genes is one of those rare endeavors, which should be—and is done—with the understanding that, although inventions based on those genes may later be commercialized, the genes themselves are to employed for the maximum benefits of humankind.

Dr. Watson’s rationale transcends the incoherent, trivial arguments that the Courts and attorneys have fixated their attention on, and brings to light a far deeper, meaningful rationale for rejecting gene patents, or any other law or policy that seeks to “commercialize” what makes us who we are. Myriad’s patents effectively prevented women from undergoing an affordable diagnostic test to determine their predisposition to a lethal disease. Myriad was not concerned with engaging in research that would generate discoveries leading to the betterment of society, at least not after they claimed their exclusive patent privileges for BRCA 1/2, but for the accumulation of profits. It is impossible to know how many women, families, and communities were adversely affected by such a vile policy, but it is justifiable to say that even one person harmed in the years Myriad enjoyed its patent

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102 *Id. at 6.*


104 *See Brief of Dr. James D. Watson, supra* note 97, at 13.
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claims, is one too many when the knowledge and ability to prevent harm was readily available.

Besides impeding the ability to identify, diagnose, treat, and possibly prevent deadly diseases such as breast and ovarian cancer, Myriad’s patents, and others like it, have acted as barriers to better understanding our natural world. Dr. Watson’s brief resonates with the belief that we all have a stake in the scientific process. We not only have a right to pursue our innate curiosities, but we have a duty to share our knowledge with the larger community of “humankind.”

Conclusion

It is clear that the entanglement of science, commerce, and the law has resulted in severe shortcomings with regard to the patenting of biological materials, namely gene patents. As the language of patents and court cases have grown more technical, important ethical and scientific considerations presented by individuals such as those from Rifkin’s opposition group to Dr. Watson’s brief, have been undermined. When it comes to forming a coherent framework with regard to intellectual property, specifically patents, it is important to incorporate all sides of the scientific discourse—from those vehemently opposed to the patenting of biological materials to those strongly in support of it.

While some claims of scientific groups may appear unorthodox or extraneous, the law must reflect that which it seeks to regulate. One side should not be privileged over another, especially if the claims are valid, and especially if those deciding in judgment of the scientific advancement are not extensively trained in the discipline directly related to the issue at hand, i.e. molecular biology. It is entirely illogical to establish a means by which judges can become more academically acquainted with the scientific or technical disciplines that are often involved in the cases before them. Scientists provide important insight into the ethical implications of their findings that relate to the bigger picture, which must be given greater attention rather than the technical minutiae that has captivated the courts in decades past.

In deciding Myriad, the Supreme Court chose to invalidate the patent claim that Myriad Genetics used to deprive women of an affordable diagnostic test that would assess their risk of developing breast and ovarian cancer as well as the opportunity to get a second opinion from another research institution. Further, Myriad prevented other scientists and research

105 Id.
institutions from studying the isolated DNA segments or utilizing them in other studies. While the Supreme Court decided in a manner favorable to women and scientists, Myriad was able to exploit its patent privileges for nearly two decades. The isolated DNA segments that Myriad discovered were an important contribution to the world of research and preventative health, but the fruits of their knowledge should have been put to the greatest utility in service of mankind.
Partisan Gerrymandering: Constitutionality, Political Repercussions, and Reforms

Max G. Lesser

Introduction

In a political status quo characterized by ideological polarization, obstructionism, and general dysfunction, partisan gerrymandering—meaning the practice of designing congressional district boundaries for political gain—has become a popular issue in our national discourse. A wide swath of political commentary has shown how our country’s electoral system allows “politicians to choose their voters,” which has contributed to the growing number of “safe” seats in the House of Representatives and the lack of genuine competition among the parties in the lower chamber. Such commentary often argues that this dynamic has also produced a system of perverse incentives, because many of our elected representatives are moving from the political “center” in order to pander to more extreme and fringe constituencies, since they only risk a real challenger in the primary rather than the general election.

Considering the ubiquity of these kinds of arguments, the logical question is why electoral gerrymandering is legal, or why does the practice even exist in the first place? The answer for this question proves far more complicated than one would expect, as gerrymandering actually has a remarkably rich and complex political history. Indeed, the practice can be traced as far back as 1788, when Governor Patrick Henry persuaded the Virginia state legislature to remake its 5th congressional district so that his political enemy, James Madison, would be running against a powerful local politician in James Monroe. The term was formally coined in 1812 when The Boston Gazette published a cartoon comparing an oddly shaped district drawn by Governor Elbridge Gerry of Massachusetts to the body of a salamander—deeming it a “gerrymander.” Since this time the practice of gerrymandering has largely evolved in line with the gradual development of our election system. Up until 1962, however, the judiciary had generally stayed out of the business of drawing districts. The courts considered the process a “political question,” and there was limited constitutional guidance

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2 Id.
or federal law on redistricting. This changed with Baker v. Carr, a landmark decision that found malapportionment claims (which refers to districts that differ in population size) justiciable under the Equal Protection Clause of the Constitution. The Supreme Court truly “entered the arena” on partisan gerrymandering, however, with Davis v. Bandemer in 1986. This case determined partisan gerrymandering could be unconstitutional, but it set such a high standard of proof that legal challenges in the court-system became effectively impossible. The question of a “judicially manageable standard” was later brought up in Vieth v. Jubelirer, which split the court on ideological lines and—again—failed to produce a standard for deciding cases of partisan gerrymandering. This trend continued in League of United Latin American Citizens (LULAC) v. Perry, with the court upholding a mid-decade congressional redistricting plan in Texas and demurring on a “reliable” standard for determining partisan gerrymanders.

In the absence of any definitive action from the Supreme Court, the problem of partisan gerrymandering has metastasized, with the congressional mid-term elections of 2010 proving a tipping point. In a landslide election that saw the Republican Party gain control of sixty seats in the House and eleven additional state legislatures, Republicans oversaw the redrawing of the majority of the country’s congressional districts for the decennial census. This process has always been politicized, but with the focused organization of the Republican State Leadership Committee and new technological mapping tools, the extent and effects of the 2010 redistricting proved unprecedented. And as pointed out earlier, this election’s effects on the configuration of our congressional districts has sparked a lively debate over the political repercussions: critics contend that partisan gerrymandering “calcifies the democratic process,” limits accountability, and discourages political moderation, while others argue gerrymandering can enhance minority representation, promote political

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6 See Eaton, supra note 4.
stability, or that larger issues—such as declining political participation and growing ideological divides—are the real causes of our country’s political ills.

A number of reform efforts have emerged to address the issue of partisan gerrymandering, which is reflected most prominently in the increasing number of nonpartisan and bipartisan election commissions. The goal of these commissions are generally to make districts “more competitive and responsive to citizens and less likely to enable incumbents to retain their position for decades,”¹¹ and they are now legally mandated in seven different states. Others have advocated for the necessity of federal legislation on the issue, and a number of different bills in Congress have been proposed for reforming the congressional redistricting process. Perhaps the most challenging avenue for reform is through the Supreme Court itself, whose justices have advanced a number of different legal approaches for determining partisan gerrymanders but have continually failed to settle on a single, effective standard. Despite the challenge of consensus, promising strategies such as “symmetry”—which essentially holds that a district should produce the same result for either party given equivalent conditions—have emerged. And a growing number of voices in the legal community have asserted the desperate need “for a uniform standard that all federal courts can rely on,”¹² so congressional districts can be challenged on the basis of partisan gerrymandering.

Electoral gerrymandering is a complex issue and the characterization of federal redistricting reform as a “silver bullet” for gridlock and partisanship is disingenuous. There are a multitude of issues driving our problems, such as a tribal, sensationalized media, declining voter participation, and the dissolution of campaign finance laws, along with many others. Furthermore, a growing portion of the public are living in politically “like-minded” communities, which means gerrymandering is by no means the only factor driving the declining number of competitive districts. But the issue is still a pressing one, especially with the advent of new voter mapping technologies and concerted political redistricting campaigns. Partisan gerrymandering undoubtedly contributes to the deeply dysfunctional and divided state of our politics, and the fact that the Supreme Court has found claims of partisan gerrymandering “justiciable” in the past demonstrates that the practice is constitutionally problematic. This sentiment was reflected by Justice John

¹¹ See Crocker, supra note 9, at 14.
Paul Stevens, who wrote the following in his dissent for the plurality in *Vieth v. Jubelirer*: “When partisanship is the legislature’s sole motivation—when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage—the government body cannot be said to have acted impartially.”

Given the circumstances, effective redistricting reform will hinge on the Court deciding on a reasonable legal standard such as “symmetry,” and citizens utilizing the initiatives process in order to install independent election commissions. Congressional legislation generally defies legislators’ political self-interest, so reform should not be expected to take place within the system.

**Political and Legal History**

Before analyzing the constitutionality of electoral gerrymandering, it is important to first distinguish the different categories of the gerrymandering as well as identify its practical dynamics. Traditionally, gerrymandering refers to what is known more specifically as ‘partisan gerrymandering,’ which refers to the “the practice of dividing a geographical area into electoral districts, often of highly irregular shapes, to give one political party an unfair advantage by diluting the opposition’s voting strength.”

This is not to be confused with ‘racial gerrymandering,’ which was the practice of white legislatures for diminishing or diluting minority voting strength (prior to the amendment of the Voting Rights Act in 1982), or ‘bipartisan gerrymandering,’ which are redistricting plans designed to favor incumbents and preserve the status quo. In spite of these distinctions, all forms of gerrymandering rely primarily on two common techniques: ‘packing’ and ‘cracking.’ Packing occurs when “potential voters with similar expected voting behavior are deliberately concentrated in fewer congressional districts,” which produces ‘wasted’ votes because it only takes “50\% plus one vote to elect a preferred candidate in the American system of single-Member, winner-take-all congressional elections.”

Cracking, on the other hand, is when “like-minded voters are deliberately distributed among several districts such that there is no chance of a majority of these individuals in any

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15 See Crocker, supra note 9, at 5.
16 Id.
17 Id.
one district.” This has the effect of diluting the voting power of a targeted group by dispersing their voters across different districts.

The constitutional foundation for the rules of congressional districting lies in Article I, Section 2, which requires that “representatives shall be apportioned among the several states according to their respective numbers, counting whole number of persons in each state.” Congress passed the first federal districting standards in 1842 with the Apportionment Act, which mandated that Representatives “should be elected by districts composed of contiguous territory…no one district electing more than one representative.” The Apportionment Act of 1872 added another requirement, which was that congressional districts should “contain as nearly as practicable an equal number of inhabitants.” These requirements would ensure that congressional districts be “contiguous, equal, and compact,” and—most importantly—that states would be split “into congressional districts according to the number of representatives allotted to them and that a single representative be elected from each district.” Taken together, these laws and regulations provided the legal foundation for the redistricting process well into the twentieth century.

Aside from mandating certain core requirements, the Constitution actually offers fairly limited guidance on how ‘apportionment’ should be accomplished and even fewer guidelines on the specifics of the redistricting process. And with the notable exceptions of the Apportionment Acts and the Voting Rights Act, there are also relatively few federal laws on congressional redistricting. So in these circumstances, “congressional redistricting is [in fact] governed primarily by judicial interpretation of fundamental constitutional rights, rather than by federal statutory law.” This prominent role for the judiciary in our electoral system is all the more surprising because—before the middle of the twentieth century—the Supreme Court had almost entirely avoided the issue. In fact, “for over 174 years the Supreme Court tenaciously refused to adjudicate districting cases involving political gerrymandering and malapportionment.” Justice Felix Frankfurter articulated the rationale for the Court’s lack of involvement in

18 Id.
19 U.S. Const. art. I, § 2.
22 See Barasch, supra note 1.
23 See Crocker, supra note 9, at 4.
24 Id.
25 See Eaton, supra note 4, at 1.
Colegrove v. Greene, in which he wrote that such issues fell under the purview of the legislative branch and that, “courts ought not to enter this political thicket.”

The Supreme Court charted a new course sixteen years later with Baker v. Carr in 1962, which held that malapportionment claims are justiciable under the Equal Protection Clause of the Constitution. This represented a crucial redefining of the Court’s political question doctrine (which had held that the judiciary had no business being involved in ‘political matters,’ such as elections), effectively “converting it from a vague trapdoor method of avoiding controversial issues to a nuanced categorization based on previous usage and constitutional logic.” And by permitting the federal courts to deal with overt population malapportionment, Justice William Brennan’s majority opinion broke new ground for the judiciary’s role in American elections. Reynold v. Sims built on this result one year later by further codifying the principle of “one person, one vote,” so that the districts for state legislatures were also required to be roughly equal in population. Congress then passed the landmark Voting Rights Act of 1965, for the purpose of protecting the voting rights of minorities in the United States. Congress amended section two of this law in 1982 in order to specifically “prohibit election laws that had the effect of reducing minority voting power,” and in 1986 the decision in Thornburg v. Gingles required “race be taken into account during the redistricting process in order to prevent the dilution of minority votes.” Since this time, the Supreme Court has consistently found that certain forms of racial gerrymandering are illegal. On partisan gerrymanders, in which voters are grouped or split based on their political orientation, however, “[the court] has a much more ambiguous record.”

The Supreme Court first truly addressed the issue of partisan gerrymandering sixteen years after the Baker ruling, in Davis v. Bandemer in

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26 Colgrove v. Greene, 328 U.S. 549 (1946) (plurality opinion).
31 See Crocker, supra note 9, at 12.
33 See Crocker, supra note 9, at 8.
35 Id.
1986.\textsuperscript{36} The case involved Indiana Democrats that challenged the redistricting scheme adopted by their Republican-controlled state legislature, on the grounds that it “diluted the votes of that state’s Democrats and violated their equal protection rights.”\textsuperscript{37} In a six to three vote, the Court declared that partisan gerrymandering was a justiciable issue under the Equal Protection Clause, which opened the door to legal challenges on this basis. The Court did not, however, decide upon an exact standard for adjudicating these claims and the test of the four-member plurality set an extremely high level of proof. For example, partisan gerrymandering challenges would require proof of “both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.”\textsuperscript{38} The second prong of this test—the requisite discriminatory effect—necessitated that the design of a particular district had directly resulted in a political group being “unconstitutionally denied its chance to effectively influence the political process.”\textsuperscript{39} So taken together, the two prongs of the Court’s standard required that claims of partisan gerrymandering demonstrate “evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.”\textsuperscript{40}

These criteria would prove a vague, confusing, and impossibly high standard for the lower courts. In the twenty partisan gerrymandering cases that followed the Bandemer ruling—for example—the federal courts denied relief every single time, which has led many legal experts to the conclusion, “the standards are fundamentally unworkable and incorporate such ambiguous and unclear commands as to be unfit for any manageable form of judicial application.”\textsuperscript{41} While district courts have occasionally found that the “intent to discriminate” has been satisfied (as was the case in \textit{Republican Party of Virginia v. Wilder}\textsuperscript{42} and \textit{Pope v. Blue}\textsuperscript{43}) it has proven extremely difficult to also satisfy Bandemer’s second prong of a discriminatory effect. The reason is that this second test requires “the plaintiffs show that they have been or will be consistently degraded in their participation in the entire

\textsuperscript{37} See Eaton, \textit{supra} note 4, at 2.
\textsuperscript{38} Davis v. Bandemer, 478 U.S. 109 (1986) (plurality opinion).
\textsuperscript{39} Id. (plurality opinion).
\textsuperscript{40} Id. at 133 (plurality opinion).
\textsuperscript{43} 809 F. Supp. 392 (W.D. N.C. 1992), aff’d 506 U.S. 801 (1992) (mem.).
political process, not just in the process of redistricting."\textsuperscript{44} Unless plaintiffs can substantiate the discriminatory effects of redistricting in a subsequent election or other areas of the political process, their cases rarely move past a court’s “motion to dismiss.” So in the aftermath of a case that appeared to be a historic change on redistricting, “Bandemer’s promise that federal courts would be open to partisan gerrymandering claims proved an empty one.”\textsuperscript{45}

After eighteen years, the Court returned to the question of partisan gerrymandering in \textit{Vieth v. Jubelirer}.\textsuperscript{46} The case revolved around the redistricting of congressional seats in Pennsylvania after the 2000 census, with the state’s Republican Party—which controlled a majority of both state houses and the Governor’s office—adopting a partisan redistricting map the plaintiffs argued was intended to “punish Democrats for enacting pro-Democrat redistricting plans elsewhere.”\textsuperscript{47} More specifically, they claimed that the plan was designed explicitly for the Republican Party to capture thirteen of Pennsylvania’s nineteen congressional seats, despite roughly equal popular support among the parties among the state’s electorate.\textsuperscript{48} As registered Democrats in Pennsylvania, the plaintiffs challenged the redistricting in federal court on the grounds that it violated the one-person, one-vote principle of Article I, Section 2 of the Constitution, the Equal Protection clause, the Privileges and Immunities clause, and the freedom of association.\textsuperscript{49}

In the Court’s decision, the four conservative members of the court found the question nonjusticiable, and Justice Anthony Kennedy considered it justiciable under the Equal Protection Clause but still rejected the plaintiff’s claims.\textsuperscript{50} The court’s liberal justices, including Stephen Breyer, Ruth Bader Ginsberg, David Souter, and John Paul Stevens, dissented from the plurality, and each proposed a new test for adjudicating claims of partisan gerrymandering in federal courts. These tests varied widely in their dimensions and applications, which may have been done deliberately in order to provide the conservative members of the plurality with a variety of legal ‘options’ to choose from (which none of them would end up supporting, of course). Justice Breyer, for example, argued partisan gerrymandering should be deemed unlawful when it involves “unjustified

\textsuperscript{44} 809 F. Supp. at 397.
\textsuperscript{45} See Greene, \textit{supra} note 10, at 1022.
\textsuperscript{46} Vieth v. Jubelirer, 541 U.S. 267 (plurality opinion).
\textsuperscript{47} Id. at 272 (plurality opinion).
\textsuperscript{48} See Eaton, \textit{supra} note 4, at 3.
\textsuperscript{49} Vieth v. Jubelirer, 541 U.S. 267.
\textsuperscript{50} See Greene, \textit{supra} note 10, at 1022.
entrenchment,” which he defined as a situation in which “a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power.”

Justice Souter (who was joined by Justice Ginsburg), on the other hand, proposed a five-point-plan that would require plaintiffs, “to satisfy elements of a prima facie cause of action, at which point the State would have the opportunity not only to rebut the evidence supporting plaintiff’s case, but to offer an affirmative justification for the districting choices.”

Justice Stevens applied an analysis similar to the one used for claims of racial gerrymandering, holding that “if no neutral criterion can be identified to justify the lines drawn, and if the only possible explanation for a district’s bizarre shape is a naked desire to increase partisan strength, then no rational basis exists to save the district from an equal protection challenge.”

In spite of these proposed solutions, the plurality opinion of the court fell back on the idea that partisan gerrymandering was—again—under the purview of the legislative branch, asserting that these are cases in which the judiciary has “no business entertaining the claim of unlawfulness.”

Justice Scalia put this conclusion in the most direct terms, writing that the very fact that the Court had deadlocked on any standard for adjudicating partisan gerrymanders was a symptom of the impossibility of developing a fair, judicially manageable standard—proving the issue should never be justiciable. Despite providing the deciding vote, Justice Kennedy’s concurring opinion did not go nearly as far as Scalia’s. While he agreed that no proper judicial solution has been found, he wrote that the Court should rule narrowly and he did not rule out the possibility of a judicial standard being developed in the future. As a split decision with no majority opinion, the overall effect of Vieth was that it did “very little to resolve the justiciability of partisan gerrymandering claims.”

This lack of a clear resolution carried through the most recent case on partisan gerrymandering, *League of United Latin American Citizens (LULAC) v. Perry.* The Court’s decision largely upheld a Texas congressional redistricting plan that was drawn mid-decade, despite claims that the

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52 Id. at 346 (Souter, J., dissenting).
53 Id. at 321 (Stevens, J., dissenting).
54 Vieth v. Jubelirer, 541 U.S. 267 (plurality opinion).
55 Vieth v. Jubelirer, 541 U.S. at 291 (plurality opinion).
56 Id. at 267 (plurality opinion).
57 See Eaton, supra note 4, at 2.
The legislature’s actions were unnecessary and constituted an unconstitutional partisan gerrymandering. The only exception for the Court was Texas congressional district twenty-three, on the grounds that it “diluted the voting power of Latinos in violation of Section 2 of the Voting Rights Act.”\(^{59}\) In keeping with the trend of the judicial decisions over the last several decades, the Court did not rule out the claim of partisan gerrymandering being within the scope of judicial review, but it was nonetheless unable to find a “reliable standard for making such a determination.”\(^{60}\) In the continued absence of such a standard, the chief legal constraints on the drawing of legislative districts remain the following: “equality of population size” under Article I, Section 2 of the Constitution; the protections of the Voting Rights Act of 1965 against vote dilution (in conjunction with the “Equal Protection Clause of the 14th amendment); and a number of laws that vary by state, such as geographic compactness, contiguity, and maintenance of “communities of interest.”\(^{61}\)

**Political Repercussions**

American exceptionalism is a dominant theme in our politics, but one area in which this ‘exceptionalism’ is more often a source of criticism than national pride is the mechanics of our election system. In the majority of modern, western democracies, independent commissions perform the important task of adjusting boundaries for their elected representatives, in line with shifts in population and other demographic factors.\(^{62}\) In the United States, however, redistricting decisions for members of the House of Representatives are still made almost entirely by state legislatures—meaning party politicians are essentially in charge of ‘choosing’ their voters.

Despite the fact that the practice can appear a small, structural issue, critics of the practice contend that partisan gerrymandering threatens the basis of the democratic process, because “the competitive struggle for the people’s vote is…the very definition of democracy.”\(^{63}\) These critics point out

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60 Id.


that our country’s founding fathers intended for the U.S. House of Representatives to be the most democratic body of our national government, and uniquely sensitive to the popular will through elections every two years, which stands in glaring contrast with the low turnover associated with gerrymandered congressional districts. Beyond these philosophical arguments, genuinely competitive elections have been shown to also have number of crucial, practical political effects. These include higher turnout among voters,\textsuperscript{64} the translation of voters’ desires into public policy,\textsuperscript{65} and increased responsiveness and accountability from elected representatives.\textsuperscript{66}

And as was pointed out earlier, competitive congressional districts can help elect more moderate politicians,\textsuperscript{67} because candidates in these circumstances must win substantial numbers of voters from both parties in order to achieve higher office. Many commentators have claimed that having more elected legislators from these kinds of ‘balanced’ districts would reduce ideological polarization in Congress and—by extension—facilitate negotiation and compromise between the parties.

By contributing to the decline in competitive congressional districts over the last several decades, however, partisan gerrymandering has pushed our country in precisely the opposite of this direction—feeding the toxic and dysfunctional state of our politics. ‘Partisanship’ and ‘gridlock’ have become the media’s favorite descriptions for the last several years, and a growing body of research has confirmed the unprecedented character of modern congressional politics. Statisticians Keith Poole and Howard Rosenthal, for example, conducted an extensive analysis of voting patterns of Republican and Democratic politicians using their DW-NOMINATE metric, and concluded that the 112th Congress was the most ideologically polarized since Reconstruction.\textsuperscript{68} This past Congress also proved the least productive on record, passing an all-time low of 283 laws; President Harry Truman’s infamous “do-nothing” Congress, by comparison, passed over 900 laws.\textsuperscript{69} And perhaps because of this inability to accomplish even the most basic

\begin{itemize}
\item \textsuperscript{65} Matthew J. Streb, Rethinking American Electoral Democracy (Routledge 2011).
\item \textsuperscript{67} See Crocker, supra note 9, at 13.
\item \textsuperscript{69} Ezra Klein, \textit{John Boehner’s Congress Is a Train Wreck}, The Wash. Post - Wonkblog, Sept. 20, 2013 at 1.
\end{itemize}
tasks of governing (such as passing appropriations bills and raising the debt ceiling), Congress has faced record levels of disapproval in the last several years, with the institution’s approval rating at a disturbing low of 10% in February 2012.⁷⁰

Although legislative gridlock and obstruction by the minority party is nothing new in our politics, the tipping point for our current hyper-partisan political climate was the 2010 midterm elections—which was a watershed moment in the history of electoral gerrymandering. The redistricting process is obviously ‘politicized’ by its nature in the United States, but the redistricting of this past decennial census saw by far the most concerted and deliberate a campaign for designing congressional districts for explicitly partisan purposes. Republican strategist Karl Rove wrote in a column in the Wall Street Journal in early 2010, “He who controls redistricting can control Congress.”⁷¹ In the piece, Rove laid out a vision of a highly funded, targeted campaign to gain full control of state legislatures so that the Republican Party would be directing the process, which was an investment he believed would “end up costing Democrats congressional seats for a decade to come.”⁷² Rove and former Republican National Committee Chairman Ed Gillespie formed the Republican State Leadership Committee (RSLC) together for precisely this purpose shortly after President Obama was elected, launching the Redistricting Majority Project (REDMAP) in order to “keep or win Republican control of state legislatures with the largest impact on congressional redistricting.”⁷³

In contrast with past elections in which “a gentleman's agreement” prevailed among politicians of both parties that the bottom line was “redistricting should keep them safe,” the RSLC stated their foremost goal would be “maximizing gains,” meaning “incumbent seats would be made somewhat less safe in service of spreading the GOP's advantage more broadly.”⁷⁴ This was made possible by computer software such as Maptitude, which allowed Project REDMAP to utilize “sophisticated data-mining techniques to draw new districts that maximally disadvantaged Democrats.”⁷⁵ In order to avoid violating the restrictions of the Voting

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⁷⁰ Frank Newport, Congress’ Job Approval at New Low of 10%, Gallup Pol., Feb. 8, 2012 at 1.
⁷² Id.
⁷⁴ Tim Dickinson, How Republicans Rig the Game, Rolling Stone, Nov. 11, 2013 at 2.
⁷⁵ Id.
Rights Act (which prohibits using racial markers when drawing districts), the organization used data identifying the wards where President Obama received the highest returns in 2008, and the group then micro-targeted specific voters for maximum political impact. The results of this organized strategy were truly dramatic, as described in the RSLC’s own post-election report:

Pennsylvanians cast 83,000 more votes for Democratic U.S. House candidates . . . but elected a 13-5 Republican majority to represent them in Washington; Michiganders cast over 240,000 more votes for Democratic congressional candidates than Republicans, but still elected a 9-5 Republican delegation to Congress. Only 52 percent of Ohio voters cast ballots for Republicans, but the delegation nonetheless swung 12-4 for the GOP.\footnote{See 2012 REDMAP Summary Report, \textit{supra} note 73, at 3.}

By extensively “packing” Democratic districts and “cracking” Republican ones with powerful data-mining technology, Republicans were able to ensure their seats were “safer and more numerous by achieving lots of districts where they’re likely to win by a safe but not extravagant margin.”\footnote{How Can Republicans Be Both Safer and More Numerous?, \textit{The Economist}, Oct. 3, 2013 at 1.}

The effects of the 2010 mid-term elections and congressional redistricting did not end there. According to a statistical analysis by the Princeton Election Consortium, the Republican controlled House of Representatives would only have had a three-seat advantage (rather than today’s thirty-three seat advantage) after the 2012 election if not for the Party’s extensive gerrymandering in 2010.\footnote{See Dickinson, \textit{supra} note 74, at 1.} The United States has seen a dramatic decrease in the competitiveness of its congressional elections, with the number of swing districts declining by 45% from 1998 to 2012.\footnote{\textit{Id.}} Many political analysts have analyzed the practical political impacts of this new congressional landscape, and a number have argued that gerrymandered districts played a crucial role in the government shutdown in October of 2013. Time Magazine’s assessment of the shutdown’s underlying causes, for example, highlighted the fact that “89% of Speaker Boehner’s 231 allies were unlikely to see a serious Democratic challenger.”\footnote{Michael Scherer & Alex Altman, \textit{Loss Leaders}, \textit{Time Mag.}, Oct. 14, 2013 at 1.} In fact, they argued that the characteristics of the Speaker’s caucus mean that the majority of his
members exist in a “one party world,” where the only risk for their job security is a primary challenge from their political “right.” This is not to say that gerrymandering is an exclusively Republican phenomenon; Democrats have certainly worked to influence redistricting in legislatures they control, which may similarly contribute to some members’ movement to the “left” on the political spectrum. But it is also indisputably clear that the gerrymandering in the last decennial census broke violently from the “gentlemen’s agreements” of the past that largely protected incumbents, and helped produce one of the most flagrantly undemocratic redistricting schemes in modern history. And in this context, a new political status quo has emerged in which “the power of minority rule, refined by the politics of safe seats, paralyzes the body politic indefinitely.”

It is important to note—however—that not all analysis of the redistricting process condemns gerrymandering. The majority of these ‘counter-arguments’ either point out political benefits of the practice, the role of population geography in declining congressional competitiveness, or why gerrymandering is falsely considered a political “silver bullet.” Racial gerrymandering, for example, can be used to help form “communities of interest,” which can enhance minority representation in Congress by creating “minority” districts with “minority” congressmen (who may be more in touch with the unique needs of their communities). Others have made the case that gerrymandering can make the electoral process more steady and reliable, because the practice “promotes political stability by limiting the number of highly competitive districts in which turnover is likely.” Although more genuinely competitive elections sounds like a “win-win,” these commentators warn that constant congressional turnover (like an influx of new employees for a company) could make effective governance more difficult.

The more common line of argument against critics of gerrymandering, however, is that the practice’s role in declining electoral competitiveness is overstated, which is much more connected with the advantages of incumbent politicians and the growth of “homogenous political communities.” Noted congressional expert Thomas Mann, for example, points out “incumbents enjoy advantages well beyond the way in which their

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81 Id.
82 Benjamin Brickner, Project, Reading Between the Lines: Congressional and State Legislative Redistricting Their Reform in Iowa, Arizona, and California and Ideas for Change in New Jersey, 2010 Eagleton Inst. of Pol. at Rutgers U. (2010). 16.
83 See Crocker, supra note 9, at 13.
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districts are configured,\textsuperscript{84} which can include a major edge in fundraising ability, greater name recognition, and the ability to deliver federal dollars back to their home districts. So rather than gerrymandering, these scholars believe the advantages of incumbent politicians are driving the lack of competition in the lower chamber, since the re-election rate for incumbents in the House of Representatives “has been over 80% for more than 50 years, and is often over 90%.”\textsuperscript{85} It is worth noting that overall electoral competition has been declining in the Senate as well (although these seats generally remain more competitive than House seats), despite the fact that these elections are statewide and therefore cannot involve gerrymandered districts.\textsuperscript{86}

Critics of the merits of redistricting reform also contend that the increasing number of “homogenous political communities” have played a major role in declining congressional competition between the parties, because people's political preferences can promote a “geographic segregation of like-minded citizens—conservatives to the exurbs, liberals to cities.”\textsuperscript{87} These geographic divides have also become much more pronounced in the last two decades: In 2012, only 17 House Republicans hailed from districts carried by President Obama, but in 1995 there were 79 House Republicans that came from districts supporting President Clinton.\textsuperscript{88}

If larger and larger regions of the country have citizens with “homogenous” political backgrounds, then it is unlikely that the specific design of districts will make a major difference for electoral competition. It is also clear that the Democratic Party (which—at least since 2010—has been the primary critic of partisan gerrymandering) would receive less than their fair share of congressional seats under any redistricting formula, because their voters are generally more tightly clustered and concentrated in urban areas “where they are more likely to waste votes with large majorities.”\textsuperscript{89} This conundrum comments on the challenge of balancing different electoral priorities when redistricting, which was elaborated on by elections expert John Sides: “It is very difficult to achieve equal district populations, respect compactness and contiguity, respect communities of interest, avoid diluting minority voting

\textsuperscript{84} Thomas E. Mann, Redistricting Reform, The Brookings Institution, June 1, 2005 at 1.
\textsuperscript{86} See Crocker, supra note 9, at 13.
\textsuperscript{87} Thomas E. Mann, Redistricting Reform, The Brookings Institution, June 1, 2005. 1.
\textsuperscript{88} Id.
strength, and create perfectly proportional representation or at least minimize seats-votes discrepancies.”

These skeptics also argue that the effects of Republican gerrymandering in 2010 can be overstated, and that the characterization of redistricting reform as a political “silver bullet” obscures the multitude of factors driving ideological divides and dysfunction in Washington. In contrast with the Princeton study, a post-election analysis by the Brennan Center for Justice, for example, found that “partisan redistricting after the 2010 census netted the Republicans just six more House seats in 2012 than they would have won using the old district lines.” And rather than describing our country’s partisan divides as a symptom of gerrymandered districts, critics of the importance of reform highlight a number of complex factors driving the status quo, including a bitterly partisan news media, economic strain and growing socio-economic inequalities, popular distrust of public institutions, cultural angst, the withering of campaign finance regulations, and—perhaps most importantly—abysmal voter participation. If only the most hardline, ideological voters turn out in a primary in either party, then the shape of the congressional district is largely irrelevant…and the fact remains that only 41.5 percent of eligible voters actually cast their ballots in the 2010 mid-term elections. Another compelling example of this phenomenon is the election of Senator Ted Cruz, who is widely considered one of the most hardline and ideologically driven members of the upper chamber. The fact remains that Cruz only needed 3.45 percent of the Texas electorate to vote for him in the GOP primary in order to coast through the general election and gain the profound institutional power of a United States Senator.

So the bottom line for skeptics of redistricting reform is that there is a danger in the emerging consensus among pundits and politicians that partisan gerrymandering is the fundamental source of our political problems, because this perspective can be “self-defeating and prevent us from searching for the true roots of this low-ebb moment in our political history.”

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90 Id. at 4.
94 See Shapiro, *supra* note 91, at 3.
Solutions

One of the most promising avenues for reform are non-partisan or bipartisan redistricting commissions, whose central goals are “minimizing partisan gerrymandering or promoting redistricting reform by creating districts that are more competitive and responsive to citizens and less likely to enable incumbents to retain their positions for decades.” Naturally, one of the major advantages of these commissions is that they take responsibility away from “partisan officials, many with public stakes in the election outcome,” and they can produce much more neutral and competitive election districts. For the 2010-2012 redistricting cycle, seven states required independent commissions to draw their congressional redistricting plans: Arizona, California, Hawaii, Idaho, New Jersey, Washington, and Montana.

The process for exactly how redistricting commissions function as well as their exact membership composition varies widely by state. Some states have commissions that only draw district maps if their state legislatures cannot agree on a plan, while others utilize them in an advisory capacity or require gubernatorial approval for the drafted plans. Many states also employ a “veil of ignorance” for those involved in designing redistricting plans, which means that members of the commission do not know whose districts they are drawing. In terms of membership, commissions can be bipartisan—meaning there are an equal or proportionate number of Republicans and Democrats—or non-partisan (a more complicated designation, with prominent examples in Arizona and California). In California, the California Citizens Redistricting Commission has gained prominence for producing some of the “fairest and most competitive electoral districts in the country,” using the following organization:

This Commission consists of 14 members: five Democrats, five Republicans, and four members who are unaffiliated with either party. The Commission holds public hearings and accepts public comments and its decisions must be approved by at least nine members of the Commission with at least three votes coming from each of the party-affiliated members. In particular, the mandate of the Commission is to draw the district lines in conformity with strict, nonpartisan rules.

