Undergraduate Law Review
at Florida State University

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Undergraduate Law Review at Florida State University

Spring 2025 Masthead

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A Note From the Executive Board

Dear Reader,

On April 17th a mass shooting on Florida State University's campus resulted in the loss of two lives and the injury of six others. This tragic event has left our entire community scared, saddened, and traumatized. While the irreparable harm done by this attack cannot fully be put into words, we wish to extend our sincere condolences to all those affected, particularly the family and friends of the deceased—Tiru Chabba and Robert Morales.

If you are in need of support, know that you are not alone, and that there are resources available to help you, including:

- FSU's Counseling & Psychological Services Crisis Hotline - (850) 644-8455
- FSU's Victim Advocate Program - (850) 644-7161

As we continue to collectively navigate this difficult time we encourage you to take the time to grieve, heal, and to find strength in your communities.

We also recognize that some of these papers may deal with issues that are particularly difficult at this time. Out of an abundance of care and caution for our readers, we have included warnings preceding papers that discuss sensitive subjects.

With love for our FSU community,

The Undergraduate Law Review at Florida State University

Letter from the Editor-in-Chief

Dear Reader,

I am excited to present the seventh volume of the Undergraduate Law Review at Florida State University. This volume features ten papers on a range of topics from a discussion of a new scheme in intellectual property litigation, to an examination of the constitutionality of seizures of foreign property, to an argument for reforming the United Nations Security Council's veto power, and more. This volume also features a paper by guest writer Meher Joshi from Tulane University that critically examines the democratic peace theory.

In addition to this volume, we have released seventeen blog-style papers which are available on our website. Many of these papers examine specific cases in depth, such as the 2010 *Citizens United v. Federal Election Commission* Supreme Court case, and recent lawsuits examining entertainment and antitrust law. Other papers focus on public policy issues, like the legalization of cannabis and the possibility of Puerto Rico becoming a state.

On a more personal note, I am extremely proud of the growth of this organization. While we have expanded our membership by a factor of five, with fifty-four members this semester, and have increased the number of papers we publish each year, we have also maintained a high quality publication. Every paper has been unique, well-argued, and well-edited. We hope you enjoy these papers as much as we have.

Kindly,
Anya Finley, President & Editor-in-Chief

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Legal Expansions to Combat the Rising Threat of Incel Terrorism

Written by Adalyn Pickett, Florida State University Class of 2027
Edited by Jenny Sanchez, Florida State University Class of 2025

Content Warning: This paper discusses mass shootings and gun violence which may be upsetting for some readers.

Abstract:

Recent mass casualty attacks resulting from the proliferation of extremist fringes of the incel or "involuntarily celibate" online subculture warrant an expanded legal response to combat the evolving threat of domestic terrorism in the United States. Examining recent international approaches to the issue, like those in Canada and the United Kingdom, may present alternatives and potential methods to broaden the legislation and counterterrorism strategies to prevent further attacks and the continued spread of the violent misogynist ideology. Considering potential challenges in addressing the issue in the U.S. additionally specifies relevant avenues to take.

I. Introduction

On May 23, 2014, twenty-two-year-old Elliot Rodger fatally stabbed his roommates, then drove around his community of Isla Vista, California, killing four more people and injuring fourteen others using knives, semi-automatic pistols, and his car near the University of California, Santa Barbara.[1] Rodger also posted a YouTube video and released his 141-page manifesto that day before committing suicide, attributing his attack to a nihilistic, intensely misogynistic ideology of a growing "incel" community.[2] A year and a half later, Chris Harper-Mercer fatally shot eight students, a faculty member, and subsequently himself at the Umpqua Community College he attended in Roseburg, Oregon, on October 1, 2015.[3] Harper-Mercer also released his manifesto, where he lamented his social status, lack of a girlfriend, and virginity, while also naming Elliot Rodger as a person like him, who stood "with the gods."[4] Three years later, on November 2, 2018, Scott Paul Beierle shot six women in a Tallahassee, Florida hot yoga studio, resulting in the death of two—one student and a faculty member of Florida State University—before committing suicide.[5] Beirele had posted a string of YouTube videos in 2014, including "The Rebirth of my Misogynism," and "Plight of the Adolescent Male," crediting Elliot Rodger to his newfound perspective.[6] All three attackers were radicalized within misogynistic online "incel" communities, and driven to act on their ideologies to actualize the digital extremism they saw into tangible violence.

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[1] Taisto Witt, *'If I Cannot Have It, I Will Do Everything I Can to Destroy It.' The Canonization of Elliot Rodger: 'Incel' Masculinities, Secular Sainthood, and Justifications of Ideological Violence*, 26 Soc. Identities 675, 675–89 (2020).
[2] *Id.*
[3] Rick Anderson, *'Here I Am, 26, with No Friends, No Job, No Girlfriend:' Shooter's Manifesto Offers Clues to 2015 Oregon College Rampage*, L.A. Times (Sep. 2023), latimes.com/nation/la-na-school-shootings-2017-story.html.
[4] *Id.*
[5] Steve Hendrix, *How Male Supremacy Fueled Scott Paul Beierle's Incel Attack*, Wash. Post (June 2019), washingtonpost.com/graphics/2019/local/yoga-shooting-incel-attack-fueled-by-male-supremacy.
[6] David Mack et al., *The Tallahassee Yoga Shooter Was A Far-Right Misogynist Who Railed Against Women and Minorities Online*, Buzzfeed News (Nov. 2018), buzzfeednews.com/article/davidmack/tallahassee-yoga-shooter-incel-far-right-misogyny-video.

The mother of George Chen, one of Elliot Rodger's victims, told the media, "This shouldn't happen to any family. This shouldn't be the lifestyle in the United States."[7] Incels and others persuaded by fervent male supremacy are more than anonymous users frustrated with the world; they contribute to a movement of radicalization, as recounted in attacks of the last decade, and present a real threat to domestic security. The U.S. legal framework should be expanded to effectively address the growing threats of incel terrorism and online far-right extremism. By examining recent international legal approaches, proactive methods, and legislative strategies for counterterrorism, such as broadening court rulings, expanding definitions of domestic terrorism, and implementing social service programs, there may be avenues to prevent future radicalization and potential attacks. A more comprehensive legal and social response is necessary to combat the spread of extremist, misogynistic violence.

II. Incel-Motivated Terror and Online Extremism

The tragic outcomes of incel-affiliated attacks are a result of an extremist ideology held by the perpetrators, derived from their engagement with proponents of a movement that fosters and amplifies deeply misogynistic beliefs in digital forums. The "involuntary celibate," or incel, movement operates mainly online as a self-proclaimed group of beta males,[8] who view themselves as lower than alpha males[9] in society. They disgruntledly claim "a position at the bottom of the social hierarchy due to their continued romantic and sexual rejection by women" and express "violent hatred of both themselves and women" in the extreme fringes of the

[7] ABC 7 Eyewitness News, *Isla Vista Killing Spree: All Victims Identified* (May 2014), abc7.com/isla-vista-shooting-victims-identified/76775.
[8] Inst. Strategic Dialogue, *Beta*, isdglobal.org/explainers/the-manosphere-explainer. "Beta" male in this context refers to a pejorative self-identifier. These individuals believe that they are not traditionally attractive, masculine men, and consider themselves easily taken advantage of or ignored by women.
[9] Inst. Strategic Dialogue, *Alpha*, isdglobal.org/explainers/the-manosphere-explainer. "Alpha" male in this context refers to dominating men, who incels believe are predispositioned to succeed and biologically advantaged to attract women.

movement.[10] The incel community is a small part of a widening "manosphere"[11] culture online, which has gained relevancy as the terminology associated with the various movements such as "incel," "alpha," and "beta" has bled into popular culture and social media, often in humorous contexts for the sake of punchlines. While the incel movement is often characterized alongside meme culture, there is potential for the most extremist members of the subculture to pose a terrorist threat, having carried out at least six deadly attacks since 2014.[12] Additionally, the increasing awareness among young men of the terms associated with this movement may have helped the movement at large gain traction, thwarting the ideology into the mainstream to some extent.

The ideology is primarily held by heterosexual males, and the nihilistic and radical perspective of the movement vilifies women and sexually active men. In their view, this in turn degrades incels' societal worth and necessitates a violent retaliation against these individuals.[13] Women are usually the primary victims and targeted enemies in their attacks, and incels are "the group most well-known within the violent misogynist communities," however, numerous attackers indiscriminately harm both women and men during their acts of violence.[14] In such incel-motivated attacks, Elliot Rodger is often quoted by perpetrators who are inspired by him and view him as a "martyr" of the incel movement. Sainthood is a prominent element of the incel

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[10] Alyssa M. Glace et al., *Taking the Black Pill: An Empirical Analysis of the "Incel"*, 22 Psych. Men & Masculinities 288 (2021).
[11] Inst. Strategic Dialogue, *Manosphere*, isdglobal.org/explainers/the-manosphere-explainer. "Manosphere" is an umbrella term that refers to a number of interconnected online communities that espouse misogynistic rhetoric, ranging from anti-feminism to more explicit, violent threats towards women.
[12] Vice, *Killer Incels: How Misogynistic Men Sparked a New Terror Threat* (May 2022), vice.com/en/article/incels-elliot-rodger-misogyny-far-right.
[13] Anti-Defamation League, *Incels (Involuntary Celibates)* (July 2020), adl.org/resources/backgrounder/incels-involuntary-celibates.
[14] Pub. Safety Can., *2019–2020 Public Safety Canada Departmental Progress Report for Canada's National Action Plan on Women, Peace and Security*, Gov. Can. (2021), international.gc.ca/transparency-transparence/women-peace-security-femmes-paix-securite/2019-2020-progress-reports-rapports-etapes-ps-sp.aspx?lang=eng.

community, canonizing Rodger in the lore of the movement, and his attack and suicide are characterized as sacrificial contributions to the ideology.[15]

The political objectives linked to the incel movement—to retaliate against and reshape an unfair social order the followers are dissatisfied with—justify a terroristic classification when analyzing attacks related to the proliferation of the ideology. Terrorism has many definitions across the world in different government agencies and legal contexts. Definitions usually create distinctions between domestic and international terrorism. Domestic attacks originate from an assailant of the same nationality as their victims and occur in their countries of origin. The Federal Bureau of Investigation (FBI) defines domestic terrorism as "violent, criminal acts committed by individuals and/or groups to further ideological goals stemming from domestic influences," under the U.S. Code at 18 U.S.C. 2331(5), and it can include the following activities:

> [A]cts dangerous to human life that are a violation of the criminal laws of the United States or of any State; appearing to be intended to: intimidate or coerce a civilian population; influence the policy of government by intimidation or coercion; or affect the conduct of a government by mass destruction, assassination or kidnapping; and occurring primarily within the territorial jurisdiction of the United States.[16]

Incel terrorism can be classified as domestic terrorism. The use of intimidation tactics and the intent to impose their worldview on the broader population, as well as the aim to inspire others to commit similar attacks, demonstrated by subsequent and interconnected violence, align with definitions and characteristics of terrorism. Additionally, this categorization is supported by the processes of incel radicalization and the strategic execution of violence. The selection of symbolic locations and targets of attacks, typical of terroristic planning, proliferates fear in female victims and maximizes the incel's intended impact. Specific locations often include those

[15] Witt, *supra* note 1.
[16] USA PATRIOT Act, 18 U.S.C. § 2331(5) (2001).

that young attractive women frequent, like universities, sororities, or yoga studios.[17] Through analyzing the varying legal standards and policies regarding domestic terror in different nations, their capacity in combating criminal activity of the incel movement can be assessed and potentially used to expand U.S. approaches.

Incel-motivated terror stems from extremist online communities, typically found on social media sites such as Reddit, while more extremist circles unsuitable for Reddit reside in 4chan or 8chan—anonymous imageboard (internet forum) sites—alongside other fringe alt-right collectives.[18] These sites have contributed to other terrorist attacks, such as the Christchurch mosque shootings in New Zealand in 2019, which resulted in the loss of over fifty lives.[19] Like Elliot Rodger, the white nationalist attacker also shared his manifesto on 8chan.[20] Similar to the FBI's outlines of domestic terrorism, the United Kingdom defines extremism in a recent 2024 update as:

> [T]he promotion or advancement of an ideology based on violence, hatred or intolerance, that aims to: (1) negate or destroy the fundamental rights and freedoms of others; or (2) undermine, overturn or replace the U.K.'s system of liberal parliamentary democracy and democratic rights; (3) or intentionally create a permissive environment for others to achieve the results in (1) or (2).[21]

According to Swedish political scientist Magnus Ranstorp, violent extremism and its rhetorical sentiments stem from a "kaleidoscope of factors," including individual, group, and societal level influences on someone's vulnerability to radicalized thought.[22] For incel movements, individual issues with social psychological problems, such as insecurities, mental health issues, or traumatic experiences, can diminish one's self-worth and make them susceptible to solutions found in

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[17] Johnathan Matusitz, *Symbolism in Terrorism: Motivation, Communication, and Behavior* 67–90 (2014).
[18] Diana Rieger et al., *Assessing the Extent and Types of Hate Speech in Fringe Communities: A Case Study of Alt-Right Communities on 8chan, 4chan, and Reddit*, 7 Soc. Media & Soc'y 5 (2021).
[19] *Id.*
[20] *Id.*
[21] U.K. Gov., *New Definition of Extremism* (Mar. 2024), gov.uk/government/publications/new-definition-of-extremism-2024/new-definition-of-extremism-2024.
[22] Magnus Ranstorp & Marije Meines, *The Root Causes of Violent Extremism* 4 (2024).

extremist rhetoric.[23] This includes blaming specific groups for their status, views that are especially amplified by social media.[24] At the group level, ideological dimensions of extremism are reinforced in groups and communities with shared experiences, spreading theoretical explanations as truths to answer societal failures. In online communities like those for incels, "radical groomers" frequently echo their misogynistic explanations of societal structure, becoming "influencers" for the incel movement and a motor for radicalist thinking.[25] Additionally, societal factors and significant events—like the COVID-19 pandemic, which left some individuals isolated and reliant on online channels—can amplify nihilistic notions about society and contribute to the proliferation of the incel movement.

III. Counter Terrorism Legal Frameworks in the United States

The U.S. government has not explicitly published a definition for extremism or "incel terrorism." However, the FBI notes two key qualities to the current threat landscape of domestic terrorism, including "lone-offenders" and "the internet and social media,"[26] which are relevant to the incel community. These attributes are paramount to incel terrorism events. The FBI expands, characterizing internet messaging platforms and social media as a place where "violent extremists have developed an extensive presence," and that these platforms "facilitate[s] the groups' ability to radicalize and recruit individuals who are receptive to extremist messaging."[27] Incel attacks are almost always committed by lone offenders as well, as illustrated in previous examples, which the FBI describes as "individuals [who] often radicalize online and mobilize to violence quickly."[28] While these insights indicate that the United States' legal frameworks and counterterrorism strategists are cognizant of extremist fringe communities like incels, there is a

[23] *Id.*
[24] *Id.*
[25] *Id.* at 6.
[26] U.S. Fed Bureau Invest., *What We Investigate: Terrorism*, fbi.gov/investigate/terrorism.
[27] *Id.*
[28] *Id.*

lack of legal specificity and alternative prevention methods to combat the rising threat of incel terrorism in the U.S.

U.S. federal law defines domestic terrorism but provides no standardized federal penalties. While domestic terrorism is left to the states to address, not every state has laws to charge perpetrators with domestic terrorism, denying victims' families validation for the gravity of the acts against them.[29] These unstandardized policies also make it difficult to define domestic terrorism consistently and formally designate an individual as a domestic terrorist. Additionally, hate crime charges are often used in place of terrorism charges, as they allow prosecutors to pursue a conviction with more certainty of receiving a guilty verdict. However, this may ultimately lessen the severity of the crime.[30] In public perception, the word "terrorism" holds significant weight and recognizes a unique, calculated threat that has the potential for strategic mass casualty events. State terrorism charges also come with harsher and higher maximum sentences than federal hate crimes. While hate crimes have broad application and can include incel-motivated violence, attributing the bias of the perpetrator based on a victim's gender,[31] terrorism charges may send a louder message to the public about the deeper context of the decisions and online radicalization process the attacker went through to carry out the attack. This may also potentially mitigate the likelihood that outsiders get involved with the movement in the future, given their awareness of its negative impacts.

A federal avenue for charging crimes of domestic terrorism may also raise awareness of the issue and expose those behind the violence; in the incel community, individuals can hide behind anonymous online personas and continue to perpetuate radical ideologies, leading to

[29] Lisa N. Sacco, Cong. Rsch. Serv., *Understanding and Conceptualizing Domestic Terrorism: Issues for Congress* 21 (2023).
[30] *Id.*
[31] U.S. Dep't Just., *Learn About Hate Crimes*, (July 2024), justice.gov/hatecrimes/learn-about-hate-crimes.

more extremist thought at large. Federal charges also imply a wider threat level and concerns for domestic security for the whole of the nation. The U.S. has yet to implement revised or additional legislation for incel-motivated violence. However, significant legislation addressing domestic and international terrorism has been passed. Following September 11th, the U.S. implemented a slew of legislation, packaged in the PATRIOT Act, which transformed intelligence gathering and counterterrorism strategy for the entire system. The Act is officially known as the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001."[32] A 2005 amendment to the PATRIOT Act in 2008, called the Foreign Intelligence Surveillance Act (FISA), authorized law enforcement to surveil and intercept "domestic wire, oral, or electronic communications."[33] This addition in particular made intercepting attackers easier for investigators, allowing them to lawfully track the planning of potential terror attacks. The pathways for addressing individual actors with the potential to carry out terrorist attacks set up the United States to effectively address the threats of the new movement. However, without widespread recognition of the incel movement as a potential threat, there are setbacks to successfully implementing and utilizing existing policies to prevent unique threats to domestic security.

IV. Canadian Case Law

International cases involving violent misogynistic terror attacks may point to some directions the United States could take in combating the threat of online extremism through adequate application of criminal charges. In the afternoon of February 24, 2020, a seventeen-year-old male walked approximately two kilometers from his home and entered an erotic massage parlor in Toronto, Canada, wielding a seventeen-inch sword engraved with

[32] USA PATRIOT ACT of 2001, H.R. 3162, 107th Cong. (2001) (enacted).
[33] FISA Amendments Act of 2008, 50 U.S.C. §§ 1801–1803 (2008).

"thot-slayer."[34] He proceeded to fatally stab a twenty-two-year-old receptionist over forty times, then stabbed another female worker in the chest and continued to attack her while repeatedly calling her a "stupid whore."[35] This event was motivated by incel ideology, as indicated by in-court admissions of the perpetrator's inspiration from an infamous 2018 van attack in Toronto. A handwritten note was also found on him after the attack that stated "Long Live the Incel Rebellion," and he admitted to paramedics that he "wanted to kill everyone in the building" and was "happy [he] got one."[36]

The attack had a significant legal impact, becoming the first instance in which an incel-motivated act of violence was prosecuted as terrorism, a global precedent set by Canada.[37] In 2023, the perpetrator was sentenced to life in prison by Justice Sukhail Akhtar.[38] With the establishment of a motivation and confirmation of the attack consisting of terroristic qualities, charging the attacker with terrorism was the adequate response and reflected the extremity of this act. Canada had also previously recognized the increasing threat of incel terrorism in a 2018 public report on terrorism.[39] It included a discussion of the rising movement following the incel-motivated 2018 Toronto van attack,[40] in which Alek Manassian was arrested after driving a van through a crowded Toronto street, killing ten and wounding sixteen, then taking to Facebook to post: "The Incel Rebellion has already begun! We will overthrow all the Chads and Stacys! All hail the Supreme Gentleman Elliot Rodger!"[41] The 2018 report also noted the rising threat of

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[34] Shanifa Nasser, *Toronto Spa Killer Pleads Guilty to Murder in Deadly Sword Attack, Cites Van Attacker as 'Inspiration'*, CBC News (Sep. 2022), cbc.ca/news/canada/toronto/incel-massage-parlour-guilty-1.6582534.
[35] R. v. O.S. (2023), 4142 O.R. 3d (Can. Ont. Sup. Ct. J.).
[36] *Id.*
[37] Pub. Safety Can., *Terrorism Charges Laid in Ideologically Motivated Homicide*, Gov. Can. (May 2020), publicsafety.gc.ca/cnt/trnsprnc/brfng-mtrls/prlmntry-bndrs/20200831/062/index-en.aspx.
[38] Paola Loriggio, *Man Who Pleaded Guilty in Incel-Inspired Toronto Murder Sentenced to Life in Prison*, CBC News (Nov. 2023), cbc.ca/news/canada/toronto/murder-toronto-spa-man-sentencing-1.7041917.
[39] Pub. Safety Can., *2018 Public Report on the Terrorism Threat to Canada* (3rd ed. 2019).
[40] *Id.*
[41] Bruce Hoffman & Jacob Ware, *Incels: America's Newest Domestic Terrorism Threat*, Lawfare (Jan. 2020), lawfaremedia.org/article/incels-americas-newest-domestic-terrorism-threat.

low-sophistication methods used in violent mass casualty attacks and their use by individuals "inspired online," emphasizing the need for advanced approaches to assessing domestic terrorism threats and countering extremist ideology online.[42] Additionally, Canada's Social Sciences and Humanities Research Council published their findings from a research project titled *Tracing Radicalization to the Incel Movement and Its Connection to Loneliness*,[43] calling attention to the mental health issue and the increasing interactions with the movement from lonely individuals seeking answers to their problems. The report also provided policy recommendations, including:

> Legal responses should target individual actors and actions, as wide scale criminalization has limited effect on decentralized and anonymous groups. National-level dialogue about regulating communications platforms is advised. Inclusive cyber-safety and media skills curriculum can address gateways to inceldom. Greater national investment in mental health supports relative to digital-era issues will facilitate access to services.[44]

These recommendations serve as progressive advancements to consider the rise of incel-related violence and extremist misogynistic rhetoric online. In 2022, the U.S. Secret Service made similar conclusions in a case study report titled "Hot Yoga Tallahassee: A Case Study of Misogynistic Extremism," tracking the many alarming incidents and the concerns from bystanders who knew of Scott Paul Beierle.[45] The Secret Service concluded that community-level threat assessments could lead to significant prevention of similar attacks.[46] While the U.S. is aware of the issue, insignificant funding and research have been allocated to address it outside of case study reports, and no significant policy adjustments have been made to counter the issue.

The Canadian government's ruling of terrorism in the massage parlor case marked a significant response, shifting the culture surrounding the way incel-motivated violence is

[42] *Id.*
[43] James Popham et al., *Tracing Radicalization to the Incel Movement and Its Connection to Loneliness* (2023).
[44] *Id.* at 2.
[45] Nat'l Threat Assessment Ctr., Dep't Homeland Sec., *Hot Yoga Tallahassee: A Case Study of Misogynistic Extremism* (2022).
[46] *Id.*

perceived. It also addressed previous failures to identify the attacks as terrorism, likely due to its online portrayal in meme culture and alternative classification as a hate crime. In the United States, for comparison, terrorism charges have not been brought against a perpetrator of incel-motivated violence. By increasing awareness of the issue to agencies across the U.S. and publishing specific governmental interpretations of the incel movement may encourage state prosecutors to charge incel attacks as acts of terrorism to adequately penalize the crime. Harsh penalties, such as life in prison as designated by the Canadian justice system, may deter potential attackers, not only from committing acts of terrorism but also from engaging in related crimes associated with the movement, such as sexual assault, harassment, or stalking.

V. The United Kingdom's Response to Incel-Related Shooting

Many attacks related to the incel ideology utilize guns and involve mass shootings. A 2021 mass shooting in the United Kingdom raised concerns about access to guns for those experiencing mental health crises and highlighted the need for enhanced gun control. The attacker expressed incel-related sentiments online, leading to increased awareness of the risk of the proliferating ideology. On August 12, 2021, in Plymouth, United Kingdom, twenty-two-year-old Jake Davison had an altercation with his mother before shooting her, leaving his house, and killing five others, including himself and a three-year-old girl.[47] While the attack was not classified as an explicit act of terrorism by the Counter Terrorism Policing of the U.K.,[48] the event sparked significant concern regarding the attacker's online communication and his ties to the incel subculture, which many saw as a contributing factor to him carrying out the

[47] Dominic Adamson & Juliet Wells, *Inquests into Mass Shooting in Plymouth Conclude—Jury Find "Catastrophic Failings" in the National and Local Gun Licensing System*, Temple Garden Chambers (Feb. 2023), tgchambers.com/2023/02/inquests-into-mass-shooting-in-plymouth-conclude-jury-find-catastrophic-failings-in-the-national-and-local-gun-licensing-system.
[48] Counter Terrorism Policing U.K., *Counter Terrorism Policing Response to the Tragic Shootings in Plymouth* (Aug. 2021), counterterrorism.police.uk/counter-terrorism-policing-response-to-the-tragic-shootings-in-plymouth.

attack.[49] After the attack, jurors determined the cause of death, with no criminal outcomes or charges, and concluded Davison viewed "posts online about incel culture…in the hours before he died."[50] An investigating officer shared that files checked by the police revealed shocking content that espoused offensive, violent, and misogynistic views.[51] In April of 2021, Davison posted a video about an assault he had carried out after someone had called him fat, stating, "This is why incels were more prone to killing themselves—or going on a killing spree."[52] Like many of the incel-inspired attackers already mentioned, he named the infamous California perpetrator, Elliot Rodger, in some of his content.[53] In July of 2021, only a month before he carried out the shooting, Davison also filmed himself discussing and lamenting his "lack of success at dating apps, disillusionment of life, and self-hatred."[54] These expressions of nihilistic attitudes and references to the incel subculture sparked concerns in the U.K. about the increasing effect of the online community and the potential for future attacks that utilize violence for the sake of an ideology or in response to a dissatisfaction with society.

In addition to media releases and news coverage advising communities of the threat of incel violence, much of the response following this attack in the U.K. focused on restricting access to gun licenses and ensuring adequate application of security measures to remove guns from those expressing radical sentiments or a history of violence, as was the case with Davison. A major concern with Davison's story was the return of his gun license after it was previously

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[49] Dominic Casciani & Daniel De Simone, *Incels: A New Terror Threat to the UK?*, BBC News (Aug. 2021), bbc.com/news/uk-58207064.
[50] BBC News, *Plymouth Shooting: Gunman 'Did Not Hesitate' Before Killing Himself* (Jan. 2023), bbc.com/news/uk-england-devon-64318699.
[51] *Id.*
[52] Steven Morris, *Plymouth Shooter Fascinated by Serial Killers and 'Incel' Culture, Inquest Hears*, The Guardian (Jan. 2023), theguardian.com/uk-news/2023/jan/18/plymouth-shooter-jake-davison-fascinated-by-mass-shootings-and-incel-culture-inquest-hears.
[53] *Id.*
[54] *Id.*

taken away from him following assault allegations.[55] Alongside policy recommendations from the coroner for the attack, the U.K. Parliament implemented statutory guidance and sought to ensure "better consistency across police firearms licensing departments" and mandated that "no one will be given a firearms licence unless their doctor has expressly confirmed to the police whether they have any relevant medical conditions, including in relation to their mental health."[56] The U.K's gun ownership requirements were already strict by American standards before the attack. Following the incident, the government tightened policies further, aiming to prevent future deaths caused by individuals experiencing mental health crises, like Davison. The potential for gun reform in the U.S. to prevent vulnerable or radicalized populations from obtaining deadly weapons is immense, and underscoring the international approach to the issue may inspire domestic lawmakers.

While the U.K. did not implement a sweeping legislative overhaul in their approach, they acknowledged the victims of the 2021 attack, and recognized the need for greater community awareness of the issue. The U.K. government published a resource handbook in 2024 as part of their Educate Against Hate program under the Department of Education titled *Incels: A Guide for Those Teaching Year 10 and Above*.[57] The document outlines how to recognize language and behaviors in line with violent extremism and misogyny, including definitions related to the subculture, case studies, and who to contact, such as a confidential Anti-Terrorist Hotline to use in the event of suspicious activity.[58] These initiatives could prevent extremist language among young children, even those unaware of the gravity of such issues, and protect schools from experiencing violence. These measures at the local level and the individualized responses to

[55] Popham et al., *supra* note 43.
[56] HC Deb (Feb. 21, 2023) (728) col. 155 (statement of Chris Philp).
[57] U.K. Dep't Educ. Res., *Incels: A Guide for Those Teaching Year 10 and Above* (2024).
[58] *Id* at 12.

warning signs are proactive measures that can counter incel-related violence. While the U.K. did not conduct an extreme restructuring of their legal frameworks, amplified recognition from the government and efforts to increase awareness for countering the movement highlight how a government can adapt to emerging and unique threats through social responses and reinforcement of policies to address new risks.