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95 See Crocker, supra note 9, at 14.
96 See Mann, supra note 87, at 3.
97 See Crocker, supra note 9, at 15.
98 Id.
99 See Krislov, supra note 28, at 34.
designed to create districts of relatively equal population that will provide fair representation for all Californians.\textsuperscript{100}

Prior to the passage of California Proposition 11 in 2008, which authorized the CCRC through the Voters First Act,\textsuperscript{101} only one congressional seat had changed party hands in the course of 225 congressional elections in the last decade, in large part because of bipartisan gerrymandering.\textsuperscript{102} Although it is “still too early to evaluate most of the hoped-for effects of this reform [such as shifting how representatives actually govern],” analysis by the Public Policy Institute of California has shown that there are promising signs in California that the commission “has encouraged higher turnover in the state’s political delegation and more fresh faces on the ballot, which has contributed to a higher number of competitive outcomes.”\textsuperscript{103}

Arizona is another prototype for redistricting reform, and—unlike California—the state’s commission is composed of “four members (two from each party) [that] are appointed by state legislative leaders from a pool approved by a judicial appointments panel,” which then draws commission maps that are “approved by a majority vote and are not subject to review by the legislature or veto by the governor.”\textsuperscript{104} Two other distinguishing requirements in Arizona are that its election commission can neither identify nor consider “the place of residence of the incumbents or candidates,” and must always favor more competitive district maps in their final decisions.\textsuperscript{105}

As one might expect, these kinds of reforms often face entrenched opposition in state legislatures, which is why citizens have increasingly turned to the initiatives process so that they can place nonpartisan redistricting commissions on the ballot.\textsuperscript{106} Twenty-four states allow these kinds of citizen initiatives, and different organizations and non-profits—such as Common Cause, Fair Vote, and League of Women Voters—are pushing forward with additional electoral commission reforms using this strategy.\textsuperscript{107} Two of the most high-profile independent redistricting commissions in California and Arizona were both established through the

\textsuperscript{100} Id.
\textsuperscript{101} Cal. Const. amend. XXI, § 3.
\textsuperscript{104} See Mann, supra note 87, at 2.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
initiatives process, and if there is “sustained interest and engagement by citizens across the country,”108 then it is possible this method will continue being a successful avenue for reform.

Another possible avenue for reform is congressional legislation, which has generally focused on installing independent commissions nationally or requiring certain national standards. Representative Jim Cooper, for example, introduced H.R. 419, the “Redistricting Transparency Act of 2011,” in the 112th Congress, which would have required states to allow for “public participation in the congressional redistricting process by establishing an official state redistricting website, allowing for the submission of plans by the public, allowing for the public to respond to final redistricting plans, and requiring for full public notification of the final plans by the appropriate state districting authority.”109 Representative Earl Blumenauer also introduced legislation on the issue with H.R. 3486, “The National Commission for Independent Redistricting Act of 2012,” which would have taken the congressional redistricting process out of the hands of the states entirely by creating a single national non-partisan commission.110 The general consensus is that citizens’ initiatives are much more likely to be successful than these kinds of sweeping federal reforms, which violate politicians’ self-interest and have failed to gain any kind of broad political traction.111

The last real option for reform is convincing the Supreme Court to find partisan gerrymandered plans unconstitutional,112 and having them put in place a workable legal standard for adjudicating these claims. As was mentioned earlier, there is a major need “for a uniform standard that all federal courts can rely on,”113 and the fact remains that the Court has found partisan gerrymandering a “justiciable claim” in the past. Justice Stevens laid out this rationale most clearly in Vieth, when he wrote: “Political affiliations are an inappropriate factor to consider when constructing district lines, and that by analyzing the appearance of the districts and procedures used to create them, courts can effectively identify unconstitutional partisan gerrymandering.”114 From this common logic, the Court’s liberal leaning justices have advanced a number of different standards for the redistricting process, such as Justice Breyer’s standard of “unjustified entrenchment” and

108 Id. at 3.
109 See Crocker, supra note 9, at 18.
110 Id.
111 Id. at 19.
112 Id. at 2.
113 See Weiss, supra note 12, at 40.
Justice Souter’s “Five Point Plan.” The problem is that the Court has been unable to come to an agreement for an appropriate standard, and although the Court's swing justice—Anthony Kennedy—has not ruled out the existence of such a standard, he has argued that as it stands there is a “lack of comprehensive and neutral principles for drawing electoral boundaries,” as well as an “absence of rules to limit and confine judicial intervention.”

While it is possible that a legal challenge in the aftermath of the unprecedented partisan gerrymandering in the mid-term elections of 2010 could produce a different judicial decision, the court’s ideological balance has prevented it from adopting a legal standard in more than two decades. This judicial ‘gridlock’ has led noted American elections expert Thomas Mann to the conclusion that “the federal courts do not appear a promising venue for reform.”

One simple, straightforward judicial standard of partisan gerrymandering that could prove promising in future appeals is the ‘symmetry’ test. Unlike other proposed standards, the symmetry test accepts disproportionate representation, but it also requires that “if one party benefits from the system, it is unfair if the other party does not get the same result if it can achieve the same sort of majority.” Put in more understandable terms, if in an election “55% of the vote allows a party to elect two-thirds of the legislators, this result is not unfair if the other party subsequently achieves 55% of the vote and gets the same benefit.” So if a candidate from one political party receives an equivalent share of the vote in an election as a politician from another party had received in the past but does not receive a similar electoral result, then this electoral district fails the symmetry test. Beyond this essential requirement, the symmetry standard also requires receiving the popular vote for gaining an electoral majority, and the “relative difference in seats produced by a majority of the popular vote for each party is expressed as a measure of system asymmetry or ‘partisan advantage.’”

The developer of the symmetry standard, Harvard political scientist Gary King, wrote an amicus brief in *LULAC v. Perry* and has also created a corresponding software system called *JudgeIt*. By analyzing past voting

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116 See Mann, supra note 87, at 2.
117 See Krislov, supra note 28, at 86.
118 Id.
119 Id. at 87.
patterns, as well as additional information such as incumbency and population trends, this system ascertains electoral volatility, which is the “popular vote shift in the system-wide vote that produces a one-percent shift in the district.”\textsuperscript{121} This volatility is the basis for the determination of instances of system “asymmetry,” which would serve as the “threshold claim” for legal challenges.\textsuperscript{122} When challenged on whether a state’s redistricting scheme featured this kind of election “asymmetry,” the burden of justification for the shape of the district in question would fall on the state itself, which would need to prove that factors such as “respect for existing political subdivisions, geographic lines, [and] political geography or concentration of voters”\textsuperscript{123} made necessary the government’s unequal redistricting scheme.

The simplicity and fairness of the symmetry test avoids complicated legal formulations or allegations of reasoning from political loyalty, and the “Supreme Court could adopt symmetry as a principle without altering any precedent.”\textsuperscript{124} The symmetry standard also presents an electoral reform that is less sweeping and less threatening to the political order, by serving as a clear, straightforward check on excessive politicization in the redistricting process. In fact, the simple “threat of [legal] review” would likely push states toward “legislative restraint, which often is more effective than the actual application of court action.”\textsuperscript{125} So by codifying the expectation that congressional districts should produce the same electoral outcome given equivalent voting percentages and circumstances, “the primacy of democratic rule [is] maintained but court action is a deterrent and channeled—[rather than] a substitute for legislative choice.”\textsuperscript{126} This more limited role for the symmetry test in comparison with other standards—coupled with its simplicity, neutrality, and practicality—would help the Supreme Court avoid being entangled in the “political thicket” and shift the burden of justification for the shape of electoral districts on to the states. The symmetry test is also fairly established because it has “been in use for a decade and has been employed in numerous cases,”\textsuperscript{127} and it also enjoys widespread support in the scholarly literature on the issue, which is “united in supporting [it] as the definition of partisan fairness in electoral systems.”\textsuperscript{128}

\textsuperscript{121} See Krislov, supra note 28, at 48.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} See Krislov, supra note 28, at 51.
\textsuperscript{126} Id. at 53.
\textsuperscript{127} Id. at 51.
\textsuperscript{128} Id.
The bottom line is that symmetry standard has emerged for many as a “logical, non-controversial standard that open-minded justices might accept without excessive commitment or a sense of entering a morass,” which would provide a highly valuable legal standard for future Supreme Court cases on partisan gerrymandering.

Conclusion

Redistricting reform is not a panacea for the problems of our political system, but it is an important step for moving our country in the right direction. Partisan gerrymandering often produces profoundly undemocratic election results, and declining intra-party competition has increased the influence of the ideological fringes of both parties—disconnecting the will of the Congress from the will of the larger public. This phenomenon is clearly reflected in our political reality today, in which initiatives with widespread public support have repeatedly stalled or failed in the House of Representatives. In fact, the 112th Congress that was elected in the 2010 mid-term elections after the most recent decennial census has broken records for its lack of legislative productivity and polarization. This status quo—of course—ties in directly with criticisms of partisan gerrymandering that have existed for decades: that the practice increases political extremism, decreases the accountability of elected officials, and makes translating the desires of voters into public policy more and more difficult.

There are several promising avenues for reform. The most effective strategy so far has been the installation of independent election commissions through citizens’ initiatives in different states, which have generally produced more fair and competitive congressional districts. The Supreme Court has deadlocked on a legal standard for adjudicating claims of partisan gerrymandering, but one approach that could develop more consensus on the Court is the ‘symmetry’ test. Symmetry requires that if a congressional district produces one result for one party, it should produce the same result for the other given an equivalent percentage of the vote—which is a simple and fair standard that sidesteps complicated legal formulations and political calculations by the Court. Beyond reforming the redistricting process, enlarging the electorate should also be a pressing concern, because more robust engagement and involvement by citizens in the electoral process is

129 Id. at 95.
crucial for “reducing the huge influence of a small slice of ideological zealots who dominate [political] primaries.”

Our country’s founding fathers intended for the United States House of Representatives to be the most democratic body of the national government. In contrast with the Senate, they planned for the House to be uniquely sensitive to the popular will through highly competitive elections held every two years. Partisan gerrymandering—which is driven today by powerful technologies and highly funded political interests—has flipped this intended design for Congress’s lower chamber on its head. Instead of being “bound to [the] fidelity and sympathy [of] the great mass of the people,” the House has become a body in which a small slice of the electorate wields disproportionate influence and electoral turnover is extremely low. Ignoring James Madison’s warnings, we have literally developed a system that “favors the elevation of the few on the ruins of the many.” And as we have seen in the course of this article, the consequences of this new dynamic for the House are not just philosophical; recent history has demonstrated the incredible difficulty of governing effectively with an insulated, unaccountable legislative body. In order to meet the challenges of the twenty-first century, the United States needs representatives elected through healthy, democratic competition, reflecting the real interests of their communities and the larger public—rather than those of a selected, like-minded few.

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130 Thomas E. Mann & Norman Ornstein, How to Save Congress: Marginalize the Radicals, Politico Mag., Dec. 10, 2013 at 2.
132 Id.
Burmese Refugees in Thailand: Thailand’s Obligation under Customary International Law to Uphold the Principle of Non-Refoulement

Keila Franks

Introduction

In light of recent political changes in Burma, rumors of refugee repatriation by both the Burmese and Thai governments, as well as by the United Nations High Commissioner on Refugees (UNHCR), have circulated regarding Burmese refugees living in Thailand. Burmese refugee organizations have issued statements outlining many pre-conditions for repatriation that have yet to be met, including landmine clearance and total withdrawal of Burma’s military forces from all ethnic regions.1 Thailand’s history of forcibly repatriating refugees, as well as Thailand’s failure to sign the 1951 Convention relating to the Status of Refugees,2 do not help to alleviate the refugees’ concerns. This article contends that, even though Thailand is not a signatory of the 1951 Convention that protects the rights of refugees, Thailand is still obligated to abide by the principle of non-refoulement. Non-refoulement means that a state is not allowed to forcibly repatriate a refugee to a place “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”3 This principle is part of customary international law, which is binding on all nations, whether they have formally agreed to abide by a particular custom or not.4

The article first explores the principle of non-refoulement within the greater body of international law. Secondly, it discusses customary international law and substantiates that all states must abide by this body of law. The third section addresses Thailand’s violations of this principle, and the fourth discusses its justifications for these infractions. After adopting a formula created by Anthony D’Amato (one of the foremost scholars in international

1 Karen Refugee Committee, KRC Position on Repatriation, BURMA PARTNERSHIP (March 25, 2013),; Karenni Refugee Committee, Position on the Repatriation of Refugees from Burma, BURMA PARTNERSHIP (December 12, 2012); Karen Community Based Organizations, Karen Community Based Organizations’ Position on Refugees’ Return to Burma, BURMA PARTNERSHIP, (September 11, 2012).
3 Id.
law and jurisprudence) to determine what constitutes customary international law, the article next argues that the principle of *non-refoulement* is part of this body of law. It then touches on the persistent objector debate and argues that even if one accepts the persistent objector rule, Thailand would not be able to opt out of its obligation to respect the principle of *non-refoulement* because it is not a persistent objector. Finally, the article explains that Thailand must not forcibly repatriate refugees, and provides solutions to discourage Thailand from violating this principle in the future.

**The Principle of Non-Refoulement in International Law**

Several international declarations and conventions outline the protections that refugees should receive, and the principle of *non-refoulement* is consistently cited as being impermissible under international law. Article 14 of the Universal Declaration of Human Rights proclaims, “The right to seek and to enjoy in other countries asylum from persecution” is a fundamental human right.\(^5\) The 1951 Convention relating to the Status of Refugees, which took effect in 1954, establishes the widely accepted definition of the term “refugee”:

> Any person who…owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.\(^6\)

As the 1951 Convention took place in the wake of World War II, it stated that only those who fled "as a result of events occurring before 1 January 1951" and "events occurring in Europe" would be considered refugees.\(^7\) The 1967 Protocol Relating to the Status of Refugees effectively removed these temporal and geographic limitations.\(^8\)

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8. *Id.*
The 1951 Convention outlines that states must grant refugees certain rights, and it also establishes the fundamental principle of non-refoulement. Article 33 states, No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. The principle of non-refoulement is also established in Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which says that no state may forcibly expel a person to another state "where there are substantial grounds for believing that he would be in danger of being subjected to torture." The General Assembly also reiterated the principle of non-refoulement in the Declaration on Territorial Asylum (1967), which states that no refugee "shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution." Finally, Article 7 of the International Covenant on Civil and Political Rights, which states that nobody "shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment," has been interpreted to mean that states are prohibited from the refoulement of refugees to a place where they have reason to fear torture. These numerous international declarations and conventions demonstrate that it has become widely accepted that refoulement is impermissible in the international arena.

**Customary International Law**

Customary international law is unwritten law that has commonly been accepted by nations as a law within the international legal system. The

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10 *Id.*
International Court of Justice (ICJ) acknowledges customary international law as having legally binding power. Article 38 of the Statute of the ICJ states that when deciding the outcome of a case, the Court can apply “international custom, as evidence of a general practice accepted as law” as well as “the general principles of law recognized by civilized nations.” Legal scholars have intensely debated what constitutes “general practice” as recognized by “civilized nations,” and they have disagreed over whether certain customary laws are binding on those nations that have not officially recognized those customs as binding. However, overall it is now generally accepted that there is a body of law (i.e. customary international law) that is binding on all nations whether they have formally agreed to abide by those norms or not.

William Hall, a major theorist at the turn of the twentieth century who was heavily influenced by the positivist legal tradition, and Lassa Oppenheim, a renowned German jurist who was also heavily influenced by positivism, argue that only nations that have formally agreed to abide by a custom (e.g. by signing a treaty) are bound to follow that custom. William Hall claimed that positivism, which states that the “existence and content of law depends on social facts and not on its merits,” provided no basis for the claim that treaty provisions could bind nations that were non-signatories of the treaty. Hall states, “A pact between two parties is confessedly incapable of affecting a third who has in no way assented to its terms.” Lassa Oppenheim likewise stated, “Of course, such law-making treaties create law for the contracting parties only.” According to Hall’s and Oppenheim’s positivist rationale, treaties cannot generate new norms of customary law, and, therefore, treaties have no implications for those who do not sign the treaty. For example, in the early twentieth century when Oppenheim published his internationally renowned book *International Law*:

16 Id.
20 Id. at 8.
A Treatise, there were numerous international treaties, such as the 1810 Anglo-Portuguese Treaty and the 1813 Ango-Swedish Treaty, that outlawed the slave trade. However, Oppenheim claimed that these treaties had no implications for states that did not sign the treaty. He also argued that the treaties did not establish a customary international law that prohibited the slave trade. When Hersch Lauterpacht edited the eighth edition of Oppenheim’s treatise in 1955, he maintained Oppenheim’s stance that it was “difficult to say that customary International Law condemns … the institution of slavery and the traffic in slaves.” However, by this time, international law had clearly prohibited the slave trade. Under the Universal Declaration of Human Rights (adopted in 1948), Article 4 states, “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.” D’Amato stated that by 1995, the slave trade was “one of the clearest prohibitions in all of international law, rising to the level (according to the International Law Commission) of a norm of jus cogens,” which is a “norm thought to be so fundamental that it invalidates rules consented to by states in treaties or custom.” Thus, by looking at actual international legal practice, the custom of abolishing the slave trade became part of customary international law.

Other legal scholars have claimed that, even if customary law is binding on nations regardless of whether they have signed a treaty or convention relating to the custom, nations still have the option of opting out of the custom. Ian Brownlie, who is one of the foremost international lawyers of the last century who was famous for fighting for human rights and civil liberties, claims that “a state may contract out of a custom in the process of formation.” He continues on to say that the “evidence of the objection must be clear and there is probably a presumption of acceptance which is to be rebutted.” He accepts that there are some norms that states are expected to follow whether they have officially committed themselves to following

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25 Id. at 733.
28 Id. at 115.
30 Id. at 11.
those norms or not (i.e. signing a treaty or convention). However, if a state opts out in a timely manner, other states would accept that state as a “persistent objector”, and the state would be free to not abide by that norm.

However, the persistent objector rule also has serious holes when it is used in the context of actual legal practice. Jonathan Charney, a professor at the Vanderbilt University School of Law and the co-editor-in-chief of the American Law Review, found that Brownlie merely restates the persistent objector rule but fails to adequately explain why the rule. Moreover, Charney states that Brownlie does not clearly state the circumstances in which a state can opt out of a custom. With the ambiguity and lack of evidence supporting the persistent objector rule, it must be assumed that under international law, there is not an accepted mechanism by which states can opt out of a norm.

A more convincing claim is that customary international law is binding on all nations, whether they expressly consented to the custom in a treaty or not. Anthony D’Amato argues that when a nation becomes an independent state, it agrees to play by the rules of the international legal system and accepts the development of new international legal customs. D’Amato also argues that no states may “pick and choose” among existing customs. He claims that the state is bound by the rules of customary international law, whether the state agreed to the rule in a treaty or not, because the state consented to the process by which the rules became part of customary international law.

Thus, there is a body of customary international law that is binding on states, regardless of whether the states have officially recognized the customs within that body of law. The next question is how to determine what constitutes customary international law. Some legal scholars, such as Parker and Neylon, claim that there is a body of jus cogens norms that is binding on all nations, and that this body of law is determined by fundamental human rights principles rather than state practice. According to Article 53 of the

31 Id. at 6–10.
32 Id. at 11.
33 Jonathan Charney, The Persistent Objector Rule and the Development of Customary International Law, 1 BRITISH YEAR BOOK OF INTERNATIONAL LAW 1, 6 (1986).
34 Id.
36 Id.
37 Id.
Vienna Convention on the Law of Treaties, a *jus cogens* norm is defined as “a peremptory norm of general international law,” which is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general law having the same character.”39 However, one aspect of *jus cogens* norms that makes them especially controversial is their ability to nullify a treaty that violates this norm. Article 53 of the Vienna Convention states, “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”40 D’Amato cites his concerns that the lack of a widely-accepted method of determining what is a *jus cogens* norm makes it possible for “any writer to christen any ordinary norm of his or her choice as a new *jus cogens* norm, thereby in one stroke investing it with magical power.”41 Any norm of a certain country’s or writer’s choosing could be elevated to the status of a ‘super-norm’ which would be binding on all nations and would be non-derogable.

A more suitable method of determining what constitutes customary international law is by looking at state practice. According to D’Amato’s formulation, the determination of the norms of customary international law includes both a qualitative and a quantitative element.42 The qualitative element refers to the “requirement that an objective claim of international legality be articulated in advance of, or concurrently with, the act,” which notifies a state of the legal implications of an act or a decision before the state commits or agrees to it.43 D’Amato cites treaties, conventions, and United Nations’ General Assembly resolutions as the sources where the greatest number of articulated rules of customary international law may be found.44 The second element which must be present to prove that a principle is part of customary international law is the quantitative element. This

40 Id.
42 D’Amato’s formulation of customary international law is just one way of determining what constitutes customary international law. For example, Judge Manley O. Hudson developed a formula which consisted of five “elements” that were required to identify “the emergence of a principle or rule of customary international law” (see *INTERNATIONAL LAW ANTHOLOGY* 61 (Anthony D’Amato ed., 1994)). However, D’Amato’s formulation is one that is widely accepted, and thus will be the only one used in this paper to determine what constitutes customary international law.
44 Id. at 69.
element refers to the practice of states and what they actually do.\textsuperscript{45} The quantitative element is necessary because there may be many different and conflicting rules articulated by states, but “a state can only act in one way at one time.”\textsuperscript{46} D’Amato argues that a state’s commitment to act as well as its actual acts and abstentions all contribute to proving the quantitative element of a custom.\textsuperscript{47} First, D’Amato claims that, unless a state abrogates a treaty by repeatedly violating it, the state’s “commitment to act under the treaty… is significant in terms of customary international law.”\textsuperscript{48} However, solely a commitment to act is not enough to signify that a principle is part of customary international law. States must also apply this principle when developing their domestic legislation to actually follow the custom in practice.\textsuperscript{49} Because D’Amato has developed a clear and widely accepted formulation for determining norms of customary international law, this article adopts his method for determining whether a principle constitutes customary international law.

**Thailand’s Violation of the Principle of Non-Refoulement**

Since the mid-1980s when Burmese began to seek refuge across the border in Thailand, the Thai government has generally complied with the principle of non-refoulement by allowing Burmese refugees to remain in Thailand.\textsuperscript{50} However, over the course of the past 25 years, there have been several cases in which Thailand has forcibly repatriated Burmese refugees. Some of these cases are highlighted below:

A. After the brutal crackdown of the 1988 uprising against the Burmese military regime, between 8,000 and 10,000 of the political dissidents sought refuge in Thailand.\textsuperscript{51} Although Thailand never granted them refugee status, it did admit that these protestors fled Burma due to a legitimate fear of prosecution.\textsuperscript{52} However, the Burmese government put pressure on the Thai government to send the 1988 protestors back to Burma.\textsuperscript{53} On October 8, 1988, Thailand forcibly removed 135 of the political dissenters from a

\textsuperscript{45} Id. at 70.
\textsuperscript{46} Id.
\textsuperscript{47} Id. at 71.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{51} *Unwanted and Unprotected: Burmese Refugees in Thailand*, *Human Rights Watch*, (September 1, 1998).
\textsuperscript{52} Id.
\textsuperscript{53} Id.
Burmese Refugees in Thailand

Buddhist monastery in Mae Sot and sent them back to Burma. \textsuperscript{54} Between October and January 1989, Thailand repatriated 387 political dissenters from Burma. \textsuperscript{55} After returning to Burma, Human Rights Watch (HRW) received reports that those who were forcibly repatriated to Burma were summoned to local police stations in order to be questioned and they then subsequently “disappeared.” \textsuperscript{56} The Thai government’s forcible repatriation of these refugees clearly violates the principle of non-refoulement because the asylum seekers were forcibly repatriated to an area where their life or freedom was threatened.

B. In 1997, the Burmese military launched an offensive against the Karen National Union in the Mergui District, causing approximately 100 Burmese to flee across the border into Thailand on March 10, 1997. \textsuperscript{57} The Thai government only allowed the refugees to stay in Thailand for five days before sending them back across the border. \textsuperscript{58} In November of that year, approximately 1,000 Karen sought refuge in Thailand. \textsuperscript{59} However, they were denied entry to the refugee camps, and two were injured when the Ninth Infantry Division of the Thai army fired warning shots over the heads of the refugees seeking entry into the camp. \textsuperscript{60} The Thai army then forcibly repatriated these Karen refugees who were seeking entrance into the refugee camps. \textsuperscript{61}

C. In August 2003, Thai officials forced a former child soldier with the Karen National Union (KNU), along with a group of about 60 other deportees, to cross the border back into Burma. \textsuperscript{62} The former child soldier, whom HRW identifies as “S,” had spent summer vacations during high school on the frontlines along with other KNU soldiers, and he had joined the KNU full-time after high school. \textsuperscript{63} After S was named as part of a personal conflict with those from another resistance faction, his captain sent him back to his village because he believed that S had reason to fear for his

\begin{footnotesize}
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Out of Sight, Out of Mind: Thai Policy toward Burmese Refugees and Migrants, 16.2 (C) Human Rights Watch 1, 16 (25 February, 2004).
\textsuperscript{63} Id.
\end{footnotesize}
personal safety. \(^{64}\) However, after returning to his village, S was still constantly on guard, fearing that he would be arrested or killed by the Burmese government for participating in an armed ethnic resistance faction. \(^{65}\) One day, Burmese military troops came to his village trying to determine the whereabouts of S and other KNU soldiers. \(^{66}\) The troops interrogated and tortured villagers in order to find out this information. \(^{67}\) As a result, S fled his village in June 1999 due to the fear of persecution and torture, walking for eight days to reach the Thai-Burmese border. \(^{68}\) On July 23, 1999, he applied for refugee status with the UNHCR in Thailand, but he was not granted it. \(^{69}\) He then went to live in a refugee camp along the border, but he left after a year because he was still not registered as a refugee and found it difficult to survive in the refugee camp. In 2001, the UNHCR officially recognized S as a refugee. \(^{70}\) However, S claimed that he still lived in fear in Thailand, stating, “There is no security, no protection. I only have the UNHCR paper. Police can arrest me at any time.” \(^{71}\) Even though the UNHCR had registered him as a refugee, he was still not able to live safely in Thailand.

On August 5, 2003, the Thai police arrested S in Bangkok and sent him to an immigration detention center. \(^{72}\) Although S approached UNHCR staff in the detention center and identified himself as a recognized refugee, the UNHCR staff told him that they could not do anything to help him. \(^{73}\) The Thai authorities put S, along with sixty other deportees, on a boat and forced them to return to Burma by crossing the river marking the border. \(^{74}\) Waiting on the Burmese side of the border were soldiers from the Democratic Karen Buddhist Army (DKBA), a renegade faction of the KNU, who were searching for former KNU soldiers. \(^{75}\) S feared that if the soldiers found out that he was a former soldier of the KNU, he risked being beaten, imprisoned, and even killed, so he threw his documents identifying him as a refugee into

\(^{64}\) Id.
\(^{65}\) Id.
\(^{66}\) Id.
\(^{67}\) Id.
\(^{68}\) Id.
\(^{69}\) Id.
\(^{70}\) Id.
\(^{71}\) Id.
\(^{72}\) Id. at 17.
\(^{73}\) Id.
\(^{74}\) Id.
\(^{75}\) Id.
the river. The DKBA soldiers did not identify S as a former KNU soldier, and S was able to bribe his way back into Thailand the same day. However, he was vulnerable to further deportation because he lived in the same precarious position as before and by that point, he lacked even the UNHCR papers which had identified him as a refugee. The Thai government’s forcible repatriation of S is another instance of Thailand’s violation of the principle of non-refoulement.

D. In the early 2000s, the Thai government instructed all refugees living in urban areas to move to the refugee camps along the border, or they would lose their status as refugees. One refugee, Aye Aye Thin, stated in an interview with Adam Saltsman, a Master’s degree candidate at Boston College, that she contacted the UNHCR consistently over the course of four years to try to move to the refugee camp, but the UNHCR officials told her either that the deadline had passed or that no new refugees could move into the camps until others had been resettled. Due to her inability to move to the refugee camps, she lost her status as a refugee and was forced to work as an illegal immigrant in Bangkok. Illegal immigrants, regardless of whether they have previously been recognized by the UNHCR as refugees, are subject to deportation under Section 29 of Thailand’s 1979 Immigrant Act, which states, “When the competent official discovers any illegal alien … [He or she] shall have authority to … detain said alien in the conveyance or to send said alien to any place for the purpose of interrogation by the competent official or else deporting said alien.” After being sexually abused by an employer, Aye Aye Thin attempted to move to a safer location, but the Thai police arrested her and subsequently deported her back to Burma.

In all four of these instances, Thailand forcibly repatriated those who had a well-founded fear that their life or freedom would be threatened in Burma. The forcible repatriation of individual refugees and groups of

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76 Id.
77 Id.
78 Id.
80 Id.
81 Id.
82 Immigration Act, B.E. 2522, 1979 (Thailand).
refugees demonstrates that Thailand has violated the custom of non-refoulement on several occasions.

**Thailand's Argument Against Compliance with International Refugee Standards**

Thailand has argued that it is not obligated to abide by the international norm of non-refoulement because it is not a signatory to the 1951 Convention or its 1967 Protocol. The Thai government has cited concerns that the application of external norms and standards regarding identifying and protecting refugees would encroach on Thailand’s sovereignty and would be contradictory to the nation’s interests. Over the past four decades, Thailand has received a large influx of refugees from its surrounding countries. Thailand considers itself a special case which should be given greater discretion when determining how to best manage these refugees. The Thai government fears that adhering to international standards regarding refugees would encourage even more refugees to come to the country, which Thailand claims could potentially be a threat to national security and the country’s economic and political stability.

Thailand has not considered itself bound to the standard international definition of a refugee. In 1998, Thailand and the UNHCR agreed on several Working Arrangements that established the criterion for admission to the refugee camps in Thailand as “persons fleeing fighting and the consequences of civil war.” However, those fleeing political persecution, religious persecution, or other human rights are excluded, despite these categories of persons being recognized as refugees in the 1951 Convention. When HRW challenged the forcible repatriation of Karen refugees in 1997 (Case B), the Thai Ambassador to the United Kingdom responded, “It is not our policy to give shelter to those who flee Myanmar due to human rights violations. Thailand only provides temporary shelter to Burmese displaced persons who

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87 Id.
have fled from fighting.” The Thai Ambassador thus had the view that Thailand was not bound to accept the internationally-accepted definition of a refugee.

In 2005, Thailand largely suspended the registration of new Burmese refugees in the country. Although the provincial admission boards (PABs) still technically exist today, and some of the forced migrants who have arrived in Thailand since 2005 have been registered by the PABs, the majority of new arrivals from Burma have not been registered. All unregistered refugees, especially those who are not allowed to enter the camps, are considered illegal immigrants and are subject to deportation under section 29 of Thailand’s 1979 Immigrant Act. The case of Aye Aye Thin (Case D) is an example of the forcible repatriation of refugees living outside of the camps.

While the Burmese population in Thailand certainly includes many economic migrants and migrants who were not fleeing persecution or violence, many who fled Burma are refugees according to the international definition, whether they live in the camps or not. The International Rescue Committee (IRC) conducted a survey in Thailand in 2008 to determine whether Burmese living in Thailand along the border of Burma merited international protection as refugees. Although many of the Burmese that the IRC surveyed cited multiple reasons for coming to Thailand, over half of those from the cities Mae Hong Son and Chiang Mai cited violent abuse, forced labor, or destruction of their property or livelihood as a reason for fleeing Burma: reasons which suggest that these refugees are eligible for refugee status.

In addition, the Thai courts have taken the position that Thailand is not bound by the international legal norm regarding repatriation, as the country is not a signatory of the 1951 Refugee Convention. This was expressed in

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90 Unwanted and Unprotected: Burmese Refugees in Thailand, HUMAN RIGHTS WATCH, (September 1, 1998).
91 Programme Report: July to December 2013, THE BORDER CONSORTIUM 1, 15.
92 Programme Report: January to June 2012, THAILAND BURMA BORDER CONSORTIUM 1, 8.
93 Immigration Act, B.E. 2522, 1979 (Thailand).
95 Id.
96 Id.
1999 when Sok Yuen, a Cambodian national who had fled to Thailand, was jailed for illegal entry and brought before the Criminal Court of Thailand by a public prosecutor who sought his extradition to Cambodia. Sok Yuen tried to claim that he was protected under the principle of *non-refoulement* articulated in Article 33 of the 1951 Convention. The Criminal Court rejected this claim, and the Court of Appeals then upheld this rejection. The Court of Appeals decision stated, “In regard to the accused’s claim of refugee status under the UNHCR mandate and claim of protection under Article 33(1) of the Refugee Convention, the accused conceded that Thailand was not a party to the 1951 Refugee Convention. Thus, the Court did not have to consider that issue in relation to the application of the Extradition Act.”

The claim by the Thai Criminal Court and the Court of Appeals that Thailand doesn’t not need to abide by the norm of *non-refoulement* again demonstrates the Thai belief that their country is a special case which does not have to follow the same norms as other nations. However, if these Thai courts had taken into account that the principle of *non-refoulement* is part of customary international law that is binding on all nations, the outcome of this case might have been different.

**Principle of Non-Refoulement as Part of Customary International Law**

Although Thailand is not a signatory to the 1951 Convention, it still is obligated to respect the principle of *non-refoulement* because this principle is part of customary international law. Article 38 of the Statute of the International Court of Justice states that, when deciding the outcome of a case, the Court can apply “international custom, as evidence of a general practice accepted as law,” as well as “the general principles of law recognized by civilized nations.” The ICJ acknowledges that customary international law has legally binding power. Anthony D’Amato states that customary international law is binding on all nations whether they expressly consented to the custom in a treaty or not. When a nation becomes an independent state, it agrees to play by the rules of the international legal system and to accept the development of new international legal customs. D’Amato also

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98 *Id.*
99 *Id.*
100 *Id.*
argues that no states may “pick and choose” among existing customs. The state is bound by the rules of customary international law, whether it agreed to the rule in a treaty or not, because the state consented to the process by which the rules became the rule of customary international law.

When using D’Amato’s formulation, one can determine whether a norm is part of customary international law by looking to see whether it has the necessary qualitative and quantitative elements. According to D’Amato, the qualitative element refers to the “requirement that an objective claim of international legality be articulated in advance of, or concurrently with, the act,” and this then notifies a state of the legal implications of an act or a decision before the state commits or agrees to it. In the case of non-refoulement, this custom is articulated in numerous conventions (i.e. Article 33 of the 1951 Convention relating to the Status of Refugees, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Committee on the Rights of the Child’s General Comment No 6, the General Assembly’s Declaration on Territorial Asylum, and Article 7 of the International Covenant on Civil and Political Rights). The language regarding non-refoulement in each of these documents is similar, and the prohibitions of non-refoulement under more specific circumstances (such as those described in the Convention against Torture) fit under the umbrella of the general prohibition laid out in the 1951 Convention.

In addition, the principle of non-refoulement meets all of the requirements of D’Amato’s formula to prove the qualitative element of a custom. First, D’Amato states that the articulation must have “a characterization of

103 D’Amato’s view that a nation can be bound by a rule which it has not expressly agreed to in a treaty is not a universally accepted view. D’Amato disagrees with William Hall and Lassa Oppenheim, who both argue that a treaty binds only its parties and that the rules set out in a treaty cannot have implications for those who have not signed the treaty. In addition, both Hall and Oppenheim claim that treaty provisions which deviate from customary international law would be legal, whereas D’Amato rejects this through his claim that all states must abide by customary international law because they agreed to the system by which customary international law was created (see INTERNATIONAL LAW ANTHOLOGY 95-96 (Anthony D’Amato ed., 1994) ; WILLIAM HALL, INTERNATIONAL LAW 7-8 (A. Pearce Higgins ed., Oxford University Press 8th ed. 1924) ; LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 28 (H. Lauterpacht ed., Longmans, Green and Co. 8th ed. 1955)).
105 Id.
For example, the fact that most states allow tourism within their borders results from a long-standing practice, rather than from a legal obligation. In order for a custom to become part of international law, the practice would have to be articulated as a legally binding custom. The principle of non-refoulement meets this requirement because the various conventions and resolutions stated above articulate a state’s obligation under international law to refrain from refouling refugees. Second, D’Amato states that “in the case of abstentions, the articulation must characterize the abstention as legally required.” If states simply abstained from refouling refugees within their borders without ever recognizing that they are legally obligated to do so, then the principle of non-refoulement may not be characterized as part of customary international law. However, a great number of states that are signatories to the 1951 Convention have subsequently incorporated the principle of non-refoulement into their domestic legal framework. This demonstrates that states recognize that their abstention from forcibly repatriating refugees is a legal obligation. Finally, D’Amato states that “the acting or abstaining state must have reason to know of the articulation of the legal rule,” and he states that this knowledge of the articulation does not require that the officials of an individual state articulate the rule themselves. Considering how many conventions, treaties, and resolutions in which the principle of non-refoulement appears, it must be assumed that Thailand knows about the principle of non-refoulement.

The second element that must be present to prove that a principle is part of customary international law is the quantitative element, which refers to the practice of states and what they actually do. The quantitative element is necessary because although there may be many different and conflicting rules articulated by states, “a state can only act in one way at one time.” D’Amato argues that a state’s commitment to act as well as its actual acts and abstentions all contribute to proving the quantitative element of a custom. First, D’Amato claims that, unless a state abrogates a treaty by repeatedly violating it, the state’s “commitment to act under the treaty…is

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106 Id.
107 Id. at 67.
108 Id.
109 Id. at 68.
110 Id. at 69.
111 Id. at 70.
112 Id.
113 Id. at 70-72.
significant in terms of customary international law.” A vast majority of states have signaled their commitment to act according to the principle of *non-refoulement* by becoming signatories of one of the conventions that state this principle. There are 144 states that are parties to the 1951 Convention, and there are 145 states that are parties to the 1967 Protocol. In addition, 153 states are parties to the Convention on Torture, and 167 states are parties to the International Covenant on Civil and Political Rights. Considering the vast majority of modern states have signed onto these treaties, the quantitative element seems to be satisfied.

However, simply a commitment to act is not enough to signify that a principle is part of customary international law. States must also have applied this principle when developing their domestic legislation and to actually have abstained from *refouling* refugees. Many states have in fact incorporated the principle of *non-refoulement* into their domestic legislation, and their courts have applied it when deciding the outcome of asylum cases. A few examples from countries across the world are mentioned below:

A. In the United States, Section 243 (h) of the Refugee Act of 1980, which is generally known as the “withholding of deportation provision,” states that the Attorney General “shall not deport or return any alien ... to a country if the Attorney General determines such aliens life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.” In the cases of *INA v. Stevic* and *INS v. Cardoza-Fonseca*, the Supreme Court upheld the standard that the government must not forcibly repatriated refugees if they demonstrate that they will face a fear of persecution in their home countries. In the case of *INS v. Cardoza-Fonseca*, the Supreme Court used the *United Nations High Commissioner for Refugees Handbook* when making its
decision to ensure that the decision would be in line with international refugee law. Both of these cases demonstrate instances of the Supreme Court using judicial review to ensure that U.S. refugee law is consistent with international refugee law.

B. In Turkey, Section 2 of Article 4 of the Law of Foreigners and International Protection states, “No one who falls under the scope of this Law shall be returned to a place where he or she may be subject to torture, inhuman or degrading punishment or treatment, or where his or her life or freedom may be under threat on account of his or her race, religion, nationality, membership of a particular social group or political opinion.”

The Ninth Administrative Court of Ankara applied this principle when it overruled a decision of the Turkish Ministry of the Interior. This decision stated that an Iraqi man and a women of the Turkoman ethnic group who sought asylum in Turkey should be deported back to Iraq because they had not proven “sufficient grounds for substantiating their fear of persecution.”

The woman was a part of the Independent Women’s Organization in Iraq, and her niece, whom she had helped to become a member of the organization, had been killed by her family as a matter of honor. When the Independent Women’s Organization published this case, the family of the woman who sought asylum in Turkey also decided to kill her. The Ninth Administrative Court of Ankara found that this was a well-founded fear of persecution and thus, she should not be sent back to Iraq.

C. In South Africa, the 1998 Refugees Act states that a person may not be returned to any country where:

(a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other

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122 Id. at 476.
123 Id. at 477.
124 Law on Foreigners and International Protection, [CIVIL CODE], Law No. 6458 (Turkey).
126 Id.
127 Id.
128 Id.
events seriously disturbing or disrupting public order in either part or the whole of that country.\textsuperscript{129}

In 2010, the Supreme Court of Appeals in South Africa decided that Mustafa Aman Arse, an Ethiopian citizen who had fled the country due to persecution based on his tribal affiliation and political opinion, should not be deported until a decision had been made on his application for asylum. This application was still pending when the court proceedings happened.\textsuperscript{130} The court was upholding the concept that an asylum seeker cannot be returned to a country unless it has been proved that he or she will not face persecution in that country.\textsuperscript{131}

D. Finally, in Japan, Article 61-2-6 of the Immigration Control and Refugee Recognition Act states:

\begin{quote}
(1) The procedures for deportation provided for in Chapter V shall not be carried out with respect to an alien who has been granted the permission set forth in Article 61-2-2, paragraph (1) or paragraph (2) [‘Permission Pertaining to Status of Residence’ for those who have been granted refugee status or are applying for refugee status], on the grounds that the alien fell under any of the items of Article 24 [Deportation] when he/she was granted the permission.\textsuperscript{132}
\end{quote}

On September 25, 2003, in accordance with the principle of non-refoulement, the Nagoya District Court revoked the written deportation order of a Burmese refugee issued by the Supervising Immigration Inspector of the Nagoya Immigration Bureau.\textsuperscript{133} The Court used the definition in the 1951 Convention to determine that the Burmese man should be granted refugee status because he was at risk of being arrested, tortured, or “made disappeared by the military junta” if he returned to Burma.\textsuperscript{134} By recognizing his status as a refugee and his well-founded fear of persecution if he were to return to his home country.

\textsuperscript{129} Refugees Act (Act No. 130/1998), (South Africa).

\textsuperscript{130} Arse v. Minister of Home Affairs, [2010] Supreme Court of Appeal 25 (South Africa).

\textsuperscript{131} Id.

\textsuperscript{132} Immigration Control and Refugee Recognition Act, Cabinet Order No. 319, 1951 (Japan).

\textsuperscript{133} Myanmarese v. Japan (Minister of Justice), [2003] Nagoya District Court, Administrative Case No. 19 (Japan).

\textsuperscript{134} Id.
return to his country, the Court ruled that he could not be deported back to Burma.\textsuperscript{135}

This list of cases is by no means an exhaustive one of how different nations have applied the principle of \textit{non-refoulement} in their respective courts. It is rather just meant to show that various states across the globe have incorporated this principle into their national legal framework and have actually applied this principle when refugee cases came before their national courts. According to D’Amato, “National courts take part in the formation of state practice, so that their permanent, uniform practice renders good arguments for proving the existence of customary law.”\textsuperscript{136} Under D’Amato’s formula, the fact that countries have incorporated the principle of \textit{non-refoulement} into their national legal framework proves the quantitative element, making the principle of \textit{non-refoulement} part of customary international law. However, some authors, such as Ian Brownlie, argue that even if a principle is part of customary international law, states can still opt out of abiding by the norm by becoming a “persistent objector.”\textsuperscript{137} The next section will examine whether Thailand can be considered a persistent objector or not.

\textbf{Whether Thailand is a Persistent Objector}

The debate over whether a persistent objector is bound by the rules of customary international law is a highly controversial one. Legal writers such as James Brierly and Ian Brownlie accept the persistent objector rule, which means that a state is not bound by a custom if it contracts out of the custom in a timely manner.\textsuperscript{138} Michael Akehurst also follows this line of thinking, claiming that unless the system can adopt a form of majority voting a state must be allowed to opt out of a custom.\textsuperscript{139} Akehurst does not believe that it is possible to adopt a form of majority voting.\textsuperscript{140} On the other hand, authors

\begin{footnotes}
\footnote{135}{Id.}
\footnote{136}{\textsc{International Law Anthology} 102 (Anthony D’Amato ed., 1994).}
\footnote{137}{\textsc{Ian Brownlie, Principles of Practice of International Law} 11 (Oxford University Press 6\textsuperscript{th} ed. 2003) ; Jonathan Charney, \textit{The Persistent Objector Rule and the Development of Customary International Law}, 1 British Year Book of International Law 1, 5-6 (1986).}
\footnote{138}{\textsc{Ian Brownlie, Principles of Practice of International Law} 11 (Oxford University Press 6\textsuperscript{th} ed. 2003) ; Jonathan Charney, \textit{The Persistent Objector Rule and the Development of Customary International Law}, 1 British Year Book of International Law 1, 5-6 (1986).}
\footnote{139}{Jonathan Charney, \textit{The Persistent Objector Rule and the Development of Customary International Law}, 1 British Year Book of International Law 1, 18 (1986).}
\footnote{140}{Id.}
\end{footnotes}
such as D’Amato have rejected the notion that a state can opt out of a general custom, asserting that states can only opt out of special customs. This happened when an asylum case was brought to the ICJ and Colombia was able to opt out of a particular regional custom that allowed for the asylum in question.  

Even if one accepts the persistent objector rule, Thailand would not be able to opt out of its obligation to respect the principle of *non-refoulement* because it is not a persistent objector. The notion of the persistent objector refers to the qualitative element of customary international law (articulation). For a state to be a persistent objector, it must explicitly articulate that it is not going to follow a particular custom. Jonathan Charney states that most writers concede that a state can be exempt from a custom in international law by “dissenting in a timely manner,” which Thailand has not done. In addition, the persistent objector not only opposes a rule but also works for its rejection, and Thailand also does not meet this criterion because it has not worked for the universal rejection of the principle of *non-refoulement*.

Thailand has not only failed to provide a clear articulation that it was dissenting from the custom of *non-refoulement*, but in practice and in international forums, Thailand has in fact consented to the principle of *non-refoulement*. First, in light of the large influx of refugees into Thailand over the past four decades, the country has prided itself on having an “impressive record of hospitality.” Since the 1970’s when tens of thousands of refugees flooded into Thailand during the Vietnam War, Thailand has accepted 1.5 million refugees fleeing from Thailand’s neighboring countries. Vitit Muntarbhorn, a professor of law at Chulalongkorn University in Bangkok, Thailand and an expert on human rights law, calls Thailand’s record when it comes to receiving refugees “commendable” and states that the country has largely abided by international law regarding the treatment of refugees. Although Thailand has generally made an effort to provide protection to

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141 *Id.* at 7-8.
147 *Id.*
Burmese refugees within its border that is in line with international standards, the Thai government’s policies have recently become more restrictive. Susan Banki, a professor at the University of Sydney and an expert on forced displacement and human rights violations, argues that this is due to the fact that Thailand’s relations with Burma began to warm in 2001. She also argues that it due to the protracted nature of the refugee situation and the constant influx of new refugees. This influx was one of the main reasons that the Thai government started resenting the refugee population. However, Thailand’s general acceptance in practice of the international customary law regarding refugees, as shown by the country’s previous commendable adherence to international refugee norms, cannot be negated by its later deviance from these norms due to political, social, and economic reasons.

Moreover, Thailand has consented to the international standards under customary law regarding who is a refugee as well as regarding the principle of non-refoulement by being a member of the UNHCR’s Executive Committee of the High Commissioner’s Programme (ExCom) as well as a member of the Asian-African Legal Consultative Organization (AALCO). Thailand was a member of both of these bodies when the organizations issued statements recognizing the principle of non-refoulement, and Thailand did not object to either of these statements. First, ExCom Conclusion No. 22 (1981), which considered how to react in the case of a large influx of refugees, addresses “persons who are refugees within the meaning of the 1951 United Nations Convention and the 1967 Protocol.” The conclusion then reaffirmed the principle of non-refoulement by stating, “In all cases the fundamental principle of non-refoulement including non-rejection at the frontier must be scrupulously observed.” All ExCom conclusions are passed by consensus of its members, so it can be argued that Thailand has articulated its agreement to the principle of non-refoulement in regards to all categories of refugees covered under the 1951 Convention (not just those

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149 Id.
150 Conclusions Adopted by the Executive Committee on the International Protection of Refugees (Conclusions 1-109, 1975-2009), UNHCR (December 2009), http://www.refworld.org/type,EXCONC,,4b28bf1f2,0.html (last visited April 19, 2014).
151 Conclusions Adopted by the Executive Committee on the International Protection of Refugees (Conclusions 1-109, 1975-2009), UNHCR (December 2009).
152 Id.
Burmese Refugees in Thailand

who are ‘fleeing fighting’). Although ExCom conclusions are not legally-binding on the UNHCR or on the member countries that host refugees, Thailand’s consent to this conclusion still could satisfy the qualitative element under D’Amato’s formula, and it certainly shows that Thailand has not established itself as a persistent objector by dissenting in a timely manner.\(^{153}\)

In addition, Thailand became a member of the AALCO in 1961, and in 1966, the AALCO issued the “Bangkok Principles on Status and Treatment of Refugees.”\(^{154}\) The Bangkok Principles reaffirm the 1951 Convention’s definition of a refugee, and it proclaims in Article 3 that “No one seeking asylum in accordance with these Principles shall be subjected to measures such as rejection at the frontier, return or expulsion which would result in his life or freedom being threatened on account of his race, religion, nationality, ethnic origin, membership in a particular social group or political opinion.”\(^{155}\) While this definition is almost identical to the meaning of non-refoulement in the 1951 Convention, the Bangkok Principles extend the definition of a refugee to refer to all those who are “seeking asylum.”\(^{156}\) Thailand rejects this broadened definition in its reservations to the Bangkok Principles by stating that in Article 3 that “seeking refugees” should be replaced by “after asylum is granted”.\(^{157}\) However, as Thailand made no reservations regarding Article 1, which gave the definition of a refugee, it can be argued that Thailand agreed to grant refugee status to all those who fall under the criteria in the 1951 Convention. Thailand is responsible for making sure that no persons falling under that broader definition are forcibly repatriated. Similar to the ExCom Conclusion No. 22, the Bangkok Principles are informal and not binding, but Thailand’s agreement demonstrates that it cannot be considered a persistent objector.

**Right without a Remedy?**

Although the principle of non-refoulement has been shown to be part of customary international law and to be binding on all nations, there does not seem to be an effective way to ensure that nations such as Thailand comply

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\(^{155}\) Id.

\(^{156}\) Id.

\(^{157}\) Id.
with their obligation to not forcibly repatriate refugees to places where they have a well-founded fear of persecution. According to Karen Parker, a renowned lawyer specializing in international law, and Lyn Beth Neylon, a prominent lawyer and human rights activist, because *non-refoulement* is a *jus cogens* norm, any court in the world would have the jurisdiction to prosecute the violators under the theory of universal jurisdiction.¹⁵⁸ Parker and Neylon state, “Since *jus cogens* obligations transcend national boundaries, jurisdiction over these international standards must be universal.”¹⁵⁹ However, in this article, they do not explain how this would be enforceable or monitored to prevent abuses, and virtually all theorists and actors in the field of international law have rejected the theory of universal jurisdiction because of its impracticality.

Another way that this violation of the principle of *non-refoulement* could be enforced would be to bring the case before the International Court of Justice. However, the Court only has true authority if the parties accept the compulsory jurisdiction of the Court, and every state has the right to accept, accept with modifications, or reject the compulsory jurisdiction of the Court.¹⁶⁰ If the states have not previously accepted the compulsory jurisdiction of the ICJ, then the states must voluntarily agree to be parties to the dispute.¹⁶¹ Thailand has not acceded to the compulsory jurisdiction of the Court, and it is extremely unlikely that Thailand would voluntarily do so if this case were brought up to the Court. Another problem with bringing this case to the ICJ is that only states may be parties to contentious cases.¹⁶² Individuals who suffered due to Thailand’s violation of the principle of *non-refoulement* or an international body such as the UNHCR would be unable to bring the case to the Court. Furthermore, it is unlikely that another state would believe it had a legitimate reason to bring the case up to the Court.

Malaysia is one of the countries that has suffered as a result of Thailand’s violation of the rights of Burmese refugees. It has been forced to accept Burmese refugees who have not been offered protection in

¹⁵⁹ Id.
¹⁶¹ Id.
In March 2013, the Thai Navy shot members of the Rohingya, an ethnic minority group, who were fleeing Burma. The Navy started shooting after the asylum seekers jumped overboard because they knew that the Thai officials would either put them in immigration detention centers or push them back out to sea. The Thai navy killed as many as twenty of the Rohingya refugees. Four refugees who survived fled to Malaysia because they feared retribution by the Thai authorities. This is one of the many incidents reported in the past few months concerning Thailand’s “push back” policy in regard to Rohingya refugees. The “push back” policy means that, rather than granting these refugees asylum in Thailand, they are given some supplies and then deported from Thailand (sometimes being sent back to Burma). Malaysia could potentially bring up the case of Rohingya refugees being shot at by the Thai Navy to the ICJ. The country could argue that Thailand’s violation of the norms of refugee protection under customary international law are causing Malaysian taxpayers to suffer because they have to bear the brunt of the additional cost of caring for more refugees. However, unless Thailand agrees to be a party to this case, then the ICJ would not have jurisdiction to prosecute the case.

In the absence of a court to prosecute Thailand’s violations of the principle of non-refoulement, perhaps the most feasible option would be to put pressure on Thailand through various informal channels. Article 65 of the Statute of the ICJ states that “The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.” Specialized agencies of the United Nations can request advisory opinions from the ICJ about “legal questions arising within the scope of their activities,” and the consent of the state is not required as long as the requesting agencies have an interest in receiving legal guidance on the issue.

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164 Id.
165 Id.
166 Id.
168 Id.
in question. The UNHCR is one of the specialized bodies that is permitted to request an advisory opinion from the Court, as the UNHCR is one of the Programmes and Funds under the General Assembly. The UNHCR has a reason to ask the Court for an advisory opinion because in the past Thailand has ignored the UNHCR’s attempt to protect Burmese refugees in the country and has forcibly repatriated them. While this advisory opinion would not be legally binding, it may put pressure on the Thai government to better comply with the principle of non-refoulement.

Finally, the Secretary-General’s ‘good offices’ have been used in the past for investigation and reporting on human rights abuses. If Ban Ki Moon, the Secretary General of the UN, were to issue a statement about the forcible repatriation of Burmese refugees or to mediate the situation himself, it would probably receive wide international support because non-refoulement is widely recognized as an inviolable custom. This intervention would also put pressure on the Thai government to prevent further refoulement of refugees. Mediating by the Secretary-General is considered less threatening to states that are concerned about infringements on their sovereignty, so this may be an especially effective strategy in this case. In 2008, Ban Ki Moon made a statement expressing concern when Thailand forcibly repatriated Hmong refugees to Laos, so it is possible that he would also take up the case of Burmese refugees in Thailand. Although the intervention of the Secretary-General would simply apply pressure to Thailand to change rather than prosecuting Thailand for its past violations of the principle of non-refoulement, it could still have significant consequences for the refugees living in Thailand.

Conclusion

It is especially important that Thailand’s violations of the principle of non-refoulement are addressed now. The ceasefire agreements between the Burmese military and most of the ethnic insurgent groups and the recent political changes enacted by Thein Sein’s government have been significant

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171 *Organs and Agencies of the United Nations Authorized to Request Advisory Opinions, INTERNATIONAL COURT OF JUSTICE*.
173 *Id.* at 155.
developments in Burma’s recent political history. These developments have caused the Thai government, the Burmese government, and the UNHCR to begin to discuss the repatriation of Burmese refugees in Thailand. In September 2012, the Thai National Security Council indicated that refugees living in Thailand would return to Burma within a year.\textsuperscript{175} Although Thailand has not yet repatriated the refugees to Burma, the discussions about repatriation have made many refugees living in Thailand anxious because there have been rumors circulating around the refugees camps that Burmese refugees will soon be forcibly repatriated by the Thai government.\textsuperscript{176} The refugees are not ready to return to their homeland, citing concerns regarding the lack of landmine clearance and the continued presence of Burmese military troops in ethnic areas.\textsuperscript{177} Addressing Thailand’s previous violations of the principle of non-refoulement could help alleviate the concerns of Burmese refugees currently living in Thailand and ensure that they are not forcibly repatriated back to Burma.

\textsuperscript{175} The Situation of Refugees on the Thai-Burma Border, BURMA PARTNERSHIP (Dec. 11, 2012).
\textsuperscript{176} Id.
\textsuperscript{177} Karen Community Based Organizations, Karen Community Based Organizations’ Position on Refugees’ Return to Burma, BURMA PARTNERSHIP, (September 11, 2012).
Introduction
The passage of the Voting Rights Act (VRA) of 1996 was a monumental event in the Civil Rights Movement that protected minority voting power from discrimination. In the recent Supreme Court Case Shelby County v. Holder, however, the constitutionality of several crucial sections of the VRA was challenged, and the Supreme Court ultimately ruled in favor of the petitioner, Shelby County. In doing so, the Court has applied misguided reasoning, since its ruling of Section 4(b) of the Voting Rights Act as unconstitutional ignores legal precedent that has established the Court’s deference to the legislature in voting matters, fails to put individual rights ahead of states’, and leaves minority citizens more susceptible to discrimination. The Court’s decision has also had the effect of severely curtailing the power of the law to monitor voting discrimination in states and counties with histories of unfair practices.

This article begins by detailing how the Court came to its improper judgment in Shelby County v. Holder. The procedural posture of the case as well as essential background information will be outlined to establish the context of the decision. Section Two explores the reasoning of the Justices in the majority as well as those in the dissent. In noting that the opinion of the majority was flawed, several factors that impacted their misguided decision are explained. Other oppositional claims aligned with the majority will also be addressed and refuted. Finally, the implications of the decision are discussed, as well as several options for protecting voting rights without Section 4(b)’s legality.

History and Background
The history of the issues involved in Shelby County v. Holder began with the implementation of the Reconstruction Amendments. After the Civil War ended, those Southern states that had seceded from the Union were required to accept the elimination of slavery established by the Thirteenth Amendment and ratify the Fourteenth Amendment in order to
rejoin the Union.\textsuperscript{1} The Fifteenth Amendment was later passed in 1870 later in the Reconstruction period. The amendments respectively outlawed slavery,\textsuperscript{2} extended the due process and equal protection clauses to all persons,\textsuperscript{3} and prohibited voting discrimination based on race or color.\textsuperscript{4} The principles inspired by these amendments helped promote political progress during the time of Reconstruction, but this period was, unfortunately, short lived. After federal troops were removed from the South in 1877, Reconstruction was effectively over, and many states found ways to maneuver around the restrictions placed upon them by these amendments, especially in terms of voter discrimination. In addition to the infamous Jim Crow laws, many states adopted measures such as grandfather clauses, poll taxes, and literacy tests to prevent African Americans and other minorities from acting on their right to vote and participate in politics. Unfortunately, these actions took their toll: By 1965, most Southern states still had less than half of their African American population registered to vote.\textsuperscript{5}

Due to the discriminatory voting practices adopted by these states and the enormous popular political pressure for reform that emerged during the Civil Rights Era, Congress passed legislation that aimed to curtail the harmful effects of state and county procedures that impacted minority rights. Sudeep Paul explains, “Congress attempted to battle voter discrimination through case-by-case litigation with the help of civil rights legislation from 1957, 1960, and 1964 [...] these attempts failed to create long-term change; barring certain types of discriminatory voting practices simply led to a modification of methods.”\textsuperscript{6} The reality of state discriminatory practices was well understood, but when Congress tried to combat these injustices with legislation, states still found ways to discriminate against minorities in elections.\textsuperscript{7} It was evident that more drastic measures were needed to protect the voting rights of minority groups. Finally, in 1965, Congress passed the Voting Rights Act to pursue more serious and effective measures to combat racial discrimination at the polls. Section 2 of the law specifically outlawed

\textsuperscript{1} Akhil Reed Amar, The Lawfulness of Section 5- and Thus of Section 5, 126 The Harvard L. Rev. (2013), 110.

\textsuperscript{2} U.S. Const. amend. XXIII.

\textsuperscript{3} U.S. Const. amend. XXIV.

\textsuperscript{4} U.S. Const. amend. XXV.

\textsuperscript{5} Abigail Thernstrom, 3 Redistricting, Race, and the Voting Rights Act (Nat'l Affairs 2010).


any practices that have the effect of impeding the right of United States citizens to vote due to their race.\textsuperscript{8} In practice, this section limits state action on voting procedures so that any measure that has the intent or effect of limiting who can vote — such as voter ID laws, poll taxes, etc.—are considered violations of the law. However, violations under this section can only be tried in court after the rights of citizens have already been violated.

Sections 4 and 5, on the other hand, really gave the Voting Rights Act teeth to act on violations of voting rights before their affects can be felt. These sections describe how states will be covered under the law and how the government can outlaw these discriminatory practices.\textsuperscript{9} Section 4 outlines the coverage formula, or the way in which states and counties are selected to require federal preclearance.\textsuperscript{10} Congress commissioned many studies that looked into voting patterns around the country, and states that demonstrated a history of discriminatory practices were eligible to be covered under the Voting Rights Act. Specifically, counties with less than half of its African American population registered to vote would be covered, and if less than fifty percent of the whole state’s black population was registered, the whole state was covered.\textsuperscript{11} Section 5 prohibits any changes to the electoral practices within these covered states and counties without first receiving approval from the Attorney General or a three-judge panel in the U.S. District Court in Washington, DC.\textsuperscript{12} The federal government can decide whether these changes will have a discriminatory effect and forbid the implementation of the laws or approve of the changes.

Shelby County, Alabama was one of the counties covered under Section 4 of the Voting Rights Act due to evidence of historic voter discrimination. Alabama has the second highest number of Section 2 court cases in the country after Mississippi.\textsuperscript{13} In addition, a 2010 recording of state legislators’ highly racist remarks on African Americans’ voting continued to showcase the entrenchment of racist attitudes towards minorities in the state.\textsuperscript{14} Nonetheless, the county sought declaratory relief that Sections 4 and 5 of the Voting Rights Act were unconstitutional, since, according to the county, the sections created unequal treatment of states because only certain states

\begin{enumerate}
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id. at 27.
\end{enumerate}
and counties were covered under the preclearance requirement without necessary reason. To Shelby County, the Voting Rights Act’s preclearance requirement forced the county to give up its sovereignty in creating their own election regulations. Shelby County claimed that this principle derives from Northwest Austin v. Holder, a case that established what could constitute a violation of state sovereignty.\textsuperscript{15} The case was first brought before the United States District Court for the District of Columbia. The court upheld both sections of the Voting Rights Act, finding that Congress was justified in renewing the coverage formula in 2006, thereby giving deference to the legislature.\textsuperscript{9} Shelby County then appealed to the US Court of Appeals for the D.C. Circuit. The court of appeals upheld the decision of the lower court, and agreed that Congress’ evidence provided sufficient reason to renew the coverage formula.\textsuperscript{10}

The Supreme Court granted certiorari in 2012. In a five-to-four decision, the Court overturned the decision of the lower courts and deemed Section 4(b) of the Voting Rights Act unconstitutional.\textsuperscript{11} The majority, including Justices Alito, Scalia, Kennedy, Thomas, and Chief Justice Roberts, who wrote the opinion, agreed that the coverage formula specified under Section 4(b) of the act was unconstitutional in that it causes unequal treatment of states.\textsuperscript{12} Roberts noted that the act represents a “dramatic departure from the principle that all States enjoy equal sovereignty.”\textsuperscript{13} Roberts espoused the view of the majority in stating that the coverage formula treats states unequally by demanding that some states subject their voting changes to federal preclearance while leaving others alone. The Chief Justice claimed that the United States has had a tradition of treating all states equally, and that the Voting Rights Act “sharply departs from these basic principles.”\textsuperscript{14} Additionally, the majority of justices felt that Congress’ interest in covering certain states’ voting practices to prevent discrimination did not outweigh the states’ interest in independently controlling their own voting procedures. These justices believed the evidence Congress amassed was not sufficient to warrant continuing the current coverage formula under Section 4(b). Roberts provided the example that the criteria in determining

\textsuperscript{9} Shelby County v. Holder, 811 F.2d 424 (D.C. 2011).
\textsuperscript{11} Shelby County v. Holder, 570 U.S. (U.S. 2012).
\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{14} Id.
what states were covered under Section 4(b) included the practices of literacy tests, pointing out that “such tests have been banned nationwide for over 40 years.”  He expressed that many of the practices that had originally necessitated preclearance for certain states are now no longer relevant problems, making the coverage formula largely obsolete.

The dissent, including Justices Ginsburg, Kagan, Sotomayor, and Breyer, disagreed that Section 4(b) was unconstitutional. Ginsburg, writing for the dissent, challenged the majority’s claim that the coverage formula is no longer necessary due to the improvements made in the covered states in terms of discriminatory voting practices. Rather than do away with the formula because of these gains, Ginsburg suggested that the existence of improvements proves that the formula works and is still necessary. Gains made by the formula could continue and thus prevent against the reoccurrence of certain practices that had been blocked by the Voting Rights Act. Ginsburg stated, “Those assessments were well within Congress’ province to make and should elicit this Court’s unstinting approbation.” Thus in the dissent’s view, Congress was well within its reason to renew the coverage formula. The dissent also argued that the coverage formula has not only triumphed in blocking past discriminatory practices, but there is evidence that the preclearances are still continuing to block voter discrimination. Ginsburg noted that covered states have not been dissuaded from submitting voting changes with potential discriminatory effects; the Attorney General continued to receive modifications to voting laws that are denied approval, and actually reviewed 626 modifications between 1984 and 2004. According to the dissent, the reality that the coverage formula continues to prevent new unfair voting rules from coming to fruition necessitates the federal government’s unequal treatment of certain states and counties in preapproving voting changes in order to uphold and protect individual rights.

Flawed Judgment in the Shelby Decision

In coming to a decision on Shelby County v. Holder, the majority of the justices on the Supreme Court bench failed to adequately assess the constitutionality of the key sections of the Voting Rights Act that had

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15 Id.
16 Shelby County v. Holder, 570 U.S. 10 (U.S. 2012), (Ginsburg, J., dissenting).
18 Id.
allowed the federal government to protect citizens from states’ infringement on voting rights. While there are many arguments that can be made against the Court’s decision, this article strictly focuses on the legality of the decision and thus elaborates on the purely legal arguments against the judgment. The article offers three main reasons that explain why the Court erred. Due to the ignorance of legal precedent that supported the legality of Section 4, the evidence gathered by Congress and the misapplication of the equal state sovereignty principle, the Court’s ruling on *Shelby County v. Holder* is flawed.

**The Ignorance of Legal Precedent**

In the *Shelby County* decision, the majority of justices erred in ruling Section 4(b) of the Voting Rights Act unconstitutional. A major problem with their decision was that they ignored extensive legal precedent for deference to the legislative branch on elections, both in the Constitution and from several significant court cases. The legislature has historically established itself as the main authority on voting rights, and the Constitution justifies this deference. Akhil Reed Amar, a noted legal scholar, explains that “there is far more warrant for judges to defer to Congress in the area of voting rights, for the simple reason that time and time and time again the Constitution’s text explicitly links voting rights to the idea of congressional enforcement power.”[^19] Section 4 of Article I of the Constitution, for example, refers to Congress’ ability to alter voting regulations in states.[^20] Moreover, the Fourteenth Amendment extends equal protection of the laws to minorities and the fifteenth protects all citizens from abridgments on their rights by discrimination, giving Congress the power to enforce these requirements. If a fundamental right of citizenship such as voting is withheld from citizens because of their race or ethnicity, Congress has the constitutional authority to intervene in state laws to protect individual rights.

Furthermore, there are several previous Supreme Court cases in which the Court upheld Congress’ enforcement power. In one such case, Turner Broadcasting System, Inc v. FCC, the Supreme Court acknowledged that Congress is better able to gather evidence to prove the weight of federal interest in legislative matters. The opinion of the Court noted, “One sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence. […] We owe Congress’

finding deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.” The Court referenced the fact that there are some issues that are better handled through the legislature, which can be more equipped for complex and changing subjects—such as American elections and voting practices. Yet in Shelby County, the Court rejected any notion of legislative deference, even though Congress had abundant evidence that reaffirmed the need to renew the coverage formula.

Another Supreme Court case, South Carolina v. Katzenbach, provides more evidence of the judiciary granting the greater claim to authority on election matters to Congress. Moreover, this case specifically deals with the Voting Rights Act after it was passed for the first time in 1965. South Carolina, a state that would be covered and required to submit its voting changes to the Attorney General under the new law, had challenged the constitutionality of the preclearance component of the act. The Court ultimately sided with the federal government and found the act’s provisions to be within congressional mandate, despite the fact that it was an uncommon exercise of congressional power. The Constitution generally provides that states set their own voting policies, but it also permits Congress to alter their laws within good reason. In ruling that Congress was in fact authorized to intervene in state laws when the legislative body has proven the necessity of its involvement, the court showed deference to the legislature in pursuing the preclearance coverage of certain states in the Voting Rights Act. These provide clear legal precedent for Congress; ability to intervene in state voting policies when the legislative branch provides substantial proof of the need for such actions.

The Proof Amassed By Congress

Even if there is ample legal precedent for the Court granting legislative deference to Congress, it is still necessary to address whether Congress has amassed enough convincing evidence to ensure the necessity of the continuity of the coverage formula. In line with the dissenting Justices, it is quite evident that Congress has in fact proven that there is still need for the present formula. The legislature has taken the time to reevaluate the need for the VRA with each renewal of the act and continued to find that

discrimination persisted in the covered areas. Noting the dedication Congress had to ensuring they amassed enough evidence to prove of the coverage formula’s necessity, Justice Ginsburg stated that the record Congress compiled of information totaled around 15,000 pages.\textsuperscript{23} From this extensive study, proof of the coverage formula’s relevance was shown through racially polarized voting, the Department of Justice’s blocking of 700 voting changes between 1982 and 2006, and the existence of many forms of second-generation barriers to voting.

Those who agree with the majority’s mindset may argue that conditions have drastically improved, and therefore the coverage formula is no longer needed. For example, they may point out the high rates of minority turnout in recent elections or that decreasing instances of outright discrimination make the coverage formula obsolete. The 2008 presidential election, for instance, has been used as proof of lessened voting discrimination: As explained by noted elections expert Stephen Ansolabehere, “Critics of the VRA point to the reelection of the nation’s first African American president, amidst record rates of minority voter turnout, as evidence of how ‘times have changed’ since 1965.”\textsuperscript{24} Due to high rates of minority election turnout, these critics infer that more minority citizens have been able to vote due to lower instances of discriminatory voting practices, which leads to their conclusion that the coverage formula is no longer necessary for protecting against discrimination. Congress, however, has gathered enough objective to show that there was definite reason for maintaining the coverage formula. Bornstein notes, “Congress undertook an extensive effort to collect evidence and solicit the views of potentially affected parties [including both supporters and critics of Section 5].”\textsuperscript{25} In evaluating the VRA and whether evidence whether there still exists present need for the coverage formula, Congress made certain to that it’s analysis was fair and objective, which is why the body included evidence for and against extending the formula again.