VI. Problems in Evolving and Applying Policy

Issues in addressing legal solutions to incel terrorism threats include the precarious, anonymous nature of online incel communities, concerns for violations of civil liberties in surveilling online activity, prosecutor's challenges to carrying out criminal charges of domestic terrorism, and the aforementioned awareness gap regarding the issue of incel extremism. Inherent to the extremist movement of incels is the online nature of their communication and digital radicalization of anonymous individuals, making tracking potential attacks difficult. However, many attackers were found to have published public announcements and explanations of their ideology, as with Scott Paul Beierle.[59] Enhanced community-based surveillance and knowledge of what incel rhetoric, particularly its violent language, looks like could have assisted in recognizing the warning signs from these attackers. However, attacks may be unexpected and anonymous online forums may be the singular place where violent plans and beliefs are expressed. Surveillance, even when possible, is often challenged by proponents for privacy and the protection of civil liberties. Some fear infringement on civil liberties and invasions of privacy by the U.S. government when surveillance of domestic individuals occurs.[60] Additionally, with distance from recent large-scale terrorist attacks such as September 11, data shows that "Americans express considerable concerns over counterterrorism measures and are less willing

[59] Nat'l Threat Assessment Ctr., *supra* note 45.
[60] Mathieu Deflem & Shannon McDonough, *The Fear of Counterterrorism: Surveillance and Civil Liberties Since 9/11*, 52 Glob. Soc'y 70 (2015).

to accept such measures in the name of the fight against terrorism."[61] These apprehensions could limit public approval of legislators' proposals for expanded methods intended to effectively surveil anonymous incel forums in the name of maintaining standards for American privacy.

In addition to a general lack of awareness about incel-related violence, the stereotypical image of a "terrorist" may also hinder legislative action aimed at countering emerging threats such as incel terrorism, ultimately failing to bring the cause to the mainstream or generate significant lobbying efforts.[62] Terrorism attributed to extremist interpretations of Islam is often cited as the predominant occurrence of terroristic activities and is given much consideration in politics and societal discussions of terrorism at large.[63] However, these generalizations perpetuate Islamaphobic discourse and produce a singular viewpoint of extremism that may lead to selective legislation and racialized rhetoric for counterterrorism initiatives. The War on Terror[64] proliferated in the mid to late 2000s in the United States, and military activities countering terror do not translate to all forms of extremism. Legislation based solely on these events and the common conception of a terrorist, rooted in Islamophobia and racism,[65] prevent the creation of sufficient laws to counter the acts of fringe extremism such as from incels. If the United States were to significantly expand their definitions and laws pertaining to domestic terrorism threats, it is essential for lawmakers to recognize these existing stereotypes. Lawmakers should consider the prevalence of ideologies beyond that of Islamic extremism, such as incel-related misogynistic

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[61] *Id.* at 77.
[62] John Sides & Kimberly Gross, *Stereotypes of Muslims and Support for the War on Terror*, 75 J. Pol. 583 (2013).
[63] *Id.*
[64] The Global War on Terrorism was a series of U.S.-initiated military operations, particularly in Afghanistan and Iraq, that sought to seek out and halt global activities that the U.S. deemed "terroristic." The campaign has been criticized for promoting imperialism and U.S. political domination. *See generally* George W. Bush Presidential Lib., *Global War on Terror*, georgewbushlibrary.gov/research/topic-guides/global-war-terror. *See also* Antony Anghie, *The War on Terror and Iraq in Historical Perspective*, Osgoode Hall L.J. 45, 60–61 (2005).
[65] Caroline Mala Corbin, *Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 2 Fordham L. Rev. 455 (2017).

violence. Acknowledging the potential for legislation to lead to discrimination and reinforce biases could also prevent further entrenchment of Islamaphobic conceptions of terrorism.

When discussing what kind of charges to carry out against incel-motivated attackers following a mass casualty event that is consistent with the definition of terrorism, it may not always be possible to carry out terrorism charges. This is largely due to the prevalence of immediate suicide following the attacker's actions, which occurred with nearly every attack previously mentioned. It may be unfair to characterize U.S. prosecutors and the Justice Department as unwilling to classify incel attacks as terrorism if there is a lack of perpetrators to charge and make a public example of through sentencing. However, this attribute of incel attacks—suicide for the sake of canonization in the movement and a total belief and devotion to their cause—points to the need to address the issue of mental health among those engaged with the online subculture.[66] Forming policy and more active social responses to locally address the mental health of those expressing violent rhetoric may be an effective method to prevent the attacks, as well as the death of the attackers. However, there may be challenges in achieving specificity in identification methods amongst other online notions of misogyny or discrimination. Also, with the mainstream relevancy of incel terms and language, it may be easy to mistake what some perceive as jokes with association to the extremist subculture.

VII. Conclusion

Recent mass casualty attacks resulting from the proliferation of extremist fringes of the incel or "involuntarily celibate" online subculture warrant an expanded legal response to combat the evolving threat of domestic terrorism in the United States. Given the threat of the extremist incel subculture, which includes attacks with terroristic qualities and the potential for future

[66] Alyssa M. Glace et al., *Taking the Black Pill: An Empirical Analysis of the "Incel"*, 22 Psych. Men & Masculinities 288, 295 (2021).

attacks against vulnerable populations, there is sufficient cause to consider expanding strategies to counter the incel movement. By examining present-day U.S. domestic terrorism standards, recent international approaches to the issue, and by considering likely challenges in the evolution and application of relevant policy, it becomes evident the current U.S. legal framework fails to fully address and counter the attacks and violence of the rising incel movement.

Studying and evaluating the approaches of other nations where many incel attacks have also occurred may be useful in translating their practices to the U.S. legal framework. This can include prosecuting attacks with terrorsim charges, potential federal charges for domestic terrorism, social responses that include mental health support, and enhanced gun control, all of which may better equip investigators and the justice system to address the threat. The unique nature of incel terrorism, which stems from forums of anonymous thinkers who canonize those that commit violence in the name of their cause, necessitates specific policy guiding counterterrorism initiatives and expansive characterizations of terrorist actors to effectively address the issue and prevent future attacks. Additionally, improved frameworks that address evolving incel attacks that stem from online spaces may also address other fringe digital communities that perpetuate violence as well as potential threats of broader extremist rhetoric cultivated and grown online.

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No Right to Die and Possibly No Right to Sue: The Legal Loss of Life in Medical Malpractice Reform and Physician-Assisted Suicide

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Abstract:

Twenty-first century technological advancements have allowed for extensive expansions of the capability and complexity of health care. Mirroring these changes, medical law has seen shifts in the legal relationship between the patient, the doctor, and liabilities associated with medical decisions. The statues surrounding the legal loss of life, specifically within the medical malpractice context, are dynamic with the continued evolution of medical technology and tort reforms. This discussion focuses on the legal loss of life and centers on the juxtaposition between physician-assisted suicide precedent and the state regulatory statues that both expand and restrict medical malpractice legislation. Examining the two highlights the inadvertent consequences, like inequality and discrimination, that come from upholding precedent in two distinctive yet equally changing fields.

I. Background and Overview

What is the price of a life? In a criminal court, second-degree murder comes with a mandatory minimum sentence of ten to fifty years in multiple U.S states. From 1988, with the reinstatement of the death penalty,[1] committing a purposeful murder[2] could mean death by electrocution. Essentially, the act of taking a life comes with severe consequences—except if you are a medical professional. In the field of medical law, the changes and improvements to medicine have advanced greatly within recent decades. These technological advancements in medicine have also allowed for different types of medical error. Recently, in *State of Tennessee v. RaDonda L. Vaught*, a nurse was sued for criminal negligence after retrieving the wrong medication from a computer-based medical inventory.[3] After Vaught administered a skeletal paralytic relaxant instead of an anti-anxiety sleep-inducing medication, the patient later died.[4] The legal question of how much a life is worth when a medical professional is accused of a mistake resulting in an injury or death is most commonly answered with one word—damages.[5] From imprisonment to payment, the consequences stand. Focusing primarily on the structure of the United States healthcare system, medical malpractice reform has allowed for inadvertent consequences due to individual state regulations. Largely, American legal precedents regarding the loss of life in a medical context focus on wrongful death through medical malpractice and the right to die through physician-assisted suicide (PAS). An examination of the legal reasoning at the state and federal level behind wrongful death lawsuits and the refusal to safeguard

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[1] Death Penalty Info. Ctr., *Federal Death Penalty*, deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty.
[2] Murder in the first degree occurs when "Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate an offense." D.C. Code § 22-2101 (2023).
[3] Tennessee v. RaDonda L. Vaught, No. 2019-A-76 (M.D. Tenn. 2022).
[4] *Id.*
[5] Damages can "refer to compensation for loss or injury, medical bills, punitive damages, and medical malpractice. This is usually money paid to the patient or the patient's family." Michael J. Bono et al., *Medical Malpractice*, Nat'l Ctr. Biotechnology Info. (Oct. 2022), ncbi.nlm.nih.gov/books/NBK470573.

physician-assisted suicide demonstrates important consequences—possible medical discrimination and unintended social repercussions for those seeking medical aid. For medical malpractice, the relationship between wrongful death statutes, payment, and coverage for doctors is regionally defined. On a related note, when considering legal precedent involving the loss of life, U.S states have the responsibility of individually passing "Death with Dignity" laws, which are laws aimed at allowing terminally ill patients to choose death over extended medical care—an issue at the core of permitting physician-assisted suicide.[6] Basically, legalizing PAS is up to individual states. A state can choose to ban the practice, restrict circumstances in which it can occur, or pass legislation that allows PAS since the stance at the federal level only bans the use of federal funding for PAS, not the practice as a whole. Both areas of loss of life have state and federal level legislation that allows for variance in the way individuals can act, that is lawsuits after death or a choice in ending one's own life. Shedding light on the precedents themselves showcases the variance within the law and the influence of top-down legislation, creating a space for inequality to those affected at the bottom.

II. Introduction

In the United States, healthcare coverage is not universally provided. Even with medical programs like Medicaid and Medicare that are publicly available to individuals who meet certain criteria, healthcare is typically provided through private companies. The Commonwealth Fund reports that, due to the lack of a universally adopted policy, "the federal government has only a negligible role in directly owning and supplying providers."[7] The U.S. Department of Health and Human Services acts as the principal federal agency safeguarding health services, while states

[6] Death with Dignity Nat'l Ctr., *About Us*, deathwithdignity.org/about.
[7] Roosa Tikkanen et al., *International Health Care System Profiles: United States*, Commonwealth Fund (June 2020), www.commonwealthfund.org/international-health-policy-center/countries/united-states.

"set eligibility thresholds, patient cost-sharing requirements, and much of the benefit package."[8] The mix of public and private healthcare allows medical claims to follow a federalism-based structure, meaning there is a separation of powers between states and the federal government. This division enables individual states to set the standards for wrongful death and medical negligence claims. For the purpose of this discussion, the term medical malpractice is used to refer to "any act or omission by a physician during treatment of a patient that deviates from accepted norms of practice in the medical community and causes an injury to the patient."[9] Medical malpractice cases and claims fall under the category of tort law, or "a body of law that creates and provides remedies for civil wrongs that are distinct from contractual duties or criminal wrongs."[10] In a medical malpractice case, the common standard to prove wrongdoing is showing that there was negligence committed by the medical professional against the patient. The patient holds the burden of proving the elements of negligence and harm. Negligence commonly refers to "conduct that falls short of a standard; the most commonly used standard in tort law is that of a so-called 'reasonable person."[11] The reasonable person standard is a fictional legal standard, utilized by courts to have an objective comparison standard between the qualities of the defendant and the things a *reasonable* person would or would not do.[12] Ultimately, the qualifications for a medical malpractice suit differ across the United States, as some states have limitations for applicants and while others have broader guidelines. This emphasis of the state's right to control medical legislation has resulted in a multitude of policy differences.

The legal loss of life, in reference to the legal standards behind dying and death, has also affected an individual's "right" to die. As previously established, physician-assisted suicide is not

[8] *Id.*
[9] B Sonny Bal, *An introduction to medical malpractice in the United States*, 467 Clin Orthop Relat Res. 339 (2009).
[10] G Edward White, *Tort Law in America: An Intellectual History* (2003).
[11] Bal, *supra* note 9, at 340.
[12] Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 Lewis & Clark L. Rev. 1233 (2010).

a recognized right at the federal level.[13] Further, federal law essentially bans the use of federal funds to be used in assisted suicide. Section 14402 of Title 42 of the U.S. Code notes that "Federal government to provide health care services within the scope of the physician's or individual's employment, no such item or service may be furnished for the purpose of causing, or for the purpose of assisting in causing, the death of any individual, such as by assisted suicide, euthanasia, or mercy killing."[14] The lack of federal policy protecting physician-assisted suicide has permitted ten states to enact their own legislation. In November 1994, Oregon became the first state to pass a Dignity With Death law; voters enacted the Death with Dignity Act by a margin of fifty-one percent to forty-nine percent.[15] In 2021, New Mexico became the tenth state to legalize medical aid-in-dying (MAID) with Governor Michelle Lujan Grisham signing it into law.[16] Legal limitations on physician-assisted suicide and barriers to sufficient medical malpractice reform at the core places limitations on the loss of life—limitations that are inherently unequal based on the semi-private healthcare system they derive from.

III. Loss of Life Limitations

A. Florida Free Kill: Limitations on Medical Malpractice Accountability

The American healthcare system allows states to restrict an individual's ability to hold physicians accountable for the loss of life. The claimant or plaintiff has the burden of proof in a medical malpractice case to show not only that the medical professional acted with negligence, but also that there was harm suffered to the patient. In the state of Florida, the "Free Kill Law" allows significant limitations on who can file a wrongful death medical malpractice suit.[17]

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[13] 42 U.S.C. § 14402 (1997).
[14] *Id.*
[15] Oregon Death With Dignity Act, Or. Rev. Stat. §§127.800–127.995 (1997).
[16] Cedar Attanasio, *New Mexico Latest State to Adopt Medically Assisted Suicide*, AP News (Apr. 2021), apnews.com/article/legislature-michelle-lujan-grisham-legislation-assisted-suicide-new-mexico-62bfb8e52a96ba46c23f6ae35cabdb5a.
[17] Florida Wrongful Death Act, Fla. Stat. § 768.21 (1990).

Introduced in 1990, the wrongful death statute outlines qualifying factors for claimants; if the person injured in the alleged medical malpractice dies without a surviving relative (who must be their spouse or children under twenty-five), any remaining family members will be unable to file a wrongful death claim.[18] This allows for the wrongful death malpractice allegations to disappear without a settlement, trial, or successful claim. Specifically outlined in Florida Statute 768.21, the Free Kill Law was introduced partially to solve a problem—medical professionals paying high insurance premiums were leaving the state to practice elsewhere.[19] The rise in medical malpractice lawsuits was disincentivizing doctors from staying and practicing in Florida. Florida Hospital Association cites Florida as having the "highest number of malpractice claims paid out"[20] and as a state with high medical litigation rates, enabling "excessive premiums for high-risk specialties."[21] Any type of negligence on behalf of a doctor, fundamentally, must deal with a patient's (or those suing on behalf of a deceased patient) expectations that were not met and the harm that occurred. Limiting who can sue on a decedent's behalf, in theory, would save practicing physicians and insurance companies money. The insurance companies that represent doctors against malpractice commonly pay for both economic damages like settlements and financial awards determined based on liability, and also other damages for pain and suffering to victims who succeed in their claims. In return, the doctors pay the insurance premium to receive coverage. Cutting the cost of the economic damages by such a tremendous amount by halting the lawsuits would begin the process of lowering the costs for practicing doctors, while allowing insurance companies to lower their rates.

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[18] *Id.*
[19] Greg Fox, *Florida's 'Free Kill' Law Could Soon Be Out*, Wesh 2 News (Mar. 2025), wesh.com/article/florida-free-kill-law-could-soon-be-out/64312284.
[20] Fla. Hospital Ass'n, *Florida's Medical Malpractice Crisis* 1 (2023).
[21] *Id.*

The legality behind the Free Kill Law has been called into question before in *Mizrahi v. North Miami Medical Center*, a case brought before the Supreme Court of Florida in 2000. The family of Morris Mizrahi, who brought a wrongful death suit after his death in May 1993 on the basis of alleged malpractice, appealed the district court decision against them.[22] The case advanced to the Supreme Court of Florida, where they examined the following legal question in reference to the 1995 Florida statutes for wrongful death:

> Does the Free Kill law violate the equal protection clause of both the Florida and the United States Constitution by preventing the recovery of "non pecuniary damages by a decedent's adult children where the cause of death was medical malpractice will allowing such children to recover where the death was caused by other forms of negligence?[23]

The Florida Supreme Court upheld the statute, reasoning that it was supported by a constitutionally sufficient justification under federalism, specifically a state's right to pass laws qualifying under a "legitimate state interest."[24]

Examining constitutionality through the scope of the rational basis test refers to a judicial process of review where a court weighs constitutionality and can rule in favor of state laws that have a rational connection between the state's interests and the law.[25] The Florida Supreme Court's ruling in *Mizrahi* was twofold—limiting claims would reduce healthcare costs, and excluding a class of unmarried individuals without a child of qualifying age for healthcare costs, alongside other factors, does not violate the Constitution.[26] Concurring Justices Harding, Shaw, Wells, and Anstead, with Lewis concurring only in the result, found that the restriction of medical malpractice claims "would proportionally limit claims made overall and would directly

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[22] Mizrahi v. North Mia. Med. Ctr., 761 So. 2d 1040 (Fla. 2000).
[23] *Id.*
[24] Establishing a legitimate state interest is a component of the rational basis test. *See generally* Legal Info. Inst., *Rational Basis Test*, Cornell L. Sch. (Mar. 2024), law.cornell.edu/wex/rational_basis_test/
[25] The rational basis test, as utilized in the United States v. Carolene Products Co., 304 U.S. 144 (1938) ruling refers to a judicial review process to determine the constitutionality of a law. A rational basis test is used to decide if a statute can be "rationally" related to a state's interests.
[26] *Mizrahi*, 761 Fla. at 1043.

affect the cost of providing health care by making it less expensive and more accessible."[27] After establishing that this would be a favorable effect for Florida, the judges used a rational basis test to determine constitutionality. Ultimately, the Florida Supreme Court approved the district court's decision, finding that the "exclusion is rationally related to controlling healthcare costs and accessibility, and does not violate the equal protection guarantees of either the United States or the Florida Constitution."[28] Yet the only dissenting judge, Justice Pariente, cites firmly that the legislature's move towards the denial of the right to compensation for a specific class of people is a decision without merit.[29] Pariente denies that a rational relationship to legitimate state interest exists as a justification, stating that:

> There is no indication that the medical malpractice crisis that formed the basis for treating this class of survivors differently than all other adult children even continues to this day. I therefore believe that the challengers of this statute have met their burden and have demonstrated that the distinction drawn by the Legislature is arbitrary.[30]

From 1990 onward, the Florida Free Kill Law has gained traction because of its far-reaching implications. The unforeseen consequences of the law include the limitations on families who are effectively prohibited from suing on the decedent's behalf for wrongful death if they do not meet the criteria. "Families of deceased victims argue that the law effectively grants immunity to healthcare providers and allows negligent doctors or hospitals to avoid accountability, undermining justice for families whose only recourse is barred by this legal loophole."[31] Ultimately, this law has resulted in a general medical attitude of being free to kill, but it leaves victims with no choice after the loss of a loved one to sue on the grounds of this faulty approach. Legally, the Florida law has discriminatory implications. By outlawing individuals as

[27] *Id.*
[28] *Id.*
[29] *Id.* at 1044.
[30] *Id.*
[31] Alice Kang, *Justice Denied: The Fight to Reform Florida's 'Free Kill' Law for Medical Malpractice Victims*, The Issue Spotter: Cornell J.L. & Pub. Pol'y (Oct. 2024), jlpp.org/justice-denied-the-fight-to-reform-floridas-free-kill-law-for-medical-malpractice-victims.

non-qualifiers, the law effectively treats multiple classes of people differently. Unmarried people without children are in a position where no one can sue for damages on their behalf, which also separates a subset of people who may be patients. A reevaluation of the so-called "rational" connection between the necessary change to the medical malpractice field in Florida could result in a revised wrongful death statute without the exclusionary implications it breeds now.

B. Physician-Assisted Suicide: Limitations on Right to Privacy and "Right" to Die

"[I]n the two hundred and five years of our existence, no constitutional right to aid in killing oneself has ever been asserted and upheld by a court of final jurisdiction."[32] The right to live is protected by the Constitution, as it is clearly written in the Due Process Clause of the Fourteenth Amendment—"no state may deprive any person of life, liberty, or property without due process of law."[33] Naturally, the legal precedent safeguarding the right to live comes with less mention of the right to die. There are clear legal behaviors that can be seen as an exception to this right to life; the Fourteenth Amendment protects life explicitly[34] and the Second Amendment lays the legal foundation to protect one's own life to the extent of the right to bear arms.[35] Inherently, this right to take a life to save oneself is not explicitly written, but the legal standard generally offers discretion. Provisions that are protected by law include self-defense as mentioned above, the death penalty, and law enforcement's ability to protect civilian life without facing consequences for justified lethal force. The Constitution outlines the right to life while the legal system upholds this right to life and outlines consequences for the actions that take life. However, this does not extend to the right to take one's own life. Notably, the Supreme Court has

[32] Compassion in Dying v. Wash., 49 F.3d 586, 591 (9th Cir. 1995).
[33] U.S. Const. amend. XIV, § 1.3.
[34] *Id.*
[35] U.S. Const. amend II.

found that it is not against the Constitution for states to make laws against medical professionals aiding a patient to end their own life through PAS.[36] The Code of Medical Ethics explicitly finds that physician-assisted death is incompatible with the dedication of medical service.[37] The Supreme Court's ruling in *Washington v. Glucksberg* was integral in establishing a legal precedent of criminality for medical professionals aiding in physician-assisted suicide.[38] Four physicians, including Dr. Harold Glucksberg, were treating three terminally ill patients and they challenged the state of Washington's ban on PAS in the landmark case.[39] The Court affirmed the negative decision.[40] The Court has been criticized for its decision upholding "traditional moral values of the nation" in lieu of ruling that this right to choose death is a constitutional violation or that the right to die for a rational, competent adult is constitutional. With the ruling coming mere months after the public law against federally funded physician-assisted suicide, the Court stood by a similar perspective employed in the federal fund restriction above. A state's ban on physician-assisted suicide is not a violation of the Fourteenth Amendment.

Moreover, when analyzing the Due Process Clause, the Court had to consider the right to privacy in coming to their decision. The Fourteenth Amendment's Due Process Clause explicitly inscribes that "no state may deprive any person of life, liberty, or property, without due process of law."[41] Extending this meaning of life and liberty provides the foundation for the interpretation of an individual's constitutionally safeguarded right to privacy. This right to privacy, though not explicitly mentioned in the Constitution, is the standard in our nation. Lawyers and doctors abide by oaths that ensure an individual's privacy and create legal consequences for breach of privacy

[36] Washington v. Glucksberg, 521 U.S. 702 (1997).
[37] Am. Med. Ass'n, *AMA Code of Medical Ethics* § 5.7 (2nd ed. 2022).
[38] *Glucksberg*, 521 U.S. at 702.
[39] *Id.*
[40] *Id.*
[41] U.S. Const. amend. XIV.

because it is a fundamental right.[42] On this same note, if the right to privacy—including the right to privacy of personhood and bodily autonomy—is a fundamental right and the ruling in *Glucksberg* counters whether that right should be upheld, the ruling itself calls into question the foundation it stands on. The Supreme Court ultimately ruled in favor of not contradicting itself, with conservative Chief Justice Rehnquist's opinion being based on "an approach to identifying fundamental rights [in this case] that is at odds with the Supreme Court's approach in its earlier privacy cases."[43] Through interpreting the ruling it can be identified that the problem with the Court's ruling is the assumption that a fundamental right exists *only* if there is a long-standing tradition of protecting it. This assumption is incorrect and suggests a wrong ruling, especially as the Court has been willing to protect rights even though there was no tradition of protection in the past.[44] Chief Justice Rehnquist delivered the majority opinion, championing the moral attitude of suicide, and demonstrated the tie between a physician's job and the safeguarded right. Rehnquist wrote that the process of purview was substantive review, stating:

> The question presented in this case is whether Washington's prohibition against 'caus[ing]' or 'aid[ing]' a suicide offends the Fourteenth Amendment to the United States Constitution.' We hold that it does not. The States' assisted-suicide bans are not innovations. Rather, they are longstanding expressions of the States' commitment to the protection and preservation of all human life. Indeed, opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages.[45]

Furthermore, in *Vacco v. Quill*, another physician-assisted suicide case, this fundamental right is partially what the Court focused on in their ruling against PAS, upholding that a state has

[42] Fundamental rights refer to "a group of rights that have been recognized by the Supreme Court as requiring a high degree of protection from government encroachment. For example, the Supreme Court fundamentally established a right to privacy in Griswold v. Connecticut under the reasoning that multiple amendments to the Constitution taken together create 'penumbras' of rights not explicitly stated." Legal Info. Inst., *Fundamental Right*, Cornell L. Sch. (Mar. 2023), law.cornell.edu/wex/fundamental_right

[43] Erwin Chemerinsky, *Washington v. Glucksberg Was Tragically Wrong*, 106 Mich. L. Rev. 1501 (2008).

[44] *Id.* at 1505.

[45] *Glucksberg*, 521 U.S. at 711.

the right to outlaw the practice.[46] Quill, a doctor in the case, challenged the criminality of physicians accused of providing aid-in-dying for terminally ill patients through physician-assisted suicide.[47] Reviewed on the basis of creating different standards for patients, the legal question centered on whether a ban against PAS constituted a breach of the Fourteenth Amendment's Equal Protection Clause.[48] *Glucksberg* and *Vacco* solidified the Court's stance because both targeted different clauses of the Fourteenth Amendment. By ruling in favor of a state banning physician-assisted suicide rather than citing constitutional violations, the Court's decisions reaffirm two perspectives. They reaffirm a federalist perspective, as both decisions strengthen individual state power and solidify that the Supreme Court approaches this right to privacy and ending one's life with reservation. Secondly, it fortifies the Court's role in physician-assisted suicide has been to intentionally *not* make a decisive ruling permitting or prohibiting the practice.

Related landmark cases that happened in the same year allowed various judges to distinguish themselves on the issue. Justices Sandra Day O'Connor's and Ruth Bader Ginsburg's decisions stemmed from weighing individual's right to control over their autonomy and their circumstance. Justices O'Connor and Ginsburg questioned whether a mentally competent person experiencing great pain has a constitutional entitlement to control the circumstances of their imminent death.[49] The Justices cited the accessibility to medication that can "ease pain to the point of hastening death," but finally decided that the Court "need not answer this question now, but should leave it to the states."[50] Chief Justice Rehnquist, who delivered the majority opinion, references the American Medical Association in stating that there is a "fundamental difference

[46] Vacco v. Quill, 521 U.S. 793 (1997).
[47] *Id.*
[48] *Id.*
[49] Lawrence K. Furbish, Off. Legislative Rsch., *U.S. Supreme Court Assisted Suicide Cases*, Conn. G.A. (Dec. 1997), cga.ct.gov/PS97/rpt/olr/htm/97-R-1055.htm.
[50] *Id.*

between refusing life-sustaining treatment and demanding a life-ending treatment."[51] The Court's ruling reads as an extension; they will not safeguard the right to die, not because it is unconstitutional, but because it is not traditionally moral, and a distinctive stance could result in more harm.

C. Relevant Analysis of Precedents Utilized in PAS Decisions

The legal precedent allowing decisions on the loss of life, from restriction of wrongful death benefits to upholding individual state bans against physician-assisted suicide, is exemplified in its analysis of trade-offs. For cases of medical malpractice, this analysis is weighed by how much the state's interest can be tied to the consequences of enacting limitations or expansions. In physician-assisted suicide, the Supreme Court has weighed the right to privacy with the state's interest in blocking the action. The inherent issue with outlawing physician-assisted suicide and offering a medical intervention for end-of-life treatment is partly the way the fundamental right to privacy is interpreted. As seen in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, bodily autonomy can be inferred from the right to privacy.[52] In this case while upholding the right to privacy, the Court also allowed many of Pennsylvania's regulatory abortion provisions[53] while staying consistent with the protection in *Roe v. Wade.*[54] Therefore, upholding *Roe*'s historic seven-to-two decision by the Supreme Court, the right to privacy outweighed the state's ability to limit abortion except in the case of maternal health concerns.[55] Be that as it may, when *Roe* was overturned, this explanation of the right to privacy was effectively discounted. If this precedent of the right to privacy outweighing government interest no longer stands, how can it be employed to physician-assisted suicide now? In both

[51] *Vacco*, 521 U.S. at 793.
[52] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
[53] *Id.*
[54] Roe v. Wade 410 U.S. 113 (1973).
[55] *Id.*

cases above, the right to privacy is being reviewed through the rational basis test; the inherent problem with that purview is the implication of government interference. Even with privacy considerations, PAS's legal standing is shaky; it is possible that this weaker foundation has been what is allowing more states to adopt Dignity with Death laws. Nonetheless, the lack of updated legal discourse surrounding PAS and the right to privacy may mean that PAS legality can be limited in these states with legislation, too. At the same time, perhaps redefining this relationship between the right to privacy and the state's compelling interest is what is needed to federally enable physician-assisted suicide once and for all.

IV. Inadvertent Consequences of Loss of Life Limitations

Loss of life limitations in the context of restricting petitioners' ability to receive awards for medical malpractice have three main unintended consequences: social discrimination, economic discrimination, and decreased medical malpractice deterrence. Moreover, the loss of life in terms of physician-assisted suicide has two major concerns: constitutional infringement and the potential consequences of precedent promoting traditional values. One unintended effect of the Free Kill Law in Florida is that discrimination against unmarried or childless individuals who live or receive medical help in the state of Florida is more likely to occur, especially with regards to medical malpractice. The Florida statute also blocks children over the age of twenty-five who lose their parents and parents who lose their adult children due to malpractice from filing claims. Moreover, there is an important relationship between social and economic discrimination; the Florida statutes form qualifying versus non-qualifying groups, effectively treating two classes of people differently. One group qualifies for economic compensation and the other does not. It is important to note that other states have implemented damage caps, limiting how much an individual can recoup for losses. Tennessee leads this practice with a

non-economic damage cap of $750,000,[56] and North Carolina follows at a $656,730 cap for non-economic damages.[57] Wisconsin's Supreme Court also reinstated caps at a maximum of $750,000 for non-economic damages.[58] In some cases, the lack of uniformity regarding medical malpractice statutes can be positive in that it extends who can petition for damages. California's wrongful death statute states that a putative spouse or minor who resided with the decedent for at least six months can sue for losses.[59] However, none of these statues limit the individual's standing and right to sue for medical malpractice. Through extremely restrictive medical malpractice regulations, the state of Florida leaves room for other states to follow suit. Florida is the first to adopt this intense policy on the petitioning party, which could create a ripple effect of the type of social discrimination seen in states that adopt applicant-specific limitations.

Continuing, the legality of these loss-of-life laws comes into question. The legality of physician-assisted suicide has almost been left to interpretation and is still evolving. The legal literature is sparse, with precedent-forming cases occurring over two decades ago, while more states are currently adopting legislation safeguarding PAS. This gap in the legal field is a double-edged sword; individuals who live in 'banned' PAS states have no choice, while those within borders providing physician-assisted suicide have two. The constitutional reasoning for not safeguarding an individual's choice for the reasons of traditional moral values is logically flawed. Traditional moral values can become the foundation for anything and justify nearly all positions because they are so broad. Though a secondary reasoning in PAS cases, this logic can be a very polarizing excuse for ruling a certain way, depending on which side the Supreme Court leans. What is the difference between conservative traditional moral values and liberal ones?

[56] Tenn. Code Ann. § 29-39-102 (2024).
[57] N.C. Gen. Stat. § 90-21.19 (2011).
[58] Wis. Stat. § 893.55 (1979).
[59] Cal. Civ. Proc. Code § 377.60 (Deering 1992).

With increasing polarization, this question may not be easy to answer—as such, the Supreme Court's justification is perplexing. Where is the line drawn between morals, values, and traditions from the eighteenth century and the traditions adopted because of Supreme Court rulings from the last century?

All in all, enacting Dying with Dignity legislation is a regional disparity across U.S. states. In Florida, the Dying with Dignity Act would have allowed physician-assisted suicide. Instead, without this Act, the door is open for a physician found performing this treatment or aiding in this process to be found medically liable for the patient's death. This, paired with Free Kill, creates an interesting contrast. Overall, in the state of Florida, the message is clear: Practitioners can be held liable in court for helping a patient commit suicide, but the medical landscape allows a doctor in a wrongful death suit to avoid medical liability if the patient who dies does not meet the Florida Statute § 768.21(8) requirements. The Free Kill Law ultimately leaves no choice for patients to die and withdraws the choice of a non-qualifying family to sue. Like many other U.S. states, the right to privacy by safeguarding PAS is a mere theory in Florida. Currently, the state unjustly limits a petitioner's rights to sue for medical malpractice and does not safeguard defendants' right to be treated equally if they are unmarried and without young children.

V. Conclusion

Delving deeper into the legal questions about loss of life shows variance in the type of laws regulating physician-assisted suicide and medical malpractice filings. The combination of overturned precedents and errors unrelated to modern technology has consequences for both nonrestrictive and restrictive loss of life legislation. The U.S. Supreme Court's precedents have allowed for restriction and expansion regarding the legal loss of life—but the inadvertent

consequences have bred outcomes that now need newer legislation to account for. Unjust restrictions on the loss of life, the inability to sue for wrongful death, and the criminalization of physician-assisted suicide highlight that, at the federal level, dominant legal interpretations of death in a medical context fail to meet the needs of our evolving society.

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Revisiting *Saint John's Church in the Wilderness v. Scott* Twelve Years Later: Are Protests with Gruesome Imagery Protected Free Speech?

Written by Maegan Smarkusky, Florida State University Class of 2027
Edited by Katarina Tomaz, Florida State University Class of 2025

Abstract:

The Supreme Court denied review to the case *Saint John's Church in the Wilderness v. Scott* in 2013. In the appellate *Saint John's* opinion, the Colorado Court of Appeals used the term "gruesome imagery" to describe speech that contained gory photos, and the court ruled gruesome imagery was not protected if children could be exposed to it. The Court denying certiorari for *Saint John's* means the Colorado Court of Appeal's opinion is binding and it limits gruesome imagery speech. *Saint John's* precedent limits First Amendment rights, and this article calls for a clearer definition of how gruesome imagery functions as a category of speech.

I. Introduction

Saint John's Church in the Wilderness v. Scott concerned a group of protesters displaying photos of aborted fetuses to an outdoor church service in protest of the church's support for abortion rights. The plaintiff, Scott, appealed the ruling in favor of Saint John's Church all the way to the U.S. Supreme Court, but the Court did not grant certiorari.[1] *Saint John's* raises questions about the penumbra of the First Amendment's speech protections, the Supreme Court's denial of certiorari leaves many of those questions unanswered. Specifically, *Saint John's* presents two constitutional issues: the government's ability to restrict gruesome imagery from being used in public protests and lower courts' conflicting understandings of whether the restriction on gruesome imagery itself met the strict scrutiny standards required by content-dependent speech rulings.[2] Both of these issues remain unresolved. This poses a problem not just within the narrow application of gruesome imagery speech, but also surrounding other questions about protected speech categories. *Saint John's* is worth revisiting today because the U.S. Supreme Court left the question of gruesome imagery protection indefinite.

II. The Facts of *Saint John's*

A. The Case

In 2005, a Colorado district court held that Kenneth Tyler Scott, a protester who displayed images of aborted fetuses outside of a church, was guilty of committing both civil conspiracy to create a public nuisance and creating a public nuisance.[3] The district court imposed an injunction that prohibited Scott from protesting with gruesome images during church hours within a block of the curtilage of the building.[4] In 2008, the Colorado Court of Appeals upheld

[1] Certiorari is defined as an order of a higher court to call up the records of a lower court. *See generally* Merriam-Webster Dictionary, *Certiorari*, merriam-webster.com/dictionary/certiorari (general definition of the term).
[2] Petition for a Writ of Certiorari, Scott v. Saints John's Church in the Wilderness, 133 S. Ct. 2798 (2013).
[3] *Id.*
[4] *Id.*

that Scott was in the wrong but added provisions allowing Scott more protesting liberty at rehearings.[5] The two courts' indecision teed up the constitutional issue in the hopes of a response from the U.S. Supreme Court, but to no avail. The Supreme Court officially denied a writ of certiorari for *Saint John's* in 2013—leaving the answer to these legal issues in the hands of conflicting lower court decisions and confusing peripheral preceding cases.[6]

While *Saint John's* never made it past certiorari petition, it still deserves acknowledgement in First Amendment literature. *Saint John's* could have clarified exactly what gruesome imagery is and brightened the line between gruesome and obscene imagery further. The questions posed by *Saint John's* have not been answered definitively, and the Supreme Court might even be indicating it is out of the business of gruesome imagery jurisprudence altogether with more than a decade of silence on the issue. This, again, leaves many questions unanswered.

B. The Content Neutrality Question

For a law to be content neutral, it must not consider the actual viewpoint of the speech when limiting its expression.[7] Content-neutral speech laws are subject to intermediate scrutiny, while content-dependent speech laws are subject to strict scrutiny.[8] The reasoning behind the application of different tiers of scrutiny is that content-dependent rulings show a governmental preference for some speech, which is antithetical to the way the Constitution lays out the First

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[5] *Id.*
[6] Saint John's Church in the Wilderness v. Scott, 296 P.3d 273 (Colo. App. 2012).
[7] Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. Cal. L. Rev. 49 (2000).
[8] Strict scrutiny, which applies to content-based laws, requires the government to show that the law "is narrowly tailored to advance a compelling government interest and that the law is the least restrictive means" of advancing that interest. In comparison, intermediate scrutiny applies to content-neutral laws and requires a lower bar for a law to be upheld. Under intermediate scrutiny, the government must show that a law serves an important or substantial government interest and is "not substantially broader than necessary." *See generally* Victoria L. Killion, Cong. Rsch. Serv., *Freedom of Speech: An Overview* 8 (2014) (discussing and comparing the levels of scrutiny applied in speech-related cases).

Amendment.[9] *Saint John's* appellate opinion created a content-dependent decision, but does the decision withstand strict scrutiny?

Former Judge John R. Webb of the Colorado Appeals Court issued the final say on the issue; however, it does not speak to the importance of content neutrality.[10] Instead, the opinion provides reasoning largely based on the potential damage to children's psyche that gruesome imagery presents, which necessitates a vested state interest in preventing the speech.[11] Judge Webb explains that the ruling is content-dependent but uses the safety of children as a justifiable state interest for limiting the speech. If *Saint John's* had been reviewed, the Supreme Court could have provided more clarity about what exactly the First Amendment looks for and whether content-dependent rulings in these cases (potentially like the one the Colorado Appeals Court laid out) are justifiable. Specifically, the Court could have clarified if potential harm to children was a good enough reason to limit speech and a qualifying state interest for a speech-dependent ruling.

C. The Gruesome Imagery Protection

The more constitutionally relevant issue laid out in *Saint John's* is the gruesome imagery question. As it currently exists, *Saint John's* ruling suggests a content-dependent ban on gruesome imagery in a public protest when children twelve or younger are at risk of seeing it.[12]

The main question raised in this issue is how to define and exactly where the government retains the power to limit this speech. If Scott's appeal to the Supreme Court had been granted, he would be required to provide a justification not just for why the speech was political, but why the gruesome imagery was important for its expression. Luckily for Scott, many people see

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[9] Eugene Volokh & Jane Bambauer, *Free Speech, Private Power, and Private Employees*, Free Speech Unmuted, Hoover Inst. (Jan. 2024), open.spotify.com/episode/63WzqdVcrXgtTa5mvRsGKY?si=ba16e92959a94898.
[10] *Id.*
[11] *Saint John's*, 296 P.3d at 273.
[12] *Id.*

gruesome imagery as an example of protected free speech because the government should apply strict scrutiny with content-dependent restrictions. Seeing as the government is not supposed to weigh in unless there is a significant state interest in doing so, it might be a hard case to argue these images necessitate that intervention.[13]

On the other side, supporters of *Saint John's* see the gruesome imagery as being useful but ultimately harmful. That reasoning also builds on the obscenity case law, which argues the potential exposure of prurient materials to children is enough of a concern for the government to limit it. *Free Speech Coalition v. Paxton*, a pending Supreme Court case concerning access to sexual material online and the possible harm to minors, will give more insight for the question of obscenity.

III. Unprotected Speech

A. Obscene Speech

The First Amendment protects citizens against government infringement on their right to free speech.[14] There are, however, circumstances when the First Amendment does not protect speech. For instance, obscene speech is an unprotected category of speech.[15] It should be clarified at this point that *Saint John's* is by no means an obscene speech case. Although obscenity exceptions are not directly applicable to *Saint John's*, it is still important to understand obscene speech exceptions, as they can provide insight into the current Court's ideology surrounding speech restrictions.

Obscene speech was defined in the 1973 case *Miller v. California*, which designated obscene speech as an unprotected category and created a test to identify it.[16] The *Miller* test

[13] Eugene Volokh, *Gruesome Speech*, 100 Cornell L. Rev. 901 (2015).
[14] U.S. Const. amend. I.
[15] Roth v. United States, 354 U.S. 476 (1957).
[16] Miller v. California, 413 U.S. 15 (1973).

requires the fulfillment of three conditions for speech to be obscene: the speech must be prurient (to be prurient is to have an "unhealthy" interest in sex), the speech must be offensive to the average adult, and there must be no political or social value in the speech.[17]

These conditions are intentionally vague, markedly the first one, as it is difficult to establish what a "healthy" interest in sex is as it pertains to speech.[18] This vagueness is intended to give more protection to speech as opposed to less, as lots of speech that could probably be classified as obscene is seldom prosecuted for this reason. The problem, however, with this framework is that while it provides sufficient leeway true to the First Amendment's provisions, it is not specific enough to categorize current cases.

On the 2024 Supreme Court docket, for instance, *Paxton* is being decided to clarify what does and does not count as obscene speech per the *Miller* test.[19] This is not to say that challenges to the *Miller* test mean the test is insufficient; it simply demonstrates that the *Miller* test did not preclude future constitutional conflict. Accentuating this, the facts in both *Miller* and *Paxton* are similar despite being decades apart—both involve minors and their ability to either access or be exposed to obscene imagery.[20] Are these parallel fact patterns a coincidence, or do they represent a lack of faith in the *Miller* test's ability to test for obscenity?

The question of defining non protected forms of speech is relevant in the Supreme Court today with *Paxton* presenting the same constitutional questions as *Miller*. That sets the stage for understanding how gruesome imagery necessitates further examination not only on its own judicial merits, but also to clarify the larger question of limiting otherwise protected speech as a whole.

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[17] *Id.*
[18] Volokh & Bambauer, *supra* note 9.
[19] Free Speech Coalition, Inc. v. Paxton, 95 F.4th 263 (5th Cir. 2024).
[20] *Id.*

B. Gruesome Imagery

The lack of clear dictatorial lines for gruesome imagery in a First Amendment context partially exists because courts have not expanded on the Colorado Court of Appeals' definition of the abortion images as being gruesome in the *Saint John's* case.[21] Although there is not a rich history of case law using this terminology in this specific context, the ideas presented by the gruesome imagery classification still loom large in the First Amendment legal conversation.[22] Beyond the First Amendment, the legal origin of the phrase "gruesome imagery" provides some insight into the reason the Colorado Appeals Court used the term to justify limiting speech in the name of an important state interest.

Originally, gruesome imagery as a term was used to describe violent or gory photographs presented to a jury.[23] A term was created to describe that specific type of evidence because gruesome imagery, in the cases it was presented in, sometimes unduly swayed jurors on the side of the presenting attorney due to its emotional impact.[24] Furthermore, some jurors reported having difficulties functioning in their everyday lives after exposure.[25] The reason gruesome imagery was used by the Colorado Appeals Court in a speech context is because of the last point: the imagery was too harmful to expose jurors to. This raises the question of whether it is right to expose the unknowing public to that same imagery in the name of political expression, especially if there are children involved.

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[21] *Id.*
[22] *Id.*
[23] David Anthony Bright, *The Influence of Gruesome Evidence on Juror Emotion and Decision Making* (2008) (Ph.D. dissertation, Univ. N.S.W.) (on file with Univ. N.S.W. Sydney's library).
[24] *Id.*
[25] *Id.*

This emotional understanding has been addressed in an unorthodox way by some protestors, who have chosen to put a warning sign before their gruesome imagery.[26] The warnings put in place by gruesome imagery protesters on their own accord could set up both a social expectation and legislative solution for the gruesome imagery problem altogether. Because the second question in *Saint John's* revolves around the content neutrality or lack thereof, at this point, it is only possible to understand the definition of gruesome imagery within the context in which it is presented.

What this means today is that the gruesome imagery rule must be content-dependent, because by nature, it cannot be generally applied to all speech. For this reason, the understanding of speech would have to include the context the speech itself was presented in. This would allow the necessary room for gruesome imagery to be used in an educational context; this also allows for the imagery to exist in a public setting as long as ample warning is given.

Seeing that obscenity law gains much of its footing from the state interest of protecting minors from harmful speech, gruesome imagery could do the same because of the similar state interest presented in *Saint John's*.[27] Beyond just the reasoning provided in *Saint John's*, it may be difficult to argue another reason the public needed to be protected from speech if they were not minors, because that is currently the way the *Miller* test frames obscenity restrictions.

C. The Distinction

Beyond understanding the two types of speech, it is important to understand what exactly in current case law necessitates the legal distinction between gruesome imagery and obscene speech. The two categories have to be differentiated because obscenity rules do not allow

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[26] Macaila Bogle & Ky Villegas, *'Genocide Photos Ahead:' Anti-Abortion Group Displays Graphic Photos on USC's Campus*, Carolina News & Rep. (Oct. 2024), carolinanewsandreporter.cic.sc.edu/genocide-photos-ahead-an-anti-abortion-group-displays-graphic-photos-on-uscs-campus.
[27] Saint John's Church in the Wilderness v. Scott, 296 P.3d 273 (Colo. App. 2012).

protections for prurient (sexually explicit and politically unimportant) speech, but gruesome imagery rules would theoretically not allow protections for public graphic imagery. This could show a governmental bias toward limiting certain categories of speech, allowing gory imagery but not sexual imagery.

With there being a de jure history of obscenity rules but only a de facto history of gruesome imagery rules with few cases resulting in actual punishment,[28] it sends the message that prurient speech is one of the only kinds of speech that can be limited by the First Amendment.

IV. The Future of Gruesome Imagery Law

With the advancement of obscenity speech law and the decade-long halt on any gruesome imagery petitions being granted, it does not appear that the Supreme Court is waiting for the right vehicle to examine the issue. Instead, it might be that this silence indicates deference to the states. Perhaps the saving grace for gruesome imagery law's advancement at the Supreme Court lies in the hands of a new legal question raised unwittingly by gruesome imagery protestors themselves—does gruesome imagery require a warning?[29]

The self-imposed warning signs that some protesting groups put in front of their protests might soon lead to a discussion of the government's role in policing even gruesome imagery that provides its own warning. Although it does not appear that the Court is waiting for a perfect vehicle to test out gruesome imagery law as a concept, this could change soon. It would be interesting to see how the states would react if a protest with self-imposed warning signs did get prosecuted.

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[28] "De jure" refers to laws that are codified, while "de facto" refers to what tends to happen in reality or practice. *See generally* Michele Metych, *De Facto*, Encyc. Britannica (Mar. 2025), britannica.com/topic/de-facto.
[29] Bogle & Villegas, *supra* note 26.

In fact, that might be the vehicle gruesome imagery law needs to be brought back into the Supreme Court's First Amendment conversation. At this point in time, however, it does appear the Court has taken more than just a step back from gruesome imagery as a concept. This is only exacerbated by the fact that obscenity cases like *Paxton* are repeatedly being placed on the docket without any gruesome imagery cases in sight. While this may have been the pattern in the past, it does not mean it will be the pattern for the future, especially with the *Paxton* decision on the judicial horizon.[30] If the *Paxton* opinion turns out to either greatly expand or limit obscene imagery restrictions, that could set the stage (perhaps in a more ideal way this time) for the gruesome imagery question to be decided.

There are many reasons the Court should weigh in on gruesome imagery one way or another. The breadth of First Amendment protections when it comes to content-dependent cases is constantly tested in the Court; gruesome imagery cases would only act to expand on that understanding and more clearly delineate what certain freedoms mean. Advocates on both sides of *Saint John's* want the gruesome imagery question to be acknowledged by the Court for different reasons. Those with a broader view of free speech protections worry that Colorado had the last word.[31] On the other hand, those with more restrictive views argue gruesome speech is similar to obscenity even if it has a stated political value and that people, specifically children, have the right to not endure exposure to it. *Saint John's* has long passed its chance for review, but the silence from the Court speaks louder.

Perhaps gruesome imagery law is another example of why the tortoise remains a symbol for the Court: both are methodical and slow. While other free speech cases have been percolating for more than a decade, the Court has held onto the gruesome imagery question and not provided

[30] Free Speech Coalition, Inc. v. Paxton, 95 F.4th 263 (5th Cir. 2024).
[31] Volokh, *supra* note 13.

any direct input. This could mean that the Colorado court's holding was correct, but it could also mean that the Supreme Court wanted the lower courts to decide the issue before fully actualizing it with a case. The advent of gruesome imagery law could start with this docket's obscene speech case, *Paxton*; perhaps the Court is acting slowly and methodically to curate an answer.

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Schedule A Lawsuits: Ushering in A New Era of Intellectual Property Litigation

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Abstract:

Schedule A Defendant (SAD) schemes allow intellectual property rightsowners to sue dozens of defendants at once without having to directly notify them through an *ex parte* temporary restraining order. SAD scheme cases have been increasing primarily in the Northern District of Illinois due to the unusually high rate at which judges grant the filings. While the SAD scheme provides benefits like more efficient and affordable case filings, it also raises due process concerns under the Fifth and Fourteenth Amendments. This paper will explore potential due process violations as well as possible changes to the filing system.

I. Introduction

Trends in intellectual property (IP) litigation have been scrutinized for violating due process rights under the Fifth Amendment at an unprecedented rate. A novel form of litigation has gained popularity in a few district courts. Addressing a rise in IP infringements originating from merchants on online marketplaces like Amazon, eBay, or Alibaba, IP rightsowners have sought more cost and time effective methods of prosecution.[1] Many IP rightsowners now seek Schedule A filings, which allow for plaintiffs to sue multiple defendants for infringement at once without having to notify any of the defendants.[2] Most defendants are not made aware of the lawsuit by the court, but rather by their online merchant account being frozen due to a temporary restraining order filed by the plaintiff.[3] While plaintiffs may be filing infringement claims in a lawful way, the Schedule A Defendant (SAD) scheme is an extrajudicial process that circumvents the rights of alleged infringers by bypassing summons and personal jurisdiction requirements.

II. Schedule A Background

IP refers to creative works that originate from the mind.[4] IP is most commonly protected through patents, trademarks, copyrights, and trade secrets.[5] IP rights are protected just as any other right to tangible property would be, and can be held by one owner, transferred, and even stolen. Nations will often establish independent offices, such as the United States Patent and Trademark Office (USPTO), to safeguard and register IP with the intention of promoting economic growth.[6] A government office granting ownership rights over IP encourages

[1] Eric Goldman, *A SAD Scheme of Abusive Intellectual Property Litigation*, 123 Colum. L. Rev. 183, 184–185 (2023).
[2] *Id.* at 185.
[3] *Id.*
[4] World Intellectual Property Org., *What is intellectual property?* 1 (2020).
[5] *Id.* at 2.
[6] *Id.*

individuals to invent and create, which, in theory, promotes economic growth through increases in research and investment. Given that IP such as patents and trademarks are only awarded on the basis of novelty or distinctiveness respectively, innovation and ingenuity is required of inventors and entrepreneurs.[7]

Judicial systems internationally have recognized the importance of enforcing IP protections for rightsowners given their potential value. Nations such as China, Brazil, and India have realized the potential value in intellectual property as their economies grow and have increased IP enforcement measures as a result.[8] The potential for loss in value or revenue from IP infringement is a significant incentive for IP rightsowners to prosecute such cases. Broadly, IP infringement can include unauthorized reproductions, sales, or manufacturing.[9] Trademark infringement, more specifically, includes the unauthorized use of any "word, name, symbol, or device" used to identify a product.[10] Patent infringement regards the unauthorized making, using, or selling of a patented invention.[11] With the sharp increase in infringement among online merchants, rightsowners are faced with an ongoing issue of widespread IP theft among users in foreign nations under anonymous names.[12] Given the frequency of infringement, it is likely too costly for most rightsowners to litigate against infringers, leading to many finding solutions in the courtroom to circumvent these hurdles. The Schedule A Defendant scheme is a relatively new trend among plaintiffs in the Northern District of Illinois and the Southern District of Florida that may help alleviate costly litigation.

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[7] Suhejla Hoti, *Intellectual Property Litigation Activity in the USA*, 20 J. Econ. Surveys 717 (2006).
[8] *Id.* at 716.
[9] U.S. Dep't of Just., *Reporting Intellectual Property Crime* 3 (3rd ed. 2018).
[10] *Id.*
[11] 35 U.S.C § 271(a) (2024).
[12] Goldman, *supra* note 1, at 185.

A Schedule A Defendant scheme allows for intellectual property rightsowners to conceal defendants' identities under a Schedule A file with approval from a judge.[13] After a formal complaint is made, the IP rightsowner files the Schedule A Defendant list separately, where they will ask a judge to seal it, thereby making it inaccessible to the public.[14] The intention of a judge sealing the defendants' names is that it denies alleged infringers the opportunity to remove listings or erase evidence. Plaintiffs then file an *ex parte* (i.e., without the defendant present) temporary restraining order (TRO), which is submitted to the online marketplaces in which the defendants are operating.[15] Although the marketplace may have grounds to dispute the TRO, they almost always abide by the order and freeze the accounts and finances of the defendants in fear of being held in contempt and charged with extensive legal fees.[16] Many defendants are only made aware of the suit when the marketplace freezes their account, given the seal placed by the judge. At this point in the case, IP rightsowners likely offer the defendants an option to settle, which many choose given the freezes on their accounts that restrict financial transactions.[17] Finally, if defendants have not settled or been voluntarily released by the plaintiff, the rightsowner will likely seek default judgment, which is a ruling in favor of the plaintiff if the defendant is not present for the hearing.[18] In Schedule A cases, defendants may not engage in litigation if they are not properly notified of the suit, or they may willingly abstain from litigation in fear of the cost. In cases of default judgements, frozen assets may be awarded to the rightsowner without any litigation taking place.[19]

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[13] *Id.* at 190.
[14] *Id.* at 187.
[15] *Id.* at 190.
[16] *Id.*
[17] *Id.* at 192.
[18] *Id.*
[19] *Id.*

Given the ease and effectiveness of the SAD scheme, IP rightsowners can prosecute multiple alleged infringers at once in a cost-effective manner. In particular, judges in the Northern District of Illinois have granted 2,486 out of 3,217 of all SAD scheme cases dating back to 1991, with that figure only increasing in recent years.[20] While the scheme has proven to be highly effective in defending IP rights, the extrajudicial means in which it operates brings into question its procedural legitimacy. *Ex parte* orders are traditionally reserved for extraordinary cases and not necessarily routine litigation.[21] If large quantities of defendants are routinely excluded from the litigation process at the discretion of a judge, are fundamental rights being curtailed?

III. Schedule A Cases in the Northern District of Illinois

The District Court for the Northern District of Illinois has proven to be a hot spot for the phenomena of SAD scheme filings, with the court housing approximately 88% of all SAD filings since 1991.[22] SAD scheme filings have gained popularity in part to the leniency in which the court grants them. In fact, due to the popularity of SAD filings, Judge Lindsay C. Jenkins of the Northern District of Illinois has even included multiple templates to aid in the filing process.[23] The district's status as the epicenter for SAD filings is likely attributed to the rate of plaintiffs' successes in these cases. Judges in this district have been known to grant plaintiffs these filings at unusually high rates given they are usually only reserved for extraordinary circumstances.[24]

In one case noted by Eric Goldman, a professor of law at Santa Clara University School of Law, a German company known as Emoji Company GmbH, which has multiple U.S. trademark registrations that use the word 'emoji,' filed a SAD filing against dozens of online

[20] *Id.* at 195.
[21] Sarah Fackrell, *The Counterfeit Sham*, 138 Harv. L. Rev. 471, 494 (2024).
[22] Goldman, *supra* note 1, at 195.
[23] Judge Lindsay C. Jenkins, *Schedule A Template* (2025).
[24] Fed. R. Civ. P. 65(b)(1)(A).

merchants that had used the word 'emoji' in their product descriptions.[25] Similar to how other SAD scheme filings have gone in the district, several defendants had reached a settlement with the plaintiff while the default judgement had been decided for many applicants who did not respond.[26] Given that trademarks in the U.S. are intended to ensure that product brandings remain distinguishable from one another, it appears that the district court is overstating the breadth of the trademark by awarding damages to the plaintiff based on the use of descriptive language in the marketplace.[27] Since text in the description or title of a product listing alone is likely not enough to cause confusion between products among consumers, a true statutory definition of trademark infringement may not have been met in cases such as these. The defendants' inability to rightfully defend themselves in cases such as these leads to unfair judgements in which the defendant may have had a compelling argument that they had not infringed upon the rightsowners' IP. The leniency and rates of success in which judges have been granting SAD scheme filings has only attracted more filings in the district.[28]

Additionally, since the lawsuits can be filed as a joinder, meaning the claim arises out of the same transaction regardless of the defendants relationship to each other, costs are minimized. In a joinder case, additional fees per defendant are not applied, meaning that only a standard rate of $402 is levied by district courts, further making SAD scheme filing a particularly attractive option for IP rightsowners.[29] For instance, in *Emoji Company GmbH v. Individuals, Corps., Ltd. Liab. Cos., P'ships & Unincorporated Ass'ns Identified on Schedule A*, Judge Andrea R. Wood of the Northern District of Illinois ordered each defendant to pay the plaintiff $25,000 in a

[25] Emoji Co. GmbH v. Individuals, Corps., Ltd. Liab. Cos., P'ships & Unincorporated Ass'ns Identified on Schedule A Hereto, 1:2023cv05829 (N.D. Ill. filed 2021).
[26] Goldman, *supra* note 1, at 194.
[27] 15 U.S.C § 1125(c)(1) (1946).
[28] Goldman, *supra* note 1, at 207.
[29] *Id.* at 199.

default judgement.[30] With dozens of defendants named in the case, this results in a massive figure being awarded to the plaintiff when compared to the costs of filing.