The data collected by Congress very clearly pointed to the continued need for the law’s coverage formula. In addition to the denial of approval for voting changes in covered countries and states by the U.S. Attorney

\textsuperscript{23} Shelby County. v. Holder, 570 U.S. 14 (U.S. 2012) (Ginsburg, J., dissenting).
General, there have been a number of new ways states and counties have found in order to maneuver around the restrictions placed on them by the Voting Rights Act. Instead of the practices of poll taxes, literacy tests and other older techniques, there have been subtler and more indirect practices put in place. Last minute changes to polling locations, for example, have been implemented in some counties and have been subsequently blocked by the Attorney General on the grounds that they present more difficulties for minorities to arrive at the correct voting center. Another new method developed with the aim of limiting minority voting has been voter ID laws, which have been prevented from going into effect by courts in Florida, Texas and South Carolina. These so called second-generation barriers to voting have been found to disproportionately affect minority voters.

Even more apparent proof that the coverage formula is still needed exists today: the riddance of Section 4(b) has allowed voting practices that target minorities to arise in many states, many of which had been previously covered by the section’s formula. Evidence from just the first year without the coverage formula of the VRA clearly demonstrates that Section 4(b) was successfully in preventing against discrimination: “The Brennan Center for Justice […] reports that in 2013 alone, a least 80 restrictive voting bills— including laws that require photo ID, demand proof of citizenship, make it more difficult for students to register, and reduce early voting opportunities—have been introduced in 31 states.”

States and counties have already taken advantage of the absence of Section 4(b) to pass voting changes that limit the ability of many citizens to vote. Many of these changes would have most likely been blocked by the Attorney General due to their harmful effects on voting before the Supreme Court’s decision, which demonstrates that the preclearances in the coverage formula provided an effective tool for preventing discrimination.

Although discriminatory voting procedures can still be challenged in court, since Section 2 of the Voting Rights Act remains intact, the dissent has noted the difficulties and disadvantages of this method of redress: “Congress also received evidence that litigation under Section 2 of the VRA was an inadequate substitute for preclearances in the covered jurisdictions.”

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28 Joshua Field, Creating a Federal Right to Vote (Ctr. For Am. Progress 2013), 4.
Preclearance occurs only after the fact, when the illegal voting scheme has already been put in place individuals have been elected pursuant to it, thereby gaining the advantages of incumbency.”

Hence, while individuals suing over state voting practices may prevail in court and successfully eliminate the voting procedure, this method takes care of the matter after it has been in effect rather than preventing it before it happens in the first place. Though court action can still provide a remedy for victims of discrimination, these kinds of action could have been outlawed in the first place if the coverage formula was still in place and the Attorney General denied the change in its preclearance—thereby protecting the rights of those that would have been adversely affected by the new procedure. By eliminating potential threats to voting discrimination prior to changes taking place, the coverage formula provided a more effective method for preventing discrimination at the polls.

The Flawed Argument of Equal State Sovereignty

The justices in the majority in Shelby County have claimed that the coverage formula of the VRA violates the notion of equal state sovereignty. History has shown time and time again, however, that there are other principles and priorities in existence that necessarily outweigh the equal treatment of states. One example that highlights this dynamic was City of Rome v. United States. The city in Georgia was covered by Section 4 of the Voting Rights Act and therefore was required to submit changes to its electoral processes for preapproval according to Section 5. The city sued after the Attorney General did not give the city’s plans preclearance, arguing that the preclearance requirement treats states unequally when it covers some but not all states.

Noting the court’s reasoning in upholding the Voting Rights Act, Sudeep Paul states that the court “rejected a federalism argument against the act on the grounds that the principles of federalism are necessarily overridden by the power to enforce the Civil War Amendments by appropriate legislation.” The Court, in its holding, appropriately puts the Civil War Amendments, and thus the rights of individual citizens to vote and receive equal protection under the law, ahead of state privilege. The Supreme Court therefore grants that there are instances in which the rights of individual citizens can precede those of states. Legal precedent

established an important principle at work in which equal state sovereignty can be limited in order to protect individual rights.

In addition, there are important historical examples of the necessity of suspending equal state treatment in some situations. States that had seceded from the Union in the Civil War received unequal treatment in order to reenter the union to guarantee their loyalty to the United States and to protect the rights of the people residing in those states. Akhil Reed Amar lists some of the requirements for state’ reentry: “States with sorry track records were required to submit new state constitutions for federal preapproval/prec clearance, and were also required to ratify the Fourteenth Amendment itself.” 32 The ex-confederate states were obliged to meet certain conditions to rejoin the United States that the states that remained in the union during the Civil War did not, since they had already proven their loyalty and many had already ended practices such as slavery. This procedure was meant to ensure that citizens, especially former slaves, residing in those states would receive fair treatment. This example may be a bit extreme, but it does show that in serious circumstances there can be reason to treat some states differently than others.

The Voting Rights Act’s preclearance requirement builds on precedents that allowed special conditions to permit the unequal treatment of states. Fishkin notes that the law corresponds to Congress’ power to intervene in state policies in order to protect the rights of individuals recognized in the Reconstruction amendments: “It is to remember a series of amendments that remade the Constitution, shifting weighty new powers to the federal government, above all in the enforcement of the rights of racial minorities.” 33 The rights of individuals were placed ahead of state privilege in the VRA, corresponding to the individual rights guaranteed by the thirteenth, fourteenth and fifteenth amendments. These constitutional amendments themselves signify the changes made in the United States to allow for the equal protection of all citizens regardless of race, so that Congress could issue laws to prevent any infringement on these fundamental components of equal citizenship. In justifying the constitutionality of Section 4’s coverage formula, the dissent did not ignore that the law did allow for different treatment of certain states. Rather, they argued that equal state sovereignty does not necessarily hold in all cases and that there are times

32 Akhil Reed Amar, The Lawfulness of Section 5- and Thus of Section 5, 126 The Harvard L. Rev., 120 (2013).

when that principle can be overridden in the interest of protecting citizens. As Ginsburg acknowledges in the dissenting opinion, “The stated purpose of the Civil War Amendments was to arm Congress with the power and authority to protect all persons within the Nation from violations of their rights by the States.”\textsuperscript{34} As the sections of the Voting Rights were devised for the same purpose, the act is in line with the Constitution.

Supporters of the majority opinion may question the validity of the coverage formula if states and counties that display marked improvements in curtailing voting discrimination, which could make their continued “covered” status unnecessarily. The fact is, however, that the Voting Rights Act had established a way out of the preclearance requirement with the bail-out mechanism, which exists as a method for states to remove themselves from the preclearance process after they have shown and sustained major improvements.\textsuperscript{35} If states and counties that have been covered under Section 4 have shown continued progress and major advancements in reducing discriminatory voting practices, they could be eligible to apply to be removed from the coverage and preclearance required by the VRA. Further, there have been instances where counties have successfully bailed out of coverage under the Voting Rights Act: “Congress placed particular emphasis on the availability of bail-out...the House Report noted that 11 counties had bailed out since the procedure was liberalized in 1982.”\textsuperscript{36} The fact that the bail-out possibility exists demonstrates that the coverage formula does not unfairly subject any state and county that had a history of discrimination to continued coverage solely based on their history. In addition, the bail-out mechanism provides an incentive for states to improve their record on fair voting practices to succeed in removal from the preclearance process. As there have been states and counties that have successfully bailed out of coverage under the law, the bail-out mechanism exists as a real way to provide that states and counties that have changed their ways are no longer unnecessarily covered by the VRA.

Others may point to evidence of existing discriminatory practices in non-covered states and counties and therefore argue that the coverage formula fails to properly devise exactly which states and counties are in need of federal preclearances. The evidence gathered by Congress in its research

\textsuperscript{34} Shelby County. v. Holder, 570 U.S. 10 (U.S. 2012), (Ginsburg, J., dissenting).

\textsuperscript{35} Id.

into state voting practices shows that, in general, the coverage formula is effective in pointing out the areas of the country that have had discriminatory voting practices in place.\textsuperscript{37} There have been more instances of voting discrimination in covered states compared to non-covered areas. In fact, there have been four times as many successful Section 2 court cases in covered jurisdictions than non-covered jurisdictions, which highlights that formula is effective in determining which counties should be monitored for preclearance.\textsuperscript{38} While the formula determining preclearance coverage may not be perfect, it does provide a method of pinpointing many states and counties that have displayed tendencies to discriminate at the polls.

There is also a bail-in procedure that can be used to include traditionally non-covered areas if they meet certain criteria for voting discrimination, opening the possibility of expanding VRA coverage to these new states and counties. Not only does this bail-in mechanism exist, but it has been used. The dissent in Shelby, for example, highlighted that there have been states included into the preclearance requirement through the bail-in procedure: “The bail-in mechanism has also worked. Several jurisdictions have been subject to federal preclearance by court orders, including the states of New Mexico and Arkansas.”\textsuperscript{39} These examples of bailed in states show that the coverage formula can be extended into new areas that previously had not been forced to submit their voting changes to federal preclearance. The existence of the bail-in procedure also further demonstrates that Section 4’s coverage formula is not just based on the ex-confederate states’ records but on any state’s county that has been discriminated against the franchise of its minority citizens, regardless of location.

The Path Forward and Possible Solutions

Although the Supreme Court was incorrect in its decision to rule Section 4(b) unconstitutional, the fact remains that the judicial body’s ruling stands. Therefore, with this decision in place, the consequences on our country’s elections must also be considered. Although only Section 4(b) was explicitly deemed unconstitutional, Section 5, while not ruled unconstitutional in fact, has been rendered powerless as a consequence of


\textsuperscript{39} Id. at 22.
the majority’s decision. Goldfeder and Perez built on this conclusion, writing, “The Shelby County ruling gutted Section 5 of the Voting Rights Act unless and until Congress revises the formula of Section 4.” Without the coverage formula laid out in Section 4(b), there is no way for specific states and counties’ voting changes to be subject to federal preclearance. This means that both Sections 4 and 5 of the Voting Rights Act have effectively been nullified, and far less can be done through the VRA to protect citizens against unfair state and county voting procedures prior to their implementation. Perez and Agraharkar note that the elimination of Sections 4 and 5 from the Voting Rights Act leave no measure in place to prevent voting discrimination before it occurs: “There is no guarantee, however, that other existing laws can substitute for Section 5. If the changes are adopted close to an election, there may be little or no practical recourse for voters.” If states make changes right before an election, it is unlikely that a court ruling against the discriminatory practice will prevent potential voters from losing their chance to exercise their constitutional right. There is nothing stopping states from enacting measures that can harm the chances of minority citizens to vote without the crucial sections from the VRA, and as previously mentioned, many states and counties have already taken advantage of Section 4(b)’s absence. Without the preventative mechanism of federal preclearances effectively in place, new solutions must be developed in light of the Supreme Court’s ruling.

One possible solution to counter the harmful effects of the Shelby County decision is to explicitly spell out the right to vote in an amendment to the Constitution. It is true that there are already amendments in existence that protect the right to vote no matter one’s race or color. However, we have seen that even this provision has not stopped states from barring access to the voting polls for supposed other reasons. This addition to the Constitution would close the loopholes a state could use in passing laws that limit voting rights in any way. A proponent of this strategy, Field argues this remedy would present no way that courts could put state privilege ahead of individual rights in terms of voting. He states, “A constitutional declaration of voting rights would force the courts to impose the highest levels of judicial scrutiny to voting laws.” An amendment to the Constitution that

42 Joshua Field, Creating a Federal Right to Vote (Ctr. For Am. Progress 2013), 5.
specifically address the right of all citizens to vote would provide such clear wording and meaning that the courts would have no way to get around upholding individual rights when they come in conflict with state prerogative to enact voting changes. While an amendment to the Constitution may be an option, there are several problems in going forward with this strategy.

While it may be that courts, applying the new amendment, will protect individual rights and strike down measures that limit voting for minorities, the issue remains that there will be no mechanism like the coverage formula in place to prevent states from passing discriminatory voting changes in the first place. An amendment expressing the right to vote may deter some state action, but many measures will be challenged in court only after they affect and limit the rights of citizens. History has shown that the existence of a constitutional amendment has not prevented violations of the amendment from occurring. The passage of the Civil War amendments, for instance, were clearly necessary for the protection of those citizens whose rights were not spelled out previously in the Constitution, but their existence alone was not sufficient to bar acts like the Jim Crow laws and racist voting practices prior to the Civil Rights movement. In addition, the amendment process is inherently very difficult. Proposed amendments require one of two methods: either by the votes of two-thirds of both Houses of Congress, or by an amendment proposal convention following the application of specific legislation by two-thirds of state legislatures, which is then followed by ratification by three-fourths of the states or by conventions in three-fourths of the states. The increased polarization of Congress presents difficulties in achieving two-thirds to vote for the amendment, and many of the states that had previously been covered by the VRA would fail to ratify the amendment. While an amendment is not entirely out of the realm of possibility, the obstacles to this task will prevent its serving as a short term solution to the absence of the coverage formula.

Another solution lies in increasing advocacy efforts to monitor voting discrimination in certain areas. This possibility could be acted on before long-term solutions such as the passage of another law by Congress can be accomplished. Charles and Fuentes-Rohwer discuss exactly what this tactic entails: “The second framework […] relies upon an emerging and fragile ecosystem of private entities, non-judicial institutions, and organized interest

groups of various stripes, which together are willing and able to mimic the elements that made Section 5 an effective regulatory device for protecting the rights of voters of color.”  

44 Activist groups can provide a short-term solution to Section 4(b)’s absence in effectively monitoring voting changes and helping minorities overcome potential obstacles to voting. Pressure can be mounted on state and local legislative bodies to dissuade them from passing discriminatory voting changes. Of course, the actions of citizens and advocacy organizations by no means provide an equally effective alternative to the power of a federal law. Until a constitutional amendment or new federal law can be passed, however, monitoring discrimination with the help of citizens and interest groups may be a possible solution for the immediate future.

By far the best option going forward in solving the coverage formula void is to pass an updated law that amends the coverage formula. Establishing a new coverage formula would certainly be the most effective way to allow the Attorney General to again issue preclearance requirements for the voting changes of the formerly covered states and counties. In fact, there are already bills in development in both the House and the Senate that aim to restore a coverage formula. In fact, a bill with the aim of establishing a new coverage formula was introduced in the Senate in January 2014. While the Senate bill currently has no Republican sponsors, some Republicans have co-sponsored the House bill.  

45 The proposed bill would now cover states with five federal violations over voting changes over the past fifteen years. Under this formula, some previously covered states such as Alabama will not be covered, nor will states like Ohio, Pennsylvania, and Wisconsin, which have just passed new voting laws that are potentially harmful to minorities.  

46 However, anything that gets some of the most discriminatory jurisdictions back under the watch of the Department of Justice is better than nothing. In addition, the bill would require districts in all fifty states to notify the media of any voting law changes so voters can better hold their local governments accountable.  

47 This provision ensures that all states, not only those covered by the new formula, must report on their voting changes in some way, which mitigates the argument of unequal treatment of states.

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47 Id.
While far from perfect, the new bill would serve as a replacement for the old preclearance requirement.

The Supreme Court’s decision to strike down the constitutionality of Section 4(b) of the Voting Rights Act went against established legal precedent while effectively opening more legislative avenues for states to engage in voter discrimination. The Justices in the majority reasoned that Congress did not have the power to select certain states and counties to be subjected to federal preclearance of their voting changes, which ignores numerous prior decisions in which the legislature was duly given deference on election matters. The majority also argued that the coverage formula devised in Section 4 of the act wrongly enforces an unequal treatment of states, but previous court cases—along with the civil war amendments—provide clear adequate evidence that in the case of individual citizens basic rights, state sovereignty can be limited to a certain extent. Moreover, the bail-out and bail-in mechanisms in the Voting Rights Act provide more evidence that the coverage formula does not unfairly focus on covering ex-Confederate states: states who have greatly improved are eligible to become exempt from coverage while new states that have displayed discriminatory tendencies can be brought under the preclearance requirement. In light of the Court’s decision that nullified Section 4 and effectively Section 5 of the VRA, action must be taken by citizens and organizations to limit discrimination at the polls before legislative changes can be implemented. The unfortunate outcome of the Supreme Court’s decision will not doom citizens in previously covered states to voting discrimination if necessary legislative actions are taken to prevent unfair practices, in the absence of Section 4(b).
Burning Persepolis: A Critique of the EU Sanctions Regime Against the Islamic Republic of Iran

Gregory Arnold

Introduction

On November 24, 2013, after several months of intensive negotiating in Geneva, representatives from the Islamic Republic of Iran and the five permanent members of the United Nations Security Council (i.e., the United States, United Kingdom, France, People’s Republic of China, Russia, and Germany) reached a tentative deal over the fate and recognition of Iran’s nuclear program. Shortly thereafter, French foreign minister Laurent Fabius announced that the European Union (EU) would reconsider its sanctions against the Iranian government and its business entities. Iran has been comprehensively sanctioned, inter alia, by the United Nations (UN), the EU, and the United States (U.S.). The decision by Iran to agree to limit its nuclear program has been seen as justification for these sanctions. Political figures in Iran and the international community, however, have condemned the sanctions as unjustified; such sanctions are strangling the people of Iran economically while strengthening the government. Despite these consequences, the sanctions have continued.

According to the principles of modern international law, the implementation of sanctions beyond what the UN advocates is illegal. Additionally, as demonstrated by the recent cases challenging the EU’s sanctions in its General Court, these additional sanctions issued by the EU are excessive according to the legal institutions of that organization.

This article is structured in four sections. First, it will discuss the history of the current sanctions regime. It will focus on the history of Iran’s relations with the West and global institutions, an overview of the UN and EU sanctions, and introduce the initial legal challenges to the EU sanctions. This section will also explain the root of the problem regarding the potential legality (or illegality) of Iran’s nuclear program through the Nuclear Non-Proliferation Treaty (NPT). The sanctions regime between the U.S. and Iran will not be covered in this article, namely because of the unique and

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1 P5+1 & Islamic Republic of Iran, Joint Plan of Action (2013).
4 Jamila Trindle, Cashed Out, Foreign Policy, Jan. 6, 2014.
complicated geopolitical relationship between the two countries. Second, this article will analyze the documents, namely the UN Charter, concerning international security, and will demonstrate what actions can and cannot be taken in the name of international security. This section will focus on the definitions of “offensive action” and “punishment” in light of international law and politics. Third, this article will examine the differences between sanctions instituted by the EU and those by the UN. Finally, it will discuss the challenges to the EU sanctions regime, using both UN documents relating to international security as well as the challenges to the sanctions handed down by the General Court of the European Union.

History of the Iranian Sanctions Crisis

Iran’s current dilemma with sanctions began about half a century ago. In the 1950s, the Imperial State of Iran, governed by Shah Mohammad Reza I of the Pahlavi Dynasty, began to investigate the possibility of utilizing nuclear power to manage Iran’s burgeoning energy needs.\(^5\) At the time, Iran worked closely with the Western world, particularly the U.S. and West Germany, to implement a civilian nuclear program. In 1968, Iran signed the NPT.\(^6\) The Pahlavi Dynasty’s work towards a civilian nuclear program continued until its ousting in 1979 during the Iranian Revolution. The revolution, followed by a number of anti-Western events such as the seizure of the U.S. Embassy in Tehran and the initiation of the eight-year Iran-Iraq War, ultimately forced the Iranian government to de-prioritize the nuclear program due to more pressing concerns.\(^7\)

In the 1990s, Iran cooperated closely with France and Russia in an effort to restart its nuclear program. Iran generally limited foreign support to technical assistance during the construction of previously known and planned facilities.\(^8\) In 2002, the National Council of Resistance of Iran, a foreign-based Iranian political dissident group, announced that Iran had begun building two nuclear sites at Natanz and Arak; these sites had not been disclosed to the International Atomic Energy Agency (IAEA).\(^9\) In

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\(^6\) Signatories and Parties to the Treaty on the Non-Proliferation of Nuclear Weapons.

\(^7\) Yossi Melman & Meir Javedanfar, The Nuclear Sphinx of Tehran 89-90 (Basic Books 2008).


\(^9\) Information on Two Top Secret Nuclear Sites of the Iranian Regime (Natanz & Arak). Iran Watch.
2003, Iran and the EU-3 (UK, France, and Germany) signed the Tehran Declaration, which recognized Iran’s nuclear program in exchange for transparency to IAEA observers. In 2004, Iran signed the Paris Agreement, in which Iran agreed to temporarily suspend enrichment of uranium. Subsequent condemnations by the IAEA and the sluggishness of the EU-3’s progress to further negotiations, however, drove greater distance between Iran and the Western world regarding this issue.

The election of President Mahmoud Ahmadinejad in 2005 saw the revitalization of Iran's nuclear efforts, which was in direct violation of the earlier Paris Agreement. As a result, both sides were unable to come to an agreement regarding Iran’s nuclear development. The IAEA reported the issue to the United Nations Security Council (UNSC), which moved to pass the first of several resolutions condemning Iran and its actions. This began in 2006 with UNSC Resolution 1696, which only condemned the Iranian government; however it then continued with UNSC Resolution 1737 later that year, which officially extended sanctions. Ultimately, the UN passed a total of seven resolutions expanding the sanctions over the course of six years.

Following the UNSC’s implementation of Resolution 1737, the EU issued its own comprehensive sanctions which extended far beyond the sanctions established by the UNSC. These sanctions targeted more than just parties immediately involved with the nuclear program; they targeted a number of Iranian companies tied to the Iranian Revolutionary Guard Corps (IRGC). In 2012, as a result of these sanctions, Iran was no longer able to utilize the Society for Worldwide Interbank Financial Telecommunication

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(SWIFT) electronic banking transfer system and the assets of several Iranian banks with branches in the EU were frozen.\footnote{SWIFT instructed to disconnect sanctioned Iranian banks following EU Council decision.” SWIFT, March 15, 2012.}

**The Nuclear Non-Proliferation Treaty and Relevant Clauses**

The NPT was created after the Cold War to prevent the spread of nuclear weapon technology and to work toward the management of nuclear technology for peaceful purposes.\footnote{Treaty on the Non-Proliferation of Nuclear Weapons, Preamble.} There are two main Articles when analyzing how the UNSC and the EU view the NPT regarding international security and Iran’s violation the NPT. First there is Article III, Section 1, which states:

Each Non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency’s safeguards system...Procedures for the safeguards required by this Article shall be followed with respect to source or special fissionable material whether it is being produced, processed or used in any principal nuclear facility or is outside any such facility. The safeguards required by this Article shall be applied on all source or special fissionable material in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere.\footnote{Treaty on the Non-Proliferation of Nuclear Weapons, Article III, Section 1.}

Article III states that actors must follow a system whereby they report and acknowledge any sites that can process fissionable material, in order to keep a non-nuclear armed state from secretly gaining these weapons. Particularly, Iran’s failure to inform the IAEA, which was tasked with monitoring violations of the NPT, about the sites being created at Natanz and Arak constituted a violation of Article III. It is the argument of those regimes which have established sanction regimes against Iran, such as the UN and the EU, that by violating Article III, Iran has violated its commitment to adhere to international law. Moreover, Article V states:

Each Party to the Treaty undertakes to take appropriate measures to ensure that...potential benefits from any peaceful applications of nuclear explosions will be made available to
non-nuclear-weapon States Party to the Treaty on a non-discriminatory basis and that the charge to such Parties for the explosive devices used will be as low as possible and exclude any charge for research and development. Non-nuclear-weapon States Party to the Treaty shall be able to obtain such benefits...Non-nuclear-weapon States Party to the Treaty so desiring may also obtain such benefits pursuant to bilateral agreements.\(^{19}\)

Article V reinforces the main argument of the Iranian government: as a signatory of the NPT, Iran is legally allowed to pursue peaceful nuclear research. Indeed, Iran’s argument is also supported by the Paris Agreement. While Iran did halt enrichment, the EU-3 has acknowledged that this was a voluntary action by Iran, and therefore not prohibited from enrichment for peaceful purposes.\(^{20}\) In November 2013, Iran and the IAEA agreed that the IAEA would be allowed to monitor all of Iran’s nuclear sites; however, implementation of physical monitoring has not been established and will take time.\(^{21}\)

The main contention in regard to these Articles is whether Iran’s nuclear research is for peaceful or militant purposes. Iran has continually argued that it has never pursued the development of nuclear weapons and only concealed its nuclear program because of prior sanctions.\(^{22}\) Members of the international community have argued that Iran’s nondisclosure of its nuclear program demonstrates that its true nuclear intentions cannot be trusted.\(^{23}\) Despite these arguments, there is only one body international politics and law that has the authority to make decisions regarding alleged violations of international law and to administer justice: the United Nations

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\(^{19}\) Treaty on the Non-Proliferation of Nuclear Weapons, Article V.  
\(^{20}\) “Communication dated 26 November 2004 received from the Permanent Representatives of France, Germany, the Islamic Republic of Iran and the United Kingdom concerning the agreement signed in Paris on 15 November 2004”. IAEA, November 26, 2004.  
\(^{23}\) "President Bush Addresses American Legion National Convention ". August 31, 2006.
The UN, International Law, and Sanctions

In 1945, after World War II, the UN was created to manage the postwar world order and to prevent future international conflicts. Thus, the UN Charter was written with several Articles that established the UN’s role as a peacekeeper. This led to the creation of the UNSC, a collection of fifteen states with five permanent members (U.S., UK, Russia, China, and France). Through Articles 39 and 41, the UNSC was empowered to be the deciding force for international disputes. In Article 39, “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” Only the UNSC, not states or organizations, can decide whether an act of aggression has been committed and whether a threat to peace exists. Similarly Article 41 stipulates,

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.

Article 41 reinforces that the UNSC is the sole enforcer of international security and is able to act in a multitude of ways. Regarding Iran, such enforcement mechanisms could include the “complete or partial interruption of economic relations,” i.e., sanctions.

In 2006, the UNSC considered Iran’s nuclear program a clear threat to the peace and issued Resolution 1737. Although this wasn’t the first resolution against Iran’s nuclear program, Resolution 1737 was the first resolution to institute sanctions regime against Iran and was enacted in accordance with Article 41 of the UN Charter. In the subsequent resolutions passed during the following five years, the UNSC continued to build upon these sanctions. The UNSC, however, over the course of its sanctions also continued to set the guidelines for its own mandate. While there have been eight “targeted sanctions” passed against Iran’s nuclear program which specifically pursue individuals and industries directly involved in the nuclear

24 UN Charter, Article XXXIX.
25 UN Charter, Article XLI.
program, it should be noted that these sanctions did not interfere with Iran’s economic assets outside of its nuclear program.\textsuperscript{27}

After the ratification of Resolution 1737, it became the duty of all member states of the UN to institute sanctions against the targeted industries and individuals listed in the resolution. Indeed, Resolution 1737 led to the first round of EU sanctions and heightened sanctions by the U.S. against Iran.\textsuperscript{28} While the UNSC sanctions only targeted the nuclear program, the EU’s measures went beyond those measures. The EU’s Decision (the Decision) in 2010, for example, passed several provisions which severely limited trade with non-sanctioned entities,\textsuperscript{29} such as international companies in China, South Korea, and India that imported petroleum and natural gas from Iran.\textsuperscript{30} While the Decision repeatedly referenced the UN Resolutions 1737 and 1929, the actions the EU took exceed those necessary or even permitted under Article 41 of the UN Charter.\textsuperscript{31}

International law operates in line with the principle of state sovereignty.\textsuperscript{32} The UNSC may decide to institute sanctions or enforce global peace, but the UN is not allowed to infringe on the important and fundamental power of states. The UN Charter acknowledges this power in Article 51, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence [sic] if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”\textsuperscript{33} Under this Article, a state or group of states has the ability to defend themselves or a third-party should there be a violation of the peace. Examples of Article 51 include: U.S. arguments for collective security in the Vietnam War\textsuperscript{34} and

\textsuperscript{28} Id. at 1407.
\textsuperscript{30} It is worth noting that the U.S. and EU granted waivers to several states purchasing gas and oil from Iran, in order to help those countries avoid sanctions and economic constraints.
\textsuperscript{31} Calamita. \textit{Sanctions}. 1408.
\textsuperscript{32} France \textit{v. Turkey}, Permanent Court of International Justice (PCIJ, 1927).
\textsuperscript{33} UN Charter, Article LI.
\textsuperscript{34} Benjamin B. Ferencz. “War Crimes Law And The Vietnam War”, \textit{The American University Law Review}, Volume 17, Number 3, June 1968.
disputably) NATO’s Article V intervention in Afghanistan.\footnote{Phyllis Bennis, \textit{Article 51: Self-Defense and Its Limits in the UN Charter}, Transnat'l Inst., Feb. 1, 2002.} Article 51 also serves as the basis for implementing sanctions: the UNSC issues the recommendation for sanctions and the member states of the UN are, technically, obliged to act.

There is, however, a notable difference between self-defense and “self-offense.” Regarding UN sanctions, UN members cannot exceed the UNSC’s suggested actions to preserve security. For example, when the UNSC issued UNSC Resolution 276 regarding South Africa’s occupation of Southwest Africa (now Namibia),\footnote{“Resolution 276 (1970)”. United Nations Security Council. January 30, 1970.} the UN recognized that South Africa continued to occupy the region despite the region’s claim to sovereignty. Some powers, such as the USSR, argued that South Africa’s aggressive occupation of Southwest Africa would be a threat to peace and required immediate action; however, the UNSC launched a subcommittee to study and address the issue\footnote{\textit{Id.}} before ultimately passing sanctions in 1977.\footnote{\textit{Id.}} Many states followed suit, issuing subsequent condemnations of the apartheid regime’s occupation, followed by passing sanction regimes in tandem with those called for by the UNSC.

While \textit{de facto} colonialism may not be the same as a potential nuclear weapons program, actions the UNSC undertook regarding illegal colonialism closely mirrors those of Iran and many other sanctioned states.\footnote{Gabriella Blum, \textit{The Crime and Punishment of States}, 38 Yale J. of Int’l L. (2013).} Much like South Africa’s colonialism, Iran’s unreported nuclear sites at Natanz and Arak were illegal under an existing treaty. Based on a breach of treaty law, the UNSC was required to and did act accordingly by holding session and initiating sanctions against the Iranian government and military.

\textbf{The Security Council as Keeper of the Peace}

Established by the UN Charter, the UNSC should, theoretically, have the final say in international security matters.\footnote{UN Charter, Article XLI.} In a world where international law is bound by state sovereignty being inviolable, how has the UN’s mandate held up in genuine cases of security threats to the world? There are numerous examples of the UNSC authorizing Chapter VII interventions,\footnote{UN Charter, Article LI} which permit the UNSC to use of military force to terminate a threat to the
peace.\textsuperscript{42} Regarding international economic measures, however, the UNSC can also a force to be reckoned with and has acted to challenge breaches of peace without using military force.

Since inception, the UNSC has had the authority to use sanctions.\textsuperscript{43} Despite this fact, however, the implementation of sanctions as a part of UNSC policy is a relatively recent phenomenon. As Gabriella Blum noted in \textit{“The Crime and Punishment of States,”} in 1991, there were only two instances of the UN issuing sanctions: one against South Africa and another against Rhodesia.\textsuperscript{44} After the Cold War, however, the use of sanctions greatly expanded and about a dozen countries were targeted by UN sanctions over the following two decades.\textsuperscript{45}

The UNSC’s authority places it in a uniquely powerful position to handle challenges to international peace that other organizations and entities may be unable to address. One of the most notable and relevant examples is that of North Korea’s own nuclear program. While North Korea has also pursued a relatively secret nuclear program, it has also withdrawn from the NPT; thus, it is not forced to adhere to the treaty obligation.\textsuperscript{46} Despite its withdrawal, the UNSC has continued to pass comprehensive sanctions against the North Korean government and nuclear program.\textsuperscript{47} These actions demonstrate that, despite the limitations that treaties have in promoting enforcement, the UNSC is able to implement international orders without treaty enforcement.\textsuperscript{48} Regarding Iran, this demonstrates that the actions of UN were not based solely on the requirements of the NPT, but because the UNSC felt that Iran’s undisclosed nuclear sites constituted a threat to peace, thus, and acted accordingly.

An issue arises, however, when Western governments’ sanctions exceed the scope of the UN requirements. Tensions between the West and Iran has existed since the 1979 Revolution and previously these governments had attempted to direct Iran’s political evolution to suit their interests. With the

\begin{footnotesize}
\textsuperscript{42} Blum, \textit{Crime.} 7-17.
\textsuperscript{43} UN Charter, Article XLI.
\textsuperscript{44} Present day Zimbabwe.
\textsuperscript{45} Blum, \textit{Crime.} 25.
\textsuperscript{46} “North Korea” NTI. Website: http://www.nti.org/country-profiles/north-korea/nuclear/.
\textsuperscript{47} Id.
\textsuperscript{48} Vik Kanwar, \textit{Two Crises of Confidence: Securing Non-Proliferation and the Rule of Law Through Security Council Resolutions}, 35 Ohio N. U. L. Rev. (2009). 200. It is worth noting that, at the time that Kanwar wrote the article, North Korea was not a member of the NPT, although the author addresses it as though it was.
\end{footnotesize}
implementation of severe Western sanctions in Iran, a policy of “disinvestment” followed whereby countries refused to do business with Iran because they feared the Western sanctions regime placed on the country. Disinvestment soon led to the hyperinflation of the Iranian economy, whereby Iran’s national currency, the rial, was valued at over 3000 to 1 US$. These sanctions devastated Iran’s domestic economy and led to a shortage of pharmaceuticals, proving far more destructive than the targeted sanctions of the UNSC. Indeed, the sanctions have become the center of international controversies in several other countries and called a “humanitarian crisis.”

EU Sanctions: An Act of Aggression

Beginning in 2006, the EU instituted a comprehensive program of sanctions against Iran. These sanctions targeted not only those industries related to the Iranian nuclear program, but also Iran’s economically crucial petrochemical and pharmaceutical industries. Given the devastating effects said sanctions have had for the people of Iran, it is necessary to analyze the justifications the EU has used for its sanctions program and whether they are compatible with the sanctions the UNSC issued.

According to the EU’s European External Action Service (EEAS), the EU has five reasons for issuing sanctions against another country or organization. Four of the five measures are compatible with the UN Charter’s Chapter VII; the fifth reason, “to develop and consolidate democracy and the rule of law and respect for human rights and fundamental freedoms,” requires closer examination in light of international law. The purpose of this article is not to debate the merits or drawbacks of democracy or human rights; however, one of the foundations of the UN Charter is that states have an inherent right to sovereignty, without which principles such as Article 51 would not be possible. This notion of sovereignty adheres to both the country’s political borders and to its domestic affairs. The EU’s pursuit to change Iran’s domestic policies, its draconian sanctions targeting Iran’s economic assets in Europe, and severing the country from the world’s

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51 Saul & George, “Sanctions.”
53 UN Charter, Article II, I. 
electronic banking system becomes far more dangerous than just maintaining the “international peace.”