One of the most critical features of the SAD scheme is the *ex parte* TRO granted by the judge. The *ex parte* order granted to plaintiffs prevents the defendant's identity from being released upon the suit being filed.[31] The plaintiff then forwards the TRO to online marketplaces, such as Amazon, who in turn, freeze the finances associated with the defendant's account. However, as what happened in the case of *Gorge Design Grp. LLC v. Xuansheng*, noted by Goldman in his paper *A SAD Scheme of Abusive Intellectual Property Litigation*, online marketplaces often freeze the entire account and not just the funds associated with the alleged infringement.[32] Online marketplaces do not want to potentially risk noncompliance with the TRO by neglecting to freeze certain funds and thereby face legal fees, so they just freeze the entire account to avoid that possibility.

Given the successes of IP rightsowners such as *Emoji Company GmbH*, other rightsowners are looking to file claims in the Northern District of Illinois to replicate such results. Courts operating beyond traditional litigation procedures combined with judges who overextend the breadth of IP rights presents a problematic issue within the judicial system. Defending IP rights at the cost of excluding hundreds of defendants from the litigation process is unprecedented and should be curtailed. SAD scheme filing leads to an overcomplicated litigation process that grants plaintiffs an undue level of power in the court. IP rightsowners have flocked to the Northern District of Illinois to contest infringement claims that stretch the scope of IP

[30] *Emoji Co. GmbH*, 1:2023cv05829 at 2.
[31] Fackrell, *supra* note 21, at 521.
[32] Goldman, *supra* note 1, at 191.

legislation, leading to an industrialized system in which plaintiffs are almost always granted a massive profit.

IV. Why Are Litigants Filing These Claims?

In the digital age, where online shopping has become a standard for many people, the opportunity for trademark infringement has increased and many are taking advantage. The interconnectedness that social media and online shopping have created has made it much easier for individuals to infringe upon trademarks.[33] Additionally, in 2021, the USPTO saw a surge in trademark filings with an increase of applications by 63% in a year, and 172% since 2019.[34] While the USPTO has not seen increases in the amount of applications close to that figure since, it still enjoys a steady flow of applications, which increases the total number of registered trademarks.[35] This inevitably leads to an increase in the amount of registered marks that are available to potential infringers. With more individuals and businesses filing trademarks, they face the issue of how to effectively combat widespread infringement. Given that litigation can be pricey for many rightsowners, the driving motivation behind SAD scheme filings is to lower legal expenses while still prosecuting infringers.

It should be noted that IP rightsowners are within their legal rights when engaging in the SAD scheme. They are following procedures outlined by both district courts and the Federal Rules of Civil Procedure (FRCP).[36] The SAD scheme is not avoidance of the law, but an abuse of it. Select judges in the Northern District of Illinois have allowed for the language of federal

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[33] Ricky Thio et al., *Trademark Law in the Digital Age: Challenges and Solutions for Online Brand Protection*, 3 Glob. Int'l J. Innovative Res. 710, 713 (2024).
[34] David Goodar, *What a Huge Surge in Trademark Filings Means for Applicants*, U.S. Pat. & Trademark Off., Dir.'s F. Blog (June 2021), uspto.gov/subscription-center/2021/what-huge-surge-trademark-filings-means-applicants.
[35] U.S. Pat. & Trademark Off., Data Visualization Center, *Trademarks Data Q1 2025 at a Glance* (2025), uspto.gov/dashboard/trademarks/#.
[36] Tommy Martin, *Schedule A Cases Can Provide Quick, Cost-Effective Relief Against Widespread Intellectual Property Theft on Online Marketplaces,* 36 Intell. Prop. & Tech. L.J. 1, 2 (2024).

procedure regarding the granting of TROs to be stretched. The FRCP allows for TROs to be granted if the plaintiff can state specific reasons for it to be granted.[37] Judges in the Northern District of Illinois who grant SAD scheme filings at high rates allow for generic claims to be made when requesting the TRO, as seen in the templates discussed previously.[38] While plaintiffs are technically meeting the required threshold for a TRO request, the almost industrialized process that these judges have established for SAD scheme filings seems to stretch the statute's language requiring plaintiffs to show "irreparable damage" to its limit.[39]

V. Do SAD Schemes Violate Due Process Rights?

The Fifth and Fourteenth Amendments to the U.S. Constitution guarantees that life, liberty, and property, shall not be deprived without due process.[40] In nearly every lawsuit brought to a court in the United States, defendants are made aware of the legal action brought against them via a process of service, or a summons.[41] In accordance with the due process clause, plaintiffs are required to provide defendants with a process of service to notify them of the lawsuit against them. Federal procedure, as discussed previously, allows for the waiving of this requirement if reasons are provided to a judge that suggest that notifying the defendant would lead to a negative outcome, such as tampering of evidence. Judges are often conservative when waiving these requirements, given that it essentially circumvents certain due process rights. However, the waiving of this right in the form of *ex parte* TROs in SAD schemes has become routine to certain judges, such as Judge Pacold.[42] Of course, this is not the case for every judge;

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[37] Fed. R. Civ. P. 65(b)(1)(A).
[38] Judge Lindsay C. Jenkins, *supra* note 23.
[39] Fed. R. Civ. P. 65(b)(1)(A).
[40] U.S. Const. amend. V; U.S. Const. amend. XIV § 1.
[41] Fed. R. Civ. P. 4.
[42] Jack Hendershott & Marko Zoretic, World Intell. Prop. Rev., *Do 'Schedule A' Cases Threaten Foreign Firms in the U.S.?* 3 (2023).

in fact, many are beginning to push back on granting seals and subsequent TROs for cases without specific reasoning for doing so.

VI. Will the Northern District of Illinois Adjust the Filing System?

In the Northern District of Illinois, judges seem to be split on the issue of regulating SAD scheme filings. While some judges believe that the plaintiffs should be awarded leniency in these filings, other judges believe that the filing system encroaches on the right to due process. Judge Seeger of the Northern District of Illinois appears to be a proponent for higher scrutiny when it comes to granting a seal on defendants identities. Recently, in *Shenzhen Yihong Lighting v. The Partnerships and Unincorporated Associations Identified on Schedule A*, Judge Seeger denied the plaintiff a sealing of defendant's identities in support of a TRO.[43] Judge Seeger stated that the plaintiff's arguments to seal the defendant's identities did not meet the heavy burden required to file without the defendant's knowledge. The judge also criticized the plaintiff's "boilerplate" language used in its request that is seen in many other 'Schedule A' cases.[44] While this case does not act as precedent in the Northern District of Illinois, it does demonstrate a potential shift in sentiments held among these judges. The routine granting of TROs with generic facts presented is a dangerous practice that abuses federal procedure. Judges that continue to allow plaintiffs to bypass the text of the FRCP risk violating due process rights altogether.

Outside of the Northern District of Illinois, with the exception of the Southern District of Florida, SAD scheme procedures are generally not routine judicial work. This is evident when newly appointed judges to the district encounter the scheme for the first time. For instance, in November 2024, Judge Sunil Harjani of the Northern District of Illinois rejected a plaintiff's

[43] Shenzhen Yihong Lighting v. Individuals, Corps., Ltd. Liab. Cos., P'ships & Unincorporated Ass'ns Identified on Schedule A, No. 1-23-cv-16703 1–3 (N.D. Ill. 2023).
[44] *Id.* at 2.

complaint on the basis of a misjoinder, meaning that the defendants were not sufficiently related to the claimed infringement.[45] Judge Harjani ordered the plaintiff to either file for a petition to use the original joined defendant, or to drop some defendants to form a proper joinder. Additionally, Judge Jeremy C. Daniel, appointed to the Northern District of Illinois in 2023, recently rejected a claim on a similar basis, demonstrating that these sentiments are not isolated.[46]

With this being said, many are in favor of the efficiency that SAD scheme filing offers rightsowners whose IP has been infringed. Proponents of the filing scheme applaud its ability to prosecute hundreds of infringers at once, which have become increasingly prevalent in the digital age.[47] Many veteran judges in the Northern District of Illinois hold this sentiment, which is why the degree of SAD cases is so high in these regions. Judge Pacold's templates, for instance, show a commitment to SAD scheme filings and that the court will likely continue to support plaintiffs. Judges who show similar leniency towards plaintiffs are also not likely to display greater scrutiny towards these filings. SAD schemes will likely become a more contentious issue in the years to come, given that judges who have been appointed to the district within the last two years have begun to reject some plaintiff's claims. If the filing system is to change, it will likely need to come from Congress.

Legislative limits on SAD scheme filings should likely not be anticipated, however. The 119th Congress currently has three proposed bills which support intellectual property owners and inventors, such as the Realizing Engineering, Science, and Technology Opportunities by

[45] Eric Goldman, *Another Judge Balks at SAD Scheme Joinder—Xie v. Annex A*, Tech. Mktg. L. Blog (Nov. 2024), blog.ericgoldman.org/archives/2024/11/another-judge-balks-at-sad-scheme-joinder-xie-v-annex-a.htm.
[46] Eric Goldman, *Will Judges Become More Skeptical of Joinder in SAD Scheme Cases?—Dongguan Juyuan v. Schedule A*, Tech. Mktg. L. Blog (Nov. 2024), blog.ericgoldman.org/archives/2024/11/will-judges-become-more-skeptical-of-joinder-in-sad-scheme-cases-dongguan-juyuan-v-schedule-a.htm
[47] Elizabeth Banegas, *Schedule "A" Cases. Not Sad at All.*, 65 IDEA: L. Rev. Frank. Pierce Cen. Intell. Prop. 107, 112 (2024)

Restoring Exclusive (RESTORE) Act.[48] While these bills are generally targeted towards the patent filing process and do not address SAD scheme filings, it may be an indication that legislators are currently more inclined to pass acts that support rightsowners, and not restrict their ability to sue infringers. While it should not be said that the SAD scheme will not be considered by Congress at all, it seems unlikely that lawmakers will be willing to cut back on the power of rightsowners in the courtroom.

VII. Conclusion

Schedule A Defendant Scheme filings have provided a relatively novel way of prosecuting intellectual property infringement. This method's low cost and efficacy have made it an incredibly trendy form of IP prosecution in the Northern District of Illinois. Additionally, leniency among judges in the district have made the process even more streamlined, causing an influx of rightsowners to file suits. Contentions between judges in the district and within Congress may make statutory or civil procedure amendments to SAD filings unlikely. While it is important to recognize that intellectual property infringement is not a victimless crime and accounts for large losses in potential revenue, circumventing due process rights by abusing federal procedure is unequivocally not the way to combat infringement. The convenience of Schedule A cases should not justify the high rates of the sealing of defendant's identities and TRO grants.

[48] Tanner Shae, *Inside the Beltway: The Future of U.S. IP Policy in the Trump Administration*, IP Watchdog Inc., (Mar. 2025), ipwatchdog.com/2025/03/06/inside-beltway-future-u-s-ip-policy-trump-administration/id=186871/#.

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The American Firearm Epidemic: Constitutional Right vs. Public Safety

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Edited by Harper West, Florida State University Class of 2027

Content Warning: This paper discusses mass shootings and gun violence which may be upsetting for some readers.

Abstract:

Mass shootings have been on the rise in the United States, with 189 school shootings since 2012. America is an anomaly with regards to the firearm epidemic, with other developed nations like Australia taking legislative action to address mass shootings and unregulated gun usage. This legislative inaction in the U.S. is due in part to the Second Amendment's vague language, which has opened the door for expansive gun rights. Additionally the actions of pro-gun lobbying groups like the National Rifle Association, that utilize the Amendment's lack of clarity to advance their political aims, further deters legislative action. This paper will examine the diminishing relevance of the Second Amendment, the ongoing firearm epidemic in the U.S., and will make an argument for reform that will ensure public safety.

I. Introduction

On December 14th, 2012, Adam Lanza gathered two AR-15 semiautomatic rifles with thirty-round ammunition magazines and carried out a horrific shooting at Sandy Hook Elementary School, killing twenty-six individuals, including twenty children.[1] This tragic event is known as the "second-deadliest school-based shooting massacre in U.S. history,"[2] and it became the tipping point in reenergizing the debate on gun control. Despite the tragedy that occurred, the United States continues to witness an alarming amount of mass shootings, with 189 school shootings occurring since Sandy Hook.[3] Even with these continued horrors, the United States has failed to enact any significant federal gun law reforms, further cementing the right to own a firearm as enshrined in the United States Constitution. Moreover, the Second Amendment's ambiguity allows for open individual interpretation, encouraging pro-gun lobbyists to take advantage of this Amendment's obscurity. In the 2008 Supreme Court Case *District of Columbia v. Heller*, Justice Antonin Scalia explicitly stated that the Second Amendment does not protect the "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[4] While Justice Scalia's attempt to clarify the Amendment establishes forward movement, the ruling reinforces the fact that the Amendment remains extremely vague and subject to interpretation by each state. The Second Amendment, written for a different time, has lost its relevance, which confirms its need for revision and control in order to reduce gun violence and evoke change for a safer America.

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[1] Michael Ray, *Sandy Hook Elementary School Shooting*, Encyc. Britannica (Jan. 2025), britannica.com/event/Sandy-Hook-Elementary-School-shooting.
[2] *Id.*
[3] *Id.*
[4] District of Columbia v. Heller, 554 U.S. 1, 2 (2008). This Supreme Court Case establishes that the Second Amendment protects an individual's right to own a gun.

II. History of the Second Amendment and How Its Purpose Has Changed

Much has changed since the year 1791 when the Founding Fathers established the Bill of Rights and constructed the Second Amendment. This Amendment reads: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."[5] While the language and interpretation of this Amendment remains debatable, it is clear the Founders viewed gun rights differently from most individuals today and wrote the Amendment with priorities that were shaped by the concerns of their time. Law Professor Darrnell Miller from Duke University supports this perspective, acknowledging:

> Few, if any, of the Founders are talking about firearms for personal self-defense against criminals during the time the Second Amendment was ratified — the debate was focused on fear of a standing army and how to organize the militia… the term "bear arms" was overwhelmingly used in a collective or military sense and almost never used in the modern sense of "carry weapons."[6]

Further, the structure of our modern government today appears entirely different from the original system envisioned in the late 1700s. The "traditional militia establishment" that once consisted of state-based militias no longer resembles today's modern military superpower, which consists of powerful, federally controlled armies and weapons.[7] It is clear the Second Amendment proves outdated, ambiguous, and ineffective because the Amendment was originally about ensuring public safety, and nothing in its language was meant to justify the loose and lenient regulations seen today. However, with the confirmation of three conservative-leaning Supreme Court justices nominated by President Donald Trump between 2017 and 2020, the Court's conservative supermajority continues to allow loose restrictions on firearms, proving their priorities no longer lie in public safety but in extreme radical change. This is demonstrated

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[5] U.S. Const. amend. II.
[6] Andrew Cohen & Darrell Miller, *The Supreme Court Is on the Verge of Expanding Second Amendment Gun Rights*, Brennan Ctr. Just. (June 2022), brennancenter.org/our-work/analysis-opinion/supreme-court-verge-expanding-second-amendment-gun-rights.
[7] *Id.*

through the Supreme Court's overturning of New York's 108-year-old concealed handgun law, which requires individuals to demonstrate proper cause beyond general "self-defense" to obtain a concealed permit for firearms.[8] The case, *New York State Rifle and Pistol Association Inc. v. Bruen*, demonstrates the Court's ability to use the Second Amendment's ambiguous wording to their advantage, stating the Amendment protects the constitutional right to carry a loaded handgun in public for self-defense.[9] This ruling, backed by the conservative majority of the Court, overturned New York's law, proving "*Bruen* does not recognize the need for gun safety laws in the interest of public safety as criteria to be considered by the courts."[10] In simple terms, this means that public safety cannot be the primary justification for restricting firearm rights after *Bruen*. It also backs radical pro-gun law expansions, making it "harder for an 18-year-old to get a driver's license than a gun in [a state like] Texas."[11] Evidently, the line between true historical intent and public safety has become increasingly muddled as pro-gun laws continue to expand through the broad interpretations of the Second Amendment. This then raises the question, to what extent should historical context dictate modern society's laws, and why is there such resistance towards change that aims to prioritize American security?

III. Gun Lobbyist Influence on the American Government:What is the NRA?

Through leveraging extensive lobbyist power, tremendous financial influence, and persuasive candidate-driven authority, organizations like the National Rifle Association (NRA) continue to profoundly shape this nation's policies and outcomes on gun safety, providing one explanation for the legislature's resistance to change. Founded in 1871, the National Rifle Association has become one of the most influential political organizations in the United States. It

[8] N.Y. State Rifle & Pistol Ass'n Inc. v. Bruen, 597 U.S. 1 (2022).
[9] *Id.*
[10] *Id.*
[11] Cohen & Miller, *supra* note 6.

lobbies adamantly against all forms of gun control and firmly claims that more guns lead to a safer country.[12] The NRA's political power is further fueled by the flexible interpretation of the Second Amendment, which provides a platform for the organization to use the Amendment in their favor and frame gun rights as a fundamental right. Specifically, it claims any opposition to gun ownership as an infringement and pushes to implement laws that "allow easy access to silencers and other modifications, open carry laws, firearm access for teachers and other employees for self-defense in public spaces."[13]

Moreover, this pro-gun organization dominates the government through many tactics, including grading members of Congress from A–F on their friendliness to gun rights and directing extensive amounts of money toward legislators and elected officials in order to sway public opinion. In 2016, for example, "the NRA spent $30m to elect President Donald Trump and $20m to support six Republican candidates for Senate."[14] On average, it spends about $250 million per year, far exceeding the total spending of all gun control advocacy groups combined.[15] The NRA also demonstrated corruption in its leadership as former Chief Executive Wayne LaPierre utilized the membership dues for personal use. One example of misconduct alleged in the lawsuit states that "Mr. LaPierre visited the Bahamas more than eight times by private plane using funds intended for the NRA, for a total cost of $500,000."[16] The organization aggressively refuses to restrict gun ownership at any cost, no matter the circumstance. For example, the NRA's response to school shootings includes statements calling for more security in schools rather than restrictions on gun ownership. Further, in 2018, it even backed President Trump's

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[12] Tom O'Neil, *US Gun Control: What Is the NRA and Why Is It So Powerful?*, BBC (Apr. 2023), bbc.com/news/world-us-canada-35261394.
[13] Megan Sanders, *The NRA and Gun Lobbyists,* Univ. Chi. Harris Sch. Pub. Pol'y (Jan. 2017), writingworkshop.harris.uchicago.edu/policy-primers/gun-policy-landing-page/the-nra-and-gun-lobbyists.
[14] *Id.*
[15] BBC, *New York Attorney General Sues to Dissolve NRA* (Aug. 2020), bbc.com/news/world-us-canada-53684033.
[16] *Id.*

suggestion to arm teachers and other members of staff to deter gun attacks.[17] Ultimately, the NRA's strong influence on the United States government and their exploitation of the Second Amendment continues to obstruct potential restrictions on guns, hinder safety reforms that aid in mass shootings, and perpetuate continued political corruption.

IV. Weak Gun Laws Increase Violent Crime: Comparing Gun Laws Between States

One example of this heavy influence is depicted through the NRA's backing of the Protection of Lawful Commerce in Arms Act (PLCAA), signed by former President George W. Bush in 2005.[18] At the time, this act was the top legislative priority of the gun industry. It allowed the gun industry to evade all accountability, therefore denying victims of gun violence the opportunity to hold these manufacturers and dealers responsible for their harm.[19] Moreover, the successful lobbying of legislators by the NRA has led to weaker or nonexistent federal gun laws, resulting in fragments of state laws. Consequently, this inconsistency correlates weak gun laws and violent crime, further demonstrating this country's need for effective regulation. In 2020, guns surpassed car crashes as the leading cause of death in the U.S. for children and teenagers, a harsh reality that highlights the severity of this epidemic.[20] This alarming statistic is further exacerbated as in the past four years, the U.S. has experienced over six hundred mass shootings annually, averaging nearly two per day.[21] Such numbers reveal that these statistics will continue unless there is proper regulation and reform, continuing this crisis cycle. Research also consistently demonstrates that states with looser gun laws experience more mass shootings and gun violence. For example, in 2007, Missouri repealed its permit-to-purchase (PTP) law, which

[17] Sanders, *supra* note 13.
[18] Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901–7903 (2005).
[19] Brady United, *PLCAA Allows the Gun Industry to Put Profits over People*, bradyunited.org/resources/issues/what-is-plcaa.
[20] BBC, *Gun Deaths were the Leading Killer of US Children in 2020* (Apr. 2022), bbc.com/news/world-us-canada-61192975.
[21] BBC, *How Many US Mass Shootings Have There Been in 2024* (Dec. 2024), bbc.com/news/world-us-canada-41488081.

required all handgun purchasers to acquire a valid license after passing background checks.[22] By 2020, a study concluded the law's repeal generated "a 47% increase in gun homicide rates and a 23% increase in gun suicide rates."[23] Missouri also obtained the sixth-highest gun-related child death rate in the nation, which was 62% higher than the national rate.[24] These statistics validate the consequences of lax firearm regulations and depict the vital need for strict laws that prioritize public safety.

In the states that have fulfilled and implemented the need for stricter gun laws, the benefits are quite evident, as these states consistently report significantly lower rates of violent crime across the country. For instance, Everytown Research scored each state based on the strength of its gun safety laws and concluded that fewer people die by gun violence in states where elected officials have taken action to pass gun safety laws.[25] Specifically, states including California, Massachusetts, New York, and Connecticut rank amongst those with the strongest gun safety laws (out of one hundred points) and lowest rates of gun violence (deaths per one hundred thousand residents), with a rating of 90.5/8, 86.5/3.7, 85/4.7, and 81.5/6.2, respectively.[26] Conversely, Mississippi, Oklahoma, Louisiana, and Idaho rank amongst states with the weakest gun laws and highest gun violence rates with a rating of 4/29.4, 7.5/19.9, 12.5/28.3, and 3.5/17.9, respectively.[27]

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[22] *Id.*
[23] Nick Wilson, *Fact Sheet: Weak Gun Laws Are Driving Increases In Violent Crime*, Ctr. Am. Progress (Aug. 2022), americanprogress.org/article/fact-sheet-weak-gun-laws-are-driving-increases-in-violent-crime.
[24] *Id.*
[25] Everytown Rsch. & Pol'y, *Gun Safety Policies Save Lives* (Jan. 2025), everytownresearch.org/rankings.
[26] *Id.*
[27] *Id.*

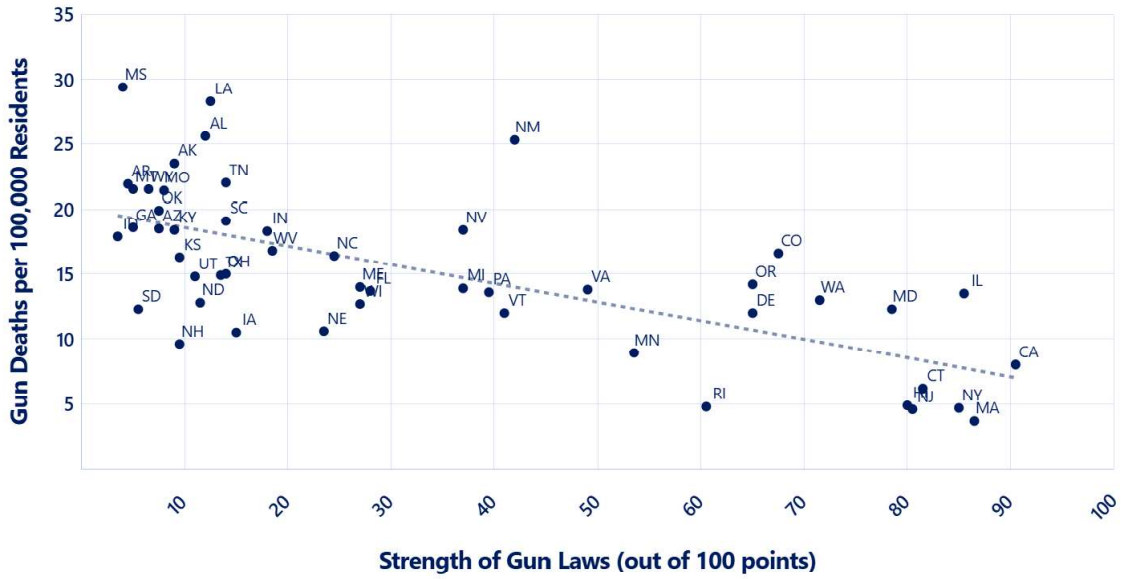

Figure 1: Graphic showing the correlation between gun deaths per one hundred thousand residents and the strength of gun laws (out of one hundred points).[28]

V. Comparing the U.S. to Other Countries: A Uniquely American Epidemic

Unlike other developed countries, gun violence in America is a uniquely severe problem this country faces alone. The U.S. stands apart from nearly every country in the world with its constitutional right to bear arms, a stipulation distorted by an extremist ideological interpretation of the Amendment, as well as a lack of response and reforms succeeding mass shootings. America also faces a wildly high ratio of guns to civilians, making addressing the crisis all the more challenging. Specifically, the number of guns in the U.S. is unparalleled as "the country has less than 5% of the world's population, but 40% of the world's civilian-owned guns."[29] While other nations have responded to gun violence with significant legislative action, America

[28] Graph of a chart assessing strength of gun laws and gun deaths, *in* Everytown Rsch. & Pol'y, *Methodology* (Jan. 2025), everytownresearch.org/rankings/methodology.
[29] Meredith Deliso, *What Other Countries Show Us About America's Gun Violence Epidemic*, ABC News (Nov. 2021), abcnews.go.com/US/countries-show-us-americas-gun-violence-epidemic/story?id=80495637.

remains paralyzed by inaction, proceeding down an unregulated path allowing this epidemic to persist.

Additionally, the experience of other countries in gun safety reforms demonstrates that enacting safe policies is not that challenging. For instance, in 1996, Australia experienced the deadliest mass shooting in its history, known as the Port Arthur massacre.[30] Martin Bryant used a semi-automatic rifle to kill thirty-five and injure twenty-three people near a popular tourist resort in Port Arthur, Tasmania, an Australian state.[31] Australia quickly began working to enact tighter firearm policies as former Prime Minister John Howard stated, "We do not want the American disease imported into Australia."[32] The reforms included adopting the National Firearms Agreement (NFA), which "established a national gun registry, required permits for gun purchases and banned all semi automatic rifles and pump-action shotguns."[33] This reform positively contributed to citizen safety, with only one mass shooting in the twenty-two years since the NFA reforms, compared with thirteen in the eighteen years prior, proving the effectiveness of simple gun safety laws.[34] In contrast, "the firearm death rate [in America] per 100,000 people in 2016 was nearly four times that of Switzerland, five times that of Canada, over ten times that of Australia, and thirty-five times that of the United Kingdom."[35] Evidently, as demonstrated by other nations, creating a safer America does not have to be that hard. The solution lies in meaningful gun regulation, which includes disbarring the Second Amendment as a defense to any gun laws.