The reactions to one group of sanctions, those severing Iran from the international banking system, demonstrate the flimsy ground on which these extrajudicial punishments are based. In 2012, SWIFT issued a complete network ban for all Iranian banks.\footnote{Corey Flintoff, \textit{New Sanction Severely Limits Iran’s Global Commerce}, 2012 NPR (2012).} This move was among the most devastating inflicted upon the Iranian economy and effectively severed Iran from the electronic banking systems which control most of all modern banking. The results were disastrous for Iran and trade relations were severely damaged with countries which it conducted business with, in particular India and China.\footnote{Nidhi Verma, \textit{Indian Pays for Iran Oil in Rupees, Turkey Route Halted: Sources}, 2013 Reuters (2013).}

SWIFT’s near annihilation of Iran’s ability to conduct international trade did more damage than just halting Iran’s nuclear program. Without SWIFT accessibility, it became impossible for Iran to purchase needed imports or deal in exports in anything aside from hard currency, which, in turn, drastically reduced that country’s currency supply. This subsequent near abrogation of Iran’s international trade created a humanitarian crisis and a shortage of exchangeable currency, medical supplies, pharmaceuticals, and other necessities.\footnote{Siamak Namazi, \textit{Sanctions and Medical Supply Shortages in Iran} 20 Viewpoints (2013).} Companies that may not have been targeted for conducting business with Iran could not and did not want to work with Iranian banks due to the fear of sanctions after cooperating with Iranian banks. Ironically, the SWIFT ban resulted in the kind of humanitarian crisis that the UNSC has the authority to prevent under the UN Charter.\footnote{UN Charter “Article XLI.”}

These expansive sanctions have not gone unchallenged. In 2013, two cases went before EU and UK General Courts, which challenged the legality of the EU’s sanctions against targeted companies.\footnote{Jamila Trindle, \textit{Cashed Out}.} First, the General Court overturned the sanctions’ restrictions on Bank Mellat\footnote{“General Court annuls sanctions imposed on Iranian Bank Mellat” \textit{Brick Court Chambers Barristers}.} and Bank Saderat,\footnote{“Sanctions imposed on Bank Saderat Iran annulled by General Court” \textit{Brick Court Chambers Barristers}.} two major Iranian banks that had European branches, and unfroze their financial assets previously seized by the EU. By August, the EU had

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57 UN Charter “Article XLI.”
58 Jamila Trindle, \textit{Cashed Out}.
59 “General Court annuls sanctions imposed on Iranian Bank Mellat” \textit{Brick Court Chambers Barristers}.
60 “Sanctions imposed on Bank Saderat Iran annulled by General Court” \textit{Brick Court Chambers Barristers}.
overturned the SWIFT sanctions against Iranian banks that had been established a year prior. These sanctions were all overturned for the same reason: the scope of the sanctions was far larger than necessary to enforce their intended goals.\textsuperscript{61}

**Conclusion: The UNSC and Acts of “Self-Offense”**

On January 20, 2014, the initial steps of the deal reached at Geneva regarding Iran’s nuclear program went into effect. Following Iran’s halt of its nuclear program, the EU has since suspended several of the sanctions placed on Iran.\textsuperscript{62} Critics might argue that the EU’s decision has been influenced by the aversion of a nuclear threat from Iran; however, the fact that the EU was willing to withdraw any sanctions at all, and particularly those geared towards non-military agencies, suggests that said sanctions had ulterior motives. Indeed, it demonstrates that the EU utilized sanctions to direct Iran’s behavior in a way that favored EU and Western interests which is, ultimately, a major breach of sovereignty.

The UN is, theoretically, the supreme enforcer of international law and peace. If the UN fails to acknowledge that its duties in Article 39 include not only violations of physical but also economic sovereignty, it will fail to achieve its mission of promoting world peace. Damage caused by open warfare is just as deadly and costly as damaged caused by sanctions. Indeed, the United Nations is just as obliged to act against aggressive and destructive militant regimes as it is required to prevent aggressive and destructive sanctions regimes. While the EU and other major powers seek to be responsible global players, they must also acknowledge that, by supporting these abusive sanction regimes, they ultimately stagnate the global peace they have promised to protect.


On the Misfortune of Mandatory Minimums

Arjang Asadi

Introduction

In 2007, federal research in the United States revealed that the average sentence for a first time, non-violent drug offender is longer than the average sentence for rape, child molestation, bank robbery, or manslaughter.¹ The main cause for this discrepancy was found to be mandatory minimum sentencing guidelines.² Indeed, these policies have helped contribute to a new status quo in our criminal justice system in which more than half of all federal prisoners are incarcerated for non-violent drug offenses, all while arrests for possession of controlled substances continue to rise.³ These statistics, along with numerous others, demonstrate the failure of the “tough on drugs” initiatives for harsher sentencing procedures, which were originally designed to discourage the production, sale, and use of illegal narcotics.

Enacted in 1986 in a bipartisan effort, the Anti-Drug Abuse Act legally limited judicial discretion by establishing mandatory minimum sentences for drug-related crimes.⁴ Only 25 years later, the results have been anything but positive. Despite the best of intentions, the sentencing reform of the United States Congress struck at the federal balance of powers by taking control of judicial proceedings away from the judicial branch in order to dis-incentivize the abuse of illegal narcotics. Moreover, the U.S. Sentencing Commission’s Report to Congress revealed that as of October 2011, over 40% of the roughly 200,000 inmates of the federal prison system had been subject to mandatory minimum sentencing.⁵ The United States now has the world’s largest prison population, with more than 2.3 million people behind bars, including every 1 in 100 American citizens.⁶ Leading the world in incarceration, the United States has 660,000 more prisoners than the next largest incarcerated population on the list, China, which has a prison

² Id.
⁶ The Pew Center on the States, One in 100: Behind Bars in America (2008).
population of 1.64 million\(^7\)—despite the fact that the United States has only one-fourth of China’s total population.\(^8\)

Current Attorney General Eric Holder has called mandatory minimums “ineffective and unsustainable”\(^9\) and has placed a moratorium on their use. As policymakers begin to assess the merits of these policies, a comprehensive review of mandatory minimums and the implications of their failure is now necessary. The first section of this article will explain and critique the legislative and judicial context for mandatory minimum sentencing. The second section will discuss the failures of mandatory minimums, specifically regarding their effects on crime rates, incarceration, and government spending. The third section will consider the effects of mandatory minimums on the separation of powers and due process. The fourth section will explore public opinion on the issue as well as the social consequences of mandatory minimums. The final section will shed light on other approaches and reforms for our imprisonment policies and handling of drug-related crimes.

The conclusion of this article is that mandatory minimum sentencing has ultimately failed in its prescribed goals, fundamentally harmed the United States criminal justice system, and necessitated more effective, constitutional sentencing policies. Because drug offenses comprise nearly three quarters of mandatory minimum sentences, this article will argue for the elimination of mandatory minimum sentencing with respect to drug-related crimes, as well as explore alternative sentencing procedures for reducing the implementation of mandatory minimum sentencing or replacing these laws altogether.\(^10\)

### Legislative and Judicial Context

Mandatory minimum sentences come from federal statutes that require a certain period of imprisonment following a criminal conviction.\(^11\) Mandatory minimum sentences were first established by the United States Congress with the Boggs Act of 1951,\(^12\) which implemented harsher

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\(^7\) Id.

\(^8\) U.S. Census Bureau, Population Estimates (2013).


\(^10\) Report to Congress (2011), supra note 5.


\(^12\) The Boggs Act of 1951, H.R. 3490, 82nd Congress. (1951).
sentencing procedures for marijuana-related crimes.\textsuperscript{13} The Boggs Act mandated a two-to-ten year minimum sentence for the production, sale, or possession of marijuana as well as a $20,000 fine, but these initial provisions were ultimately repealed by Congress in 1970.\textsuperscript{14} In response to a rising tide of crime, however, Congress created the Sentencing Guidelines Commission in 1981 in order to provide judges with a framework for sentencing with respect to a given crime.\textsuperscript{15} Until the U.S. Supreme Court deemed the Guidelines as “advisory” in \textit{Booker v. U.S.} (2005), they were mandatory for federal courts.\textsuperscript{16} Currently, the Guidelines moderate sentencing while allowing federal district judges to depart from the recommended sentence given proper justification. However, failure to adequately justify the departure in cases of an increased sentence can be grounds for an appeal.

During the 1984 elections, however, the Democratic Party was repeatedly accused by political opponents for maintaining a weak stance on the enforcement of the War on Drugs and the reduction of crime in the United States.\textsuperscript{17} A combination of factors that included the rise in crime since the end of World War II, the proliferation of crack cocaine, and domestic political dynamics brought this issue to the political forefront.\textsuperscript{18} Come the 1986 midterm election period, Democratic lawmakers came together with Republicans to “get tough on drugs” by passing the Anti-Drug Abuse Act of 1986 (ADAA) just a week before election day by a margin of 392-16 in the House of Representatives and 97-2 in the Senate.\textsuperscript{19} While also banning the analogs of controlled substances, the ADAA’s primary provision was the reestablishment of mandatory minimum sentences for drug-related crimes, including crack cocaine and marijuana.\textsuperscript{20} While there are now almost 200 mandatory minimum sentencing provisions, only a handful related to drugs or weapons offenses are used regularly.\textsuperscript{21} Across the board for drug-related crimes, mandatory minimum statutes established longer prison sentences than the sentencing guidelines, and they have remained law ever since.

\textsuperscript{13} \textit{Busted - America’s War on Marijuana: Marijuana Timeline} (Frontline PBS, 1996).
\textsuperscript{14} H.R. 3490.
\textsuperscript{17} Eric E. Sterling, \textit{Drug Laws and Snitching: A Primer}, Frontline PBS, 1999.
\textsuperscript{20} Id.
\textsuperscript{21} \textit{See} Report to Congress (2011), \textit{supra} note 5.
Judicial review in the past two decades has mostly upheld mandatory minimums as constitutional, with the Supreme Court affirming that they abide by the requirements set by due process and right to trial by jury.²² Constitutional challenges on the basis of double jeopardy, ex post facto, separation of powers, due process, and equal protections have not yielded any notable results,²³ although these constitutional provisions have helped establish the boundaries in which mandatory minimums operate.²⁴ Challenges founded on the Eighth Amendment’s cruel and unusual punishment clause, on the other hand, have been the most successful in limiting, if not eliminating, mandatory minimums.²⁵ Capital punishment was ruled out as a possible mandatory minimum sentence well before the passage of the Anti-Drug Abuse Act in Gregg v. Georgia (1976), on the grounds that it violated the Eighth Amendment.²⁶ In O’Neil v. Vermont (1892), three dissenting Justices wrote that the cruel and unusual punishment clause protected against “all punishments which by their excessive length or severity are greatly disproportionate to the offences charged.”²⁷ The dissenting judges had their views implemented in Weems v. United States (1910), where the court struck down, under the cruel and unusual punishment clause, the sentence for Paul Weems.²⁸ For the crime of falsifying public documents, Weems had been sentenced to 15 years of hard labor followed by lifelong probation and the inability to vote or hold property.²⁹ Despite these rulings, the cruel and unusual clause has almost exclusively been used for capital punishments. So overall, court rulings have done little to limit mandatory minimums, and they have accomplished even less for drug-related mandatory minimums or restraining legislative encroachment on the proceedings of the judicial branch.

While the Supreme Court has affirmed that the Eighth Amendment protects against mandatory capital punishment and lengths of incarceration that are “grossly disproportionate to the seriousness of the crime for which [they] is imposed,”³⁰ this protection has rarely been implemented. Ewing v.

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²³ See Doyle, supra note 10, at 15.
²⁴ See Doyle, supra note 10, at 18.
²⁵ U.S. CONST. amend. VIII.
²⁸ Weems v. U.S., 217 U.S. 349 (1910)
²⁹ Id.
³⁰ See Doyle, supra note 10, at 2.
California (2003) was one of the only recent cases to come close to setting a precedent for cruel and unusual punishment protections with respect to mandatory minimums, though it ultimately fell short of doing so. Nevertheless, the case did not discourage future cruel and unusual punishment challenges and it provided a clear example of the sentencing disparities caused by mandatory minimums.

In *Ewing*, Gary Ewing had been convicted of thirteen prior crimes was sentenced to life in prison under California’s Three Strikes law for stealing three golf clubs valued at roughly $400. The defendant challenged his sentence under the Eighth Amendment protection against cruel and unusual punishment. In a 5-4 decision against Ewing, the Supreme Court joined the California appellate courts in rejecting the Eighth Amendment claim. Justice O’Connor, however, joined a concurrence with Justice Kennedy and Chief Justice Rehnquist, and added that the decision was fashioned specifically for Ewing and California's three strikes law: “In weighing the gravity of Ewing’s offense, we must place in the scales not only his current felony, but also his long history of felony recidivism.” Indeed, Ewing had thirteen prior convictions including grand theft auto, unlawful possession of a firearm, and three counts of robbery, which were amassed over the course of nine years. Ironically, the time period in which all these crimes occurred is still shorter than some mandatory minimum sentences for first time, non-violent, victimless drug crimes. While proponents of mandatory minimum sentencing have used *Ewing v. California* as legal support, even a shallow analysis of the ruling finds that it was specifically tailored for California’s Three Strikes Law and in light of Ewing’s extensive recidivism. If anything, Ewing’s fourteen prior convictions sheds light on the disparity between the lax punishments for his victimizing crimes and the victimless crimes that most often receive harsh mandatory minimum sentences.

More recent judicial developments have paved the way for reform. In *Alleyne v. United States* (2013), the Supreme Court ruled that any facts that increase a mandatory minimum sentence must be given due process, be

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32 Id.
33 Id. at 31-2.
34 Id. at 29. Prior to the Three Strikes conviction, Ewing had been convicted of theft, grand theft auto, petty theft, battery, burglary, possession of drug paraphernalia, appropriating lost property, trespassing, unlawful possession of a firearm, robbery, and three counts of burglary between 1984 and 1993.
brought before a jury, and be found beyond a reasonable doubt.\textsuperscript{36} Alleyne overruled 
\textit{Harris v. United States} (2002),\textsuperscript{37} which stated that only facts that increased the maximum sentence were subject to due process.\textsuperscript{38} Facts related to a crime, such as the presence of a weapon, can no longer be used to enhance the mandatory minimum without a jury having found such facts beyond a reasonable doubt.\textsuperscript{39} This ruling has done the most of any court case to open up elements of mandatory minimum sentences to trial by jury or any analysis—for that matter—beyond the laws on the books. It has also significantly reduced the ability of prosecutors to “stack” the charges brought on a defendant as a means of increasing the mandatory minimum sentence, which will be further explored later in this article. This case was ruled on in June of 2013, which makes it the most recent judicial stride towards reducing the usage, length, and abuse of mandatory minimum sentencing.

\textbf{Failures, Crime Rates, Incarceration, and Government Spending}

The U.S. Sentencing Commission’s 1991 Report to Congress identified six rationales, or objectives, for mandatory minimum sentencing:\textsuperscript{40}

1. Retribution or “just deserts”: Proponents of mandatory minimums argue that longer sentences are deserved and that judges tend to distribute lower-than-appropriate sentences.

2. Deterrence: Mandatory minimum sentences aim to discourage a recipient of the sentence from further involvement in the crime while also deterring potential lawbreakers.

3. Incapacitation: The mandating of longer sentences aims to “incapacitate” the offenders with said sentences in order to protect the public.

4. Elimination of Sentencing Disparity: A mandatory minimum sentence is meant to insure that the disparity in judicial discretion is illuminated in order to establish a fairer sentencing procedure.

\textsuperscript{36} See Selected Supreme Court Cases, \textit{supra} at 5.
\textsuperscript{37} Harris v. United States, 536 U.S. 545 (2002).
\textsuperscript{38} Selected Supreme Court Cases, \textit{supra} at 5.
\textsuperscript{39} Selected Supreme Court Cases, \textit{supra} at 5.
5. Inducement of Cooperation: The threat of a long sentence is intended to encourage offenders to cooperate with authorities in the investigation of other criminal acts in return for shorter sentences.

6. Inducement of Pleas: Prosecutors contend that mandatory minimum sentences can be used as a bargaining chip in order to elicit guilty pleas and save the state the cost of a trial.

The Sentencing Commission’s Report went on to conclude that sentencing guidelines, which are advisory rather than mandatory, ultimately better serve these intended purposes than the actual utilization of mandatory minimums.\(^{41}\)

The primary objectives of mandatory minimum sentencing as stated by the U.S. Sentencing Commission in a Congressional testimony have failed on four of five measurable counts, with one showing evidence of minimal improvement, and the sixth objective, retribution, being entirely subjective. The second stated objective of mandatory minimum sentences is deterrence, or discouraging similar criminal acts in the future. On this count, mandatory minimums have clearly failed to achieve their desired objective. The most recent edition of the Bureau of Justice Statistics’ Drugs and Crimes Facts publication found that the “number of arrests for drug abuse violations has been increasing” since 1982, with more than “four-fifths of drug law violation arrests [being] for possession.”\(^{42}\) More specifically, in 1982 there were roughly 500,000 arrests for simple possession of drugs, whereas in 2007 it had risen to just over 1.5 million.\(^{43}\) For the sale or manufacture of drugs, roughly 160,000 arrests were made in 1982 compared to over 330,000 in 2007.\(^{44}\) While some may attribute rising drug crime statistics to population growth, population growth in the United States since 1980 is 38%\(^{45}\) while the increase in arrests for possession of drugs have increased roughly 300%.\(^{46}\) Further divorcing these statistics from natural growth explanations is the increase in the rate of drug use in the United States. The National Survey on Drug Use and Health found that in 2011, 40% of Americans had

\(^{41}\) Id.


\(^{43}\) Id. at 18.

\(^{44}\) Id.


\(^{46}\) See Dorsey and Middleton, supra note 23, at 18.
used illicit drugs in their lifetime,\textsuperscript{47} up from 31.3% in 1979.\textsuperscript{48} It is quite evident that mandatory minimum sentencing has not achieved its goal of deterring the possession, sale, and use of illegal drugs, since their use has skyrocketed in the last several decades.

The third goal of mandatory minimum sentencing is incapacitation, or preventing the lawbreakers from being a danger to society. This goal has failed as well, as demonstrated by based the previous statistics showing that the public has been exposed to more crimes of possession, sale, and manufacture of drugs. While incapacitation theory seeks to imprison lawbreakers in order to protect society, the penetration of these drugs into prisons has shown that the state cannot even fully protect the lawbreakers themselves. In Florida alone, 2,832 grams of marijuana and 92 grams of cocaine were confiscated from prison inmates in 2009.\textsuperscript{49} At the same time, 1.9% of Florida’s prison population tested positive for drug use, and the number was 3.3% for New York’s prisons.\textsuperscript{50} And in California, the number one cause of violence within prisons is gang-related drug activity.\textsuperscript{51} These statistics betray the inability of mandatory minimum sentencing to protect either the public at large from the occurrence of crimes or even the lawbreakers themselves.

For the fourth rationale of eliminating sentencing disparities, the implicit goal of establishing a fairer sentencing procedure has definitely not been achieved. By doling out similar, extensive sentences for offenders with different contextual facts, mandatory minimums remove the ability of a judge to determine what is or is not fair in a given case. In addition, mandatory minimum sentences for victimless drug crimes are so high that they create a sentencing disparity between them and more violent, victimizing crimes, which was described in the first sentence of this article.\textsuperscript{52} Disparities in mandatory minimum sentences can also arise based on which charges are brought forth by the prosecutor of the case. So these sentencing disparities can certainly still exist; the only difference is that this discretion is in the hands of prosecutors rather than judges.

\textsuperscript{47} Substance Abuse & Mental Health Services Admin., Nat’l Household Survey on Drug Abuse (2011).
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} See Brady-Myerov, supra note 1.
On the Misfortune of Mandatory Minimums

The fifth goal, the inducement of cooperation from offenders, may be assisted by mandatory minimums, but this benefit is in no way exclusive to these policies. The strictly advisory sentencing guidelines established by the U.S. Sentencing Commission also permit for the reduction of a sentence if substantial assistance is provided to the authorities by an offender. So these guidelines also have the benefit of encouraging offenders to work with government authorities. Thus, the achievement of inducement of cooperation could also be accomplished without the costs of mandatory minimums.

For the last objective of inducement of pleas, mandatory minimum sentencing has also failed. In a 2011 Report to Congress, the U.S. Sentencing Commission revealed that 94.1% of federal drug offenders faced with a mandatory minimum sentence pled guilty while 97.5% of those not facing a mandatory minimum sentence also pled guilty. This provides evidence for the argument that mandatory minimums encourage people to go to trial, which wastes the time and resources of the state prosecution. Considering that mandatory minimums are clearly unsuccessful on four of five measurable counts, the only logical conclusion is that these policies have absolutely failed to achieve their intended result and have instead deprived millions of Americans of their liberty through extensive incarceration.

An examination of the effects of mandatory minimums on incarceration and government spending levels in the United States provides abundant evidence of their inefficiency and counter-productivity. Since mandatory minimum legislation passed in 1986, the federal prison population has ballooned from 24,000 inmates to well over 218,000, which is a 908% increase. Yet despite the fact that arrests for drug production, sale, and possession have increased exponentially, the U.S. remains the world’s leading consumer of narcotics. This relationship provides a strong indication that mandatory minimums have not met their stated goals of reducing the prevalence of crime or the abuse of drugs. Instead, these policies have inflated the federal prison population and shifted the costs of maintaining these prisons and their inmates onto the taxpayer.

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53 See Report to Congress (2011), supra note 5.
54 Id.
55 Id.
56 Id.
Analyzing the statistics of mandatory minimum sentencing with respect to the prison system and spending reveals the failure of the policy. In 1982, taxpayers spent $9 billion on state prison systems. By 2009, that number had increased exponentially to over $60 billion. In this same period, criminal arrests had soared, mandatory minimums were doled out in record numbers, and all the while drug usage actually increased. From a strictly fiscal perspective, mandatory minimum sentencing has created an environment that is severely damaging for society. It has imposed severe economic costs on taxpayers and bloated our federal prison population while offering few corresponding benefits to public health or safety.

But the costs do not stop there. In 1980, the U.S. spent $540 million on the federal prison system. In 2013, $6.9 billion was spent on federal prisons – a full 12 times the amount spent in 1980. To put this into perspective, that $6.9 billion comprised 26% of the Department of Justice’s total 2013 budget. A policy with such substantial costs and few tangible results is siphoning off over a fourth of the Department of Justice’s available funds, preventing those funds from being used in crucial areas such as police pay, force size, and reducing violent crime. This begs the question of whether or not upholding a failed policy is worth sacrificing the number and quality of those on the front lines in the fight against crime. The cost of mandatory minimums and the prison-industrial complex as a whole creates a powerful connection between taxpayers, lawmakers, and the failures of mandatory minimum sentencing.

In another comparison that highlights the misplaced priorities of the U.S. Congress, in the last twenty years the rate at which states spent money on prison systems has increased by 127%, which is a full six times more than national education spending. According to research from the Department

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59 The Nat'l of State Budget Officers, State Expenditure Report 52 (2012).
60 Id.
61 See Dorsey and Middleton, supra note 23, at 18.
63 See Nat'l Household Survey on Drug Abuse (2011), supra note 27.
64 Families Against Mandatory Minimums, Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums (2013).
65 Id.
of Justice and the National Education Foundation, many states have been found to spend four times as much per capita on inmates than students.\textsuperscript{68} The rate at which the United States incarcerates its citizens while denying its students proper funding for their education is neither sustainable nor justifiable. In terms of our national priorities, there needs to be a fundamental reevaluation of imprisonment policies and the practice of mandatory minimum sentencing. Ballooning costs and prison populations are far too important to be ignored, especially when they are consequences of a policy that is depriving Americans of their freedom by placing them behind bars for significant periods of time. The moral and fiscal price tag for these policies is unacceptable, given the failure of mandatory minimums to satisfy their stated objectives.

While these failures are damning enough, they must be further compared with their effect on the U.S. prison system itself. As mentioned earlier in this article, arrests for drug possession have skyrocketed from roughly 500,000 in 1982 to roughly 1.5 million in 2007 alone, a 300\% increase.\textsuperscript{69} Meanwhile, arrests for the sales and manufacture of drugs have also risen throughout the years, doubling from 1982 (~160,000 arrests) to 2007 (330,000).\textsuperscript{70} The incredibly high number of arrests being made on a daily basis are translating into an overflow in the population of our prison system. The federal prison system operates at 136\% its capacity, with medium security prisons 44\% over capacity and high security prisons 54\% over capacity.\textsuperscript{71} It is reckless to threaten the safety of U.S. prison guards, as well as the public at large, by packing prisons beyond the numbers they were meant to hold and straying from their original designs. Not only could this overflow make prison violence more likely and more difficult to control, but it may also oppress the prisoners themselves by forcing them to be held in tight spaces and reducing their access to prison facilities. It is simply irresponsible to allow mandatory minimum sentencing to fail so miserably.

\textsuperscript{68} Elizabeth Prann, \textit{States Spend Almost Four Times More Per Capita on Incarcerating Prisoners Than Educating Students, Studies Say}, Fox News, Mar. 14, 2011.

\textsuperscript{69} See One in 100, \textit{supra} note 6.

\textsuperscript{70} \textit{Id}.

in reducing the prevalence of drug-related crime,\textsuperscript{72} growing prison spending to such great an extent,\textsuperscript{73} and filling prisons so dangerously beyond their capacity.\textsuperscript{74}

Expanding the scope through which we examine mandatory minimum sentencing will reveal the extent of the damage it has caused. On an international scale, U.S. citizens convicted with a mandatory minimum sentence comprise 73.6\% of all global mandatory convictions.\textsuperscript{75} This is not only indicative of the massive extent to which the United States puts its citizens behind bars but also of the far smaller scale which countries around the world utilize mandatory sentences for convictions. The use of mandatory minimum sentences are limited to just a handful of countries, with the majority of them having mandatory sentences only for violent crimes. In an August 2013 speech, current Attorney General Eric Holder pointed out that the United States, which has just 5\% of the world’s population, incarcerates almost a quarter of the world’s prisoners.\textsuperscript{76} This incredible disparity exposes the extent of the United States’ addiction to incarceration as a criminal justice strategy.

\textbf{Balance of Power and Due Process}

Mandatory minimum sentencing upsets the balance of power by eliminating one of the judiciary’s crucial checks on the executive branch and compromising their role as the final arbiters of the law. By legislating a mandatory minimum sentence for a given crime, the legislative branch is in effect taking away a judge’s ability to interpret the law, assess the evidence, and act as a trier of facts. Congress has—in effect—limited a judge’s ability and duty to actually judge. As previously mentioned, 32\% of those convicted with mandatory minimum sentences had little to no prior criminal record.\textsuperscript{77} A mandatory minimum sentence is almost always comprised of jail time, which is often upwards of 5 years. For these sentences to be handed down to first time offenders or those with little criminal history is significant in and of itself. But it is even more disturbing when judges are directly limited in their ability to factor in mitigating circumstances for drug offenses, such

\textsuperscript{72} See One in 100, supra note 6.
\textsuperscript{73} See State Expenditure Report, supra note 57.
\textsuperscript{74} See Samuels, supra note 69.
\textsuperscript{75} See Report to Congress (2011), supra note 5.
\textsuperscript{77} See Report to Congress (2011), supra note 5.
as the level of involvement in the crime, prior criminal history or the lack thereof, and the violence of the crime.

When sentencing is dependent not on a judge’s understanding of the facts of a case but rather on the type and number of charges being brought by the prosecuting attorney, the very basis for our country’s criminal justice system is compromised. The U.S. Sentencing Commission’s 2012 Federal Sentencing Statistics disclosed that 90% of all federal offenders were given a sentence of incarceration. That same year, 96.5% of all federal drug offenders were also put behind bars. Our justice system is predicated on the notion that Americans have the right to a fair trial. How American or fair is that trial when the accused’s fate lies in the hands of Washington bureaucrats and a list of years in jail? It isn’t, but it can be once again. The United States must heed the calls of its judges, and cut off Congress from the expensive political points they receive from passing legislation that appears “tough on crime” but spells disaster for our country’s spending, prison systems, judges, crime fighters, and citizens.

Mandatory minimum sentencing not only takes the power of sentencing away from judges of, but it also transfers this power in large part to prosecutors. Mandatory minimums and substantial assistance statutes, which offer reductions in sentences if defendants provide “substantial assistance” to prosecutors with respect to criminal cohorts, have greatly expanded prosecutorial powers. Since prosecutors are part of the executive branch, this represents a major shift of the balance away from the judicial branch to the executive branch. Worse, these snitch agreements, under substantial assistance statutes, differ from plea bargains and therefore lack legal protections such as due process, representation by counsel, review by a judge, formalization in writing, and legal enforcement by the offender. In a legislatively legalized skirting of the premises of the justice system, prosecutors are able to effectively strong-arm defendants into unprotected

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78 Figure D, in 2012 Sourcebook of Federal Sentencing Statistics (U.S. Sentencing Comm’n 2012).
80 U.S. Const. amend. VI.
82 Id.
snitch agreements. With mandatory minimum sentencing statutes and substantial assistance statutes playing hand in hand against judges and defendants, these policies entail an abuse of the power not only by the prosecutors who engage in them, but also by the members of the United States Congress. So substantive due process is another victim of mandatory minimum sentencing statutes. And this is not even the strongest tool in prosecutors’ underhanded arsenal.

Prosecutors and federal agents are in charge of determining how to stack offenses in order to ensure incarceration, maximize jail time, or threaten the defendant. Whereas 97% of all federal convictions are held without a trial, the incentives already exist for prosecutors to “win” by deriving maximum jail time without a trial by jury in order to spare the government the burden of proving guilt beyond a reasonable doubt. All that is required is probable cause and an appearance for the grand jury indictment. Little attention is paid, however, to the fact that housing a federal inmate for a year costs an average $31,000. Skewed incentives, disproportionality powerful “stacking” procedures, and little to no judicial authority form a dangerous cocktail that pushes incarceration and pressures no trial by jury. On a very basic level, the concept of mandatory minimum sentencing with no regard for mitigating circumstances is unfair, to say the least. But further examination reveals that the tactic of “stacking” by prosecuting attorneys has turned the right to trial by jury on its head over the course of the last two decades. One of the primary reasons for the creation of mandatory minimums was to establish an across-the-board guideline for drug crime sentencing. This was done to create a sense of fairness in sentencing, since judges were once able to distribute anywhere from 5 years to 1 month for the same crime. Mandatory minimums, however, have in large part resulted in the prosecutorial methods of “stacking,” which take away from the defendant the chance to have their day in court. When you are facing 25 years if you take it to trial or 5 years with a plea, innocence loses its value.

Not all is lost in the fight for the Sixth Amendment against mandatory minimums; in fact much has been gained in recent years. The Supreme Court

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85 Id.
86 See Will, supra note 79.
87 See Will, supra note 79.
88 Jonathan Caulkins et al., Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money? (Rand Drug Policy Research Center, 1997).
89 Report to Congress (2011), supra note 5.
ruled in *Harris v. United States* that neither the Sixth Amendment nor the prior rulings of the Court limited Congress’ authority to legislate mandatory minimum sentences or the courts’ authority to implement them.\(^90\) The Court did, however, establish “procedural safeguards” for when Congress applied its authority.\(^91\) These safeguards were mostly related to how different circumstances of a crime could increase the mandatory minimum being imposed. For example, if a gun was also found with drugs in someone’s possession, the mandatory minimum would be raised. In *Harris*, the Court distinguished between the circumstances that raised the mandatory minimum and those that raised the statutory maximum, establishing that the former required it to be proved to a jury beyond a reasonable doubt. While this did not reel back mandatory minimums in and of themselves, it reigned in the use “stacking” by forcing prosecutors to be able to prove stacked charges before a jury. As previously mentioned in this article, *Alleyne v. United States* ruling in 2013 established that any fact meant to increase the mandatory minimum sentence must be proven beyond a reasonable doubt in front of a jury. This most recent case has also done wonders to reign in both the use of “stacking” and the abuse of mandatory minimum sentences that result in disproportionality long sentences.\(^92\) While the Supreme Court has made slow strides in monitoring and controlling the use of mandatory minimums and related judicial legislation, decisions such as *Alleyne* have made important progress for those on the receiving end of rough and indiscriminate mandatory minimum sentences.

**Public Opinion and Social Consequences**

A government of the people, by the people, and for the people should respond to the people’s calls for reformation of current sentencing procedures. Public opinion has shifted heavily against mandatory minimum sentencing laws after 27 years, and lawmakers must now respond to public calls for reform. In 2012, the Pew Center on the States published a series of polls that found that 84% of Americans believe “some of the money that we are spending on locking up low-risk, non-violent inmates should be shifted to strengthening community corrections programs like probation and

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\(^{90}\) Harris v. United States, 536 U.S. 545, 568 (2002).
\(^{91}\) Doyle, supra note 10, at 34.
\(^{92}\) Alleyne v. United States, 133 S. Ct. 2151 (2013).
Considering the millions of such prisoners in the United States prison system and the billions of dollars we spend on these prisons, this shift in funds has the potential to yield significant public policy results. The same Pew research went on to conclude that 88% of Americans agreed that “we have too many low-risk, nonviolent offenders in prison and we need alternatives to incarceration that cost less and save our expensive prison space for violent and career criminals.” With the vast majority of Americans agreeing on these basic ideas that our incarceration policies aren’t working and cost too much, the responsibility for addressing these concerns falls on the elected representatives of the United States Congress. With the respect to specific policies, a 2013 Huffington Post poll revealed that only 32% of Americans still believe there should be mandatory minimums for a given crime while 51% believe Judges should be given more leeway in determining sentences. With support having fallen for mandatory minimums specifically, the continued support of these laws from our elected representatives is no longer popularly mandated. In fact, the corresponding increase in support for the discretion of judges reflects the public’s demand for reforms of sentencing policies.

Mandatory minimum sentencing affects minorities to a much higher degree, which has led to vast racial disparity in sentencing policies. The most recent Report to Congress on mandatory minimums from the U.S. Sentencing Commission found that Hispanic offenders, while comprising only 16.9% of the population of the United States, accounted for 38.3% of those sentenced with mandatory minimums. For African Americans, they comprised 13.1% of the population but 31.5% of mandatory minimum offenders. Caucasians, however, were 63% of the population but only 27.4% of mandatory minimum offenders. This clearly shows that mandatory minimums are utilized much more frequently for minorities, particularly African Americans and Hispanics. The hugely disproportional

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94 Id. at 2.
95 Emily Swanson, Drug Sentencing Poll Finds Most Oppose Mandatory Minimums, Huffington Post, Aug. 27, 2013 at <http://www.huffingtonpost.com/2013/08/27/drug-sentencing-poll_n_3818866.html>
96 See Population Estimates, supra note 8.
97 See Report to Congress (2011), supra note 5.
99 See Report to Congress (2011), supra note 5.
100 See Population Estimates, supra note 8.
101 See Report to Congress (2011), supra note 5.
sentencing of minorities with mandatory minimums is also relevant for the equal protection clause of the Fourteenth Amendment. Having formed the basis of many landmark civil rights victories for minorities, the equal protection clause denies the ability of the states to deprive any person of equal protection under the law. It should be noted that Bolling v. Sharpe (1954) interpreted this restriction to also apply to the federal government through the Fifth Amendment. The racial disparity in sentencing shows that equal protection under the law is not being awarded to Hispanic and African Americans. These disparities prove mandatory minimums are not only constitutionally unsound, but fundamentally wrong in their premises and worse in their implementation.

Racially disproportional sentencing under mandatory minimums is also indicative of the structural flaws in our sentencing policies. Prior to 2010, the mandatory minimum sentencing guidelines required possession of shockingly greater quantities of powdered cocaine to yield the same sentence as that of crack cocaine—to the tune of 100:1. While more than two-thirds of crack users in the United States are of other races, African Americans in 2002 alone constituted more than 80% of those sentenced under crack cocaine mandatory minimums. This incredible disparity was left active for 24 years since the Anti-Drug Abuse Act of 1986 was implemented, until the passage of the Fair Sentencing Act of 2010, which reduced the 100:1 weight ratio to 18:1. While rectifying the weight ratio to some degree, the Fair Sentencing Act was not retroactive. As a result, in Dorsey v. United States (2012) the Supreme Court ruled that federal crack offenders who had committed their crime before the Fair Sentencing Act was signed into law on August 3, 2010 could be held to the 18:1 standard, but only if they were sentenced after law’s enactment. While recent developments have served to solve one underlying racial issues, crack cocaine sentencing disparities were only a symptom of the larger problem of mandatory minimums. The overarching racial disparities in mandatory minimums

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102 U.S. CONST. amend. XIV, § 1.
103 Id.
108 Id.
sentencing will remain, as will other issues discussed throughout this article, until mandatory minimums are fully reformed or eradicated.

Alternate Solutions

The adaptability of the United States—our ability to learn from past failures and pursue new and innovative approaches to issues—is a major part of what has contributed to our rise to global prominence. As with most things that make their way through the halls of Congress, mandatory minimums may have been passed with good intentions but the laws themselves have proven severely flawed. But there are many tested and legislatively practical solutions that merit discussion.

One of these solutions is the expansion of the use of safety valve statutes, or more specifically, the passage of the Justice Safety Valve Act of 2013.110 The safety valve statute currently states that a judge, if he or she so chooses, may deliver a sentence below the mandatory minimum if the offender did not possess a gun, did not have a prior criminal record, or played no supervisory role in the sale of drugs.111 Currently, however, safety valve statutes only apply to a small niche of drug crimes and nowhere near address the issue as a whole. Bipartisan legislation, co-sponsored by U.S. Senators Rand Paul (R-KY) and Patrick Leahy (D-VT), has proposed to expand the scope of the safety valve so that judges essentially have the ability to deliver sentences below the mandatory minimum sentence in the interest of justice.112 Senator Paul joined Democrat and Republican colleagues alike to offer a statement on the issue: “Our country’s mandatory minimum laws reflect a Washington-knows-best, one-size-fits-all approach, which undermines the Constitutional Separation of Powers, and violates our bedrock principle that people should be treated as individuals.”113 Unlike most issues in the U.S. capital, there is consensus across the aisle that mandatory minimum sentencing statutes are not just failing, but hurting the nation as a whole. Senators Paul and Leahy, the Senate Judiciary Committee Chairman, are in the positions to pass these reforms and return a level of balance to the balance of powers, so that judges can fulfill their role as arbiters of justice.

111 Leahy, Paul Team Up on Sentencing Bill, Families Against Mandatory Minimums, Sept. 28, 2013
112 Id.
An innovative and state-tested solution is the implementation and usage of drug courts. Rather than subject a person involved with drugs to an explicitly non-rehabilitory term of incarceration, legally sanctioned drug courts offer an alternative of treatment for the accused.\textsuperscript{114} For a minimum of one year, those sentenced in drug courts must undergo frequent drug tests, accept the necessary treatment for becoming and remaining sober, regularly appear before a judge to monitor progress, and be held accountable for either succeeding or failing the program.\textsuperscript{115} The demarcation between drug courts and rehabilitation centers is that drug courts are sanctioned by many states and even act as legal bodies in others.\textsuperscript{116} Moreover, these drug courts have already produced impressive results where they have been implemented. Drug courts save between $3,000 and $13,000 per client in prison costs, reduced recidivism and the ensuing trials, and reduced victimization.\textsuperscript{117} Across the country, 75\% of drug court clients remain arrest and recidivism-free for two years or more.\textsuperscript{118} Not only have they proven effective for clients and authorities, but they are good for the taxpayers as well. The National Association of Drug Court Professionals found that for every $1.00 invested in drug courts, $3.36 are saved in criminal justice costs.\textsuperscript{119} Morally, legally, and statistically, drug courts are leagues beyond mandatory minimum sentencing in offering tangible results for decreasing crime and drug usage while preserving the sanctity of the Constitution and the U.S. judicial system.

It should also be noted that treatment as a whole has been extensively studied and empirically found to be more cost-effective and successful for reducing drug use and drug-related crime than incarceration. In 1997 alone, the RAND Drug Policy Research Center, under the order and funding of the Clinton Administration, found that, in terms of kilograms of cocaine consumption prevented per million dollars, ‘treatment’ for heavy users was a full three times more effective than conventional law enforcement methods such as imprisonment and fines.\textsuperscript{120} Per million dollars spent, treatment was found to prevent upwards of 100 kilograms of cocaine consumption, in comparison with 30 kilograms prevented with conventional

\textsuperscript{114} Nat'l Ass'n of Drug Ct. Professionals, What Are Drug Courts? (2014).
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Nat'l Ass'n of Drug Ct. Professionals, Facts and Figures (2014).
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Caulkins, supra note 85.
law enforcement measures. Furthermore, treatment was found to prevent 7.5 times more selling of cocaine than longer sentences for drug dealers, with 110 kilograms prevented versus 15 kilograms. While opponents of conventional law enforcement measures for drug-related crimes often cite the RAND Drug Policy Research Center’s research, the political class of the United States has largely overlooked it. American citizens deserve policies aimed at providing tangible results for our society, not policies that try to look “tough on crime” for political points. We as a nation have access to an incredible array of statistics, historical trends, and empirical evidence, which should allow us to decide clearly what does and does not work for our country. In the age of information, we must be brave enough admit our mistakes and forego failed policies, so we can adapt to an ever changing world and an ever growing nation.

Conclusion

The elimination of mandatory minimum sentencing statutes for drug-related crime is a crucial next step for the United States in reducing the burden the statutes have placed on our prisons, our populace, and our judicial system. Under mandatory minimum sentencing, drug usage, drug-related crime, prison capacity, and government spending have all spiraled out of control. At the same time, the policies have stifled substantive due process and upset the balance of power by taking sentencing discretion away from judges and offering it to prosecutors. Other approaches to solving the issues that mandatory minimums had sought to tackle have been empirically proven to be more successful, while also respecting the integrity of the American justice system.

After 28 years, mandatory minimum sentencing statutes for drug-related crimes no longer pass the strict scrutiny test. Ever soaring costs for an ever expanding failure do not represent a compelling governmental interest. Sweeping laws passed by Washington bureaucrats that mandate incarceration without judicial discretion are not narrowly tailored to achieve a goal. Imprisoning Americans by the hundreds of thousands, depriving them of life and liberty, for nonviolent and often victimless crimes is not, by any accounts, the least restrictive means of achieving an objective. Under all three tests of the highest standard of judicial review in the United States, mandatory minimum sentencing statutes not only fail strict scrutiny, but

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121 Caulkins, supra note 85.
122 Caulkins, supra note 85.
offers a textbook example of government infringing on fundamental constitutional rights, weakening separation of powers, and squandering national funds. They must be struck down, and they must be made history.
Adoption and Tribal Law: Can the Duality be Reconciled?

Zoe Goldstein

Introduction

The Supreme Court of the United States hears dozens of cases every year, each of a vastly different nature, yet many of these cases specifically address and clarify the scope of the federal government. The Spring 2013 term proved no exception. The Roberts Court heard arguments over the Defense of Marriage Act, national security, the IRS, and many other important federal issues. However, one case that garnered a startling amount of publicity, Adoptive Couple v. Baby Girl, concerned adoption and Indian law, an interesting mix of legal policy that yielded a nationwide emotional upheaval.

As National Indian Child Welfare Association (NICWA) director Terry Cross noted, “State Attorneys General, current and former members of Congress, national adoption and children's advocacy groups, military and veterans' rights organizations, psychologists' associations, and law professors have coalesced… to submit briefs in support.”

Before the Supreme Court debate even began, many attorneys, including Vanderbilt law professor Amy Howe, recognized that “this case [was] unlikely to conclude with a happy ending,” making the impending decision all the more significant. Now that the Court has made its decision, the importance and implications of the case are all the more evident.

The Adoptive Couple case originated in a South Carolina family court, and involved a four-year old girl named Veronica; her adoptive parents, the Capobiancos; and her biological father, Dusten Brown who was a registered member of the Cherokee Nation. Veronica’s biological mother, Christina Maldonado, put Veronica up for adoption without consulting Brown, who had relinquished his parental rights in a text message to Maldonado. The Capobiancos, a non-Indian couple from South Carolina, began adoption proceedings in 2009 and obtained custody of Veronica for two years. Upon hearing of these proceedings, Brown halted the process by invoking the 1978 Indian Child Welfare Act (ICWA) to gain custody of Veronica. Under the

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2 Amy Howe, Argument Preview: Court to Take on Law and Emotion in Indian Adoption Case, SCOTUSBLOG (Apr. 13, 2013).
The premises that Brown relinquished his parental rights prior to Veronica’s adoption, the Supreme Court issued a ruling to return Veronica to her adoptive parents.³

One issue with this ruling, however, is the applicability of the ICWA, which the Supreme Court essentially ignored in its majority opinion.⁴ Congress created the ICWA to support the best interests of Native American children by keeping them with their birth families. However, according to the Supreme Court, it could not be invoked in the case of Adoptive Couple v. Baby Girl because Maldonado chose non-Indian parents to adopt Veronica. Furthermore, while Maldonado was looking out for her child’s best interests, Brown’s use of the ICWA as a “trump card” to override her decision and Veronica’s best interests overstepped the boundaries and purposes of the Act.⁵

However, the methodological issues the Court raised are detrimental to the ICWA and its preservation. As Justice Clarence Thomas pointed out in his concurring opinion and Justice Sonia Sotomayor outlined in her dissent, the federal government, in passing the ICWA, interfered unconstitutionally in the affairs of the state.⁶ The decision of the Supreme Court on the Adoptive Couple v. Baby Girl case proves that significant amendments to the ICWA will be necessary, in the expectation that Indian parents will no longer be able to override the child’s best interests through use of the Act. Furthermore, the Supreme Court decision reveals serious flaws in the constitutionality of the ICWA, proving that it ignores the sovereignty of the Tenth Amendment and gives too much power to the federal government in the realm of Indian law. The argument will proceed in three parts, first detailing a background to the case and its issues, then outlining the importance and implications of the argument, and finally offering a solution to amend the ICWA so it includes a clause about the “best interests of the child.”⁷

**American Adoptive Law and the ICWA**

The Adoptive Couple case is unique in that it addresses two distinct conflicts of sovereignty, the first being the clash between federal and state government jurisdiction over adoption. The second addresses the dispute between state and tribal courts in cases that relate to both adoption and tribal

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⁶ Id. at 21.
⁷ Id. at 16.
law, like baby Veronica’s. After examining these two issues separately, it is possible to evaluate how the Supreme Court came to its decision in Adoptive Couple.

Adoption law in the United States is a convoluted issue, and, as a component of family law, is a matter almost entirely deferred to the states. By allowing state courts to have almost full discretion on family law issues, judges can make unique decisions that reflect the differing family situations within their respective states.8 The federal government should not infringe upon a citizen’s personal matters through the imposition of uniform standards (e.g. the ICWA) that do not take varied aspects of the state’s demographics into account.

Although adoption laws differ by state, the overall process of adoption is fundamentally the same nationwide. United States adoption law is not recognized in the Constitution, so it is entirely regulated by statutes. Historically, the law only permitted the option to adopt for couples that could not have children of their own. Over time, adoption has developed into a full-fledged legal institution that has expanded to “help place children into improved environments,” and take the “best interests of the child” into account.9 Individual states have the jurisdiction to decide the main legal requirements for adoption, though “virtually all statutes make parental consent to adoption an indispensable condition.”10 This requirement is one of the most significant issues in baby Veronica’s case. Although it is generally accepted that states have more power to exercise control in the area of adoption law than the federal government, the introduction of the ICWA complicates the issue significantly.

The ICWA materialized at a time in American legal history in which Indian tribes began to fight for their autonomy and civil rights despite an ever-expanding federal government. First, in 1968, the Indian Civil Rights Act went into effect, ensuring that the states could no longer assume civil and criminal jurisdiction over Indian territories.11 Consequently, Indian leaders began to fight for autonomy from the national government as well. Ten years later, Congress passed the ICWA in response to public and private

10 Id.
11 Nancy D. Stancel, Researching Am. Indian Law, (UMKC School of Law 2000).
adoption agencies removing Indian children from their homes. The agencies placed Indian children into the care of non-Indian foster and adoptive parents without any consideration for the child’s heritage. At the time, these measures were appropriate due to the necessity of preserving the slowly diminishing Native American culture in the United States. The Association of American Indian Affairs conducted surveys in the 1970s, which “indicated that between 25 to 35 percent of all native children were separated from their homes and living either in foster care, adoptive care, or institutions at the time.”

In an effort to prevent this from happening, the ICWA allotted special political status to Indian children as “members of sovereign tribal governments.”

Since the passage of the ICWA, Indian leaders have held Congress responsible for the welfare and protection of Indian children in order to preserve tribal cultures and resources. Interest groups have formed by activists of all backgrounds and political affiliations to raise awareness about the issues surrounding the ICWA and its application. The National Indian Child Welfare Association (NICWA) is one such group that advocates for strict usage of the ICWA today, and works to enhance tribal-state relations. Despite its efforts, a duality still exists between the sovereignty of the states and the desire for autonomy in the Indian territories.

The conflict between state and tribal courts with regards to their respective sovereignties is heavily disputed. Currently, state courts exercise concurrent adjudicative jurisdiction over cases that “could properly be held in a tribal court, and, often without discussion, applying state law to the dispute.” This procedure allows two or more courts from different systems – in this case, state and tribal courts – to exercise simultaneous authority over a given case. Indian tribes constantly fight for their right to legal sovereignty in the territories that the federal government lawfully grants them. In this sense, the ICWA was a huge victory because it diminished the federal government’s power to get involved in matters of Indian adoption. However, the application of the act in United States federal and state governments alike is not as easy as the ICWA claims it to be. Often, tribal law is “not necessarily codified or easily accessible,” and is still often

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14 Id.
perpetuated by word-of-mouth through tribal elders. This concept is foreign to state court judges and proves that there are seemingly irreconcilable differences between tribal and state law. In every area of legal jurisdiction, from criminal law to corporate law, the battle between state and tribal courts for hegemony continues.

**Adoptive Couple v. Baby Girl**

Although adoption law is an issue left to the states, adding Indian law to the equation necessitates a difficult duality. A brief summary of the logistics of the case of *Adoptive Couple* is essential to see this conflict between Indian law, federal law, and adoption law. When Maldonado found out she was pregnant, she did not live with Brown, nor did he support her financially. Brown sent her a text message relinquishing his parental rights to the unborn baby, though he later testified that he was only relinquishing his rights to Maldonado. Regardless, Brown was a registered member of the Cherokee Nation, and, although Maldonado tried to verify his status, she spelled his name wrong and misrepresented his birthdate in her request. As a result, the retrieval of Brown’s status was delayed. Meanwhile, Maldonado listed Veronica’s ethnicity as “Hispanic” on her birth certificate and put her up for adoption.

Matt and Melanie Capobianco began proceedings with the state of South Carolina to adopt Veronica in 2009. Brown stopped these proceedings when he notified the Cherokee Nation and verified his status as a member. The Cherokee Nation filed a notice of intervention, stating that Veronica was considered an “Indian child” under the ICWA, which prompted Brown to relinquish his consent to the adoption. The South Carolina Supreme Court ruled in favor of Brown, stating that he was a “parent” under the ICWA due to paternity status, and that he had pursued custody as soon as he learned about Veronica’s adoption. The court claimed that the Capobiancos did not follow routine directives under the ICWA to obtain Brown’s consent before beginning the adoption proceedings.

Following the decision of the South Carolina Supreme Court, the Capobiancos appealed to the Supreme Court, where the case was granted certiorari and heard in April 2013. In a split decision, the majority decided in favor of *Adoptive Couple*, which was then reversed and remanded to the

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16 Id.
18 Id. at 6.
South Carolina Supreme Court. Writing for the majority, Justice Alito stated, “A non-custodial parent cannot invoke the ICWA to block an adoption voluntarily and lawfully initiated by a non-Indian parent.”\(^\text{19}\) The Court asserted that the ICWA’s preference for placing an Indian child with family, i.e. members of the child’s tribe, or other Indian families did not apply in this case, since the Capobiancos were the first to come forward to adopt Veronica. In fact, the Capobiancos came forward to adopt Veronica even before her own extended family members did. As stated in the majority opinion, the Court feared that agreeing with the lower court’s decision would create a precedent in which noncustodial Indian parents could use the ICWA as a “trump card” to “override the mother’s decision and the best interests of the child.”\(^\text{20}\)

An interesting facet of the majority’s opinion, which Justice Thomas highlighted in his concurrence, was that it relied heavily on constitutional avoidance.\(^\text{21}\) The Court wisely implemented this principle in order to exercise judicial restraint, so that it did not overstep the bounds of the powers it was delegated: “Judicial restraint […] may validate the Court's use of the avoidance canon. The early Congresses' temporal proximity to the drafting of the Constitution may similarly justify some reliance on early congressional decisions.”\(^\text{22}\) In exercising judicial restraint, the Court recognizes that to maintain order it cannot upset the balance when it absorbs powers that were vested in Congress, i.e. “legislating from the bench.” Thus, in Adoptive Couple, the Court avoided overturning the ICWA because it would have overstepped the bounds of its powers as enumerated in the Constitution thereby diminishing the powers of Congress and unsettling the separation of powers.

The concurring and dissenting opinions of the Supreme Court outline many of the issues surrounding the importance and implications of Adoptive Couple particularly as it relates to the Tenth Amendment. For example, in his concurring opinion, Justice Thomas claimed that since “the Constitution does not grant Congress power to override state law whenever that law happens to be applied to Indians,” application of the ICWA in this case would be unconstitutional.\(^\text{23}\) Since family law is almost entirely reserved to the states, it appears that, according to the majority opinion, Congress

\(^{19}\) Id. at 14.
\(^{20}\) Id. at 16.
\(^{21}\) Adoptive Couple, 570 U.S. (Thomas, C., concurring).
\(^{23}\) Id. at 32.
overstepped its constitutional authority in passing the ICWA in the first place. Thomas pointed out that there are issues with constitutionality, but took an avoidance approach in order to evade amendments or revocation of the statute.

In her dissenting opinion, Justice Sotomayor expressed concern that the majority opinion distorted the ICWA statute and did not consider the child’s best interests or Congress’s intent in passing the law. She worried that the case could cause constitutional problems with the ICWA in the future on the basis of Tenth Amendment rights:

The majority’s treatment of this issue, in the end, does no more than create a lingering mood of disapprobation of the criteria for membership adopted by the Cherokee Nation that, in turn, make Baby Girl an “Indian child” under the statute. Its hints at lurking constitutional problems are, by its own account, irrelevant to its statutory analysis, and accordingly need not detain us any longer.24

Both Sotomayor’s and Thomas’s remarks suggest the potential shortcomings of the majority’s decision in Adoptive Couple regarding the constitutionality of the ICWA and the utility of the Tenth Amendment.

The Implications of Adoptive Couple

Many modern legal scholars consider the Tenth Amendment, an important outline for federal-state relations, to be nothing more than a formality, as it has narrowed in relevance significantly over the past century. Despite this, law professor Kathryn Abrams claims, “Reports of the death of the Tenth Amendment have been greatly exaggerated. Though the doctrine of ‘state sovereignty’ […] the return of the Amendment to its previous status as a ‘truism’ is no more inevitable than it would be wise.”25

The Tenth Amendment is applicable today for a variety of reasons. First, in Federalist 46, James Madison claimed, “The powers proposed to be lodged in the federal government are as little formidable to those reserved to the individual States, as they are indispensably necessary to accomplish the purposes of the Union.”26

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24 Adoptive Couple, 570 U.S. (Sotomayor, S., dissenting).
delegated. Many people to this day share Madison’s same fear, as the government encroaches into the spheres of healthcare, infrastructure, family law, and tribal law. A certain degree of freedom must be granted to the states in order for them to govern their own territories and to prevent oppression, just as Madison warned.

The federal government, which has not been expressly given jurisdiction over family law or tribal law, may have violated the Indian Commerce Clause (ICC) when passing the act in 1978, overstepping Congress’s constitutional boundaries. The ICC states, “The Congress shall have power to […] regulate Commerce […] with the Indian Tribes,” and, as Justice Thomas noted in his concurring opinion, commerce at the time referred to “selling, buying, and bartering, as well as transporting for these purposes.”27 Congress cited the ICC as proof of its constitutional powers in Indian affairs when it passed the ICWA, but do children count as commerce? Does Congress have the constitutional authority to regulate tribal adoption law simply because it is given powers of “commerce”? “The term ‘commerce’ did not include economic activity such as ‘manufacturing and agriculture,’” Justice Thomas claimed, “let alone noneconomic activity such as adoption of children.”28 Due to both the tenets of the Tenth Amendment and the inapplicability of the Indian Commerce Clause, there are fundamental constitutionality issues with the ICWA.

In summary, the implications of Adoptive Couple are far-reaching and have yet to be fully realized. There is overwhelming evidence that the ICWA is unconstitutional based on issues related to the Tenth Amendment, and that Congress overstepped its authority in passing the Act. However, if the Court had nullified the entire act on a constitutional basis it would have also overstepped its power. This leads to a necessary compromise, which includes leaving the ICWA intact while amending it to be elastic and applicable to different kinds of cases. Elasticity and greater applicability permits a judge to properly consider a child’s best interests when deciding when and how to apply the ICWA, rather than solely focusing on the two opposing, and often irreconcilable, sides of the argument.

**Proposed Solution**

In principle, the ICWA is integral to ensuring the sovereignty and protection of Native American children in the United States, but as Adoptive

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27 Adoptive Couple, 570 U.S. (Thomas, C., concurring).
28 Id.
Adoption and Tribal Law: Can the Duality be Reconciled?

Couple has shown, constitutional issues will prevent its legitimate use in the future. One solution to this problem is to revoke the ICWA as a federal law altogether, since tribal affairs and adoption law should technically be a power solely granted to the states, according to the Tenth Amendment and the Indian Commerce Clause. Despite the ICWA’s inapplicability in many circumstances, this solution would be problematic because there are aspects of the statute that serve a relevant purpose. As Justice Sotomayor pointed out in her dissent, “Congress recognized that ‘there is no source that is more vital to the continued existence and integrity of Indian tribes than their children’ 25 U.S.C. §1901(3), and it found that this resource was threatened.”

The ICWA was passed in order to protect many Native American children from losing their heritage and suffering from abuse and neglect, which was common in many of the homes where they were placed.

Thus, the ICWA should be amended, not revoked as federal law altogether. The solution to the problems created by the ICWA, as shown in the Adoptive Couple case, must be a compromise that will protect the heritage and sovereignty of the Native American community, while maintaining flexible standards for judges to apply in cases where the best interests of a child must be considered. In a comment to the press, Mark Fiddler, the adoption attorney who represented the Capobiancos before the Supreme Court, said, “The intent of the ICWA was good at the time, but I think some courts are making what's best for the tribe paramount, instead of what's best for the children. We need to take a step back and ask if that's what the law intended.”

As a Native American, Fiddler began his career supporting the ICWA and fighting for the rights of Native American biological parents in court. Now, along with other lawyers from the American Academy of Adoption Attorneys, he is making efforts to amend the ICWA so that the legislation considers the best interests of a child. “I believe the ICWA has done more harm than good,” Fiddler claimed in a recent interview, where he cited a thirty-five year history of children being ripped from the only parents they had ever known and forced to live with Indian relatives they had never met. Thus, it is evident that changes still need to be made.

31 Interview with Mark Fiddler, adoption attorney, to author (Jan. 8, 2014).
Adoption proceedings must be observed on a case-by-case basis, rather than as an objective set of statutes with little real-life application. Adoption attorneys Annette Appell and Bruce Boyer argue, “When a parent’s care falls beneath minimally adequate standards or jeopardizes the well being of the child, deference to the family must yield to the state's interest in protecting its most vulnerable citizens. Thus, when necessary, the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare.”

It is difficult to understand why Congress passed the ICWA in 1978 without any clause indicating that the Act must serve the best interests of the child or, at the very least, consider the child’s welfare. Despite this notion, the decision in Adoptive Couple indicates that the time has come for the ICWA to be amended in favor of the child.

Furthermore, the ACLU claims, “Modern adoption procedures almost always evaluate adoption applicants on a case by case basis, recognizing the unique needs of each child and the fact that prospective parents from diverse backgrounds and circumstances may be able to offer stable and loving homes.” Although this claim is made in the context of adoption by gay and lesbian couples, it also directly applies to the ICWA. The Capobiancos provided Veronica with a “stable and loving home,” despite the fact that they came from a different background than that of Veronica's. When the South Carolina court followed the directives of the ICWA and ruled in favor of Brown, Veronica went to live with a stranger, after living with the Capobiancos for almost two years. As attorney James G. Dwyer comments, “Undoubtedly the ICWA has benefitted some children, but it has also harmed many children by trapping them in bad homes and delaying and disrupting good adoptions.” Therefore, application of the ICWA on a case-by-case basis is essential, and the method used to evaluate each case should depend on the best interest of the child.

According to Ohio’s adoption law policy, §3107.161, “[a] person who contests an adoption has the burden of providing the court material with the evidence needed to determine what is in the best interest of the child and must establish that the child's current placement is not the least detrimental

33 ACLU, In the Child's Best Interests: Defending Fair and Sensible Adoption Policies (ACLU 1998).
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In Brown’s case, when using the ICWA, he was not required to provide evidence of Veronica’s best interests or the “least detrimental alternative.” Therefore, an amendment to the ICWA should include the addition of a clause that fits along the lines of “considering the child’s welfare,” or “serving the best interest of the child on a case-by-case basis.” Though these phrases are vague in text, they give judges the flexibility to determine whether or not the ICWA applies to the case at hand. This freedom of judgment allows a judge to decide whether or not the child would benefit by being raised by his or her biological parents. A simple clause such as the ones suggested above gives the ICWA more elasticity without the need to revoke it altogether. Revocation could likely intensify the conflict between tribal courts and U.S. courts, which is an ongoing issue that must not be exacerbated. Though it has been constitutionally contested in the past, the ICWA has helped ease the tension between tribal and federal law, at least symbolically, and therefore it should remain, with the necessary amendments made.

Conclusion

The decision of Adoptive Couple v. Baby Girl proves that significant amendments are necessary for the ICWA. The amendments must address the expectation that Indian parents will no longer be able to override the child’s best interests through use of the Act. Furthermore, the practice of judicial restraint in the majority decision covers up the serious flaws in the constitutionality of the ICWA, proving that it ignores the sovereignty of the Tenth Amendment and gives too much power to the federal government in the realm of Indian law. However, to reconcile the conflict between tribal and U.S. courts, the ICWA must not be revoked altogether, despite its constitutional issues.

Ultimately, the ICWA should be made flexible enough to allow judges to consider the best interests of the child. Other parties’ interests are secondary to the child’s welfare. Drs. Christine Adamec and William Pierce assert, “A home in the child’s own culture is the first and best choice; however, when a suitable home is unavailable, one should consider a home with a family of another race before making a child wait.”

government are extremely important, Indian children should not be used as political pawns on either side. Not only is this unfair use of children in the political arena detrimental to tribal and state relations, but it is also harmful for the child’s welfare. In non-ICWA contested adoptions, the best interest of the child is always considered. Indian parents should not have the authority to use the ICWA as a “trump card” to override this basic principle of U.S. adoption law. Baby Veronica has set this precedent, and it is up to future courts and legislation to bring justice to her and all future Native American children who will be affected by the ICWA.
European Competition Law: The Cases of Gazprom and Microsoft

Andrea L. Sestanovich

What could potentially be the biggest competition case of the decade is currently in its infancy in the European Union (EU). At issue is a dispute between the European Commission (EC) and Gazprom, a Russian energy giant that is one of the world’s largest energy companies and a producer of more natural gas than any other company in the world.\(^1\) Gazprom delivers more than 25% of Europe’s natural gas supply,\(^2\) making it the second largest natural gas supplier to the EU.\(^3\) The company delivers a majority of the gas supply to Poland, Hungary, the Czech Republic, Slovakia, Lithuania, Estonia, and Bulgaria,\(^4\) leaving these Eastern and Central European countries worryingly dependent on Gazprom for their energy supply. Due to the Russian government’s ownership of over 50% of the company’s shares,\(^5\) these countries are not just dependent on Gazprom, but on the Russian government itself.

This article will serve as a guide to the current state of the Gazprom-EU conflict; provide a comparison with the case of Microsoft, which the EC found guilty of violating the same law Gazprom is accused of violating; and provide insights into what the future could hold should the EC determine that Gazprom is guilty of violating competition law in the EU.

The Dawn Raids

In 2011, the European Commission, the executive power of the EU, launched unannounced raids of Gazprom satellite offices in Germany and the Czech Republic, in addition to RWE AG (known as Rheinisch-Westfälisches Elektrizitätswerk until 1990) in Germany and the Czech Republic, E.On Rurgas in Germany, PGNiG (Polskie Górnictwo Naftowe i Gazownictwo) in Poland, OMV (formerly Österreichische

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Mineralölverwaltung) in Austria, and Overgas in Bulgaria to determine if these energy companies were guilty of anticompetitive behavior. It is not entirely by chance that these companies were being investigated at the same time. All of these companies were under suspicion of violating EU competition law. For the past few decades, the EU has been working toward a liberalized internal energy market and a slow but steady break up of vertically integrated companies (VICs), such as the aforementioned energy companies.

Vertically integrated companies are large companies that have merged several entities operating in different stages of production into a single entity. The legal framework for the liberalization of the energy market and the break-up of VICs is the EU’s First, Second, and Third energy packages. Each of these packages builds upon provisions established in the previous package to further liberalize the energy market in the EU. The Third Energy Package, which came into force on July 13, 2009, establishes the principle of ownership unbundling for vertically integrated companies that would separate transmission systems from production and supply operators. Requiring the owner of the transmission network to be independent from production and supply functions ensures third party access to the transmission network by eliminating a conflict of interest that may arise if the same entity owns all of these stages of production.

On September 4, 2012, one year after the raids, Brussels announced that it had officially launched a probe into Gazprom, to determine if the company was guilty of anticompetitive behavior. The Commission suspects that Gazprom is “abusing its dominant market position in the upstream gas supply markets in Central and Eastern European Member States, in breach of Article 102 of the Treaty of the Functioning of the European Union (TFEU).” The ‘upstream market’ refers to the explorations and production

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8 1-3 Energy Packages.
14 Id.
sector and deals with all aspects of locating gas supplies and extracting them for processing and transport.\(^\text{15}\) Article 102 of TFEU reads, “Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.”\(^\text{16}\)

Based on this Treaty, Gazprom is accused of the following:

1. “divid[ing] gas markets by hindering the free flow of gas across Member States;
2. prevent[ing] the diversification of supply of gas, and;
3. impos[ing] unfair prices on its customers by linking the price of gas to oil prices.”\(^\text{17}\)

The European Commission defines abuse of market dominance as a company that uses its control over the market in an unfair way, so as to undermine competition in the market.\(^\text{18}\) In order for a company to be considered dominant, it must account for over 40% of the market, or account for a portion of the market that is considerably greater than the next largest company’s share.\(^\text{19}\) However, in 2012, Norway’s natural gas company, Statoil, sold more energy to Europe than did Gazprom,\(^\text{20}\) making it unclear if Gazprom is actually a dominant player in the natural gas market. If the EU does find Gazprom is guilty of the above-mentioned charges, it could face fines of over €14 billion,\(^\text{21}\) amounting to more than $19 million.

A company accused of violating EU competition laws has the option under Article 9 of Regulation 1/2003 of taking a commitment decision, in which the company contacts the EC and expresses its interest in establishing a commitment decision.\(^\text{22}\) The company pledges to fix the practices which


\(^{19}\) Brian Sher, Abuse of Dominance in the EU: the evolving law and practice. 9. Competition Handbook. 2010.


\(^{21}\) Foo Yun Chee and Andrius Sytas, EU Preparing to Charge Gazprom in Antitrust Case, Reuters, Oct. 3, 2013.

\(^{22}\) Council Regulation (EC) No 1/2003, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
were of concern to the EC, and in return the EC guarantees to end all investigative action against the company. Commitment decisions can be favorable for a company that would prefer to avoid public knowledge of the potential violations of competition law, because it can damage the company’s reputation. If the EC decides to accept a commitment decision, the company is required to change its practices, but without formally determining that an infringement of EU law has taken place. The EU will not continue its investigation into the company to determine if wrongdoing has actually taken place or if a law has actually been violated. In December 2013, Gazprom responded to the EC’s accusations by submitting proposals for a commitment decision regarding changes to its pricing and business practices in the EU. Since that time, Russia’s Deputy Energy Minister, a representative from Gazprom, and EU antitrust officials have been working together to reach an agreement. Despite this dialogue, EU Competition Commissioner Joaquin Almunia said, “It would be premature to anticipate when the next steps might be taken, but we have now moved to the phase of preparing a statement of objections.” Since 2006, every company that did not reach a settlement prior to receiving a statement of objections received a prohibition decision, fines, or significant binding commitments.

Legal Proceedings Moving Foreword

Despite Gazprom’s attempt to reach a settlement, the EC is moving forward with its Statement of Objections. The Statement of Objections is a detailed document sent to the company involved in the investigation that

23 Id.
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26 Council Regulation (EC) No 1/2003, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
27 Id.
32 Alex Barker, Brussels on Course to Issue Gazprom Antitrust Charges, Financial Times, (Jan. 15, 2014).
European Competition Law: The Cases of Gazprom and Microsoft

outlines the EC’s concerns regarding anticompetitive behavior. This is the first step in the formal proceedings against a company potentially in violation of antitrust laws. The company has two months to respond. Additionally, the company has the right to request an oral hearing. If the EC is not satisfied with the response, the next step is to issue a prohibition decision under Article 7 of Regulation 1/2003.

A prohibition decision requires the company to stop the practice that is in violation of EU competition law, and additionally permits the EC to issue fines and impose remedies to correct the violations. In this case, the EC could fine Gazprom up to €14.3 billion as well as requiring it to stop the anticompetitive practices of which it was accused. Such a decision would inevitably necessitate major changes in Gazprom’s business practices in the EU, a circumstance which the Russian government would almost certainly resist. Any prohibition decision against Gazprom would likely take at least two years to be issued once the EC delivers the Statement of Objections, which is projected to happen in Spring 2014.

Following the prohibition decision, Gazprom would have the right to appeal to the EU General Court, which can amend or annul the decision, as well as adjust any fines. If it is found to be in violation of competition law, citizens and businesses of the EU harmed by its anticompetitive practice have the right to sue for damages in national courts.

A Similar Case: Microsoft

33 Id.
34 European Commission, Procedures in Anticompetitive Agreements (Article 101 TFEU cases).
36 European Commission, Procedures in Anticompetitive Agreements (Article 101 TFEU cases).
38 Id.
41 EU vs Gazprom: The Substance and Implications of Antitrust Clash, Chatham House.
42 European Commission, Procedures in Anticompetitive Agreements (Article 101 TFEU cases).
43 Id.
In the case *Microsoft Corporation v. Commission of the European Communities*, there are several likely similarities in terms of the timeline, procedure, and possible outcome of the case.