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[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*

VI. Unrestricted Access to Purchasing Weapons: Reforming the Law

To create a safer America, we must impose stricter regulations on the accessibility and purchase of firearms. A key factor in this crisis is the widespread availability of semi-automatic weapons to the public, which poses the concern of whether current gun laws align with public safety. In most recent years, assault weapons have been used in 59% of mass shootings, with incidents involving rifles resulting in the highest number of casualties. It is no surprise that semi-automatic weapons have been a key factor in the deadliest shootings on record, including those in "Las Vegas (2017), Orlando (2016), Sutherland Springs (2017), Sandy Hook (2012), and Uvalde (2022)."[36] Given the ability of semi-automatic weapons to inflict devastating amounts of damage, it proves crucial to reassess the necessity of easy access to these weapons, which did not exist and were likely not what the framers pictured when they protected the right to bear arms. Additionally, the current law must also reform to include stricter stipulations for the average American civilian. This includes mandating comprehensive background checks for all gun purchases, establishing minimum age requirements, enforcing waiting periods, and ensuring proper permits for gun owners. Florida serves as an example of a state that stands in stark opposition to these necessary reforms. No permit is required to purchase or carry a concealed weapon, private gun sales remain unregulated, and the three-day waiting period excludes rifles and shotguns.[37] Moreover, restrictions must be placed on firearm access for felons and other individuals who present a potential harm. Advocating for these reforms does not aim to invade the personal freedom to own a gun, but instead ensures that gun ownership prioritizes the necessary precautions to protect public safety.

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[36] Jennifer Mascia, *Are Handguns or Rifles Used More Often in Mass Shootings?*, The Trace (July 2023), thetrace.org/2023/07/mass-shooting-type-of-gun-used-data.
[37] Inst. Legislative Action, *Florida Gun Laws*, Nat'l Rifle Ass'n, nraila.org/gun-laws/state-gun-laws/florida.

VII. Conclusion

Continuous mass shootings in America substantiate the need for proper reform and regulation of firearms. The now-outdated Second Amendment continues, in part, to fuel the radical pro-gun movement that upholds unrestricted firearm access as a fundamental right, which deems any restrictions or guidelines as unconstitutional. Further, its ambiguity allows for too much individual interpretation leading to inconsistent regulations and policies that continuously fail to prioritize public safety. This crisis also continues to gravely affect the U.S. today, ending the lives of innocent individuals all over the country. This country's lack of comprehensive gun laws not only demonstrates America's priorities but also reinforces the precedent that the threat of punishment is insufficient in deterring shooters. Simple reform and regulation prove entirely attainable, as conveyed by other developed countries. It is up to the federal government to recognize this epidemic and implement the necessary reforms vital in making America safer.

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The Case for "Unusual Punishments" in Fighting for the Abolition of the Death Penalty

Written by Leilani Fries, Florida State University Class of 2026
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Abstract:

As the second Trump administration settles into place, President Trump and his Justice Department are determined to restore the federal death penalty. Meanwhile, more and more states are abolishing the death penalty, with twenty-three states already banning it altogether. Because the death penalty is neither effective nor humane, America needs to move to abolish the death penalty entirely. This paper explores the options that states and courts, which often face less gridlocking than the federal government, can take to best abolish the death penalty. Additionally, a specific focus on the Eighth Amendment's prohibition on "unusual" punishments will highlight how the death penalty is unconstitutional.

I. Introduction

On the first day of his second term, President Donald Trump signed over twenty executive orders.[1] This included an order titled "Restoring the Death Penalty and Protecting Public Safety," which reversed the Biden-era moratorium on the federal death penalty, vowed to obstruct judges and politicians who prevent the death penalty, and directed the United States Attorney General to increasingly pursue the death penalty.[2] This Executive Order comes after former President Biden commuted thirty-seven federal death row inmates' sentences, which was disavowed by President Trump within his Executive Order.[3] The federal death penalty has functionally been a tug-of-war between presidential administrations, leaving its future in perpetuity. Meanwhile, states have been gradually abolishing or pausing their own executions.[4]

The nationwide decrease in the death penalty occurs in the context of a growing consensus that the death penalty is ineffective and cruel. Currently, twenty-three states have abolished the death penalty, and four states have gubernatorial holds on executions.[5] Federal executions have also been infrequent; there were no federal executions from 2003 to 2020, resuming once President Trump headed the execution of thirteen death row inmates.[6] Since President Trump has promised a return to the federal death penalty, it is likely that there will be an impassioned return to federal executions.[7] States might also increase their own executions. In response to President Trump's Executive Order, Attorney General Pam Bondi issued a

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[1] Sara Chernikoff & Ramon Padilla, *Comparing Trump's Day 1 Executive Orders to Past Presidents: See Graphics*, USA Today (Jan. 2025), usatoday.com/story/graphics/2025/01/23/how-many-executive-orders-did-trump-sign/77881247007.
[2] Exec. Order No. 14164, 90 C.F.R. 8463 (2025).
[3] Ruth Comerford, *Biden Commutes Most Federal Death Sentences*, BBC (Dec. 2024), bbc.com/news/articles/cgkxe4xlvgxo.
[4] Death Penalty Info. Ctr., *State & Federal Info: State by State*, deathpenaltyinfo.org/state-and-federal-info/state-by-state.
[5] *Id.*
[6] Michael Tarm & Michael Kunzelman, *Trump Administration Carries Out 13th and Final Execution*, Associated Press (Jan. 2021), apnews.com/general-news-28e44cc5c026dc16472751bbde0ead50.
[7] 90 C.F.R. 8463.

memorandum to the Justice Department that stated her responsibility to "to assist states in prosecuting capital crimes and implementing death sentences."[8]

At this point, the death penalty undoubtedly violates the Eighth Amendment's prohibition of cruel and unusual punishment.[9] States that want to execute a prisoner must undergo a gauntlet of challenges to carry out an execution, leading to the adoption of inhumane and ineffective execution measures. The death penalty has also become an unusual form of punishment in the modern world, leaving the United States as a criminal justice anomaly. Abolishing the death penalty signifies "evolving standards of decency that mark the progress of a maturing society,"[10] indicating the necessity of this reform.

II. Why the Death Penalty Should Be Abolished

To understand the importance of abolishing the death penalty, the problems with it must first be established. The most glaring problems with the death penalty include disproportionate application, ineffectiveness, and cost. When considering all three of these components, it is clear that it is not worth it for states or the federal government to pursue the death penalty and that they therefore should move to abolish it.

A lack of privilege and resources is correlated with being sentenced to death. Black offenders are disproportionately sentenced and executed by the death penalty.[11] This sentencing disparity is multiplied if the victim is white; in an analysis of the death penalty in the U.S., it was found that "victim race stood out as the most influential predictor of death sentences."[12] The amount of racial resentment within a state, measured by its amount of lynchings, has been

[8] Off. of the Att'y Gen., *Reviving the Federal Death Penalty and Lifting the Moratorium on Federal Executions* (2025).
[9] U.S. Const. amend. VII, § 1, cl. 1.
[10] Marissa Stanziani et al., *Marking the Progress of a "Maturing" Society: Madison v. Alabama and Competency for Execution Evaluations*, 26 Psychol. Pub. Pol'y & L. 145, 146 (2020).
[11] Paul Kaplan, *Challenges to the Contemporary Death Penalty in the United States*, 20 Annu. Rev. L. Soc. Sci., 353, 362 (2024).
[12] *Id.* at 363.

statistically linked to greater death sentences for Black offenders.[13] Therefore, it has been suggested that these sentencing disparities follow the legacy of institutional racism. Even with this disparity well known, it is difficult for the accused to challenge their sentence due to the precedent set in the 1987 U.S. Supreme Court Case *McClesky v. Kemp*, which held that the accused that received the death penalty in a racially discriminatory way must prove "'intentional' discrimination in individual cases…to gain relief—a discriminatory outcome is not enough."[14]

Poorer individuals are also more likely to be sentenced to death. Those with less wealth are unable to get the same quality of legal representation as their richer counterparts.[15] This can lead to "juries not hearing critical evidence or other failures that then result in a death sentence where a more vigorous defense would have resulted in a different outcome."[16]

This sentencing disparity, especially among accused individuals who are poorer, helps explain why wrongful capital conviction happens. "[N]early 200 capital convicted persons have been exonerated in the modern era…which represents 2% of the total capital convictions during the same period."[17] This does not include those that had claims of innocence that have gone ignored. For example, on September 24, 2024, Marcellus Williams was executed by the state of Mississippi despite numerous pieces of evidence suggesting that he did not commit the murder he was accused of.[18] Innocent individuals who have been executed rarely have their records expunged postmortem due to a lack of legal resources.[19] Therefore, it is empirically known that a percentage of those sentenced to death are innocent, but the "real" number of innocents is likely higher than statistics can account for.

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[13] Frank R. Baumgartner et al., *Racial Resentment and the Death Penalty*, 8 J. Race Ethnicity Pol. 42 (2022).
[14] McCleskey v. Kemp, 481 U.S. 279, 363–64 (1987).
[15] S. Ctr. Hum. Rts., *Poverty*, schr.org/death-penalty/poverty.
[16] *Id.*
[17] Kaplan, *supra* note 11, at 357.
[18] Death Penalty Info. Ctr., *Executed But Possibly Innocent*, deathpenaltyinfo.org/policy-issues/policy/innocence/executed-but-possibly-innocent.
[19] *Id.*

One of the common defenses of the death penalty, as mentioned in President Trump's Executive Order, is that executing criminals deters other "potential" criminals from doing the same crimes.[20] While numerous studies have tried to measure so-called deterrence in a variety of ways, "the problem is in operationalizing a rational murderer who weighs the pros and cons of homicide."[21] Since the existence of deterrence is difficult to prove, many academics are suggesting that it is disregarded as a benefit of the death penalty.[22] Joined with deterrence, retribution is the second most cited benefit of the death penalty. Many argue that executing offenders gives a sense of catharsis or closure to the victim's families. Not only is this argument wrong in generalizing the reactions of a victim's loved ones, but it again is a relationship that is hard to definitively prove.[23]

Even when executions are carried out, they could be botched, meaning that the execution fails due to a technical problem.[24] Lethal injection is the most common form of execution,[25] yet it does not have a uniform procedure, and some states use different combinations of one to three drugs. National and international companies have refused to provide the U.S. with the needed drugs to perform the standard three-drug "cocktail" necessary for the most effective and humane form of lethal injection.[26] Without the necessary drugs, states experiment with drug combinations, which can lead to "prolonged and painful executions."[27] As a result, lethal injections have the highest failure rate of any form of execution at around seven percent.[28] States have turned to a new method of nitrogen gas suffocation, "nitrogen hypoxia," to find a "humane"

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[20] 90 C.F.R. 8463.
[21] Kaplan, *supra* note 11, at 360.
[22] *Id.*
[23] *Id.* at 361.
[24] *Id.* at 355.
[25] Death Penalty Info. Ctr., *Lethal Injection*, deathpenaltyinfo.org/executions/methods-of-execution/lethal-injection.
[26] Hana Mir, *Pharmaceutical Firms Against Lethal Injection and the Ramifications*, 2 Phil., Pol., & Econ. Rev. (2023).
[27] Death Penalty Info. Ctr., *supra* note 25.
[28] Mir, *supra* note 26.

replacement to lethal injection.[29] On January 25, 2024, Alabama performed the first execution using nitrogen hypoxia on Kenneth Eugene Smith.[30] This was Alabama's second attempt to execute Smith, as he had undergone a botched lethal injection attempt in 2022.[31] While there were conflicting eyewitness reports on whether the execution was "humane," it is important to consider that the U.N. High Commissioner for Human Rights and veterinary euthanasia researchers both condemn the practice.[32]

Of course, morality is subjective, and many of those who support the death penalty disregard these points as null. The reality is that morality is used to justify executions, no matter how subjective it is. In response to an inquiry about the potential use of nitrogen hypoxia in Oklahoma executions, director of Oklahoma's prison system Steven Harpe stated: "Our intentions are if this works and it's humane and we can, absolutely we'll want to use it."[33] As argued by Paul Kaplan, a professor with the San Diego State University's School of Public Affairs, execution guidelines are "created not to minimize human suffering but to deflect challenges that could halt or eliminate executions."[34] This is why there is such a rush for states to find a "humane" substitution for lethal injections because if humanity was the concern in conducting executions, the evidence discussed above would disqualify these claims. President Trump's executive order is honest in stating its goals of punishment and retribution. This is why the death penalty still exists in America, because it is "symbolic and expressive," and not for any

[29] Kim Chandler & Sean Murphy, *Will Other States Replicate Alabama's Nitrogen Execution?*, Associated Press (Jan. 2024), apnews.com/article/nitrogen-execution-alabama-oklahoma-lethal-injection-c088b01aeb581da7bfb73e52aa6caf3f.
[30] *Id.*
[31] *Id.*
[32] Alison Mollman, *Alabama Has Executed A Man With Nitrogen Gas Despite Jury's Life Verdict*, Am. Civ. Liberties Union (Feb. 2024), aclu.org/news/capital-punishment/alabama-has-executed-a-man-with-nitrogen-gas-despite-jurys-life-verdict.
[33] Chandler & Murphy, *supra* note 29.
[34] Kaplan, *supra* note 11, at 355.

empirically backed benefit.[35] Through exploring several faults with the death penalty in America, it can be concluded that there is no real benefit to keeping it around, and there are only opportunities for further harm.

III. The Death Penalty is Unconstitutional

The death penalty is a glaring Eighth Amendment violation, both in the prohibition of "cruel" and "unusual" punishments.[36] As detailed in the previous section, the death penalty is cruel in terms of application and procedures. Oftentimes, the cruelty of the death penalty, or a certain measure of execution, is contested, neglecting the fact that state executions are becoming increasingly rare and therefore unusual, both in the U.S. and globally. Over half of U.S. states either have halted or banned the death penalty altogether.[37] In states that have retained the death penalty, "executions have declined significantly over the past two decades…[and have] been concentrated in a few states and a small number of outlier counties."[38] The United States is the only nation in the Western hemisphere that executes those who are sentenced to death.[39] "[M]ore than 160 of 193 Member States of the U.N. have either abolished the death penalty or do not practice it."[40]

While there is a strong argument that the death penalty is cruel, determining if something meets the standards of cruelty can be an arbitrary task. The Constitution does not hold cruel as a static term, making it difficult to assess the death penalty based on cruelty.[41] While the term unusual still presents some similar problems with arbitrariness, it is much easier to prove that

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[35] *Id.* at 359.
[36] U.S. Const. amend. VII, § 1, cl. 1.
[37] Death Penalty Info. Ctr., *supra* note 4.
[38] Death Penalty Info. Ctr., *Executions Overview*, deathpenaltyinfo.org/executions/executions-overview.
[39] Targeted News Serv., *Inter-American Commission on Human Rights Welcomes Abolition of Death Penalty in New Hampshire, United States*, ProQuest (June 2019), proquest.com/wire-feeds/inter-american-commission-on-human-rights/docview/2242111867/se-2?accountid=4840.
[40] U.N. Sustainable Dev. Grp., *Death Penalty: Excerpt from the UNDG Guidance Note on Human Rights for Resident Coordinators and U.N. Country Teams* 2 (2017).
[41] Ronald J. Tabak, *Justice Brennan and the Death Penalty*, 11 Pace L. Rev. 473 (1991).

something is unusual mathematically than cruel on some other, non-operationalized scale. Even though the framers of the Constitution do not give explicit guidance on when a punishment becomes unusual, if a punishment is both unusual within the Country and globally, then it is logical to conclude that it is unusual.

IV. How to Stop the Death Penalty

The death penalty can be issued for state, federal, or military crimes.[42] The military death penalty, while still "constitutional," has only four individuals on death row and has had no executions since "the modern era of the death penalty."[43] Since it is not an active threat as compared to the federal and state executions, and is outside the scope of the general population, military execution will not be the priority for this analysis. Abolition on the federal level is also extremely difficult, if not impossible at this moment. All three branches of the federal government are currently hostile to any form of abolition. The current interaction of the Supreme Court, the "Roberts Court," has not made any major rulings on Eighth Amendment cases in recent years, although the composition of the Court suggests a pro-death penalty lean.[44]

> The departure of Anthony Kennedy and Ruth Bader Ginsburg…two justices who supported key limitations on the death penalty and expanded protections for prisoners…were replaced by two justices, Amy Coney Barrett and Brett Kavanaugh, whose lower-court records suggest broad support for capital punishment and little appetite for expanded Eighth Amendment protections for prisoners.[45]

If the Court's justices seem unlikely to expand protections to prisoners, the total abolition of the federal death penalty is even more unlikely. Perhaps in the future, the Supreme Court could be a good avenue for abolition, but this is unlikely in the immediate future. Current President Trump has already signaled his approval for the death penalty with his Executive Order, swiftly halting

[42] Death Penalty Info. Ctr., *Military*, deathpenaltyinfo.org/state-and-federal-info/military.
[43] *Id.*
[44] Andrew Cohen & Carol Steiker, *The Eighth Amendment, the Death Penalty, and the Supreme Court*, Brennan Ctr. Just. (Feb. 2022), brennancenter.org/our-work/analysis-opinion/eighth-amendment-death-penalty-and-supreme-court.
[45] *Id.*

any hope for abolition on the executive front. Concerning Congress, there is little chance that legislation abolishing the death penalty will be passed. While Republicans have traditionally been pro-death penalty, Democrats recently scrubbed "opposition to the death penalty" from their 2024 Democratic Party Platform; this is the first time since 2012 where the Democratic Party did not state an anti-death penalty stance within their official platform.[46] In a hypothetical world where legislation was able to be filed, and even successfully passed the House of Representatives, it would have to be filibuster-proof to pass the Senate. Sixty votes are required to stop a filibuster in the Senate, which can be done passively and indefinitely through a "silent filibuster."[47] If sixty U.S. senators allow the filibuster to end and the bill gets a majority vote in the Senate, then the legislation depends on the signature of the President, which would be unlikely under the current administration. In laying out all of the steps of the federal legislative process, it is clear how truly difficult it will be to end the federal death penalty through legislation. Accounting for all three of the federal branches of government, federal abolition of the death penalty can be regarded as in limbo at the moment. The best hope at this moment is to have future Presidents commute the sentences of those on federal death row, but this does not end the death penalty or negate the harm that having an active death penalty in a society does.

Individual U.S. states do not face this same governmental gridlock to the degree that the federal government does, making states more flexible to abolish their death penalty laws through legislation and state Supreme Court rulings, often joined with Governors taking a supportive role in the abolition process. Washington state used all three branches of its government to permanently remove the death penalty from state law in 2023.[48] In 2014, the Governor of

[46] Rebecca Schneid, *The Changes to the Democrats' Criminal Justice Platform You May Have Missed*, Time (Aug. 2024), time.com/7014604/changes-to-democrats-criminal-justice-platform.
[47] Scott Bomboy, *Filibustering in the Modern Senate*, Nat'l Const. Ctr. (Dec. 2022), constitutioncenter.org/blog/filibustering-in-the-modern-senate.
[48] Equal Just. Initiative, *Washington Supreme Court Strikes Down Death Penalty, Citing Racial Bias* (Oct. 2018), eji.org/news/washington-supreme-court-strikes-down-death-penalty.

Washington, Jay Inslee, issued a moratorium on state executions.[49] Following this move, the Washington Supreme Court declared the state's death penalty unconstitutional in 2018, arguing that it was "imposed in an arbitrary and racially biased manner."[50] Then, the state legislature passed a law in 2023 that removed Washington's remaining death penalty laws.[51] Most states that have gotten rid of the death penalty have done it through legislation, including Colorado in 2020 and Virginia in 2021.[52] While the states' approach indicates the increasing unpopularity of the death penalty, it is important to note that abolition through just legislation is not permanent. In 2015, Nebraska's legislature passed a bill that abolished the state's death penalty.[53] Yet after an "initiative-veto" referendum, Nebraska's abolition was halted by a 60% vote to reverse the legislation.[54] For states to successfully pursue abolition, protections against the death penalty must be woven within multiple avenues of the state. Washington provides a strong example of what an ideal track to permanent abolition looks like. It may be difficult for politically diverse or divisive states such as Virginia to secure abolition in all three branches as quickly as Washington; regardless, there must be a continued fight after the first step is achieved, be that a governor's stay on execution or a state's supreme court ruling. This is especially important for states that have temporary memorandums enforced by their governors, as a simple change in governor could rapidly reverse the state's policy for the worse.

V. Conclusion

The American death penalty is disproportionately applied, ineffective, and costly—but most importantly, it is plainly unconstitutional. The best way to end the death penalty at this

[49] Death Penalty Info. Ctr., *Washington*, deathpenaltyinfo.org/state-and-federal-info/state-by-state/washington.
[50] Equal Just. Initiative, *supra* note 48.
[51] Equal Just. Initiative, *Washington Abolishes the Death Penalty* (Apr. 2023), eji.org/news/washington-abolishes-the-death-penalty.
[52] Death Penalty Info. Ctr., *supra* note 4.
[53] Austin Sarat et al., *When the Death Penalty Goes Public: Referendum, Initiative, and the Fate of Capital Punishment*, 44 L. & Soc. Inquiry 391 (2019).
[54] *Id.*

moment is state-level abolition. While it is important to federally do away with the death penalty as a whole, that power lies with the President and a Supreme Court unwilling to challenge the death penalty's legitimacy under the Eighth Amendment's "cruel" prohibition. However, if the death penalty's abolition is argued through the "unusual" prohibition, it would appeal to the Court's textualist leaning and bypass the arbitrary challenge of proving something as "cruel." This is a long-term approach though, and in the meantime, efforts should be directed at supporting organizations that help those on death row.

Abolition efforts need to continue with urgency, as the Trump Administration has already taken its first material steps in expanding the death penalty. On April 1st, 2025, Attorney General Pam Bondi announced that the Department of Justice will seek the death penalty for Luigi Mangione, who is the accused killer of UnitedHealthcare CEO Brian Thompson.[55] This is just the start of this practice under the second Trump Administration, but it should be the end.

[55] Kara Scannell et al., *U.S. Justice Department to seek the death penalty for Mangione*, CNN (Apr. 2025), cnn.com/2025/04/01/politics/death-penalty-doj-luigi-mangione/index.html.

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The Constitutionality of United States Seizures of Foreign Property

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Abstract:

Due to recent geopolitical turmoil, the U.S. federal government has started to freeze and repossess assets owned by nationals from countries including Iran and Russia, as a response to curtail violent conflict. This paper will examine the constitutionality of the seizures through textual analysis and court precedent in cases like *Brown v. United States*, *U.S. v. Nasri*, *Dames & Moore v. Regan*, and more. It will also examine laws that impact the permissibility of asset seizure, such as the International Emergency Economic Powers Act. This paper will ultimately conclude that seizures are constitutional due to the nature of implied powers and specific constitutional interpretation regarding international conflict.

I. Introduction

In late 2024, former President Biden signed H.R. 815, a bill that provided foreign aid to conflict-ridden regions such as Ukraine, Israel-Palestine, and the Indo-Pacific.[1] The bill also allowed the federal government to freeze American assets owned by Russian state entities who use the assets' monetary capabilities to fund the war in Ukraine.[2] The Office of Foreign Assets Control, part of the U.S. Department of the Treasury, defines sanctions to include "blocking the property of specific individuals and entities to broadly prohibiting transactions involving an entire country or geographic region, such as through a trade embargo or prohibitions related to particular sectors of a country's economy."[3] This development included seizures of private property as well, such as the *Amadea*[4] and *Tango*[5] yachts owned by Russian oligarchs, based on the International Emergency Economic Powers Act (IEEPA)[6] and claims of money laundering.[7] However, recent discussion has ensued about whether or not it is constitutional for the U.S. government to repossess foreign assets regardless of claims of election interference and conflict abroad. Looking at the nature of implied power, court precedents, and the balance of power can

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[1] Press Release, U.S. Dep't Just., *Justice Department Announces Terrorism and Sanctions-Evasion Charges and Seizures Linked to Illicit, Billion-Dollar Global Oil Trafficking Network That Finances Iran's Islamic Revolutionary Guard Corps and Its Malign Activities* (Feb. 2024) (on file with author), justice.gov/archives/opa/pr/justice-Department-announces-terrorism-and-sanctions-evasion-charges-and-seizures-linked [hereinafter U.S. Dep't of Just., *Charges and Seizures*].

[2] *Id.*

[3] Off. Foreign Assets Control, U.S. Dep't Treas., *Basic Information on OFAC and Sanctions* (Aug. 2024), ofac.treasury.gov/faqs/topic/1501.

[4] Press Release, U.S. Dep't Just., *Civil Forfeiture Complaint Filed Against $300 Million Superyacht Amadea Involved in Sanctions Evasion* (Oct. 2023) (on file with author), justice.gov/usao-sdny/pr/civil-forfeiture-complaint-filed-against-300-million-superyacht-amadea-involved [hereinafter U.S. Dep't of Just., *Civil Forfeiture*].

[5] Press Release, U.S. Dep't Just., *$90 Million Yacht of Sanctioned Russian Oligarch Viktor Vekselberg Seized by Spain at Request of United States* (Apr. 2022) (on file with author), justice.gov/archives/opa/pr/90-million-yacht-Sanctioned-russian-oligarch-viktor-vekselberg-seized-spain-request-united [hereinafter U.S. Dep't of Just., *$90 Million*].

[6] The IEEPA is a law that "gives the President authority to regulate commerce—including the power to investigate, regulate, and block transactions—in response to 'any unusual and extraordinary threat…' whereas the Executive ought to declare a national emergency regarding matters of international relations, security, etc." International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1709 (1977).

[7] E. Maddy Berg, *A Tale of Two Statutes: Using the International Emergency Economic Powers Act (IEEPA) to Inspire Committee on Foreign Investment in the United States (CFIUS) Reform*, 118 Colum. L. Assn. 1763 (2018).

provide a clear explanation for the constitutionality of U.S. seizures of foreign property. This topic may continue to change going forward into the second Trump administration as it continues to develop rapidly.

II. Definition and Background of Asset Seizure

Asset seizure is not an explicit constitutional power of the executive branch, as it is Congress' responsibility to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."[8] Despite this, the 1814 U.S. Supreme Court case *Brown v. United States* sets the precedent for asset seizure, wherein the Court details the procedure to repossess British property during the embargo of 1812.[9] This case will provide modern insight into whether or not seizures are constitutional when they meet certain aims. *Brown* declared that to seize foreign assets, the U.S. must pass legislation permitting confiscation, and that declaring war on a country is insufficient to repossess its property in the U.S.[10] In *Brown*, 550 tons of British timber on a cargo ship had fallen off the ship and been lost downstream.[11] This cargo was discovered by an American citizen, who then sold the timber to another American citizen.[12] The timber was owned by the appellant Armitz Brown, who intended to transport the wood to England.[13] However, the declaration of war enabled the U.S. to seize foreign property that had been "landed," that is, thoroughly taken downstream and into the possession of American citizens. With regard to the Constitution, the case stated that due to powers of war that are contained within the U.S., seizures are not impacted by the Fifth and Sixth Amendments.[14] It also stated that this is unrelated to whether or not an individual is a U.S. citizen

[8] U.S. Const. art. I, § 8, cl. 11.
[9] Brown v. United States, 12 U.S. 110 (1814).
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* at 111.

or if they are guilty of a crime, insofar that seizures are government measures to coerce foreign parties away from malicious intent.[15] While the case declared that individual American citizens cannot seize assets during war, it reconfirmed that it is Congress, not the President or Supreme Court, that is authorized to seize enemy property during wartime.[16] A notable quote from the majority opinion in *Brown* explains that:

> In expounding the Constitution of the United States, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess anywhere else and which would fetter that exercise of entire discretion respecting enemy property which may enable the government to apply to the enemy the rule that he applies to us.[17]

In other words, using seizures could be considered Constitutional to protect the U.S. against the powers of foreign entities that threaten the nation. President Biden's H.R. 815 could support the need for our country to protect its interests against an enemy nation as the aforementioned majority opinion in *Brown* suggests, yet Biden seems to contradict the ruling that it is the responsibility of the legislative branch to conduct seizures by trying to authorize the executive branch to conduct said seizures. The executive branch is currently given this power through additional legislation introduced after *Brown*, however, further seizures would also require using existing legislation, such as the IEEPA, which provides a pathway for the executive branch to conduct seizures.[18]

III. Legal Proceedings

To evaluate the constitutionality of government forfeiture of foreign property during wartime, several court precedents may provide insight. First, a civil forfeiture case in the Ninth

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[15] *Id.* at 134.
[16] *Id.*
[17] *Id.* at 116.
[18] Alexandre Lamy et al., *US President Signs National Security Package with Provisions Doubling the Statute of Limitations for Sanctions Violations, Authorizing the Seizure of Russian Assets, Targeting Russia and Iran with Additional Sanctions, and More*, Glob. Sanc. & Export Controls Blog (Jan. 2023), sanctionsnews.baker mckenzie.com/us-president-signs-national-security-package-with-provisions-to-seize-russian-assets-and-target-russia-and-iran-with-additional-sanctions/.