The Microsoft case began in 1998 over a conflict between Sun Microsystems (Sun) and Microsoft.\(^{44}\) Microsoft refused to provide Sun Microsystems with information regarding Microsoft’s operating system that would allow interoperability, the ability of different systems to operate with each other, between Windows and non-Microsoft servers, such as those made by Sun.\(^{45}\) In February 2000, the EC requested that Microsoft provide information concerning its Windows 2000 operating system to ensure that it allowed for fair competition in the EU.\(^{46}\) From August 2000 until August 2003, the EC issued three Statements of Objections. The first stated that Microsoft may have violated competition laws in the EU by disallowing interoperability and not providing information to companies that would allow their products full functionality on Microsoft operating systems.\(^{47}\) The second addressed Microsoft’s bundling of Windows Media Player to its operating system.\(^{48}\) The third provided supplemental evidence to support these allegations and specified remedy options to rectify the violations to EU competition law.\(^{49}\) Microsoft responded to all three Statements of Objection.\(^{50}\)

In Microsoft’s response to the third Statement of Objection, the company requested an oral hearing,\(^{51}\) which occurred on November 12-14, 2003.\(^{52}\) During a closed hearing that lasted for three days Microsoft, Sun, and others presented their arguments to a Hearing Officer.\(^{53}\) On March 24, 2004

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\(^{46}\) Commission examines the impact of Windows 2000 on competition. (Feb. 10, 2000).
\(^{50}\) European Commission, The Commission’s Investigation, (2012).
\(^{51}\) *Id.*
\(^{52}\) Final Report of the Hearing Officer is Case COMP/C-3/37.792 – Microsoft.
\(^{53}\) *Id.*
the EC found Microsoft in violation of Article 82 of the Treaty Establishing the European Community.\textsuperscript{54}

The EC issued its decision in March 2004 finding Microsoft guilty of abusing its dominant market position in the market for PC operating systems due to its intentional denial of interoperability between Microsoft’s Windows and servers from other companies.\textsuperscript{55} The investigation found that this practice undermined competition in the market for work group server operating systems.\textsuperscript{56} The EC also found the company guilty of bundling Windows Media Player with its operating system, thereby hindering competition in the market for media players.\textsuperscript{57} The EC issued several remedies.\textsuperscript{58} It gave Microsoft 120 days to release information that would allow for full interoperability between Windows and non-Microsoft servers, and 90 days to unbundle Windows Media Player from its operating system.\textsuperscript{59} The company also faced a fine of €497 million,\textsuperscript{60} which it paid before its appeal.\textsuperscript{61} The EC issued a prohibition decision in the Microsoft case, releasing the full details of the proceedings and the five-year investigation to the public.\textsuperscript{62}

Microsoft responded by filing an action for annulment of the decision with the Court of First Instance (CFI)\textsuperscript{63} (later called the EU General Court...
following the Treaty of Lisbon), and two weeks later filed an application to suspend the remedies under interim measures until the court reached a final decision regarding Microsoft’s appeal. Interim measures are permitted when there is potential that a long court proceeding could cause irreversible harm to a person or entity involved. Once the proceedings conclude and the parties reach a final agreement, the interim measures are no longer valid. In Microsoft’s application for interim measures, it claimed that the remedies the EC imposed would cause irreversible damage to the company by infringing on its intellectual property rights, limiting its commercial freedom, causing market changes that are not reversible, and harming its reputation. After months of motions, oral hearings, and deliberation, the Court of First Instance dismissed Microsoft’s request for interim measures in December 2004, determining that the EC’s remedies did not pose a threat of irreversible damage to Microsoft.

The EC adopted the decision on November 10, 2005, allowing Microsoft one month to comply with the remedies. In the decision, the EC fixed the penalty for noncompliance by December 15, 2005 at €2 million per day. Although Microsoft attempted to comply, the EC found that the interoperability information Microsoft provided was insufficient. One week after the December 15 deadline, Brussels issued a Statement of Objections alleging the company’s failure to comply with the remedies. Microsoft responded to the Statement of Objections in February 2005 and requested an Oral Hearing. This process occurred again in 2006 after Microsoft continued to provide inadequate information for interoperability. Due to

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64 Treaty of Lisbon, European Union.
67 Id.
69 Press Release, Court of First Instance, The President of the Court of First Instance Dismisses Microsoft’s Application for Interim Measures, (Dec. 22, 2004).
70 Commission Decision, Imposing a Periodic Penalty Payment Pursuant to Article 24(1) of Regulation No 1/2003 on Microsoft Corporation, art. 1 (Nov. 10, 2005).
71 Id.
Microsoft’s ongoing failure to comply with the 2004 decision, in July 2006 the EC increased the fine to €3 million per day.\(^{75}\) At this time, Microsoft owed €280.5 million in non-compliance fines.\(^{76}\) One year later the EC issued a third Statement of Objections to Microsoft over unreasonable pricing for interoperability information.\(^{77}\)

Microsoft’s appeal to the Court of First Instance concluded in September 2007, three years after it began.\(^{78}\) The Court ruled that the EC was correct in its initial decision and upheld every remedy that the EC imposed, in addition to the fines.\(^{79}\) One month later, Microsoft agreed to make appropriate changes to comply with the EC’s decision, including significantly reducing fees for interoperability information.\(^{80}\) By the time Microsoft complied, the company owed €899 million in fines,\(^{81}\) which the General Court reduced to €860 million in 2012.\(^{82}\) In a press conference regarding the decision, the European Commissioner for Competition Policy, Neelie Kroes, remarked that, “the 2004 Decision set an important precedent in terms of the obligations of dominant companies to allow competition, in particular in high tech industries.”\(^{83}\) This case has laid the foundation for future competition cases in the European Union. Its establishment of precedent for dominant market players to ensure competitive practices makes this a landmark case, one that may very well be cited should Gazprom follow a similar path.

\(^{75}\) Press Release, European Commission, Competition: Commission imposes penalty payment of €280.5 million on Microsoft for continued non-compliance with March 2004 Decision (July 12, 2006).

\(^{76}\) Id.

\(^{77}\) Press Release, European Commission, Competition: Commission warns Microsoft of further penalties over unreasonable pricing as interoperability information lacks significant innovation (March 1, 2007).


\(^{79}\) Id.


\(^{82}\) Press Release, European Commission, Antitrust: Commission welcomes General Court judgment in Microsoft compliance case (June 27, 2012).

\(^{83}\) Press Release, European Commission, Introductory remarks on CFI ruling on Microsoft’s abuse of dominant market position (Sept. 17, 2007).
The Future of Gazprom

As of December 2013, Gazprom and Russian officials have been submitting comments to the EC regarding its accusations of anticompetitive behavior. So far, Commissioner Almunia reports that Gazprom has sufficiently addressed two out of the three claims of unfair behavior, but has not adequately addressed the issue of unfair pricing. Until Gazprom proposes a solution to pricing that is satisfactory, the EC will continue drafting its Statement of Objections against the company. If Gazprom does not reach a settlement with the EC that adequately addresses all three allegations before the Statement of Objections is complete, the EC will likely issue a prohibition decision against Gazprom, leading to fines and potentially to additional court cases against Gazprom by consumers harmed by the company’s anticompetitive practices.

Considering the outcome of the Microsoft case, it may be in Gazprom’s best interest to reach an agreement over pricing before the EC issues a prohibition decision against the Russian energy company. Should the EC adopt a prohibition decision, the findings of its investigation into Gazprom will be public information. Energy companies that Gazprom pricing policies could have harmed will have access to information that could serve as evidence in any lawsuits against Gazprom.

Lithuania is one such example. Since 2012, Lithuania and Gazprom have been involved in a legal battle in the Stockholm Arbitration Tribunal over unfair pricing of natural gas. Gazprom is the sole natural gas provider in Lithuania and refuses to renegotiate prices as the energy company has in other European countries, such as with Germany. Currently, Lithuania is suing Gazprom for €1.5 billion, the amount it alleges that Gazprom overcharged Lithuanian energy companies between 2004 and 2012. Additional lawsuits such as this could compound the damages Gazprom faces with the EC.

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84 EU Says Gazprom Yet to Satisfy its Concerns Over Pricing, Reuters, Feb. 7, 2014.
85 Id.
86 Id.
87 Id.
89 DG Competition, Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU, art. 134, EC.
91 Id.
Another important point to consider is that Microsoft failed to comply with the EC decision for multiple years, leading to additional fines incurred for noncompliance.93 Although Microsoft provided information in an attempt to comply with the decision, the EC found that the company was not in compliance94 and issued additional multimillion-euro fines.95 Considering that Gazprom is proposing solutions that the company finds acceptable, but the EC does not, a similar situation may arise in this case. Should the EC find that Gazprom’s pricing policies continue to fail to meet the EC’s standards, Gazprom could continue to incur fines as Microsoft did, despite attempts to comply.

Implications

Like the Microsoft decision, a decision finding Gazprom guilty of violating competition law in the EU would require Gazprom and other dominant market players in the energy sector to allow for unfettered competition. This is central to the EU’s goal of achieving a liberalized internal market for energy. The EU’s Energy Packages are concerned with achieving these goals in the natural gas and electricity market.96 Should the EC find Gazprom guilty of the aforementioned violations, remedies correcting these practices would advance the goals of the EU’s Third Energy Package.

Directive 2009/73/EC, also known as the Third Energy Package, ensures non-discrimination in transmission and distribution systems for natural gas.97 Since 1998, Gazprom has allowed other energy companies to access and utilize its gas transmission pipelines for a transit fee.98 Third party access to gas pipelines was an important first step in liberalizing the gas market in the EU, which lawmakers established in the EU’s first Gas Directive in 2000.99 By 2003, 16% of gas that traveled through the Unified Gas Supply System of Russia (UGSS) was from third party suppliers.100

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95 Press Release, European Commission, Competition: Commission imposes penalty payment of €280.5 million on Microsoft for continued non-compliance with March 2004 Decision (July 12, 2006).
96 See Energy Packages.
99 Id.
100 Id.
Although Gazprom allows third party access, the company still imposes unofficial roadblocks to third parties, such as complaints by Gazprom that it is unable to transport the full amount of gas for which other companies have requested. The intention of the Third Energy Package is to unbundle the ownership of pipelines to ensure outside companies do not face roadblocks in accessing existing transmission networks.

To prevent pipeline access discrimination, the EC implemented the Third Energy Package to break up vertically integrated companies’ ownership of transmission systems. Pipeline discrimination occurs when the gas supplier is also a producer and the owner of the transmission network, leading to a conflict of interest regarding transporting other companies’ gas. Allowing other suppliers to access this network is clearly not in that company’s best interest. Non-discriminatory access can best be ensured through a breakup, or unbundling, of the production, supply, and transmission of natural gas. Under the Third Energy Package, vertically integrated companies like Gazprom have two options: full ownership unbundling, which requires each level of production to be owned and operated independently, and independent systems operators. The latter would entail the company maintaining ownership of the transmission network, but allowing another company to take over daily operations. Under the Third Energy Package, EU countries “have the choice of implementing ownership unbundling either by direct divestiture or by splitting the shares of the integrated undertaking into shares of the network undertaking and shares of the remaining supply and generation undertaking.” Either way, vertically integrated companies will lose part of their assets.

Besides forcing Gazprom to unbundle, the outcome of this case may also lead to the EU requiring Gazprom to change its pricing policy. Currently, Gazprom establishes the price of its gas by linking it to the price

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104 Id.
106 Art. 13 – 16 of directive 2009/72/EC.
107 Id.
108 Id.
of oil, known as oil-indexation, in long-term contracts (LTCs). These LTCs are a point of contention for some EU Member States, and may be the basis of the unfair pricing allegations. Although European utility companies are demanding hub gas prices, the price of gas on the open market, this may not be in consumers’ best interest in the long-term due to the intrinsic volatility in gas prices. While consumers may be over-paying now because of the gas-oil price link, gas prices are far more volatile than oil prices, which could leave consumers susceptible to gas price spikes. In addition, oil prices are expected to decrease, while gas prices are projected to increase in the coming years, again leading to consumers paying more than they would have under oil-indexation.

Conclusion

The legal battle Gazprom faces will undoubtedly be a long one if the EC does not accept a commitment decision from the Russian energy giant. In the case of Microsoft, the legal battle lasted more than a decade, and it is not unlikely that a similar battle between the EC and Gazprom could last just as long, if not longer. For this reason, it is likely in Gazprom’s best interest to settle under Article 9. A commitment decision would avoid this prolonged legal battle, and would halt any investigation by the EC into Gazprom. If Gazprom and the EC fail to reach an agreement, it is probable that the EC will issue a prohibition decision against Gazprom. The latter outcome could establish landmark precedents in the energy sector, as the case with Microsoft established important precedent in the information technology sector.

Finding Gazprom guilty of hindering the diversification of the gas supply and the free flow of gas in the EU could lead to achieving the practices put forth in the Third Energy Package regarding ownership unbundling. This could have severe implications for Gazprom, as it would force the company to restructure its European assets. If the EC forces Gazprom to reform its pricing policy, this could lead to European

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110 Id.
111 Id.
consumers paying even more for gas than they are paying currently. Ultimately, enforcing the Third Energy Package may have undesirable effects, both for Europe’s consumers and Gazprom.

Although this case has not been receiving much international media attention, as it unfolds the world will likely begin to watch more closely as Russia and the EU engage in a battle between maintaining the status quo and market liberalization that could set international precedent in the natural gas sector.
Privacy in the 21st Century: The Third Party Doctrine in the Digital Age

Aman Y. Thakker

Introduction

In June 2013, National Security Agency contractor Edward Snowden began a series of leaks regarding a top-secret government surveillance program called PRISM. Since 2007, this program has actively subpoenaed Stored Internet Communications data from Internet companies such as Google and Apple. The NSA obtained legal authorization for this program from Section 702 of the Foreign Intelligence Surveillance Act Amendments Act of 2008, which allows the Attorney General and the Director of National Intelligence to jointly authorize the targeting and collection of data regarding foreign terrorist threats. The revelation of this program has sparked a lively debate in the United States about the constitutional right to privacy in the 21st Century. At the center of this controversy, however, is the larger, legal basis for such surveillance activity, called the Third Party Doctrine.

Third Party Doctrine was born as a result of two Supreme Court cases, *United States v. Miller* and *Smith v. Maryland*. The doctrine states that if an individual "knowingly reveals information to a third party," then they have no reasonable expectation of privacy because they have “relinquishe[d] Fourth Amendment protection in that information.” The protections against “unreasonable searches and seizures” no longer apply to information shared with third parties, and the government can access such information with only a subpoena rather than a formal search warrant. This has significant implications for information privacy, particularly in a digital age, where social media websites and search engines are considered “third parties.” The Third Party Doctrine effectively narrows the Fourth Amendment’s protections to a more literal interpretation of “persons, houses, papers, and effects;” Americans’ online information is considered outside of these antiquated categories, and thus has limited protection from government surveillance.

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1. 50 U.S.C § 1881a (2012).
4. *Id.*
5. U.S. Const. amend. IV.
6. *Id.*
The George Washington Undergraduate Law Review

Historically, the third-party doctrine has been utilized in order to gain information on a targeted individual or group of suspects. This no longer holds true. The PRISM program, exposed by Mr. Snowden, used the lax protections of the Third Party Doctrine to attain vast troves of user information data belonging to ordinary Americans from companies such as Facebook, Google, Twitter, and Microsoft. Relying on Third Party Doctrine, the government has argued that online users had willingly given up their private information to these companies, through a contract such as a “Terms and Conditions of Use” agreement. Therefore, under the combined decisions of Smith and Miller, these users had forfeited their information’s Fourth Amendment protections and the government could legally subpoena such digital information. While a contractual agreement between companies and individuals at the time of subscription allows these companies to collect and store any information released on their website, the government’s use of Third Party Doctrine allows agencies such as the NSA to access this information with only a subpoena—that is without a warrant or “probable cause.” This has effectively restricted constitutional privacy protections to only tangible items that an individual claims in his material possession, which belies the underlying logic of the Fourth Amendment’s protections of “papers.”

Without new internal protections or legislative action, this legal dynamic will continue to seriously jeopardize Americans’ most basic conception of privacy, and place dangerous surveillance tools at the government’s disposal. To fully understand the Third Party Doctrine, this paper will discuss the origins of the Third Party Doctrine, and how it transformed Contract Law over the last four decades. It will then discuss how the Third Party Doctrine has evolved through legislative and judicial actions over the last forty years, and will also highlight the biggest concerns surrounding the Third Party Doctrine. The paper will also try to address some of these concerns by proposing constructive solutions.

Background

The Third Party Doctrine originated as a result of the decisions in the Supreme Court cases United States v. Miller\(^8\) and Smith v. Maryland\(^9\). Both cases addressed the issue of defining exactly what is meant by a “reasonable expectation of privacy,” which had served as a loose legal definition in prior

\(^7\) Id.


cases on relevant surveillance issues. The questions before the Court were whether there was a reasonable expectation of privacy to claim Fourth Amendment protections on information that was willingly given up to third parties by the defendant, and whether that expectation changes if the defendant did not know that their information was “given up” to a third-party. In both *Miller* and *Smith*, the information that was given up was used to arrest the defendants, and in both cases, the arrests made by law enforcement authorities were upheld.

In *Miller*, the court upheld the conviction of tax fraud, which was based on evidence from a third party. The defendant had been operating a whiskey bootlegging operation, and hid the income from tax authorities. Law enforcement authorities, however, subpoenaed evidence, under the jurisdiction of the Bank Secrecy Act, from a bank that the defendant had been using as part of his operation.\footnote{31 U.S.C. §§ 5311-5314e (1974).} Miller argued that he had Fourth Amendment protections from the government accessing this data, and that the evidence should not be admissible against him. The Court, however, upheld the government’s power to force banks to retain customer information for law enforcement purposes, holding that there was no expectation of privacy for information “voluntarily” revealed to a business entity for a limited purpose.\footnote{United States v. Miller, 425 U.S. 435 (1976).} The court also utilized a broad definition of “voluntarily,” and considered the fact that the bank was compelled to collect and retain that information, and that the defendant was required to disclose it in order to use the bank’s services as still within the scope of a “voluntary disclosure.”

*Smith v. Maryland* dealt with the Fourth Amendment implications of pen registries installed at a phone company collecting information about callers, including what numbers were called from a particular number. The defendant was charged with robbing Patricia McDonough and making obscene and threatening phone calls to her after the robbery. Law enforcement authorities asked the phone company to install a pen register on all of Smith’s calls, and found calls to Ms. McDonough. Using this evidence, they were able to gather enough evidence to search his house and arrest him. Smith, however, sought to suppress the list of phone calls made from his home, which, he claimed, were recorded without a warrant, and
hence violated his Fourth Amendment rights. The Supreme Court upheld the conviction, ruling:

Given a pen register's limited capabilities, therefore, petitioner's argument that its installation and use constituted a "search" necessarily rests upon a claim that he had a "legitimate expectation of privacy" regarding the numbers he dialed on his phone. This claim must be rejected.12

The importance of this decision when it comes to the third-party doctrine is its application to machines and electronic communications. The court, through Smith, had expanded the third party doctrine to include information revealed to a machine carrying out a routine task. Today, this ruling has a tremendous impact on electronic mediums of communication, particularly the Internet.

**Contract Law**

The first issue that must be examined when looking at digital privacy is the right of private companies to collect information regarding their users. The Federal Trade Commission has granted website operators the right to collect “Personally Identifiable Information.”13 This term is defined as information that, independently, can single out or identify a particular person. This includes private information such as names, Social Security numbers, dates of birth, biometric information and medical, educational, financial, and employment information.14 To collect such information, companies must follow certain regulations. The Federal Trade Commission Fair Information Practices mandates that companies follow four key protocols in how they collect and use information, which include:15

- Provide notice to individuals before collecting information about them,
- Allow users a choice as whether and how information is collected,
- Allow users access to data to ensure accuracy, and
- Ensure security from improper use of data.

Companies use a variety of different tools to meet these legal obligations. As a website operator with independent servers such as Facebook, for example,

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14 Id.
15 Id.
has the right to collect information about its users. They collect this information for a variety of reasons, such as the customization of features for individual users and services such as suggested friends to “add” or pages to “like.” To meet FTC regulations, Facebook drafts a Terms of Agreement that a user must accept in order to use their service, which serves as the notice that Facebook will collect their information. Facebook also provides the user the ability to change their privacy settings as a mechanism to give users a choice on how information is collected. Facebook users can also access their own data on their own Timeline, and Facebook ensures the security of private information on their servers from hackers and unaffiliated parties. Through these different kinds of measures, Facebook, as a social media outlet and website, meets the legal requirements pertaining to data and information collection.\(^\text{16}\) In regards to what Facebook can do with this information, the FTC has much more limited regulations in place.\(^\text{17}\) This lack of oversight is directly connected with Third Party Doctrine, as the regulations were written in accordance with the Doctrine, which has allowed these companies a significant degree of freedom in how they utilize this information.

According to sociologist and scholar Manuel Castells, “Rather than an oppressive ‘Big Brother,’ it is a myriad of well-wishing ‘little sisters,’” relating to each one of us on a personal basis because they know who we are, who have invaded all realms of life.”\(^\text{18}\) Due to the lack of regulation over what these corporations or “little sisters” do with the tremendous amount of private information they collect, there is tremendous room for abuse, especially in relation with government surveillance. According to Castells, the United States created a “comprehensive homeland security system that involves the monitoring of foreigners and the granting of extensive powers of surveillance to federal agencies, consolidated in a new Homeland Security Department.”\(^\text{19}\) Such a powerful and networked intelligence community has easily taken advantage of these vast troves of data through Third Party Doctrine, which has grave implications for our understanding of privacy in the 21st Century.

\(^{16}\) Id.
\(^{17}\) Id.
\(^{19}\) Id.
The Third Party Doctrine

The origins of The Third Party Doctrine can be traced back to one of the earliest privacy cases heard by the United States Supreme Court, *Katz v. United States.* The court dealt with the notion of privacy and wiretapping in public places. Charles Katz was a member of an illegal gambling ring that used a public payphone to make his wagers. However, the FBI began wiretapping these phone calls, and used the recordings as evidence to arrest Katz. The Supreme Court overturned the arrest, and ruled, “the Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment.”

They pointed to the idea the fact that Katz took extreme precautionary steps by going to a pay phone away from his work or home, which meant he had a reasonable expectation of privacy to his phone conversation. And going further, they ruled that regardless of location, citizens have a right “to a reasonable expectation of privacy.” The Court, however, did not clearly define what a “reasonable expectation” entails, which led to a number of future lawsuits. Two cases that were particularly important—as mentioned earlier—were *United States v. Miller* and *Smith v. Maryland.*

It was the ruling of these two cases that truly established the grounds of the Third Party Doctrine. *Miller* dealt with the warrantless governmental search of bank records, as the case involved federal officers who obtained the defendant’s bank records, including microfilm copies of checks, deposit slips, and balance sheets, without a search warrant but rather by issuing subpoenas to two of the banks where the defendant held accounts. When the Court applied the “reasonable expectation” test set forth by *Katz,* they found that the defendant had no objectively reasonable expectation of privacy in the records held at the banks in which he kept his accounts because the bank was a third party, meaning no Fourth Amendment violation had occurred. *Smith* also reached a similar conclusion, which went as follows:

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21 *Id.*
22 *Id.*
23 *Id.*
25 *Id.*
First, we doubt that people in general entertain any actual expectation of privacy in the numbers they dial...All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills. In fact, pen registers and similar devices are routinely used by telephone companies for the purposes of checking billing operations, detecting fraud, and preventing violations of law.\(^\text{26}\) In both cases, the Court ruled in favor of the government, stating “this Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”\(^\text{27}\) These cases have, hereby, set the precedent for the Third Party Doctrine, which utilized as a legal rationale to this day, nearly forty years later.

The doctrine states that “…that knowingly revealing information to a third party relinquishes Fourth Amendment protection in that information.” The Court went into greater detail regarding the reasoning behind this standard in \textit{Miller}:

\begin{quote}
The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.\(^\text{28}\)
\end{quote}

This effectively means that when that private information such as credit card transactions and social security numbers held by Capital One, telephone records held by AT&T, and contact information held by Facebook, are beyond the scope of Fourth Amendment protection because the individual willingly gave up this information to a third party. So under the Third Party Doctrine, only a subpoena and prior notice are needed to compel an Internet Service Provider (ISP) to turn over any information given up by the user. This is a much lower hurdle to overcome than needed under probable cause,


\(^{27}\) \textit{Id.}

which—in line with the Fourth Amendment—requires a warrant for approval that must be approved by a judge.\textsuperscript{29} This lower standard poses a threat to private information shared on the Internet, and gives vast power to the government and law enforcement for collecting private information.

The United States Congress has taken steps in the past to limit the consequences of Third Party Doctrine provided by Supreme Court. The Electronic Communications Privacy Act (EPCA), passed in 1986, was a measure by Congress to extend governmental restrictions on wiretaps to electronic communications.\textsuperscript{30} However, the law only dealt with the ‘physical’ intrusion of privacy. The definitions it provided for “electronic communications” were limited to “signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system that affects interstate or foreign commerce.”\textsuperscript{31} But at the same time, the EPCA specifically omitted any “wire or oral communication, any communication made through a tone-only paging device, any communication from a tracking device, or electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds” from privacy protections.\textsuperscript{32} In simpler terms, the law gave privacy protections to outdated technologies using electronic communications, but limited those protections to mediums of communication popular and newer technologies such as telephones and the earliest stages of the Internet. By excluding these crucial means of communication, the EPCA failed to adequately counteract the effects of the Third Party Doctrine for individual privacy.

Another attempt to bolster Fourth Amendment protections to online and electronic communications was the passage of the Stored Communication Act (SCA), passed in 1986 as an amendment to the EPCA.\textsuperscript{33} This law addressed the disclosures of electronic communications, voluntary or compelled, that are stored by third-party Internet Service Providers. The SCA created Fourth Amendment-like privacy protections for email and other digital communications, in response to the limitations on such protections because of the Third Party Doctrine. Moreover, it forced governmental authorities to get a subpoena to obtain private information.

\textsuperscript{29} U.S. Const. amend. IV.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
from ISPs, and severely limited the ability of companies to give up or sell private information for a profit.\textsuperscript{34} Despite these measures, the law was flawed. By requiring a subpoena or court order with prior notice to force ISPs to turn over their information, the SCA gave this information only marginally better protection than under the Third Party Doctrine, and did little to curb potential abuse.

Since 1986, however, various bills that have followed have diminished even these marginal protections. The Communications Assistance to Law Enforcement Act of 1994,\textsuperscript{35} the USA PATRIOT Act of 2001,\textsuperscript{36} the USA PATRIOT reauthorization acts of 2006,\textsuperscript{37} and the FISA Amendments Act of 2008,\textsuperscript{38} all have amended the ECPA, making it much easier for governmental intelligence agencies such as the National Security Agency and Central Intelligence Agency to collect information under the Third Party Doctrine, including provisions where they can demand information from internet companies, or “little sisters” that hold tremendous amounts of personal data.\textsuperscript{39} In particular, the USA PATRIOT Act and the FISA Amendments Act of 2008, passed in the aftermath of the attacks on September 11, have sought to increase surveillance activity in order to prevent terrorist threats. More specifically, title II of the USA PATRIOT Act laid out the new foundation for surveillance procedures. It gave authority to intelligence agencies such as the CIA and the NSA to “intercept wire, oral, and electronic communications relating to terrorism; to intercept wire, oral, and electronic communications relating to computer fraud and abuse offenses; utilize pen registers and ‘trap and trace authority’ under FISA; and authorize a nationwide service of search warrants for electronic evidence.”\textsuperscript{40} These provisions—in effect—gave broad and expansive powers to intelligence agencies to collect electronic communication from third parties, and because of the authority granted by the Supreme Court, they could do so without a warrant.

The FISA Amendments Act of 2008 was another measure to increase the ability of intelligence agencies to use surveillance programs for the purposes of preventing terrorist activity. The original Foreign Intelligence

\textsuperscript{34} Id.
\textsuperscript{36} 18 USC § 175-3583 (2006).
\textsuperscript{37} 18 USC § 1029-1828 (2006).
\textsuperscript{40} 18 U.S.C. § 3121 (2006).
Surveillance Act was passed 1978, which laid the foundation for proper procedures for the physical and electronic surveillance and collection of "foreign intelligence information" between "foreign powers" and "agents of foreign powers." The latter was defined to include American citizens and permanent residents suspected of espionage or terrorism. The 2008 Amendment Act, however, made such surveillance significantly easier. Key provisions in the new law included increasing the time for warrantless surveillance from 48 hours to 7 days, permitting the Director of National Intelligence and the Attorney General to jointly authorize warrantless electronic surveillance for one-year periods, and granting telecommunications companies immunity if they cooperate with an FISA investigation by turning over information or evidence they possess that is linked to the investigation. By allowing the government to continue warrantless searches for extended amounts of time, and encouraging telecommunication corporations to turn over private information to the government, the FISA Amendment Act of 2008 takes advantage of the Third Party Doctrine’s legal foundation for collecting private information under the purview of national security. And even if there was the need for a warrant, there is a FISA court that can issue warrants in secret, reducing public oversight and transparency over the decision to collect private online information. Therefore, any protections Congress had tried to institute through the EPCA and the SCA were entirely reversed with the USA PATRIOT Act and the FISA Amendments Act of 2008.

In 2010 the United States Court of Appeals for the Sixth Circuit decision in United States v. Warshak renewed debate on the practicality and viability of the Third Party Doctrine. Warshak dealt with the privacy implications of seizing over 27,000 emails from the defendant’s ISP for the purpose of a criminal investigation. Warshak had been defrauding his customers by using a process called “double dinging,” that is, charging a customer’s credit card information multiple times. He used emails to coordinate these fraudulent techniques, and he argued that this communication was private and required a warrant and probable cause before being seized. The court overturned the conviction, and ruled “where

41 50 USC §1801(b) (2012).
42 Id.
43 50 U.S.C §§ 1802, 1881b (2012).
45 United States v. Warshak, 631 F.3d 266.
46 Id.
the third party is not expected to access the e-mails in the normal course of business … the party maintains a reasonable expectation of privacy, and subpoenaing the entity with mere custody over the documents is insufficient to trump the Fourth Amendment warrant requirement.”47 The court went on to say, “to the extent that the SCA purports to permit the government to obtain such emails without a warrant, the SCA is unconstitutional.”48 For the first time, an appellate court had recognized that there is a reasonable expectation of privacy in the content of e-mails, even if they are stored on third party servers, and that the Fourth Amendment protected the content of these emails.49 The ruling in Warshak challenged the precedent set by United States v. Miller and Smith v. Maryland, by fundamentally recognizing that the Third Party Doctrine was antiquated and requires reexamination. Because the decision only has force in the Sixth Circuit, however, the Third Party doctrine still remains the dominant legal standard.

Warshak was not the only instance where courts or judges found flaws in the Third Party Doctrine. In United States v. Jones, the Supreme Court ruled on the constitutionality of attaching a GPS tracking device to an automobile for an extended period of time without a warrant.50 Although the court upheld the police action planting the GPS, Justice Sonia Sotomayor, in her concurrence, called for the court to reconsider the Third Party Doctrine, writing:

More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers… I would not assume that all information voluntarily disclosed to some member of the

47 Id.
48 Id.
49 Id.
public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.\textsuperscript{51}

In a digital age where privacy concerns are much more complex that when the Third Party Doctrine was formed, a growing number of experts both outside and inside of the government are recognizing the profound need for increased privacy protections in online and electronic information in the hands of third parties.

The most alarming evidence that the Third Party Doctrine has become both outdated and dangerous for American privacy rights since its establishment in the 1980s was the NSA PRISM program brought to the world’s attention by Edward Snowden. Taking advantage of how the Third Party Doctrine circumvents Fourth Amendment protections, the NSA was able to gain private information on millions of Americans by forcing companies such as Google, Microsoft and Yahoo to turn over stored communications and personally identifiable information to governmental agencies. In the information age where almost personal and business related activity has some kind of online presence, the notion that the government has such easy access to private information poses a grave threat to privacy and Fourth Amendment rights of all Americans.

**Problems and Implications of the Third Party Doctrine**

*Katz v. United States* recognized that there are varying levels of privacy, and that each individual had a differing expectation of privacy in a unique situation. The biggest obstacle the justices in Katz faced was to create a boundary for which actions are private, even if they take place in public places, and which actions are public.\textsuperscript{52} To reconcile these two expectations, *Katz* established the reasonable expectation of privacy test, and established two different types of expectations:

- A subjective expectation of privacy – a certain individual's opinion that a certain location or situation is private; this expectation of privacy varies greatly from person to person
- An objective, legitimate, reasonable expectation of privacy – an expectation of privacy generally recognized by society.\textsuperscript{53}


\textsuperscript{52} Katz v. United States, 389 U.S. 347 (1967).

\textsuperscript{53} Id.
When applying the second prong of the reasonable expectation of privacy test, the Court must consider that society today clearly considers certain information on the Internet as being private. Online banking, purchasing patterns, healthcare information, and other personally identifiable information (PII), even if it is available online, is undoubtedly still believed to be one’s private information. It follows that society’s rational and objective expectations of privacy regarding PII runs in glaring contrast with the legal framework for the Third Party Doctrine developed in Miller and Smith. And under this second prong of the Katz test, if such information were necessary for the government to attain and search due to a criminal or terrorist claim, they would ordinarily have to follow the Fourth Amendment by proving probable cause and receiving a warrant.  

Under the context of the Third Party Doctrine, however, a simple subpoena is required to collect such data from ISPs and telecommunication companies. To obtain a subpoena, the government must only have reasonable suspicion, and the entity conducting the search does not need probable cause, which is a much higher benchmark (because a Fourth Amendment violation occurs). In United States v. Morton Salt Company, the Supreme Court described subpoenas as “presumed relevant unless there is no reasonable possibility that the materials seized will produce relevant information. A subpoena is therefore valid even if based on nothing more than official curiosity.” This extremely low level of protection of online private information, which should fall under the category of “papers and effects” as stated in the Fourth Amendment and be protected accordingly, poses a threat to civil liberties. As Justice Sotomayor said in her concurrence in Jones, private information like phone numbers dialed, URLs visited, e-mail addresses contacted, and the products bought online will no longer be considered private. So information that should necessitate a warrant in order to be searched and seized can instead be accessed for the sake of “official curiosity” on the part of government and law enforcement authorities.

As mentioned earlier, the precedent set by the Third Party Doctrine also has made it extremely easy for the National Security Agency to collect information under programs such as PRISM, which was authorized by Section 702 of the FISA Amendments Act of 2008.  

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54 U.S. Const. amend. IV.  
56 50 U.S. Code § 1881a (2012).
allowed for the United States Attorney General and Director of National Intelligence to jointly authorize warrantless data collection for up to one year, and to obtain subpoenas and warrants secretly through the FISA Court.\textsuperscript{57} Not only are the subpoenas secret, but the proceedings before the FISA Court are also completely secret, since there is no provision for a release of information regarding such hearings or for the record of information actually collected. While the Third Party Doctrine requires that a subpoena be issued to collect private information in the hands of the third party, laws such as FISA and USA PATRIOT Act have made the process of getting those subpoenas secret, which allows for surveillance programs such as the PRISM program to exist in the first place.\textsuperscript{58}

The overarching rationale for the use of the Third Party Doctrine under programs such as PRISM has been their essential importance for national security. More specifically, the government claims that the battle against terrorism is centered on intelligence collection rather than military deterrence, and that mass data mining and collection programs such as PRISM are crucial for preventing terrorist attacks. The evidence, however, generally does not support this argument. The New America Foundation recently performed a study of leaked documents regarding 225 individuals the NSA targeted as “terrorist recruits.”\textsuperscript{59} They found that “surveillance of American phone metadata has had no discernible impact on preventing acts of terrorism and only the most marginal of impacts on preventing terrorist-related activity, such as fundraising for a terrorist group,”\textsuperscript{60} which provides clear evidence that the violation of American privacy is not yielding justifiable results.