Circuit Court of Appeals, *U.S. v. Nasri*, involved a Canadian citizen living in Dubai who contested United States repossession of assets in a foreign bank account after the company Nasri worked for, Phantom Secure, was convicted by the United States of selling encrypted phones to criminals.[19] Nasri had stored illegal profits earned in the U.S. in a bank account in Liechtenstein, yet was neither an American citizen nor living in the U.S. He filed a claim against the seizure of the assets yet would not show up to court, citing his Fifth Amendment right against self-incrimination, and would not surrender in his criminal case.[20] The circuit court decided that the government could seize the illegal assets from a foreigner since the fugitive disentitlement statute, 28 U.S.C. 2466, allows for property seizures related to a fugitive's criminal charges.[21] The court also noted that the government had *in rem* jurisdiction,[22] meaning they could exercise authority over matters of property in the region of the court regardless of the property's owner. They also noted that this action would not violate due process and that Nasri could be considered a fugitive even if he did not flee the U.S. with the intention to avoid criminal charges.[23] The case also clarified that assets located in a foreign bank account may still be seized if they are connected to violations of U.S. law.[24] This case consisted of a court authorizing a civil forfeiture, different from a federal asset seizure, on the grounds that foreign nationals had only used the U.S. financial system when they were sanctioned with crimes without being U.S. citizens; this may provide context to foreign nationals having their assets currently seized on behalf of international relations.

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[19] United States v. Nasri, 119 F.4th 1172 (9th Cir. 2024).
[20] *Id.*
[21] Civil Asset Forfeiture Reform Act, 28 U.S.C. § 2466 (2000).
[22] From the Latin phrase meaning "against a thing," *in rem* refers to a court's authority to adjudicate matters directed against property. *See generally* L. Info. Inst., *In Rem*, Cornell L. Sch. (Sept. 2023), law.cornell.edu/wex/in_rem (general definition of the term).
[23] *Nasri*, 119 F.4th at 1172.
[24] *Id.*

The second of these cases is the civil forfeiture complaint filed against the owner of the superyacht *Amadea*, Russian oligarch Suleiman Kerimov, who is currently facing sanctions regarding the yacht's maintenance and upkeep in the U.S.[25] The boat is valued at over $300 million and was repossessed following a court order of the Fijian government after a request by the District of Columbia Circuit Court, following a sanctions violation where Kerimov and family paid for the upkeep of the yacht using costs denominated in U.S. dollars (USD) through the U.S. financial system. The complaint was filed by the U.S. Attorney for the Southern District of New York and the codirectors of Task Force KleptoCapture, a unit developed by the U.S. to assist the country and its allies in economic movements to punish Russia for its aggression in Ukraine.[26] The complaint stated that Kerimov had been designated as a key player in the advancement of Russia's malicious intent since 2018 and that he had purchased the yacht in 2021 through transfers between three shell companies intended to prevent public knowledge of the yacht's ownership.[27] Russian individuals are currently disputing the yacht's ownership, making the approved forfeiture difficult.[28] They each claim to control shell companies connected to *Amadea*, and during the ongoing dispute, over $500,000 USD of taxpayer funds are being used each month for the yacht's upkeep prior to its government sale.[29] If seizing *Amadea* was not related to wartime nor authorized by the Legislative branch, its seizure would not come from a literal interpretation of the Constitution as identified in *Brown*.

A similar seizure occurred in April 2022 in Spain when Spanish authorities seized *Tango*, a yacht owned by the Russian oligarch Viktor Vekselberg, who the U.S. has targeted with

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[25] U.S. Dep't of Just., *Civil Forfeiture*, *supra* note 4.
[26] *Id.*
[27] *Id.*
[28] Matthew Kupfer et al., *Yacht Docked in US Port Symbolizes Struggle to Convert Seizures into Cash for Ukraine*, Voice Am. (May 2024), voanews.com/a/yacht-docked-in-us-port-symbolizes-struggle-to-convert-seizures-into-cash-for-ukraine-/7622986.html.
[29] *Id.*

sanctions since 2018.[30] In a manner similar to the seizure of *Amadea*, the Spanish authorities repossessed the boat following a U.S. seizure warrant stating that the boat's owner violated U.S. sanctions and has outstanding warrants for crimes including bank fraud and money laundering.[31] This was the first seizure of KleptoCapture, and a press release stated that it is the responsibility of the U.S. government to prove whether or not the assets are forfeitable for the task force to operate. It also stated that the Federal Bureau of Investigation (FBI) was investigating *Tango* using both its offices in the U.S. and in Spain.[32]

IV. Constitutionality of Previous Seizures

These examples of past and current case law demonstrate how the U.S. government justifies seizures of property by declaring foreign criminals as fugitives, using court orders to repossess property paid for violating sanctions and displaying individual connections to terrorism. However, since none of these seizures were ordered by Congress but rather by the executive branch, through the Department of Justice, constitutionality needs to be examined. As previously stated, the IEEPA provides context for the executive branch to seize property. Yet, it was only cited to seize *Amadea* and was not directly consulted in the seizure of Nasri's money or the Iranian oil. Nasri's assets were seized by a court, not on the grounds of the IEEPA, but rather because the property was within the jurisdiction of the circuit court.

V. Further Details About the IEEPA

It is unclear if President Biden's signing of H.R. 815 is constitutional since it amends the IEEPA to allow the executive branch to seize assets from countries such as Russia that have engaged in activity that is deemed harmful to the U.S.[33] The recent seizures depended on whether

[30] U.S. Dep't Just., *$90 Million*, *supra* note 5.
[31] *Id.*
[32] *Id.*
[33] H.R. 815, 118th Cong. (2024) (enacted as a session law at National Security Act of 2024, Pub. L. No. 118-50, 138 Stat. 895).

or not it is constitutional for a President to amend a bill to grant the executive branch a power traditionally reserved for Congress. It is debated whether or not the Constitution justifies seizures of assets held by designated terrorist groups and supporting agencies related to Iran since these are neither nations nor entities that the U.S. has formally entered into a war with. The omnibus bill, which included twenty divisions on topics such as supplemental appropriations in Israel, Ukraine, and the Indo-Pacific, specified that

> [T]he President should lead robust engagement on all bilateral and multilateral aspects of the response by the United States to acts by the Russian Federation that undermine the sovereignty and territorial integrity of Ukraine, including on any policy coordination and alignment regarding the repurposing or ordered transfer of Russian sovereign assets in the context of determining compensation and providing assistance to Ukraine.[34]

The bill primarily works to clarify that the executive branch ought to take measures to curb the progression of those deemed "terrorist" groups by the U.S. government, such as the Islamic Resistance Movement (commonly referred to as Hamas), and to prevent Iran from using American networks to finance its terrorism.[35] However, the bill details such aims vaguely and does not explicitly state whether or not seizures of Iranian assets are a power the President continues to have.[36] In contrast, the Nasri case presents an example where a court, not the executive branch, overtakes the seizure of foreign securities. Should the criminal be a fugitive, as the Nasri case alleges, the only way these foreign seizures are legally justified is if they are conducted by the legislative branch or by a court.[37] Therefore, the constitutionality of this seizure depends on whether or not higher courts would consider Nasri a fugitive even though he is not affiliated with the United States.

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[34] *Id.*
[35] *Id.*
[36] Lamy et al., *supra* note 18.
[37] United States v. Nasri, 119 F.4th 1172 (9th Cir. 2024)

VI. Current American Seizures

In addition, the U.S. government is currently involved in seizures of Iranian assets that are reportedly responsible for funding terrorism abroad. In New York, seven individuals were charged with crimes including terrorism and sanctions evasion after trafficking oil to the Iranian Islamic Revolutionary Guard Corps, a U.S.-designated terrorist group, and the Quds Force, an Iranian organization that supports terrorist groups from other foreign nations.[38] The seven individuals had over $100 million in financial assets repossessed.[39] Another seizure in the District of Columbia reclaimed five hundred thousand barrels of Iranian oil from an Omani citizen and Chinese citizen with allegations of trafficking the oil to China.[40] Oil trafficking on behalf of Iran is known to financially support groups that are recognized by the U.S. government as terrorist organizations, such as Hamas and Hezbollah, through a complex network of shell companies across countries such as Turkey, Russia, and China.[41] These resources help Iran financially sustain connections to countries such as Syria and China. Iran has recently launched cyberattacks on an American children's hospital, and the FBI has stated that the country poses a major threat to the U.S. Therefore, American seizures of Iranian assets may help destabilize Iran's financial support of terrorist activity.[42]

VII. Constitutionality of the IEEPA

Debate on the repossession of international securities suggests that the amended IEEPA had provided a sufficient basis for Biden to repossess Russian assets since he had cited the Ukraine conflict as an emergency. However, American legal experts, such as University of Virginia law professor Paul Stephen, question whether the IEEPA is in accordance with national

[38] U.S. Dep't of Just., *Charges and Seizures*, *supra* note 1.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*

laws and if the law is excessive, also questioning the current balance of power between the executive and legislative branches.[43] Previous literature regarding the IEEPA suggests that the bill requires the President to announce an imminent public threat before they can use the bill to regulate commerce.[44] The extent of this power is debatable, yet this could potentially reveal the constitutionality of current seizures when considered in the context of a previous Supreme Court case, *Dames & Moore v. Regan*. In *Dames*, the Court held that seizures of Iranian assets in 1979, during the Carter administration, were constitutional since Congress had consistently approved of agreements regarding the President and foreign nationals during times where it is in the national interest to do so.[45] The majority opinion noted that the implicit authorization of Carter through the IEEPA allowed for foreign seizures on behalf of the President during times of national chaos.[46] However, Congress did not provide Carter with explicit power to arbitrate with Iran during the hostage crisis.[47] This would mean that the constitutionality of Biden's usage of the IEEPA would rely on the Court's precedent from *Dames* to allow the President to seize such assets. However, the IEEPA and its precedents could remain open to interpretation on the grounds that neither the IEEPA nor the President has a consistent means of declaring what type of international emergency constitutes a national threat or which entities ought to have their property seized. In future time periods where the U.S. may grow further involved in foreign conflicts, the country will need a streamlined method to determine when to conduct seizures and from whom.

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[43] Laurence H. Tribe, *Does American Law Currently Authorize the President to Seize Sovereign Russian Assets?*, Lawfare (May 2022), lawfaremedia.org/article/does-american-law-currently-authorize-president-seize-sovereign-russian-assets.
[44] Berg, *supra* note 7.
[45] Dames & Moore v. Regan, 453 U.S. 654 (1981).
[46] *Id.*
[47] *Id.*

The IEEPA also delegates the President the power to unfreeze foreign property, which does not revoke the owner's original claim to the asset yet does allow it to be repurposed to a new owner,[48] which would provide a legal pathway for current President Trump to finance Ukraine using Russian assets. Still, the IEEPA was amended so that the President could freeze assets should the U.S. be in conflict with a foreign power, such as after September 11th, by relying on the implied constitutional power of the President to recognize foreign power and repossess its property.[49] The constitutionality of the seizures may be of particular importance when foreigners raise their property disputes to higher courts that may engage with the federal government and require constitutional interpretation of their power.

VIII. Global Ramifications of American Seizures

One implication of asset seizures that will likely require increased deliberation will be how these seizures affect foreign investors in the United States. One potential consequence is the debasement of the U.S. dollar, as unrelated foreigners may fear that it is an unstable and risky currency and instead invest in other foreign currencies. China is currently promoting its official currency, the Renminbi, to countries isolated by asset seizures from Western-owned banks.[50] This is an issue since the USD is one of the most widely used currencies for foreign investors, but if it is no longer used by countries under investigation for financial crimes, like Russia, it could be harder for the U.S. to monitor such crimes worldwide. An additional implication of asset seizures could include retaliatory seizures. Once again using Russia as an example, the U.S. has over $290 billion invested in American assets that could be potentially seized by the Kremlin. Russia has already proven its willingness to seize American assets, as shown in its repossession of

[48] 50 U.S.C. §§ 1701–1709 (1977).
[49] Tribe, *supra* note 43.
[50] Sam Boocker et al., *Why Do the U.S. and Its Allies Want to Seize Russian Reserves to Aid Ukraine?*, Brookings (Apr. 2022), brookings.edu/articles/why-do-the-u-s-and-its-allies-want-to-seize-russian-reserves-to-aid-ukraine.

hundreds of millions of USD in J.P. Morgan accounts in Russia.[51] The legitimacy of seizures extends past their constitutionality in the U.S. since international law generally prefers that nations that are directly affected by conflicts are the ones to conduct seizures, not for the benefit of foreign policy on behalf of other nations. Because the United States regards asset repossession as a measure to influence the course of a war between Russia and Ukraine, countries such as Germany are intimidated by U.S. seizures since they fear that many nations will use the publicity of American seizures as traction to request additional reparations for World War Two.[52] Furthermore, the European Central Bank President cautions that seizures may undermine the cooperation between nations.[53]

IX. Foreign-Owned Property Discrimination and Challenges of Constitutionality

A recent lawsuit that may shed light onto the constitutionality of foreign property ownership in the U.S. is *Shen v. Simpson*, a case brought forward by four Chinese citizens who live in Florida and claim that Florida Senate Bill 264, Chapter 692, is discriminatory in that it bans citizens of China, Iran, Russia, North Korea, Syria, Cuba, and Venezuela from owning certain kinds of Florida real estate.[54] Specifically, citizens from China are banned from owning any property unless they live in Florida and may own only one residential property of fewer than two acres and further than five miles from a military installation.[55] This is a major issue for the families behind the lawsuit since many important urban centers like Orlando, Miami, and Tallahassee are within five miles of a military installation.[56] The plaintiffs argue that the Florida

[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] Complaint, Shen v. Simpson, No. 4:23-cv-00208 (N.D. Fla. 2023).
[55] Jennifer M. Kramer & Felicia Leborgne Nowels, *Updates on SB 264—Florida Law Restricting Persons From Foreign Countries of Concern From Owning, Having a Controlling Interest in, or Acquiring Certain Real Estate, Including Hotels and Condominium Hotel Units*, Akerman (July 2024), akerman.com/en/perspectives/updates-on-sb-264-florida-law.html.
[56] *Shen*, No. 4:23-cv-00208 at 2.

bill is in violation of the Constitution because it allows for housing discrimination and that the racial profiling resulting from this bill could make it harder for American citizens with Asian names to purchase homes in Florida.[57] As it relates to the repossession of foreign assets, the precedent of cases like *Shen* can be used to argue whether or not sanctions on foreign individuals and repossessions of their property could be considered unconstitutional on the grounds of discrimination.

This and similar arguments raise the question of whether or not foreigners have a right to own property in the U.S. In a similar nature to *Brown*, a subset of the U.S. government (in this case, Florida's state government) has considered the ownership of property within the U.S. to be a hazard, whether or not foreign individuals are found guilty of a crime. Yet this requires consideration if the state of Florida has a right to restrict investment in the U.S. on matters of national security, and if it is legal for this to be applied to all citizens of a certain country, as part of implied wartime powers during a time of peace.

X. Conclusion

In conclusion, foreign asset seizures on behalf of the U.S. are likely constitutional because they derive from implied powers and from additions to legislative proceedings that allow the federal government to deter international aggression using nonviolent measures. Additionally, previous interpretations of the Constitution have allowed for leniency in terms of repossessing property during conflict. Should these grounds be used to uphold the legality of U.S. seizures, their constitutionality depends on whether international conflicts can be consistently evaluated as a threat to the United States. Even if U.S. involvement is deemed necessary to protect American interests, the implications of seizures on international relations

[57] *Id.*

between countries across the globe may or may not outweigh the benefits of asset seizures for American national security.

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The Regulatory Leviathan: How the Expansion of Administrative Agencies Fails When Examined Under Philosophical Theories of Law

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Abstract:

Since 1946, federal administrative agencies have grown both in number and in terms of how many rules they create annually. In recent years, this growth has been criticized through the use of constitutional, theoretical, and pragmatic arguments, with the Supreme Court even taking action to restrain the role of agencies. However, the role and function of administrative agencies has yet to be considered under philosophical theories of law. This paper will apply theories like John Stuart Mill's harm principle and promulgation principles, exposing errors in the current state of these agencies that cause tangible harm to citizens. Despite this, agencies play an important role in governance by reducing Congress' workloads and crafting nuanced policy. Reform to these agencies, such as expansions to the Congressional Review Act, the introduction of new congressional policy, an increased attention on the principles that used to govern administrative agencies, and a better method for altering citizens of changes in rulemaking all present viable paths forward.

I. Introduction

Over the last five years, administrative agencies housed under the United States Executive Branch collected over eighty-three billion dollars in fines and penalties.[1] While some of this money, perhaps even the majority, was collected from major corporations and businesses, much of it also came from everyday citizens who had been found to violate administrative rules.[2] Unlike laws passed by Congress, which undergo a timely process and require widespread support from political actors,[3] administrative agencies can create rules under limited oversight. After an administrative agency is established, it is often free to create rules or guidelines that are enforced with the strength of law,[4] with limited interference from the public or Congress. These rules are then published in the Federal Register, a document that has at times contained close to one hundred thousand pages, and are later codified in the Code of Federal Regulations.[5] The sheer size of the Register makes it difficult for citizens to familiarize themselves with the rules it contains.

Despite the current state of administrative rulemaking, these agencies have not always possessed their current power, but rather, began to accumulate it following the passage of the Administrative Procedure Act (APA) of 1946. The current phenomenon of administrative agencies "exercising the power to create, adjudicate, and enforce their own rules" has earned these agencies the title of an "administrative state."[6] Today, these agencies are comparable to a

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[1] Jason Chaffetz, House Comm. Oversight & Gov. Reform, *Restoring the Power of the Purse: Shining Light on Federal Agencies Billion Dollar Fines Collections* 4 (2016).
[2] *Id.*
[3] H.R. Con. Res. 190, 110th Congress (2007) (enacted).
[4] James A. Thurber, *Rivals for Power: Presidential-Congressional Relations* 106 (7th ed. 2022).
[5] Clyde Wayne Crews Jr., *Biden's 2023 Federal Register Page Count Is the Second-Highest Ever*, Forbes (Dec. 2023), forbes.com/sites/waynecrews/2023/12/29/bidens-2023-federal-register-page-count-is-the-second-highest-ever. In 2023, the Federal Register contained 90,402 pages, the second-highest the page count has ever been.
[6] Ballotpedia, *Administrative State*, ballotpedia.org/administrative_state.

Leviathan,[7] far-reaching and powerful, exerting their control broadly across the nation. The administrative state has faced objections from both sides of the political spectrum, particularly centered around constitutional concerns about how Congress has delegated power to these agencies,[8] and the excessiveness of rulemaking.[9] While many of these concerns are backed by understandings of the Constitution and prior case law, the administrative state has yet to be sufficiently examined through philosophical theories of law. Philosophical theories regarding government regulation and promulgation of law can be applied to assess the current state of administrative agencies and the impacts of their rulemaking. In particular, John Stuart Mill's harm principle, which states that law should only be made to prevent harm to other individuals,[10] can be useful in evaluating the necessity of the many administrative rules that are routinely created. Similarly, theories regarding the promulgation of law[11] highlight inherent issues with the way administrative rules are shared. While administrative agencies are known for creating specialized and nuanced policy, the current latitude granted to agencies by Congress violates Mill's harm principle and theoretical requirements for promulgation of law, leading to tangible harms for citizens. Despite these issues, reform is possible. Revising and expanding the Congressional Review Act, reemphasizing the need for intelligible principles, or specific principles that guide agency action, and creating new methods to alert citizens of changes in rules can ensure these philosophical principles are more closely adhered to.

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[7] "Leviathan" often refers to a large and powerful thing. *See generally* Britannica, *Leviathan* (Mar. 2025), britannica.com/topic/leviathan-middle-eastern-mythology (for a simple definition of Leviathan). To trace the historical roots of the term, *see generally Job* 41:1–34 (King James).
[8] *E.g.,* Lathan Watts, *The Administrative State: The Lawmakers No One Votes For*, All. Def. Freedom (June 2024), adflegal.org/article/administrative-state-lawmakers-no-one-votes. *See also* Molly Reynolds, Brookings Inst. *Improving Congressional Capacity to Address Problems and Oversee the Executive Branch* 4 (2019).
[9] *E.g.,* Neil Gorsuch et al., *A Conversation with Justice Neil Gorsuch on 'The Human Toll of Too Much Law'*, Nat'l Const. Ctr., at 7:58 (Sept. 2024), constitutioncenter.org/news-debate/americas-town-hall-programs/a-conversation-with-justice-neil-gorsuch-on-the-human-toll-of-too-much-law.
[10] John Stuart Mill, *On Liberty* 13 (Cambridge Univ. Press, 1956) (1859).
[11] This paper will specifically mention theories set forth by Thomas Aquinas, Thomas Hobbes, and Jeremy Bentham.

II. The Evolution of Administrative Agencies

The establishment of administrative agencies dates back to nearly the founding of the United States. The first administrative agency, the Department of Foreign Affairs, was established in 1789 with the aim of leading the nation in foreign policy issues.[12] Quickly thereafter, other agencies like the Office of the Attorney General and the Department of Justice were created and still remain operational today.[13] The first "modern regulatory agency," the Interstate Commerce Commission, was created in 1886 to regulate transportation in the United States.[14] Until 1928, the establishment of agencies and rulemaking had been limited by the "nondelegation doctrine," officially established in *Field v. Clark*, which held that Congress could not delegate or give its legislative power to the President or any executive agency.[15] The decision was based on an understanding of Article I of the Constitution and the principle of separated powers, which supports the notion that lawmaking is strictly a power of Congress.[16]

In 1928, the Supreme Court ruled in *J.W. Hampton, Jr. & Co. v. United States* that Congress could have limited power to delegate legislative authority when a statutory law was passed that "included an 'intelligible principle' to guide executive action."[17] The intelligible principle required three components: "(1) a detailed policy objective in the underlying statute; (2) a plan by which the executive was to carry out that objective; and (3) a finding made by the executive prior to using his delegated authority."[18] Requiring an intelligible principle helped

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[12] Jeannie Ricketts, *A Very Brief History of Federal Administrative Law*, Okla. Bar J. (Nov. 2017), okbar.org/barjournal/nov2017/obj8830ricketts.
[13] *Id.*
[14] Susan Dudley, *Milestones in the Evolution of the Administrative State*, 150 Daedalus 33 (2021).
[15] Field v. Clark, 143 U.S. 649 (1892).
[16] *Id.*
[17] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).
[18] Meaghan Dunigan, *The Intelligible Principle: How It Briefly Lived, Why It Died, and Why It Desperately Needs Revival in Today's Administrative State*, 91 St. John's L. Rev. 270 (2017).

ensure that Congress only delegated its power in limited and clear ways, and that the Executive had a restrained scope for creating rules through these agencies.[19]

The loss of the intelligible principle requirement is often cited as the turning point for administrative agencies and the explanation for the current state of rulemaking.[20] In the early 1930s, in the midst of the Great Depression, President Franklin D. Roosevelt brought forth his New Deal, a set of policies aimed at promoting development of new jobs, the introduction of which "signaled a change in the government's role in regulating society."[21] At least sixty-nine New Deal agencies were established with the hope of creating new jobs in government-financed public works projects and encouraging national economic stability.[22] During this period, the Supreme Court and Congress typically allowed administrative agencies to work their will, as deemed necessary due to the state of the economy, and did not seek "to uphold the [non-delegation] doctrine and follow the intelligible principle."[23] The Court repeatedly upheld administrative rules even when there was no clear intelligible principle that they emerged from.[24] While the New Deal was arguably beneficial as it helped pull the U.S. out of the Great Depression, the shift away from requiring intelligible principles left a lasting impact on the state of administrative agencies. The greater leeway allotted to agencies during this period opened the door for the increased and constant creation of rules seen today.

Administrative agencies continued to develop and grow in 1946 with the passage of the APA, which laid the groundwork for the creation of administrative agencies and detailed their procedures for rulemaking.[25] The Act identified rulemaking as the process of formulating,

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[19] *Id.*
[20] *Id.* at 260.
[21] *Id.*
[22] History, *New Deal* (Feb. 2025), history.com/topics/great-depression/new-deal.
[23] Dunigan, *supra* note 18, at 260.
[24] *Id.*
[25] Administrative Procedure Act, 5 U.S.C. §§ 551–559 (1946).

amending, and repealing a rule,[26] where rules are guidelines that have the same force and enforceable nature as law.[27] Rulemaking differs from the Congressional passage of statutory law as it requires no majority or supermajority support from Congress, and needs no presidential approval to become enforceable.[28] Once a rule is made final following a public comment period, it is considered enforceable.[29]

Since the passage of the APA, more power has continued to be granted to administrative agencies. For many years, the number of administrative rules created has far outnumbered the number of laws passed by Congress.[30] Because of this, administrative agencies have been criticized through the use of constitutional, theoretical, and pragmatic arguments. The constitutional concerns with these agencies cover questions about separation of powers, due process, equal protection, and more.

The Supreme Court has shared concerns about the administrative state, and has begun to restrain the role of these agencies, particularly in terms of their ability to adjudicate disputes.[31] In *Loper Bright Enterprises v. Raimondo*, the Court held that it is up to the court system to decide when an agency has acted within its statutory authority.[32] Similarly, in *Securities and Exchange Commission v. Jarkesy*, the Court decided that individuals charged with civil penalties or violations of rules by the SEC had a right to a jury trial.[33] While this case was focused on the SEC, the holding would likely extend to other administrative agencies as well. By limiting the

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[26] *Id.*
[27] Jared Cole & Todd Garvey, Cong. Rsch. Serv., *General Policy Statements: Legal Overview* 2 (2016).
[28] *Id.*
[29] Fed. Commc'ns Comm., *Rulemaking Process*, fcc.gov/about-fcc/rulemaking-process.
[30] Dudley, *supra* note 14. The Code of Federal Regulations, where administrative rules are codified, is four times the size of the U.S. Code of Laws, where federal laws are codified.
[31] It should be clarified that these Supreme Court cases are not discussed for their merits, but rather to illustrate the trend of restraining and limiting administrative agency power.
[32] Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).
[33] SEC v. Jarkesy, 603 U.S. ___, No. 22-859, slip op. at 2 (2024).

ability of agencies to adjudicate disputes, the Court has restrained the overall power of these agencies.

The Court did consider a question regarding delegation of rulemaking power in 2019, where it held in *Gundy v. United States* that a delegation of authority to the U.S. Attorney General did not violate the nondelegation doctrine.[34] While this decision did not lead to increased restraint on agencies, the dicta and dissent authored by Justice Neil Gorsuch serve as a "strong signal that the nondelegation doctrine may yet have life in it."[35] Justice Gorsuch's dissent, joined by Chief Justice John Roberts and Justice Clarence Thomas, encourages the Court to turn back to more traditional tests and principles, like the one used in *J.W. Hampton*, for assessing delegation of authority.[36] Justices Samuel Alito and Brett Kavanaugh also acknowledged the importance of revising and reexamining the nondelegation doctrine,[37] showing the Court's broad support for restraining or changing the role of agencies.

While the Court has restrained administrative agencies in some ways through these cases, or signaled that future restraint is possible, it has not fully addressed concerns about the nondelegation doctrine or the loss of clear intelligible principles. In turn, questions about the future of administrative agencies and how their rulemaking will proceed have been left unanswered.

III. Theoretical Background

Despite the recent restraints on agencies, many criticisms about the amount of rules created and their enforcement remain. Beyond the sheer number of rules published, many come across as redundant or are interpreted as unnecessary regulation. Administrative rules are also

[34] Gundy v. United States, 588 U.S. 128 (2019).
[35] Clay Phillips, Note, *Slaying "Leviathan" (Or Not): The Practical Impact (Or Lack Thereof) of a Return to a "Traditional" Non-Delegation Doctrine*, 107 Va. L. Rev. 919, 922 (2021).
[36] *Id.* at 931.
[37] *Id.*

criticized for not being promulgated in a way that is accessible to the average citizen. To assess these criticisms, and administrative rulemaking as a whole, a theoretical background in legal philosophy can be established and applied.

Many philosophers and political scientists have argued for limited government regulation. Classic liberal principles support the idea that government intervention should be limited and focused on preservation of the public good.[38] Libertarians take this view a step further, arguing for the smallest and least intrusive government possible that only governs to protect individual freedoms rather than limit them.[39] In his 1859 essay *On Liberty*, John Stuart Mill argued for guidelines that justify when government action, or paternalism, is justified.[40] Paternalism, defined as an exercise of power that limits an individual's free will,[41] occurs when governments or administrative agencies create policies or rules that restrict citizens. Mill believed there was a high bar required for paternalistic actions to be legitimate, and that government intervention should only take place when an individual's actions will cause harm to another person or group of people.[42] This theory, commonly referred to as the harm principle, forbids the government from intervening when an individual is only harming themselves or when their action will not clearly cause harm to another.[43] At the core of this theory is Mill's belief that individuals are sovereign and that people can only achieve excellence if given substantial autonomy to make their own decisions.[44] If a government intervenes unnecessarily, it disrupts an individual's autonomous decision-making, and may lead them away from what is best for them

[38] Samuel Freeman, *Liberalism*, Oxford Rsch. Encyc. Politics 4 (2017).
[39] Peter Robinson & Milton Friedman, Hoover Inst., *TAKE IT TO THE LIMITS: Milton Friedman on Libertarianism*, YouTube (Dec. 2010), youtu.be/JSumJxQ5oy4?si=SarMlYVroQzrbesZ. Milton Friedman, economist and Nobel laureate, is commonly cited as a prominent figure in libertarianism.
[40] Mill, *supra* note 10.
[41] Eunseong Oh, *Mill on Paternalism*, 47 J. Pol. Inquiry 1 (2016).
[42] Mill, *supra* note 10.
[43] *Id.*
[44] *Id.*

or for society. The harm principle is also supported by the assumption that paternalistic interference is fallible, and that a government will not always understand what is best for each person.[45]

While Mill's harm principle provides a clear background to assess administrative actions, his theory is not the first to espouse these ideals. The Founding Founders of the United States shared Mill's beliefs. In Thomas Jefferson's *Notes on the State of Virginia*, he also identifies government power as being legitimate only when it addresses actions that are "injurious to others."[46] The concept of limiting government intervention to focus solely on protecting citizens is a long argued and supported one.

The effectiveness of administrative agencies can also be assessed based on how they promulgate, or publicly announce, rules. Promulgation is an essential component of policymaking as it ensures that citizens are aware of laws and rules, and that they understand the punishments for failing to obey. If rules are not adequately promulgated, individuals may unknowingly violate a rule, resulting in fines or other punishment. Adequately sharing policy also benefits lawmakers, allowing them to cite their policy clearly when imposing punishment. If policy is not clear to citizens, the legitimacy of the rules may be questioned when lawmakers attempt to enforce them. While some theories of law argue that promulgation is a moral requirement of lawmaking, others claim that is simply a practical necessity. Despite the difference in explanation for why promulgation is required, nearly every theory of law requires that laws be adequately shared to be considered enforceable.

Theories of promulgation date back as far as the thirteenth century to individuals like Thomas Aquinas, philosopher and theologian, who believed promulgation was a moral necessity

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[45] *Id.*
[46] Thomas Jefferson, *Notes on the State of Virginia* 155 (Library of Congress, 1853) (1785).

to produce legitimate law.[47] Similarly, seventeenth-century philosopher Thomas Hobbes argues in his seminal book *Leviathan* that dissemination of the law is necessary for maintaining social order.[48] In *De Cive*, Hobbes expands on this idea, arguing that if laws are not promulgated, then "they are not laws."[49] A more modern and expansive theory put forth by James Milton, a doctoral candidate in the University College London's Faculty of Laws, requires "full-bodied promulgation," or an informal intervention "to inform citizens about a change in the law," when newly created rules do not align with typical legal and moral norms or long-standing rules.[50] This full-bodied promulgation is crucial to help citizens assess their legal options and guide their behavior.[51] Full-bodied promulgation can involve public campaigns with simplified language that cuts to the core of what a new law or rule means for citizens.[52]

The theory of promulgation that places arguably the heaviest burden on the government was created by Jeremy Bentham, an English philosopher and jurist, known primarily for his theories on utilitarianism. Bentham argued that in order for laws to be obeyed they must be known, and to be known they need to be promulgated.[53] Bentham believed it was not enough to simply publish a law on paper or dictate it to people, but that it needs to be presented in such a way that citizens can have it "habitually in their memories" and can consult it as needed.[54] Universal codes or laws that impact everyone must be "promulgated to all."[55]

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[47] St. Thomas Aquinas, *Summa Theologica* (Benziger Bros ed., Fathers Eng. Dominican Province trans. 1947) (1854).
[48] David Dyzenhaus & Thomas Poole, *Hobbes and the Law* 68 (2012).
[49] *Id.*
[50] James Milton, *The Rule of Law and Full-Bodied Promulgation*, 88 Mod. L. Rev. 1 (2024).
[51] *Id.* at 2.
[52] *Id.*
[53] Jeremy Bentham, *Essay On The Promulgation Of Laws, And The Reasons Thereof* (1776), *reprinted in The Works of Jeremy Bentham* 338 (John Bowring ed. 1843).
[54] *Id.*
[55] *Id.* at 339.

In concert, these theories regarding promulgation can simply be referred to as the promulgation principle, which requires that rules be promulgated in a way that is accessible and understandable to all citizens, particularly if the rule conflicts with widespread moral principles. This promulgation principle can be applied to assess if the promulgation of rules in the Federal Register is sufficient.

IV. Application of the Theories to Administrative Agencies

Every year, more rules than laws are created,[56] with many of them governing actions that arguably do not cause tangible harm to other people. When an action cannot be shown to cause tangible harm, paternalistic actions such as imposing a fine violate the harm principle. While some administrative rules may prevent tangible harm, plenty of rules either do not prevent harm or prevent harm in an unclear manner. For example, a rule from the Department of Agriculture that requires "Domestic watermelon producers of 10 acres or more and domestic first handlers of watermelons" to pay four and a half cents per hundredweight was published in January 2025.[57] Additionally, the Food and Drug Administration has issued rules governing the size of breath mints,[58] such as Altoids and Tic Tacs. The National Park Service even issued a rule preventing dancing and expressive movement at certain public monuments,[59] which ultimately faced a lawsuit due to its restrictions on individual freedoms.[60] The list of rules that, like these, govern seemingly insignificant issues that do not present a clear harm is extensive.

While it is possible that regulating required payments for watermelon producers, governing the size of breath mints, and banning dancing at public monuments all prevent some

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[56] Dudley, *supra* note 14.
[57] 7 C.F.R. § 1210 (2025).
[58] 21 C.F.R. § 101 (2010).
[59] 36 C.F.R. § 7.96 (2011).
[60] Ben Kerschberg, *D.C. Circuit Opinion Banning Dancing at Memorials Deserves Very Close Scrutiny*, Forbes (May 2011), forbes.com/sites/benkerschberg/2011/05/18/d-c-circuit-opinion-banning-dancing-at-memorials-deserves-very-close-scrutiny.

harm from occurring to people, identifying the harm they prevent is not immediately clear. Classic liberal principles and the harm principle demand a higher burden for establishing what harm is being addressed when any law or rule is made. Citizens should not be left to infer how a rule prevents harm; instead, laws should respond directly to identifiable harms. Examining rules like these demonstrates that the harm principle is not consistently satisfied by administrative agency action.

The method of sharing agency rules also fails when considered under the promulgation principle. While the Federal Register and Code of Federal Regulations are public records and theoretically accessible to all citizens, this accessibility is dependent on citizens' knowledge of the records. If citizens are not familiar with the existence of the Register or Code, they fail to satisfy the promulgation principle. Additionally, the Register is updated every business day as rules are made official,[61] meaning full understanding would require citizens to update their knowledge of the rules daily. Practically speaking, many citizens do not have the time or resources to check this Register daily. With 438 federal agencies and sub-agencies consistently issuing new rules, it is unrealistic to expect citizens to keep themselves abreast of new rules and constantly evolving agencies. This task has only become more difficult as the number of rules released annually has increased from approximately twenty thousand in the late 1950s to nearly two hundred thousand in 2023.[62] Even for those who are aware of each new rule, these rules also may not be clear as they tend to diverge from long-standing legal and moral principles and instead focus on complicated and detailed issues, such as the ones in the aforementioned examples.

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[61] Nat'l Archives, Off. Fed. Reg., *About the Federal Register* (Aug. 2018), archives.gov/federal-register/the-federal-register/about.html.

[62] Neil Bradley, U.S. Chamber of Com., *The Regulatory Environment and the U.S. Chamber of Commerce's Growth and Opportunity Imperative* 1 (2025).

V. The Harm Caused by Administrative Agency Failures

By failing to satisfy the harm principle and promulgation principle, agencies cause tangible harm to citizens. The creation of rules that violate the harm principle results in decreased individual freedom and autonomy, as well as economic harms. When a rule limits individual action without clearly justifying the restriction, it decreases the autonomy of citizens. According to Mill's rationale, this will lead to a decrease in an individual's ability to achieve excellence and pursue what is best for them and for society. By limiting individual autonomy, rulemaking may also lead to decreased innovation, particularly for small or up-and-coming businesses that lack the means to fully navigate continuously changing regulations.[63] Given that "what is permissible or required in one moment may become prohibited or not required in the next," it can be difficult for companies to make decisions.[64] In turn, unnecessary rulemaking leads to increased costs for both existing businesses and a higher barrier to entry for those looking to create businesses.[65]

When agencies fail the promulgation principle, harm is also done to citizens who may violate these rules without even knowing. Individuals may then be responsible for paying a fine, or may have to go through a lengthy process of administrative or judicial review to have a decision reversed, which often must occur in a strict time frame. Individuals who are unfamiliar with the rule they have violated, due to its improper promulgation, may also struggle to successfully appeal their decision.

Additionally, failure to satisfy the promulgation principle can erode public trust in these agencies and the government writ large. While trust in one's government "has steadily eroded

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[63] *Id.*
[64] *Id.*
[65] *Id.* at 2.

since the late 1960s,"[66] this trust is crucial as it promotes compliance with policy, which is ultimately beneficial to both a government and its citizens.[67] Failing the promulgation principle puts agencies at risk of continuing to erode the public's trust.

VI. Acknowledging the Importance of Administrative Agencies

Despite the concerns about the administrative state, these agencies do serve an important societal role. These agencies may be able to more efficiently police "the minutiae of conduct in some designated field," leveraging their expertise.[68] As society advances and specialized fields expand, members of Congress will inevitably lack expertise in some of them. Administrative agencies can serve as a "valuable resource to hard-pressed and overburdened legislatures" by reducing their workload.[69] By shifting the burden of rulemaking to agencies that possess specialized knowledge, laws may also be more accurate and based on an understanding of factors like science, technology, global affairs, and more. For example, scientific understanding of climate change and air pollution is continuing to evolve,[70] and while Congress can pass legislation addressing these issues, it may be inadequate given how the necessary policy is rooted in an evolving understanding of science. The existence of agencies like the Environmental Protection Agency allows for policy creation that is nuanced and based on specialized and evolving knowledge. Similarly, the Food and Drug Administration can prevent tangible harm to consumers by ensuring the "safety, efficacy, and security" of food and drugs.[71] While Congress could also work to protect consumers, they may struggle to work at the speed necessary as new

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[66] Rebecca Cohen, *Breaking Down Public Trust*, Univ. Mich., Gerald R. Ford Sch. Pub. Pol'y (June 2021), fordschool.umich.edu/news/2021/rebuilding-trust-in-government-democracy.
[67] Chris Dann, *Does Public Trust in Government Matter for Effective Policy-Making?*, Econ. Observ. (July 2022), economicsobservatory.com/does-public-trust-in-government-matter-for-effective-policy-making.
[68] Frank Cooper, *Administrative Agencies and the Court* 14 (1951).
[69] *Id.* at 18.
[70] U.S. Env't Prot. Agency, *Air Quality and Climate Change Research* (Jan. 2025), epa.gov/air-research/air-quality-and-climate-change-research.
[71] U.S. Food & Drug Admin., *What We Do* (Nov. 2023), fda.gov/about-fda/what-we-do.

food and drug items enter the market. Administrative agencies can combat legislative inefficiency and produce specific and important policy quickly.

VII. Potential for Reform

Despite the flaws in the administrative state, it is clear that agencies play an important role in policymaking, ensuring it is responsive to ongoing changes in society. Eliminating administrative agencies altogether would greatly increase the workload of Congress, decrease government efficiency,[72] and would eliminate millions of jobs.[73] In an effort to reform these agencies, and address their inefficiency and productivity, President Donald Trump ordered the establishment of the Department of Government Efficiency (DOGE).[74] The Department is headed by billionaire Elon Musk, known for his work with Tesla, X (formerly Twitter), and SpaceX. It is a renamed and revitalized version of the United States Digital Service that was created by President Barack Obama.[75] The DOGE has been tasked with cutting federal spending by reducing the federal workforce and workload.[76] While in theory, the Department could be a solution to the problems posed by administrative agencies, the method used has led to concerns from both federal workers and lawmakers. Workers have raised concerns about job security amidst probationary layoffs and deferred resignation proposals.[77] Lawmakers and legal scholars have also questioned the constitutionality and legality of the Department given that Musk, an unelected official, has been granted access to government records and data that typically would

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[72] Cooper, *supra* note 65.
[73] USAFacts, *How Many People Work for the Federal Government?* (Dec. 2024), usafacts.org/articles/how-many-people-work-for-the-federal-government.
[74] Exec. Order No. 14210, 90 C.F.R. 9669 (2025).
[75] Dominick Fiorentino & Clinton Brass, Cong. Rsch. Serv., *Department of Government Efficiency (DOGE) Executive Order: Early Implementation* 2 (2025).
[76] Aimee Picchi, *What Is DOGE? Here's What to Know About Elon Musk's Latest Cost-Cutting Efforts*, CBS News (Feb. 2025), cbsnews.com/news/what-is-doge-elon-musk-findings-trump.
[77] Meg Kinnard, *A Comprehensive Look at DOGE's Firings and Layoffs So Far*, Associated Press (Feb. 2025), apnews.com/article/doge-firings-layoffs-federal-government-workers-musk-d33cdd7872d64d2bdd8fe70c28652654.

be considered secure.[78] Additionally, it would typically be under the purview of Congress, not the executive branch, to restrain and limit the spending of agencies.[79] While the DOGE currently operates on unclear and unstable legal ground, there are opportunities for reform that are well-established and constitutionally sound.

Most notable among the solutions to administrative agency overreach is the Congressional Review Act (CRA), which enables Congress to "overturn certain federal agency actions."[80] If Congress does not approve of a final rule produced by an agency both chambers can create a joint resolution of disapproval.[81] This resolution must then be passed by both chambers and signed by the President, or if the President fails to sign it Congress can pass it using a veto-override.[82] If this is successful, the rule is nullified.[83] While the Act appears to be a clear solution to administrative overreach, its implementation has been scarce, with only twenty rules successfully overturned since the Act's 1996 passage.[84] There are several reasons for the Act's limited implementation, including the sixty day timeframe required for a rule to be overturned[85] and the political reality that a President is unlikely to nullify a rule issued by an agency under their administration.[86] While the current CRA is unlikely to provide a solid ground for restraining excessive rulemaking, the Act could be reformed. The review period for nullifying rules could be extended beyond the current sixty day requirement to provide members of Congress with ample time to work together and secure the necessary votes. The Act could also

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[78] Amber Phillips, *Is What DOGE Doing Legal?*, Wash. Post (Feb. 2025), washingtonpost.com/politics/2025/02/27/is-what-doge-doing-even-legal.
[79] *Id.*
[80] Maeve Carey & Christopher Davis, Cong. Rsch. Serv., *The Congressional Review Act (CRA): A Brief Overview* 1 (2024).
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] Thurber, *supra* note 4, at 106.

be expanded to allow Congress to overturn multiple rules from an agency at once,[87] helping them more efficiently restrain these agencies.

Additionally, reform could include reemphasizing the need for intelligible principles. Congress could pass new legislation further clarifying the necessity of an intelligible principle before an agency can act. They could also pass legislation reiterating that a federal agency can only make a set of rules when called on to do so by Congress. Going forward, when Congress authorizes an agency to create rules they could also focus on ensuring the policy objectives in their statutes are clear, following the original guidelines for intelligible principles. In recent years, acts geared at reform have been introduced in Congress, including the Regulatory Accountability Act, introduced by Republican Senator Robert Portman from Ohio.[88] This Act would require federal agencies to consider "whether rulemaking is required by statute or is within the discretion of the agency," if an existing law or rule could be changed or removed to solve the problem, or if there are other alternatives to a new rule that could also produce the intended outcome.[89]

Similarly, Republican Representative Marlin Stuzman introduced the Restoring Checks and Balances Act in February 2025, which would require rules to sunset after five years unless reauthorized by Congress, and would require agencies to provide justification when asking for reauthorization of a rule.[90] While the Regulatory Accountability Act failed to pass[91] and the Restoring Checks and Balances Act was only recently introduced,[92] these acts signal that there is interest amongst lawmakers to address the issue of administrative overreach.

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[87] Paul J. Larkin, *Reawakening the Congressional Review Act*, 41 Harv. J.L. & Pub. Pol'y 188, 201 (2017).
[88] Regulatory Accountability Act, S.2278, 117th Cong. (2021).
[89] *Id.*
[90] Press Release, Marlin Stutzman, U.S. House of Rep., *Rep. Stutzman Introduces Legislation to Restore Checks and Balances in the Federal Government* (Feb. 2025), stutzman.house.gov/media/press-releases/rep-stutzman-introduces-legislation-restore-checks-and-balances-federal.
[91] S.2278, 117th Cong. (2021).
[92] Stutzman, *supra* note 90.

Beyond ensuring accountability, these reforms would also better align agency action with the harm principle. These changes would promote limited rulemaking that is specifically aimed at preventing, rather than exacerbating, harm. Additionally, they would safeguard individual liberties and minimize economic harm by establishing a high burden of proof for demonstrating that a rule is necessary.

While these reforms would help address issues of administrative overreach and the excessive creation of rules, they would not address issues of promulgation. To address promulgation, Congress and the agencies themselves should take guidance from the requirements of Milton's full-bodied promulgation. This could include public campaigns with brief descriptions of new sets of rules or social media posts from the respective agency describing any new rules they have published. Agencies could also send emails or physical mail describing new rules that have been published. While these changes may not satisfy Bentham's requirement that citizens have these rules habitually in their memories, they more closely ensure that the promulgation principle is met. The Trust in Government Act of 2022, proposed by Democrat Representative Katie Porter, aimed to address agency communication by directing certain agencies to improve their service delivery.[93] While this Act did not specifically address promulgation, it indicates an acknowledgement that the current agency communication methods are insufficient. While the harm principle and the promulgation principle are not currently satisfied through administrative agency rulemaking, reform could help satisfy these principles and ensure that agencies do not overreach and that rules are accessible and understandable to all citizens.

[93] Trust in Government Act, H.R. 9233, 117th Cong. (2021).

VIII. Conclusion

Administrative agencies wield immense Leviathan-like power that has caused tangible harm to citizens. Applying philosophical theories of law such as the harm principle and the promulgation principle exposes both the failures of the administrative state and the harm caused by these failures. While the harm principle permits paternalistic action when there is a risk of harm to others, the rulemaking done by agencies often extends beyond limiting or preventing harm. Instead of limiting harm, these agencies often cause it by decreasing individual freedom and autonomy, and imposing economic harms on citizens and businesses alike. Moreover, their failure to satisfy the promulgation principle leaves citizens uncertain of the rules that govern them, increasing the risk of unintentional violations and further eroding public trust. Despite these flaws in the administrative state, reform can ensure they more closely align with the harm principle, the promulgation principle, and the principles of limited government our nation was founded on.

As actions from the Supreme Court, Congress, and the executive branch demonstrate, there is growing recognition across the political spectrum that administrative overreach must be addressed. Since agencies play a crucial role in society, increasing legislative efficiency and creating nuanced policy, it is clear that the solution is not to remove them entirely but rather to reform them and restore the purpose they were founded on. Reforming the Congressional Review Act, reemphasizing the need for intelligible principles or other methods to hold agencies accountable, and requiring better systems for sharing rules are all implementable solutions that can strike this balance and ensure our nation's fundamental principles are adhered to.

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Unveiling the Democratic Peace Theory: Navigating Limitations and Reevaluating Concepts in Contemporary International Relations

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Abstract:

Democratic peace theory asserts that democracies—characterized by representative governance, institutional constraints, and respect for individual freedoms—are less likely to engage in war with one another. This paper explores the foundations of this widely debated theory, tracing its historical origins and analyzing the factors that might contribute to the observed correlation between democratic governance and reduced interstate conflict. The study evaluates the validity of this theory and considers alternative explanations, such as economic interdependence, international institutions, and normative constraints. Additionally, this paper challenges the exclusivity of the democratic peace by examining whether similar patterns emerge among other regime types, including communist, theocratic, and junta governments. By investigating these frameworks, this paper aims to determine whether the correlation between democracy and peace is a unique phenomenon or part of a broader political dynamic, with the ultimate aim of contributing to the ongoing discourse on the intersection of governance and international stability.

I. Introduction: The Enigma of Democratic Peace

Imagine a world where the threat of war fades away—where democratic nations, by virtue of their political systems, engage in diplomacy rather than conflict. The democratic peace theory promises this vision, but reality is far more complex, sparking intense debate among scholars about whether peace is truly inherent in democracy or merely a convenient myth. This theory posits that democracies, characterized by representative governance and individual freedoms, are less inclined to engage in armed conflicts with one another.[1] The democratic peace theory, while compelling, demands rigorous examination. What are the historical foundations of this proposition, and what mechanisms truly underpin the observed tendency for democracies to avoid war with each other? This analysis will move beyond mere assertion to critically evaluate the theory, scrutinizing its validity and exploring alternative explanations for the apparent reluctance of democracies to wage war against each other. It will scrutinize whether democratic peace is an exclusive feature among shared regime types or if analogous patterns can be identified within contrasting political frameworks, such as communist, theocratic, or junta[2] regimes.

II. Defining and Categorizing Democratic Peace

The democratic peace theory posits that democratic states never, or almost never, wage war on other democracies.[3] The concept of democratic peace must be distinguished from the claim that democracies are in general more peaceful than non-democratic countries. While the idea that they are inherently more peaceful is controversial, the claim that democratic states do not fight each other is widely regarded as true by scholars and practitioners of international

[1] Kevin Placek, *The Democratic Peace Theory* 5 (2012).
[2] "Junta," a phrase derived from Italian, Spanish, and Portuguese, is a government with a militaristic, authoritarian state system—particularly one that proceeds a coup d'etat. *See generally* Encyc. Britannica, *Junta* (Oct. 2023), britannica.com/topic/junta (simple definition of the term junta).
[3] Placek, *supra* note 1.

relations.[4] Democracies, however, are not necessarily less prone to war overall compared to non-democratic regimes.[5] There has always been debate over the definitions of democracy and peace, often using minimalist criteria that creates a space of unclarity.

In the realm of democratic peace theories, a common practice is to categorize these theories into dyadic and monadic variants. The dyadic approach arranges states into pairs, termed dyads, grounded in the theoretical assertion that democracies rarely, if ever, go to war against each other.[6] Consequently, democratic dyads are anticipated to exhibit less warlike tendencies compared to pairs of states involving non-democracies or a mix of regimes. On the other hand, the monadic perspective posits that democracies, in general, are less prone to engage in war than other regime types.[7] This perspective assesses the overall conflict involvement of democracies versus non-democracies, disregarding specific interactions between pairs of states.

III. Kant's Philosophical Foundations

Immanuel Kant, a German enlightenment philosopher renowned for his influential essay *Perpetual Peace*, published in 1795, is widely acknowledged as a pioneer of modern democratic peace theory. Within his philosophical treatise, Kant articulates three mechanisms that contribute to fostering peace among nations and societies.[8] Firstly, he emphasizes the importance of a 'republican constitution,' where public approval is a prerequisite before a government can decide on military actions.[9] Secondly, Kant highlights the impact of close trade relations, regarded as integral to commerce at large.[10] Thirdly, he proposes a federation of states to address the lack of

[4] Terence Ball et al., *Democratic Peace*, Encyc. Britannica (Apr. 2015), britannica.com/topic/liberalism/classical-liberalism.
[5] Emily Velasco, *Democracies More Prone to Start Wars—Except When They're Not*, Cal. Inst. Tech. (July 2018), caltech.edu/about/news/democracies-more-prone-start-wars-except-when-theyre-not-82879.
[6] Shuhei Kurizaki, *Dyadic Effects of Democratization on International Disputes*, 4 Int'l Rel. Asia-Pac. 1, 1–33 (2004).
[7] Patrick A. Mello, *Democratic Peace Theory*, 1 Sage Encyc. War: Soc. Sci. Persps. 472 (2014).
[8] Luca Poletti, *Kant, Doyle, and the Democratic Peace Thesis: A Postcolonial Critique* (2021).
[9] *Id.*
[10] *Id.*

anarchy in international politics, emphasizing the significance of international law.[11] Kant's arguments for the first two mechanisms are grounded in utilitarian cost-benefit calculations. He posits that citizens would likely oppose war if they had to bear its costs directly.[12] Therefore, giving citizens a say in decisions on war and peace, as well as fostering close trade relations between nations, should logically promote peaceful interstate relations. Within the rational choice tradition, which analyzes how democratic institutions create political costs for leaders considering war, it is assumed that leaders act to maximize their utility by weighing the risks and benefits of military conflict. It emphasizes that leaders, facing public opinion and accountability, make calculated decisions based on cost-benefit analyses, thereby promoting peace. Many scholars interpret Kant's treatise as specifying the political costs that democratic governments face when initiating war.[13] These costs, including but not limited to domestic opposition, public protest, legislative interference, and the toll on life and national wealth, are considered deterrents. Consequently, leaders are expected to be hesitant to employ military force due to these deterrents.[14]

IV. The Normative Argument: Projecting Domestic Peace

A compelling normative argument suggests that democracies project their domestic norms of political competition and conflict resolution onto their interactions with other states in the international system.[15] Consequently, when democracies interact with each other, they adhere to similar norms, prioritizing peaceful conflict resolution through negotiation and political compromise. Despite many democracies' efforts to extend their norms to the international arena,

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[11] John MacMillan, *Classical Theory in International Relations* 52–73 (2006).
[12] *Id.* at 52–58.
[13] Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (1795), *reprinted in Kant: Political Writings* 93–130 (H. S. Reiss ed., H. B. Nisbet trans. 1991).
[14] *Id.*
[15] Piki Ish-Shalom, *Democratic Peace: A Political Biography* (2013).

they acknowledge the often anarchic and insecure nature of modern global relations.[16] For instance, a democracy might prefer to resolve a border dispute through international arbitration, but recognizes that a neighboring non-democracy could unilaterally seize the disputed territory, as there is no overarching authority to enforce agreements. As a result, democracies externalize their domestic norms primarily when dealing with fellow democracies, with whom reciprocity is expected.

In contrast, when interacting with non-democracies, democracies adjust their behavior to align with the norms of the latter. For example, when engaging in trade negotiations with a non-democracy known for intellectual property theft, a democratic nation might set aside its usual transparent approach and instead adopt stricter confidentiality measures, mirroring the non-democracy's approach to protecting sensitive information. This adaptive approach aims to prevent exploitation or threats by regimes perceived as predatory.[17]

The normative argument redirects attention to mutual perceptions, the social construction of in-groups and out-groups, and the role of collective identity between democracies and non-democracies.[18] This argument suggests that democracies view other states as legitimate when they share similar values, institutions, and ideologies. Democratically governed countries are perceived as trustworthy and predictable, fostering peaceful relations among themselves. Conversely, non-democracies with autocratic regimes are seen as potentially dangerous and unpredictable. Hence, shared norms form the collective identity of democracies. For example, shared norms in this context could include the protection of fundamental human rights like freedom of speech and assembly and the rule of law. When democracies observe these rights

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[16] Spencer R. Weart, *Never at War: Why Democracies Will Not Fight One Another* (1998).
[17] Org. Econ. Coop. Dev. Pub. Governance Revs., *Building Trust and Reinforcing Democracy: Preparing the Ground for Government Action* 153 (2022).
[18] Zeev Maoz, *The Controversy over the Democratic Peace: Rearguard Action or Cracks in the Wall?*, 22 Int'l Security 162, 162–198 (1997).

being upheld in another state, they are more likely to view that state as a partner for cooperation, rather than a potential adversary. These shared norms potentially lead to peaceful relations among democracies but also foster aggression towards non-democratic regimes.