The Third Party doctrine, and the rulings of Miller and Smith, also assume the literal meaning of the Fourth Amendment, and extend privacy protections towards only “papers, and effects.” This interpretation, however, contradicts the decision in Katz, which stated that the Fourth Amendment protects “people rather than places.”\textsuperscript{61} What the Court meant was that rather than protecting the privacy of a home or a paper, the Fourth Amendment should protect the privacy of the citizens themselves.\textsuperscript{62} Katz recognized “that privacy conceptions must go beyond pure property notions

\textsuperscript{57} 50 U.S. Code § 1803 (1978).
\textsuperscript{58} Id.
\textsuperscript{59} Peter Bergen, David Sterman, Emily Schneider, and Bailey Cahall, Do NSA’s Bulk Surveillance Programs Stop Terrorists?, New America Foundation (2014).
\textsuperscript{60} Id.
\textsuperscript{62} U.S. Const. amend. IV.
in response to modern technology, but this understanding was contradicted by the decision in *Miller*, which asserted that the “Fourth Amendment applies only to items physically held by their owners.” This rationale fundamentally overlooked a crucial component of the *Katz* decision, which was described in the following terms:

Restricting constitutional privacy protections to protect only tangible items over which the defendant claims possession belies the logic underlying the Fourth Amendment’s protection of “papers.” In an age of informationships, much personal and highly confidential information exists on paper and in machines that are not within their originator’s physical grasp. The fact that the government can seize such information without actually invading the originator’s physical space or property is a controversial and important issue.

It is clear that in addition to its problems in practice, the Third Party Doctrine’s literal understanding of the Fourth Amendment represents a crucial departure from foundational prior precedents on privacy.

There are also key commercial implications for the Third Party Doctrine, such as the new concept known more specifically as the “Monetization of Privacy,” which refers to the practice of companies profiting from the use of collected private information for a wide variety of purposes. A prime example of this phenomenon is the FTC regulations regarding Personally Identifiable Information. A key feature of the monetization of privacy is the introduction of online practices designed to ‘enhance’ the consumer’s experience or through customized advertising. These features include the high degree of customization pursued by companies such as Netflix and Amazon, which recommend films and products to consumers based on data analysis of users previous interactions on the website. Another example is Google’s autocomplete and Translate functions, which draw from prior online history and customize their services accordingly. While these are features all geared towards benefitting

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consumers as a whole, they involve companies using private information in ways that users may not have wanted the company utilizing or even possessing in the first place. 68 For example, it is common practice now companies to “sell” private information to advertisers, so users can be micro-targeted based on their consumption preferences. Although companies stress that the identities of users are protected, the information—however private or sensitive—is shared and sold nonetheless; as Manuel Castells described, these companies have become the “little sisters” that are eroding our conceptions of basic privacy. 69 The “monetization of privacy” has grave Fourth Amendment implications, and the problem has been allowed to develop with limited legal checks or regulations because of the expansiveness of the Supreme Court’s Third Party Doctrine. 70

**Solutions**

There are clearly numerous issues with the Third Party Doctrine’s implications for civil liberties, national security and surveillance in the digital age, legal precedent, and the commercial use and sale of private information. In an age so dominated by online information usage, a new of legal definition of privacy needs to be developed that also gives fourth amendment protections to private information that is not physically tangible and is instead stored on internet sites and online resources. It follows that effective reform will require that the Supreme Court recognize that this kind of online information falls under the “papers and effects” clause of the Fourth Amendment. 71 The Court must do away with the inconsistent and antiquated Third Party Doctrine doctrine, and return to the standard set up in *Katz*, 72 which described an objective, legitimate and reasonable expectation of privacy as “an expectation of privacy generally recognized by society.” 73 Considering that society reasonably expects a certain level of privacy for online information, the only way government should be able to gain access to this data is through a proper warrant. In the same vein, online companies, Internet Service Providers and social networking websites should not be required to turn over the private information of their users with a basic subpoena, simply because they are a legal “third party.” So aside from a new,

68 Id.
71 U.S. Const. amend. IV.
73 Id.
more relevant legal standard from the Supreme Court, additional laws should be passed by Congress to limit the ability of FISA courts to secretly execute warrants that permit unconstitutional searches of American citizens with extremely powerful data-mining technologies such as the PRISM program.

On the corporate side, a reconciliation of the agreement of the Terms and Conditions of Use and the sale and usage of private data is also extremely important. While companies under FCC regulations do possess the right to use information that they receive once they meet four essential requirements, these standards provide minimal privacy protections for Internet users. It follows that the FTC and other relevant agencies must increase their regulation and oversight of these practices, specifically the second pillar of FTC Regulations of Personally Identifiable Information that states that companies must allow users a choice regarding exactly how their information is collected and utilized.\footnote{Federal Trade Commission, \textit{Privacy Online: Fair Information Practices in the Electronic Marketplace: A Report to Congress} (2000).} In practice, this would involve a company providing advance notification in order to seek approval from the user to share, sell, distribute, or turn over their information. The consumer would then have the right to decide if whether the company could use this information for personalized customization, advertisement sales, or other purposes. More explicit consumer ‘consent’ is crucial for appropriately regulating the “monetization of privacy” and placing a check on its effect on individual privacy.

Conclusion

Since the 1980s, the Supreme Court has been using an outdated and inconsistent doctrine on privacy issues in order to minimize protections on private information in the hands of third parties. In a new age of digital media, online information and big data, however, this legal doctrine needs to be seriously reconsidered. The glaring lack of privacy protections under Third Party Doctrine came to public forefront during the revelation of the National Security Agency’s PRISM program, which utilized the doctrine to compel online companies and Internet Service Providers to turn over massive troves of private information to our country’s intelligence agencies. We live in a time where online services such as online banking, search engines, and phone companies hold tremendous amounts of personal data on their users, and it is now abundantly clear that the Third Party Doctrine
provides extremely inadequate protections for this kind of personal information and leaves open the possibility of extensive, unchecked abuse. It follows that the manner in which the Supreme Court and the United States government perceive privacy must change in order to fit the realities of the twenty-first century. The Third Party Doctrine can no longer adequately provide Fourth Amendment protections for personal and private information, and it must be replaced with a more effective and appropriate legal standard.
The Post 9/11 Foreign Intelligence Surveillance Act: National Security Crisis & the Resurgence of the Imperial Presidency

Nicole Grajewski

Introduction

National security threats have tested the scope of presidential power while raising questions on how to reconcile security with constitutional protections against government search and seizure as well as unwarranted electronic surveillance. In an effort to combat these threats, the sweeping expansion of executive power has led to congressional acquiescence and judicial restraint in the realm of foreign affairs and electronic surveillance.¹ The War on Terror provided the Bush Administration with the ideal setting for the rise of the imperial presidency characterized by unilateral decision-making, increased surveillance, and intense secrecy.² The Obama Administration, as the beneficiary of this executive expansion, has furthered the scope of presidential prerogative through electronic surveillance. While legislative authority over national security recedes, presidential power has expanded allowing the federal government to construct vast and indiscriminate surveillance apparatus under the pretext of national security.³ Government surveillance has reached its peak, permitting unwarranted and invasive practices within a framework provided by the Foreign Intelligence Surveillance Act (“FISA”) and its classified court, the Foreign Intelligence Surveillance Court (“FISC”).⁴ In addition to the president’s Article II plenary powers, the new FISA regime presents the imperial presidency with congressional legislation to maximize the president’s power.

Presidential power is contingent on the will of Congress.⁵ When presidential action corresponds with an expressed or implicit authorization

⁵ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring) (establishing a tripartite framework to measure the fluctuations of presidential power: I) presidential action pursuant to express or implied authorization of
from Congress, “his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” Presidential power in the new FISA regime is at its apex. Moreover, the new FISA regime threatens the separation of powers, resulting from congressional acquiescence, judicial restraint, and presidential prerogative.

First, this article will provide a background of the Constitutional debates over executive power during national security crisis. It will secondly explore the historical precedent of the national security exception for warrantless surveillance prior to the enactment of FISA in 1978. The third section will demonstrate that the findings of the Church Committee motivated Congress to limit presidential prerogative through FISA. The article will then determine that post 9/11 security threats prompted the executive branch to expand executive authority for surveillance through Congressional amendments to FISA. The final section will illustrate the implications of the new FISA regime, where secrecy increases executive power. Congress enacted FISA in 1978 to curtail presidential power; however, the circumstances surrounding September 11 have resulted in an expansion of executive power through FISA’s amendments.

Executive Power and National Security

The Founding Fathers’ crafted a system of governance where ambition could be counteracted by ambition so the no one man’s prerogative determines the circumstances for war and peace. The Constitution enjoins three co-equal branches with the necessary provisions and motives to resist encroachment on the rights of the governed. This model originates as a precaution of William’s Blackstone’s model where the British King was “the sole prerogative of making war and peace.” Therefore, the Framers placed the authority to initiate war in Congress knowing that one man’s pursuit for glory could lead to the end of a nation. Yet, the Founding Fathers

Congress; II) presidential action in absence of Congressional grant or denial of authority; III) presidential action contrary to expressed or implied will of Congress).

6 Id.
9 Id.
11 See Schlesinger, supra note 2, at 3.
recognized that prerogative, as clarified in John Locke’s *Second Treatise of Government*, “to act according to discretion, for the public good, without the prescription of the Law, and sometimes even against it” might be necessary in times of grave crisis.\(^{12}\) Presidents may resort to extraconstitutional measures to prevent the destruction of the nation.\(^{13}\) While the Constitution places distinct powers in each branch, interpretations in favor of a strong executive have found power in the ambiguities.

Alexander Hamilton articulated the notion of a vigorous executive in Federalist 70, “Energy in the Executive is a leading character in the definition of good government; [...] a feeble executive implies a feeble execution of the government.”\(^{14}\) National security crisis calls for the imperative of an “energetic executive” for “decision, activity, secrecy, and dispatch.”\(^{15}\) While Hamilton advocated for an energetic executive, the evolution of presidency set a precedent for unfettered executive power.\(^{16}\) The presidency directs foreign affairs and no longer functions as “the bulwark of the national security,” instead serving as the facilitator of unilateral decision-making.\(^{17}\)

Alexander Hamilton’s philosophy of an energetic executive did not come to fruition until World War II. Prior to World War II, Congress constrained the presidents in matters foreign and domestic.\(^{18}\) Neutrality agreements hindered presidential ability to formulate foreign policy and exert influence through legislation.\(^{19}\) The presidential office itself was meager in comparison to the resources possessed by congress. However, World War II equipped the presidency with the circumstances to develop an office with the capacity to influence and control the agencies of the executive branch.\(^{20}\) Franklin Delano Roosevelt erected the Executive Office of the President and the Office of Management and Budget’s predecessor, the Bureau of Budget. New administrative resources allowed the president to bypass

\(^{13}\) See Schlesinger, *supra* note 2, at 3.
\(^{14}\) The Federalist No. 70 (Alexander Hamilton).
\(^{15}\) *Id.*
\(^{17}\) The Federalist No. 70 (Alexander Hamilton)
\(^{18}\) See Schlesinger, *supra* note 2, at 100.
\(^{19}\) *Id.*
\(^{20}\) President’s Committee on Administrative Management, *Administrative Management in the Government of the United States* 5 (1937).
Congress and to influence budget, programs, and legislation through a quiet process within the executive branch bureaucracy.\textsuperscript{21} Truman created the Central Intelligence Agency (“CIA”) through the National Security Act of 1947, which institutionalized executive discretion to conduct clandestine operations.\textsuperscript{22} In addition to elevating the prestige of the office of presidency, war and times of national security crisis magnified the might of the presidency as the undisputed vehicle for foreign policy.\textsuperscript{23}

The notion of presidential prerogative evolved into the creation of the imperial presidency. An imperial presidency finds its power in the ambiguities of Article II, especially under the pretext of war.\textsuperscript{24} Throughout history national security crisis have proved to be the “health of the presidency.”\textsuperscript{25} The War on Terror has exaggerated Alexander Hamilton’s energetic executive, and the implications pose an enduring question on how to reconcile national security within the Constitution’s framework.

**Surveillance Before FISA**

Since the 1930s, the monitoring of citizens domestically and abroad characterized executive branch intelligence activities.\textsuperscript{26} The executive branch partook in “warrantless electronic surveillance on its own unilateral determination that national security justifies” the intrusion of individual rights.\textsuperscript{27} Presidential duty to protect the nation was interpreted as a blank check to conduct warrantless eavesdropping on American citizens.\textsuperscript{28}

A decade before FISA, Title III of the Omnibus Crime and Safe Streets Act (“Title III”) established a procedure for judicial authorization of electronic surveillance and prohibited Congressional legislating in national security area.\textsuperscript{29} With the exception of situations pertaining to national security, Title III banned warrantless electronic surveillance of private

\begin{itemize}
\item \textsuperscript{21} Terry M. Moe & Scott A. Wilson *Presidents and the Politics of Structure* 57 Law & Contempt. Probs. 29 (1994).
\item \textsuperscript{22} National Security Act of 1947, 50 U.S.C. § 402.
\item \textsuperscript{23} See Schlesinger, *supra* note 2, at 122.
\item \textsuperscript{24} See Schlesinger, *supra* note 2, at 11.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} See generally S. REP. NO. 94-755.
\item \textsuperscript{27} S. REP. NO. 95-604(I), at 7, 1978 U.S.C.C.A.N. 3904, 3908.
\item \textsuperscript{28} Id. at 8.
\end{itemize}
communications. Title III recognized that nothing can “limit the constitutional power of the President to take such measures as he deems necessary [...] to obtain foreign intelligence information deemed essential to the security of the United States.” With this grant of authority, presidents enjoyed the unrestricted ability to invoke national security exceptions as means of justifying unwarranted surveillance.

Historically, presidents justified their inherent authority as a means of reducing the Fourth Amendment’s warrant requirement in the realm of electronic surveillance by invoking a national security exception. United States v. U.S. District Court, hereinafter Keith, challenged presidential acquisition of electronic surveillance in domestic security matters without prior judicial approval. Arguing that Section 2511 of Title III authorizes wiretaps in ordinary criminal cases, the federal government sought to justify unwarranted domestic wiretapping. Title III explicitly denies any interference of the president’s duty to protect the nation against attacks with collection of intelligence from a foreign power. In addition to arguing national security, the president drew upon his customary authority since presidents have been engaging in national security wiretaps for decades. The District Court found that the collection of warrantless domestic electronic surveillance of citizens violates the Fourth Amendment.

Domestically, the Fourth Amendment does support the sole discretion of the executive to collect surveillance since there is no special exigency for national security in domestic electronic surveillance. The Supreme Court ruled upon matters of domestic surveillance and neglected to address the warrant requirement for foreign powers or agents of foreign powers. The Court “implicitly recognized that the broad and unsuspected governmental

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35 Id.
37 Id. at 407.
38 Id. at 308–09, 321–22; 38.
incursions into conversational privacy which electronic surveillance entails necessitate the application of Fourth Amendment safeguards. The safeguards include the warrant requirement and unreasonable search and seizure. Keith differentiates the conditions of foreign intelligence surveillance from criminal investigations. Unless the government demonstrates a link to a foreign power, the president and intelligence agencies did not possess the authority to conduct electronic surveillance without ex ante judicial approval.

Despite the prohibition of the collection of unwarranted electronic surveillance in domestic security, the Keith verdict implies a foreign intelligence exception to the Fourth Amendment’s warrant requirement. Even though the ruling of Keith addressed the issue of domestic surveillance, the Court acknowledged the duty of the president to protect the country by engaging in surveillance with respect to foreign activities. The decision suggests that the president’s duty to preserve, protect, and defend the nation under Article II of the Constitution includes the inherent authority to collect intelligence when engaging with foreign powers. With the national security exception the court solidified the Congressional grant of an unbridled presidential prerogative in foreign affairs. Congressional acquiescence, judicial restraint, and a lack of oversight led to the sweeping expansion of executive branch activities.

Before FISA, Congress expressed the president’s constitutional power to collect foreign intelligence information through Title III. Presidential power to conduct foreign surveillance for national security occupied the highest sphere of power.

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39 Id. at 314.
40 Id. at 316-318 ("The freedoms of the Fourth Amendment cannot properly be guaranteed if domestic security surveillances are conducted solely within the discretion of the Executive Branch, without the detached judgment of a neutral magistrate.").
41 Id. at 323.
42 See Schlesinger, supra note 2, at 157.
43 See Bazan, supra note 34, at 9.
44 407 U.S. 311.
45 Id., at 301-308.
48 David Cole, Reviving the Nixon Doctrine: NSA Spying, the Commander-in-Chief, and Executive Power in the War on Terror, 33 WASH. & LEE J. C.R. & SOC. JUST. 17 (Fall 2006).
The Post 9/11 Foreign Intelligence Surveillance Act

Church Committee & FISA

In 1972, the Supreme Court rejected the executive branch’s assertion of a “domestic security” exception to the warrant requirement. The decision in Keith developed a consensus that foreign intelligence surveillance should occur within a legal framework, distinct from domestic procedures. The systemic failure of implementing checks and balances called for further legislation to prevent the incursion of the Fourth Amendment from government overreach.

In light of the mistrust perpetuated by Watergate, the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities, hereinafter known as “the Church Committee,” initiated an investigation of intelligence agencies and the executive branch. The findings of the Church Committee exposed the unilateral seizure of authority by these agencies and presidents to gather evidence on American citizens dating back to Franklin Roosevelt’s Administration.

The Church Committee unveiled the executive branch’s and the CIA’s routine engagement in surveillance of targeting both political adversaries and prominent figures who posed no threat to national security. From 1963 to 1968, the FBI monitored Martin Luther King Jr. with the intention to discredit him. Operating in tandem to gather correspondence of foreign agents, “intelligence agencies expanded international surveillance programs into the domestic sphere.” Without distinguishing probable cause, executive branch agencies subjected American citizens to unreasonable searches and seizures. The violation of the separation of powers provoked the aggrandizement of presidential powers. The revelations of the Church Committee proved that Congress failed to provide a legal framework to monitor foreign electronic surveillance.

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49 407 U.S. at 323-24 (the Supreme Court called upon Congress to develop legislation that draws distinctions between national and foreign intelligence surveillance).
52 See Schlesinger, supra note 2, at 266-77.
53 See Forgang, supra note 32, at 234.
56 S. REP. NO. 94-755, at 289.
The combination of the Church Committee’s findings and the imperative to hamper intrusive government surveillance similar to Keith formed the impetus behind FISA. Congress enacted FISA with the understanding that a lack of legislative and judicial oversight contributed to executive overreach. Therefore, FISA provided a legal framework for gathering foreign intelligence information and established a judicial process to oversee surveillance activities.

In 1978, FISA established a legal regime for foreign electronic intelligence surveillance with the involvement of each branch of government. Whereas presidents previously engaged in foreign intelligence surveillance without judicial oversight, Congress drafted FISA to articulate that any collection of electronic surveillances required a warrant based on probable cause with the approval of the Attorney General and the FISC. Central to the implementation of FISA, the FISC, a specialized and classified court, presided over applications for surveillance and monitored agency activities. The FISC satisfied dual imperatives, secrecy and judicial supervision.

FISA regulated the collection of foreign intelligence information within the United States. Congress amended Section 2511 of Title III through FISA ending the tradition of executive branch surveillance without court order. To obtain a FISC order for electronic surveillance, applications required the government to specify the individual targets or facilities, times of surveillance, procedures for minimization, and kinds of information sought. The FISC judge would assess whether the statement of facts in each application supported a probable cause to believe that the target was a foreign agent or facility used by a foreign agent and that the purpose was primarily for foreign intelligence.

Applications for surveillance required ex ante judicial review and ex post monitoring after a warrant authorization to “assess compliance with the

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57 Id.
58 Id. at 136.
59 50 U.S.C. § 1801(e).
61 Id.
63 124 Cong. Rec. 10887 (Statement of Sen. Kennedy) (“It is the courts, not the executive, that would ultimately rule on whether surveillance should occur”).
64 50 U.S.C. § 1804.
65 Id. § 1804(a)(1)-(9).
minimization procedures by reviewing the circumstances under which information concerning United States persons was acquired, retained, or disseminated.”

The structure of FISA reconciled the need for secrecy and dispatch with due process and the Fourth Amendment. To satisfy the need for secrecy, the decisions of the FISC are classified and the proceedings are *ex parte*. Moreover, FISA included exceptions for warrantless wiretapping under the circumstances of war. No longer could the executive branch conduct surveillance without obtaining individualized warrant issued by the FISC.

By amending Title III and enacting FISA, Congress reconciled the imperative of intelligence gathering for national security with the Constitution. Congress eliminated the national security exception for cases involving foreign powers of the Keith decision and stated that FISA and Title III are the exclusive means for conducting electronic surveillance by the government. FISA did not restrain the president but instead provided the statutory process for him to follow.

**AUMF, PATRIOT ACT, FAA**

September 11, 2001 initiated a substantial increase in government misuse of FISA by eliminating its original statutory safeguards of the Fourth Amendment, the doctrine of separation of powers, and the basic liberties

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66 50 U.S.C. § 1805(d)(3); *see also* Shults (“by mandating ex ante judicial authorization, FISA incorporates into the foreign intelligence surveillance context the central check on the executive’s surveillance power generally: the Fourth Amendment’s requirement of a warrant based on probable cause.”).


68 50 U.S.C. § 1805(a) (*ex parte*).


70 *See* Brief of Former Church Committee Members and Staff as *Amici Curiae* Supporting Respondents and Affirmance, Clapper v. Amnesty Int’l, 133 S.Ct. 1138 (2013) (No. 11-1025) [herein after “Church Com. *Amici*”].

71 24 Cong. Rec. 10889-90; *see also* Foreign Intelligence Surveillance Act: Hearing on H.R. 7308 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary, 94th Cong. 28, 29 (1976).


endowed by the Constitution. Grave threats to national security allowed President George W. Bush and, subsequently, President Barack Obama to adopt a unilateral approach in both domestic and foreign policy.\textsuperscript{74} Prior to September 11, FISA balanced national security imperatives with the Constitution, enumerating the circumstances for warranted electronic surveillance; however, subsequent amendments to FISA undermine its intent as an authentic check on presidential prerogative.

Authorization of Military Force (“AUMF”), PATRIOT Act\textsuperscript{75}, and FISA Amendments Act (“FAA”) significantly altered FISA’s viability to circumvent unfettered executive authority. The amendments to FISA revived the imperial presidency, where war invigorates the presidency with extraconstitutional authority.

\textbf{A. AUMF}

Directly following the September 11 attacks, the Bush Administration obtained Congressional approval, “to use all necessary and appropriate force against those nations, organizations, or persons [the president] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”\textsuperscript{76} The AUMF suggests that decisions regarding the War on Terror can be made without oversight by the legislative or judicial branches, including those of electronic surveillance.\textsuperscript{77} Therefore, the AUMF violates FISA’s exclusive means of obtaining intelligence.\textsuperscript{78}

From the onset of the War on Terror until 2006, the NSA intercepted unwarranted international telephone and email correspondence of American citizens under the clandestine Terrorist Surveillance Program (“TSP”).\textsuperscript{79} The president authorized the NSA to intercept international communications


between United States citizens and persons linked to al-Qaeda or related terrorist organizations. The Bush Administration argued its consistency with the president’s inherent authority to conduct electronic surveillance for foreign intelligence for national security.

Although the Bush Administration perceived FISA as a procedural burden that harnessed the scope of the president’s inherent authority to dominate the realm of foreign affairs, the Administration justified the AUMF by arguing its consistency with FISA. Then Deputy Assistant Attorney General, John Yoo, argued that warrantless foreign intelligence surveillance conducted abroad was consistent with the president’s foreign affairs powers. Likewise, former Attorney General Alberto Gonzales argued, “electronic surveillance conducted by the President pursuant to the AUMF, including the NSA activities, is fully consistent with FISA.”

However, since the AUMF declines to specify the conditions for electronic surveillance, the Bush Administration relied solely on the president’s Article II plenary powers.

Though the proponents of a unitary presidency apply FISA to the AUMF as an expressed grant of executive power, the AUMF neither permits nor prohibits the surveillance endeavors of the Bush Administration. When a president acts absent of a Congressional grant or denial, his authority is in a “zone of twilight.” The TSP was outside the president’s authority under FISA and subsequently, the Bush Administration shifted to revising FISA’s legislation in favor of presidential prerogative.

B. PATRIOT ACT

Unlike the AUMF, the PATRIOT Act, and later the FAA, are explicit grants of electronic surveillance from Congress that elevate presidential

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82 See, e.g., U.S. Dep’t of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President 6–10 (2006) [herein after DOJ White Paper].
84 See Yoo, supra note 16.
85 See DOJ White Paper, supra note 82.
86 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring).
power to its maximum zenith.\textsuperscript{87} With the PATRIOT Act, Congress delegated the power to gather information on the facilities, telephone lines, and emails of United States citizens domestically and abroad to the president.\textsuperscript{88}

The enactment of the PATRIOT Act decreases FISA’s procedural burden significantly, allowing for a greater degree of mobility between intelligence agencies and greater amount of information obtained in each search. The PATRIOT Act modifies the “primary purpose” requirement, broadens the circumstances for the government to obtain intelligence of any “tangible object”, and develops laws regarding technology.\textsuperscript{89}

The PATRIOT Act reduces restrictions on foreign intelligence gathering within the United States by eliminating FISA’s “primary purpose” statute and instead, only requiring that the application certify a “significant purpose” to obtain foreign intelligence.\textsuperscript{90} To thwart agencies from using national security to justify domestic surveillance, FISA exclusively applied to cases where the “primary purpose” was foreign intelligence.\textsuperscript{91} Easing the language to a “significant purpose” in the PATRIOT Act, relaxes the standards of intelligence gathering when the purpose of the investigation is actually intended for domestic criminal procedures.\textsuperscript{92}

Pursuant to the necessary distinction of foreign intelligence information and federal investigations found in \textit{Keith}, FISA established a “wall” to prevent the government using national security as an excuse to conduct domestic surveillance.\textsuperscript{93} Amending FISA through the PATRIOT Act permits intelligence and law enforcement agencies to exchange information

\textsuperscript{87} \textit{Youngstown Sheet \& Tube Co.}, 343 U.S. 579, at 635 (Jackson, J., concurring).


\textsuperscript{90} 50 U.S.C. § 1803.

\textsuperscript{91} William C. Banks, \textit{And the Wall Came Tumbling Down: Secret Surveillance After the Terror}, 57 U. MIAMI L. REV. 1147, 1166 (2003).

\textsuperscript{92} Nat’l Comm’n on Terrorist Attacks Upon the U.S., \textit{The 9/11 Commission Report} 539 (2004) [hereinafter 9/11 COMMISSION REPORT] (necessitating more communication between agencies such as the CIA and FBI).

and eliminates the “wall” established in 1978. FISA’s procedural protections have decreased significantly allowing a greater degree of autonomy for the executive branch and intelligence agencies paralleling the discoveries of the Church Committee.

The PATRIOT Act lowers the standard for surveillance, permitting the use of pen registers, tap-and-trace devices, and roving wiretaps for foreign intelligence investigations. Section 206 of the PATRIOT Act amends FISA to allow “roving” wiretaps, adding flexibility to the amount of specificity with which the location or facility subject to electronic surveillance under FISA must be identified.

Section 215 of the PATRIOT Act increases the ability of law enforcement agencies to gather telephone, e-mail communications, and records from third parties. The application must indicate that the objects for surveillance are relevant to protect the nation against perennial threats such as terrorism. By modernizing the scope of FISA, the government can easily obtain business records from third parties for surveillance programs.

Both the Bush and Obama Administrations have employed Section 215 to seize business records or any tangible items from third parties. The NSA collects telephone numbers and the dates, times, and locations of calls, which is understood as telephony meta-data. Meta-data examines digital data patterns for the purposes of identifying the behaviors of suspects rather than the content of conversations. Edward Snowden, a former government contractor, leaked information revealing that the NSA has been monitoring

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95 Church Comm. Amici, supra note, at 27.
96 PATRIOT ACT, § 206.
97 PATRIOT ACT, § 206.
102 President’s Review Group, Liberty and Security in a Changing World: Report and Recommendations of the President’s Review Group in Intelligence and Communications Technologies, 17 (2013)
millions of United States citizens through a FISC order for Verizon’s telephone records. Consistent with the collection of all tangible objects, “the NSA determined that under the [2011 Presidential] Authorization it could gain access to approximately 81% of the international calls into and out of the United States through three corporate partners.” Whereas FISA previously approved investigations for individualized warrants with a primary purpose to gather foreign intelligence, Section 215 encompasses entire databases and records from third parties rather than the specific records of the target of an investigation.

C. FISA Amendments Act of 2008 ("FAA")

Despite the significant increase of executive authority through the PATRIOT Act, the Bush Administration contended that FISA needed additional provisions to protect national security. Therefore, Congress passed the Protect America Act of 2007 ("PAA"), later replaced by the FAA after its expiration in February of 2008. The FAA builds upon the framework of the PAA with respect to the targeting of non-U.S. persons overseas and granting retroactive immunity for third parties who provide the government with records.

The FAA authorizes mass surveillance that neither requires an individualized suspicion nor a demonstration of probable cause. For up to one year, the Director of National Intelligence ("DNI") and Attorney General can target an individual if there is reasonable belief that the target is outside of the United States and that the information collected is intended for foreign intelligence surveillance. Section 702 of the FAA does not oblige the government "to specify the nature and location of each of the particular facilities or places at which the electronic surveillance will

107 50 U.S.C. § 1881a(g)(2)(B) (targeting procedures); § 1881a(g)(2)(C) (minimization procedures) Surveillance of non-US persons reasonably believed to be outside of the United States.
108 Amnesty Int'l USA v. Clapper, 638 F.3d 118, 124 (2d Cir. 2011); Compare 50 U.S.C. § 1805(c)(1) with id. §§ 1881a(d)(1), (g)(4).
The DNI and Attorney General are therefore authorized to conduct surveillance without demonstrating probable cause or specifying the location or persons searched.\textsuperscript{111} The procedures abandon the individualized application requirement, paving way for “mass surveillance authorization.”\textsuperscript{112}

While Section 702 applies to non-United States persons, information collected may include international communications of United States citizens. International communications flowing through any facility, including those in the United States, are subject to government surveillance in so far as the government’s primary purpose is to collect foreign intelligence and that there is reasonable belief that the target is a non-United States person. Without probable cause, individualized targets, and oversight by the FISC, the FAA paves way for mass surveillance, obstruction of privacy, and executive branch abuses.\textsuperscript{113}

The FAA targets any non-United States individual, reasonably believed to be outside the United States if the information obtained is of interest to national security. The FAA authorizes the government to maintain and analyze intelligence reasonably believed to be outside of the United States without the minimization procedures or \textit{ex ante} warrant requirement by the FISC.\textsuperscript{114} Shifting from an \textit{ex ante} to \textit{ex post} warrant requirement, the FAA rejects the role of the FISC to exercise judicial review before electronic surveillance is collected. The executive branch monitors the minimization procedures, while the FISC simply ensures the application upholds the procedures for targeting and collecting information.\textsuperscript{115} Even though the Church Committee deemed judicial review of applications necessary to circumvent an aggrandizement of executive power, the FAA eliminates the oversight abilities of the FISC.\textsuperscript{116}

**Implications**

Congressional approval of the AUMF, PATRIOT Act, and FAA supported presidential demands for unilateral and swift action, vesting excessive power in the executive branch.

\textsuperscript{110} Amnesty Int’l USA v. Clapper (2d Cir. 2011); See 50 U.S.C. § 1881a(g)(4).

\textsuperscript{111} Compare 50 U.S.C. § 1805 (c)(1) with id. §§ 1881a(d)(1), (g)(4).

\textsuperscript{112} Amnesty Int’l USA v. Clapper, 638 F.3d 118, 124 (2d Cir. 2011).

\textsuperscript{113} 50 U.S.C. § 1881.


\textsuperscript{115} 50 U.S.C. § 1881a(a).

\textsuperscript{116} Church Comm. \textit{Amici}, supra note 61, at 25.
FISA originally included provisions to satisfy national security needs to conduct surveillance with Constitutional provisions but has now been used as tool for unilateral action due to the amendments under the Bush and Obama Administrations. The evolution of FISA concentrates power in the executive branch with minimal accountability, asserting that the president’s inherent powers are as strong as the president’s willingness to defend them.\textsuperscript{117}

In conjunction with the clear evisceration of the separation of powers doctrine, both the legislative and the judicial branches support an inflated executive branch. Executive authority depends largely on legitimacy, “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”\textsuperscript{118} The Constitution does not restrain the president from acting effectively and decisively, but rather seeks to ensure that the actions taken by the executive branch are held accountable. Dire circumstances do not warrant uninhibited executive action. The amendments to FISA, however, demonstrate that additional legislation can indeed empower the executive to act beyond his constitutional powers.

Since September 11, Congress has passed a series of laws to amend FISA, while the judicial branch consistently rules in favor of presidential prerogative for the sake of national security.\textsuperscript{119} The original legislation of FISA purposely included the judicial branch to uphold the Fourth Amendment and to restrain the power of the Executive Branch.\textsuperscript{120} Bereft of an authentic check on the executive branch surveillance, the new FISA regime diminishes the FISC’s scrutiny of warrants.\textsuperscript{121} When Congressional action failed to prevent presidential prerogative, the judicial branch traditionally reinforced a check on unilateral power.

Without an authentic check on the executive branch surveillance, these laws lessen the FISC’s scrutiny of warrants. The new FISA regime “eviscerates the Fourth Amendment to the Constitution and represents an unwarranted transfer of power from the courts to the executive branch.”\textsuperscript{122}

\begin{footnotesize}
\begin{enumerate}
\item See Williams C. Banks, \textit{The Death of FISA}, 91 MINN. L. REV. 1209, 1226-1227 (May 2007).
\item See Forgang, \textit{supra} note 30.
\item See \textit{In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act}, 551 F.3d 1004, 1010-11 (FISA Ct. Rev. 2008).
\end{enumerate}
\end{footnotesize}
The FISC simply functions as a rubber stamp for presidential power. Of the 1,856 applications presented to the FISC in 2012, forty were modified, and only one was withdrawn.\footnote{Letter to Speaker Harry Reid from Peter J. Kadzik, Principal Deputy Assistant Attorney General April 30, 2013.}

Since the onset of the War on Terror, both presidential administrations have claimed an inherent constitutional authority to unilaterally act in areas of national security often without congressional or judicial approval. Congress passed legislation that institutionalizes presidential prerogative and affirms inherent authority as Commander-in-Chief to collect warrantless electronic surveillance.\footnote{See Mark Tushnet, \textit{Controlling Executive Power in the War on Terrorism}, 118 HARV. L. REV. 2673, 2674-79 (2005).} After September 11, secrecy was considered crucial in fulfilling the president’s constitutional obligation of protecting the nation from further attacks.

As a means of combatting terrorism and expanding executive authority, the federal government established 1,074 clandestine organizations “related to counterterrorism, homeland security, and intelligence in at least 17,000 locations across the United States.”\footnote{See Dana Priest and William Arkin, \textit{Top Secret America: The Rise of the New American Security State} (2011).} FISA’s very existence relies on secrecy, which caused the resurgence of the imperial presidency. The notion that national security crises can only be reconciled by unilateral power reemerged after September 11 terrorist attacks.

**Conclusion**

Congress enacted FISA with the understanding that war and national security threats prompted an outgrowth in the executive branch. As a result of the overarching threat of terrorism, the Bush Administration and, subsequently the Obama Administration, amended FISA to presidential power. Perennial threats tempt the executive branch of the United States to override the separation of powers doctrine, infringing upon the liberties established by America’s forefathers. In 1978, FISA’s legislative and judicial intervention to inhibit an imperial presidency was precisely the kind of counterbalancing that the Founding Fathers identified as essential to preventing tyranny and injustice. However, the new FISA regime provides the presidency with a precedent to override the Fourth Amendment and the separation of powers doctrine.