V. Institutional Constraints and Transparency

The second set of explanations, which seek to explain why democracies are less likely to fight each other (the core claim of the democratic peace theory) revolves around political institutions. These arguments stem from the division of powers inherent in democratic polities, with decision-makers being accountable to various social groups, including citizens, legislatures, bureaucracies, private interest groups, and the media. The institutional constraints argument posits that risk-averse democratic leaders are constrained by the need for public support,[19] particularly in decisions on war and peace with immense human and material consequences.[20] Proponents argue that democratic leaders are unlikely to act against public opinion on such critical matters given the assumption that citizens are generally reluctant to go to war, following the Kantian cost-benefit rationale.[21]

One illustrative example is the decision by the former U.K. Prime Minister Tony Blair to support the 2003 invasion of Iraq. Despite significant public opposition and widespread protests, Blair proceeded with military action, aligning closely with U.S. President George W. Bush.[22] This decision led to a substantial erosion of public trust in politicians and internal turmoil within the U.K. Labour Party, effects that have persisted over the years. Similarly, President Bush faced

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[19] Bruce Bueno de Mesquita et al., *An Institutional Explanation of the Democratic Peace*, 93 Am. Pol. Sci. Rev. 791, 791–807 (1999).
[20] Matthew A. Baum & Philip B.K. Potter, *War and Democratic Constraint: How the Public Influences Foreign Policy* 1–13 (2015).
[21] Shane Simpson, *Making Liberal Use of Kant? Democratic Peace Theory and Perpetual Peace*, 33 Int'l Rel. 109, 109–128 (2019).
[22] Patrick Wintour, *How the Iraq War Destroyed the U.K.'s Trust in Politicians and Left Labour in Turmoil*, The Guardian (Mar. 2023), theguardian.com/world/2023/mar/20/iraq-war-destroyed-uk-trust-politicians-labour-turmoil-tony-blair.

fluctuating public opinion regarding the Iraq War. Initially, there was considerable support, but as the conflict prolonged and casualties increased, public sentiment shifted, which led to declining approval ratings.[23] These cases demonstrate that democratic leaders may choose to act contrary to public opinion on matters of war, but such actions can result in long-term political repercussions and diminished public trust.

The mobilization argument, another institutional explanation, highlights the complexity of the military mobilization process, effectively preventing democracies from spontaneous military operations or surprise attacks, even if such intentions existed within political leadership.[24] To prepare for large-scale war, democratic leaders must undergo a lengthy and public institutional process, securing approval from the legislature and various government agencies.[25] This prolonged mobilization process allows additional time for negotiations, political compromise, and alternative conflict resolution methods, contributing to the peaceful settlement of conflicts between democracies.[26]

The transparency argument states that democratic institutions facilitate reliable signaling during crises.[27] The security dilemma is a significant driver of conflict in international politics, worsened by uncertainty regarding the intentions of other actors.[28] The security dilemma describes a situation where actions taken by a state to increase its own security can unintentionally lead to a decrease in the security of other states. Democratic institutional

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[23] Carroll Doherty & Jocelyn Kiley, *A Look Back at How Fear and False Beliefs Bolstered U.S. Public Support for War in Iraq*, Pew Rsch. Ctr. (Mar. 2023) pewresearch.org/politics/2023/03/14/a-look-back-at-how-fear-and-false-beliefs-bolstered-u-s-public-support-for-war-in-iraq.
[24] Michael Doyle, *Why They Don't Fight*: *The Surprising Endurance of the Democratic Peace*, Foreign Affs. (June 2024), foreignaffairs.com/world/why-they-dont-fight-doyle.
[25] Thomas Rocha Correia, *Democratic Peace Theory: Kant's Heritage and Its Flaws*, Revista Minerva Universitária (Sept. 2022), revistaminerva.pt/democratic-peace-theory-kants-heritage-and-its-flaws.
[26] Michael R. Tomz & Jessica L. P. Weeks, *Public Opinion and the Democratic Peace*, 107 Am. Pol. Science Rev. 849, 849–865 (2013).
[27] *Id.*
[28] Anders Wivel, *Security Dilemma*, Encyc. Britannica (Jan. 2019), britannica.com/topic/security-dilemma.

procedures promote transparency, allowing for clear communication of political goals. As a result, uncertainty is diminished, reducing the likelihood of misjudging a leader's intentions. Other nations can accurately assess the intent and domestic constraints of a democratic government. Therefore, if two democracies find themselves in a dispute, the expectation is that it would culminate in a political compromise through a negotiated settlement rather than escalating into violence.[29]

VI. Doyle's Liberal Legacies

In *Kant, Liberal Legacies, and Foreign Affairs*, Michael Doyle argues that states adhering to liberal principles experience a unique form of peace among themselves.[30] In this context, liberal principles include the protection of individual rights, a representative government, the rule of law, market economies, and a belief in international law. States embracing liberal principles are prone to engage in wars against non-liberal states.[31] Doyle's research found that states securely committed to liberal principles through their constitutions have not engaged in wars with each other.[32]

States with republican constitutions that emphasize liberal values exhibit heightened caution in initiating wars. Republics find it challenging to justify wars against other republics that uphold liberal standards of domestic justice.[33] This caution is rooted in the liberal framework, which, according to Doyle, emphasizes three sets of individual rights: freedom from arbitrary authority, various social and economic rights, and democratic participation. These principles, which form the foundation of a republic, are supported by five key elements: juridical equality, freedom of religion and the press, responsible legislatures, private property, and a

[29] Bruce Russett, *Bushwhacking the Democratic Peace*, 6 Int'l Studies Persps. 395, 395–408 (2005).
[30] Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, *Part 2*, Phil. & Pub. Affs. 323, 323–353 (1983).
[31] *Id.* at 343–345.
[32] *Id.* at 350–351.
[33] *Id.* at 351–352.

market economy driven by supply and demand. This framework makes the justification for war more scrutinized, as violating these rights and institutions is seen as too costly.[34] Doyle argues that liberal principles can serve as a catalyst for aggression due to two key reasons. Firstly, from the standpoint of liberal states, non-liberal states are perceived as lacking the entitlement to be shielded from foreign intervention.[35] This perspective arises from the belief that non-liberal states do not ensure domestic justice for their citizens.[36] Consequently, liberal states may assert a right or obligation to intervene in the actions of non-liberal states to uphold what they perceive as essential principles of justice and freedom.[37] Secondly, liberal states are inclined to view non-liberal states as potential aggressors.[38] This perception is rooted in the belief that the lack of transparency and unwillingness of non-liberal states to adhere to liberal principles domestically make them potential sources of aggression.[39] Thus, these considerations contribute to the complex dynamics of international relations, where the clash between liberal and non-liberal principles may lead to tensions and conflicts.

VII. Critiques of the Democratic Peace Theory

Three notable objections arise concerning the causal logic of the democratic peace theory. Firstly, critics argue that the conventional differentiation between dyadic and monadic variants lacks justification.[40] Despite the democratic peace seeming to manifest as a dyadic phenomenon,

[34] *Id.* at 343–347.
[35] *Id.* at 349–352.
[36] *Id.* at 345–349.
[37] Bademba Barrie, *Understanding Liberal Aggression: Why Liberal States Are More Aggressive Towards Their Illiberal Counterparts* 1, 30–39 (2022).
[38] *Id.* at 5–7.
[39] *Id.* at 9–12.
[40] Stephen L. Quackenbush & Michael Rudy, *Evaluating the Monadic Democratic Peace*, 26 Conflict Mgmt. & Peace Sci. 3, 268–285 (2009).

most established theories rely on monadic mechanisms, implying a general inclination toward peace among democracies, a point acknowledged by only a few proponents.[41]

Secondly, existing theories have been criticized for yielding conflicting tendencies.[42] The causal logic can operate in both directions—toward peace but also toward belligerent behavior.[43] For example, liberal norms may incite military intervention against non-democratic regimes or foster peace between liberal democracies. While institutional arguments often assume public war aversion, the public can be deceived, misinformed, or outright aggressive, potentially leading to democratic war involvement. The 2003 invasion of Iraq illustrates how a democratic public, influenced by misrepresented intelligence about weapons of mass destruction (WMDs) and ties to terrorism, can be swayed to support military action.[44] In the lead-up to the invasion, the U.S. government and media presented intelligence reports that suggested Iraq was developing WMDs and had links to terrorist organizations like Al-Qaeda.[45] These claims, later proven to be false or exaggerated, were widely circulated and created a climate of fear and urgency. As a result, a large segment of the American public, convinced of the immediate threat posed by Iraq, supported the war.[46] This example demonstrates that even in democracies, where public opinion can be seen as a check on power, strategic manipulation of information can override inherent war aversion, leading to military actions that might otherwise have been resisted.

Lastly, some critics propose the possibility of reversed causality. Countries might transition to democracy only in environments that permit it, as a hostile and conflict-ridden

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[41] Cornelia Febriani Tjandra, *The Logic of Democratic Peace Theory in the Post-Cold War Era*, Bina Nusantara Univ. (Nov. 2018), ir.binus.ac.id/2018/11/19/the-logic-of-democratic-peace-theory-in-the-post-cold-war-era.
[42] Femke E. Baker, *The Microfoundations of Normative Democratic Peace Theory: Experiments in the U.S., Russia and China*, 2 Pol. Rsch. Exchange 1 (2020).
[43] David J. Lorenzo, *Democratic Peace Theory, the Problems of Pluralism, and the Opposition to the Use of Military Force in the U.S.*, 14 Democracy & Security 4, 414–442 (2018).
[44] George W. Bush Presidential Libr. & Museum, *The Iraq War*, georgewbushlibrary.gov/research/topic-guides/the-iraq-war.
[45] Doherty & Kiley, *supra* note 23.
[46] *Id.*

region may incentivize the development of autocratic state structures.[47] In contrast, peaceful regions might provide the conditions for countries to allocate resources to trade, welfare, and democratize their political institutions.[48]

Christopher Layne, an American academic specializing in foreign policy, argues that in the realm of international relations, the norm is characterized by a state of "fear and distrust."[49] According to Layne, states operate in an environment where "security and survival are always at risk."[50] This outlook contrasts with the optimistic premise of the democratic peace theory, which suggests that democracies are inherently inclined to avoid conflict with each other. Layne's criticism further disputes the notion that democratic states respond differently to each other compared to their interactions with non-democratic states. Contrary to the theory's proposition that democracies are less likely to go to war with fellow democracies, Layne contends that the nature of international relations is such that democracies, like any other states, are driven by the constant concerns of security and survival.[51] In Layne's view, democracies do not exhibit a distinctive inclination to trust or cooperate more with other democracies; rather, he suggests that the standard state of international affairs is characterized by a pervasive sense of insecurity and mutual distrust among all states, democratic or otherwise.[52] This contrasts with the core optimism of the democratic peace theory, highlighting a fundamental disagreement about the nature of state behavior and whether democratic institutions can truly transcend the traditional logic of power politics.

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[47] Michael Mousseau & Yuhang Shi, *A Test for Reverse Causality in the Democratic Peace Relationship*, 36 J. Peace Rsch. 639, 639–663 (1999).
[48] Edward D. Mansfield & Jack Snyder, *Democratization and War*, 74 Foreign Aff. 79, 79–97 (1995).
[49] Christopher Layne, *Kant or Cant: The Myth of the Democratic Peace*, 19 Int'l Sec. 5 (1994).
[50] *Id.* at 12–16.
[51] *Id.* at 3–11.
[52] *Id.* at 30–40.

VIII. Normative Critiques and Misapplications of Democratic Peace

In terms of normative critiques, two notable observations emerge. Firstly, the democratic peace theory, owing to its resonance with policymakers, has been employed on several occasions to legitimize a strategy of external democratization through military intervention.[53] Examples of such cases include the rhetoric used to justify the 2003 invasion of Iraq and the interventions in Afghanistan following the September 11th attacks of 2001. In both instances, proponents of military action argued that forcibly establishing democratic institutions would lead to long-term regional stability and peace, aligning with the core tenets of the democratic peace theory. Similarly, the concept has been brought up in discussions surrounding interventions in the Balkans during the 1990s, where the establishment of democratic governance was presented as a means to prevent future ethnic conflicts. The breakup of Yugoslavia in the 1990s sparked violent ethnic conflicts, including the Bosnian and Kosovo Wars, marked by severe ethnic tensions among Serbs, Croats, Bosniaks, and Albanians.[54] The Bosnian War saw ethnic cleansing by Serbian forces, leading to thousands of civilian deaths, and was ended by the 1995 Dayton Accords, which created a power-sharing arrangement.[55] The Kosovo War intensified these tensions, with ethnic Albanians seeking independence from Serbia, prompting interference by the North Atlantic Treaty Organization (NATO) in 1999 to stop Serbian repression.[56] This intervention was driven by the belief that promoting democracy and stability in the region would prevent further ethnic violence. This has prompted significant backlash from those who perceive the democratic peace theory as a justification for the structural violence enacted by Western

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[53] Sadaf Nausheen et al., *The Democratic Peace Theory: Is War a Means to Peace?*, 25 J. Peace & Conflict Stud. 2 (2021).
[54] Dep't of State, Off. of the Historian, *The Breakup of Yugoslavia, 1990–1992*, history.state.gov/milestones/1989-1992/breakup-yugoslavia.
[55] Bill Clinton, *Dayton Accords*, Encyc. Britannica (Feb. 2025), britannica.com/event/Dayton-Accords.
[56] Encyc. Britannica, *Kosovo Conflict* (Mar. 2025), britannica.com/event/Kosovo-conflict.

industrialized states against some nations in the Global South.[57] Notably, even proponents of the democratic peace theory have voiced their dissent, condemning the political misuse of their theory for policy objectives.[58] They assert that the theory itself never endorsed the notion of imposing democracy through external military means. Second, critics protest the ahistorical treatment of democracy in many studies. These critics hold that the democratic peace proposition is value-laden, being less about democracy than about countries that apply to the Western model of liberal democracy. Critics even argue that democracies have frequently violated liberal norms when they have engaged in imperial war.[59] For instance, during the nineteenth and early twentieth centuries, European democracies such as Britain and France, despite their domestic liberal institutions, waged numerous imperial wars to expand and maintain their colonial empires. These wars, fought against non-democratic states and indigenous populations, often contradicted the very principles of self-determination and liberty that were central to liberal democracy. The British Empire's expansion in India and Africa, or France's colonial wars in Algeria, highlight the tension between the democratic ideals these nations professed and the imperial actions they pursued abroad. Such examples suggest that the democratic peace theory fails to account for the complexities and contradictions in the historical behavior of so-called democratic states.[60]

IX. Alternative Explanations: Realism and Capitalist Liberalism

Concerning alternative explanations for the democratic peace phenomenon, two prominent lines of argument have garnered considerable influence. Firstly, scholars from the realist school of international relations assert that the overarching distribution of material power

[57] Gojko Vuckovic, *Promoting Peace and Democracy in the Aftermath of the Balkan Wars: Comparative Assessment of the Democratization and Institution-Building Processes in Croatia, Bosnia and Herzegovina, and Former Yugoslavia*, 162 World Affairs 1, 3–10 (1999).
[58] Sebastian Rosato, *The Flawed Logic of Democratic Peace Theory*, 97 Am. Pol. Sci. Rev. 4, 585–602 (2003).
[59] *Id.*
[60] *Id.* at 2–4.

across the international system remains the primary determinant influencing the dynamics of war and peace.[61] This stands in contrast to the democratic peace proponents who emphasize the role of domestic political institutions. Realists also cast doubt on the enduring stability of the ideational structures proposed by the democratic peace theory.[62] From their perspective, there is no assurance that states currently operating as democracies will not, under specific systemic pressures, revert to authoritarianism at some point.[63]

Secondly, a liberal argument posits that capitalism, rather than democracy, might be the driving force behind the peaceful relations observed among democracies. This perspective suggests that elements such as economic development, financial integration, and a convergence of state interests have the potential to reshape preferences in favor of trade and harmonious interstate relations. Over the course of time, the economic ties between the United States and China have deepened significantly, even amid the recent surge in military tensions within the South China Sea.[64] A critical examination of democratic peace theory reveals a notable flaw—an excessive focus on politics as a primary instigator of conflict, with inadequate consideration given to the peace-promoting aspects and incentives arising from economic interdependence. Democratic peace theory struggles to account for the observed restraint in conflict escalation between the United States, a democracy, and China, an autocracy, despite their divergent political systems—an interaction that seemingly violates the theory's expectations. Contrary to the

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[61] Notre Dame Int'l Sec. Ctr., *An Introduction to Realism in International Relations*, Univ. Notre Dame (July 2022), ndisc.nd.edu/news-media/news/an-introduction-to-realism-in-international-relations.
[62] Therese Etten, *How Convincing is the Democratic Peace Thesis?* (2014).
[63] Robert Skidelsky, *The False Promise of Democratic Peace*, Project Syndicate (Apr. 2022), project-syndicate.org/commentary/democratic-peace-theory-is-wrong-by-robert-skidelsky-2022-04.
[64] These tensions stem from competing territorial claims in the South China Sea, where China has been building and militarizing artificial islands. The United States and other regional actors express concerns about these actions, asserting the importance of freedom of navigation and adherence to international law. This has led to increased military presence and exercises in the area, contributing to heightened strategic rivalry.

expectations set by democratic peace theory, there has been no recorded instance of a conflict between the United States and China that resulted in at least one thousand battle deaths, which is required by the theory's statistical definition of war. This holds true even in the face of simmering military tensions in the South China Sea. The theory's limitations become evident in its inability to elucidate why these democratic and autocratic nations are less predisposed to warfare despite the prevailing economic interdependence.[65]

X. Mousseau's Capitalist Peace Theory as an Alternative Framework

Michael Mousseau's capitalist peace theory, proposed in the early twenty-first century, challenges the conventional wisdom of democratic peace theory by offering an alternative explanation for the observed phenomenon of peace between democracies. Mousseau argues that economic interdependence, specifically in the form of market-oriented capitalism, is a more reliable predictor of peace than democracy.[66] According to his theory, nations that are economically interdependent and have strong capitalist economies are less likely to engage in conflict with each other.[67] Mousseau challenges the idea that shared political systems are the primary drivers of peace. Instead, he emphasizes the role of economic interests, suggesting that nations with strong economic ties have a vested interest in maintaining stability and avoiding conflict, as disruptions could harm their economic well-being.[68] According to Mousseau, this concept, known as "capitalist peace," argues that the economic interdependence created by market-oriented policies is the real key to reducing the likelihood of war.[69] He contends that countries with authoritarian political systems can also experience capitalist peace if they embrace

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[65] Toni Ann Pazienza, *Challenging the Democratic Peace Theory—The Role of U.S.-China Relationship* (2014) (M.A. thesis, Univ. S. Fla.) (on file with the university).
[66] Erik Gartzke, *The Capitalist Peace*, 51 Am. J. Pol. Sci 166, 166–191 (2007).
[67] *Id.* at 181–186.
[68] *Id.*
[69] Michael Mousseau, *Coming to Terms with the Capitalist Peace*, 36 Int'l Interactions 185, 185–192 (2010).

market-oriented economic policies.[70] Mousseau points to examples such as China and Singapore, both of which have authoritarian regimes but have become highly integrated into the global economy.[71] Their economic interdependence with other nations has contributed to a reduction in their likelihood of engaging in armed conflicts, as war would disrupt their significant trade relations and economic growth.[72]

XI. Challenges to Peace During Democratic Transitions

The global expansion of democracy may pose challenges to international peace for two notable reasons, both rooted in the complexities of the democratization process. Firstly, various studies indicate that when a nation undergoes a democratic transition amid weak political institutions, often prevalent during the shift from autocracy to democracy, the likelihood increases that this transition will spark aggressive nationalist sentiments or lead to civil or interstate conflicts. This risk is further escalated when the country's elites feel threatened by the democratization process as they are compelled to address a broad and diverse array of newly-formed interests. In situations where political institutions are feeble during the initial stages of a transition, the growing demand for mass participation can incentivize elites to adopt nationalist, ethno-religious, or populist policies.[73] Importantly, this occurs before these elites can be held sufficiently accountable to the broader electorate.[74] Numerous historical examples support this observation, ranging from Napoleon III's France, Wilhelmine Germany, and Taisho Japan to more recent instances like Serbia under Slobodan Milosevic (the Yugoslav Wars), conflicts between Peru and Ecuador in the late 1980s and early 1990s (Cenepa War 1995),

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[70] *Id.* at 188–190.
[71] *Id.* at 189–192.
[72] Michael Mousseau, *Market Prosperity, Democratic Consolidation, and Democratic Peace*, 44 J. Conflict Resol. 4 (2000).
[73] Christian Davenport & David A. Armstrong II, *Democracy and the Violation of Human Rights: A Statistical Analysis from 1976 to 1996*, 48 Am. J. Pol. Sci 3, 538–554 (2004).
[74] Mansfield & Snyder, *supra* note 48, at 1–5.

Ethiopia's 1998–2000 border war with Eritrea following the collapse of the Dergue dictatorship, and the 1999 India-Pakistan war after limited moves towards democratization in both Pakistan and Kashmir. This pattern extends to the observation that the majority of civil wars over the past century have occurred within transitional or mixed regimes, as opposed to either democratic or authoritarian regimes.[75] The latter are better equipped to contain repression through democratic or violent means, respectively.[76] Considering these factors, a country is more likely to successfully consolidate its transition if democratization follows a specific historical sequence: the emergence of a national identity, followed by the institutionalization of the central government, and then mass electoral and political participation.[77]

XII. Conclusion: Reassessing Democratic Peace and the Need for Synthesis

Ultimately, the democratic peace theory, while offering significant insights into historical patterns of peace, falls short in capturing the complexities of the evolving global landscape. The dyadic and monadic explanations, suggesting a lower likelihood of war among democracies, provide a valuable, yet incomplete, framework. Further, the theory's application falters when confronted with complex relationships such as that between the United States and China or India and Pakistan. Specifically, the enduring conflict between India and Pakistan, both democracies, highlights a significant challenge to the democratic peace theory. Despite sharing democratic characteristics, these nations have engaged in multiple wars and sustained periods of intense hostility since their partition in 1947. The Kashmir dispute, a territorial conflict rooted in the partition, has served as a persistent flashpoint, fueling military confrontations and undermining efforts at peaceful resolution. Moreover, the presence of nuclear weapons in both countries adds

[75] Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 Foreign Affs. 22 (1997).
[76] *Id.*
[77] Placek, *supra* note 1.

another layer of complexity, making the potential for escalation particularly dangerous.[78] The repeated instances of cross-border terrorism, accusations of state-sponsored violence, and deep-seated mistrust underscore the limitations of applying the democratic peace framework to this region. While both countries possess democratic institutions, these institutions have not prevented them from engaging in conflict, revealing that factors such as historical grievances, territorial disputes, and national security concerns can override the supposed pacifying effects of shared democratic governance.

The normative and structural explanations within the democratic peace theory provide a nuanced understanding of how shared values and political structures contribute to peaceful relations. Nevertheless, these explanations alone prove insufficient in capturing the intricacies of contemporary geopolitics. The interplay of economic interests and incentives for peace among capitalist nations provides an alternative lens through which to understand global stability. While the democratic peace theory has significantly contributed to our comprehension of certain historical patterns, it is crucial to acknowledge its shortcomings in capturing the complexities of contemporary state interactions. Moving forward, a synthesis of theories that considers both political and economic dimensions may offer a more comprehensive framework for analyzing the ever-evolving landscape of global relations.

[78] Ctr. Preventive Action, *Conflict Between India and Pakistan*, Council Foreign Rels. (Apr. 2024), cfr.org/global-conflict-tracker/conflict/conflict-between-india-and-pakistan.

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Vetoing the Veto: Evaluating Reform of the United Nations Security Council's Procedural Framework

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Abstract:

The United Nations Security Council (UNSC) is the organ of the United Nations tasked with monitoring global peace and forming resolutions. Five permanent members of the Security Council (China, France, Russia, the United Kingdom, and the United States) are granted special permission to veto resolutions. Currently, there is no way for a vetoed resolution to be overridden. Recent global conflicts, like Russia's invasion of Ukraine, reveal why the veto power is in dire need of reform. Russia has repeatedly vetoed resolutions condemning their own actions. This paper evaluates the feasibility of possible reforms of the veto—from removing the veto power altogether to altering the existence of permanent members.

I. Introduction

The United Nations prides itself on being an organization that has evolved to meet the challenges of the global community.[1] They have amended their charter multiple times, yet despite these changes, current conflicts highlight the glaring weaknesses embedded in the legal structure of the Security Council. Founded in the aftermath of the two world wars, the United Nations (U.N.) aimed to create a platform that promoted cooperation and mitigated the tensions that could lead to war.[2] While many administrative organs comprise the U.N., the United Nations Security Council (UNSC) has the daunting task of maintaining peace. Operating with a set of fifteen member states at a time, with five of them being permanent, the UNSC has the power to condemn a state's behavior, impose sanctions, and deploy peace missions.[3] After World War II, China, France, Russia, the United Kingdom, and the United States were chosen as permanent members to maintain a balance of power in a postwar world with divided ideals.[4] However, modern international conflicts have exposed serious weaknesses in the UNSC's structure.

The permanent member states' special power to veto resolutions has been and continues to be a major source of controversy. It is no coincidence that the five permanent members often have differing viewpoints on the topic of international security. Their appointment was because of such differences. One of the main functions of the U.N. is to serve as a platform for diplomatic decisions. The critics of the veto feared that its strength would cause gridlock in decision-making because of differing opinions. Oxford University defines gridlock as a general condition of international politics in which multilateral interdependence creates conditions that undermine the ability to reach agreements.[5] These conditions are caused by a combination of diversified

[1] United Nations, *About Us*, un.org/en/about-us.
[2] *Id.*
[3] U.N. Charter art. 39.
[4] Council on Foreign Rels., *The UN Security Council* (Sept. 2024), cfr.org/backgrounder/un-security-council.
[5] Thomas Hale, *Gridlock: The Breakdown of Global Governance*, Blavatnik Sch. Gov. (May 2013), bsg.ox.ac.uk/blog/gridlock-breakdown-global-governance.

interests among countries at both an internal and international political level, as well as procedural limitations within the institutions responsible for facilitating agreements.[6] For example, by 1970, the former Soviet Union had cast over one hundred vetoes, many of which were used to reject the admission of many countries to the U.N. due to their own fear of increased Western influence in the Cold War.[7] These vetoes were bypassed through a package deal resolution that allowed sixteen new member states to join at once, calling on the United Nations ideals of universality and nonexclusivity.[8] While this problem could be resolved, an increase in the complexity of global political relationships since then has made such impasses more frequent and harder to find effective solutions for.

The U.N.'s framework for being noninterventionist means that the Security Council's powers are some of the strongest tools in the entire organization for enforcing peace.[9] To maximize such peace, it is imperative to ensure that the Council is operating as efficiently and effectively as possible. Of course, there must be checks on its power, but they should not be so strong that the Council cannot act. Potential recommendations for reforming the veto power and procedural structure of the UNSC include the modification of permanent members and removal of the veto power. The functions of the UNSC without permanent members could be gravely impacted because there would be no consistency in the agenda. It appears that at least a revision of the veto is necessary to prevent excessive inaction. While the veto serves a useful purpose to prevent the U.N. from violating its own ideals, the U.N. would benefit by, at the very least, removing the power of the veto and effectively enforcing such removal in situations where states are directly specified in the draft resolutions.

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[6] *Id.*
[7] *Rep. of the Open-Ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council*, at 13–19, U.N. Doc. A/58/47 (2004).
[8] G.A. Res. 995 (X), at 50 (Dec. 14, 1955).
[9] U.N. Charter art. 39.

II. Assessing the Need for Reform

The constraints on the UNSC's power has been an issue for so long that in 1950 the General Assembly (G.A.), the main organ of the U.N., enacted resolution 377A as a way to circumvent the veto.[10] This resolution is also referred to as the "Uniting for Peace" resolution because it is intended as a safeguard for maintaining international peace in dire situations where the UNSC fails to take appropriate action. It states that:

> [I]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately…including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.[11]

This grants the General Assembly the power to hold an Emergency Special Session.[12] These sessions can also be requested by the UNSC itself.[13] The UNSC is supposed to have the primary responsibility of peace monitoring and restoration, but is a much smaller body than the General Assembly. These emergency sessions allow the G.A. to make important recommendations on wide-ranging or more urgent topics, if the UNSC is not, or is unable to, act efficiently. Emergency Special Sessions have been called eleven times from 1956 to 2024.[14] While this appears to be an insignificant number of Emergency Special Sessions, the last two sessions concerning the Israel-Palestine conflict and war in Ukraine have had fifty-nine and nineteen meetings respectively.[15][16] This number is significantly higher than meetings held for previous Emergency Special Sessions, which indicates that the procedural framework under which the

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[10] G.A. Res. 337A, Uniting for Peace (Nov. 3, 1950).
[11] *Id.* at 10.
[12] *Id.* at 12. Emergency Special Sessions are unscheduled meetings that permit the General Assembly to make recommendations to the Security Council on urgent threats.
[13] *Id.*
[14] G.A. Res. 337A, *supra* note 10, § 5.
[15] Gen. Assembly of the U.N., *Tenth Emergency Special Session*, un.org/en/ga/sessions/emergency10th.shtml.
[16] Gen. Assembly of the U.N., *Eleventh Emergency Special Session*, un.org/en/ga/sessions/emergency11th.shtml.

UNSC operates is becoming increasingly either too restrictive or inefficient in solving modern conflicts. Regardless of the cause, the UNSC should follow in the footsteps of its main body's commitment to evolving to keep up with current challenges.

In the case of Ukraine, Russia's position on the Security Council gave them the ability to veto draft resolutions condemning their own actions. The draft S/2022/155 called attention to Russia's violation of the U.N. Charter and asked for respect of internationally agreed-upon borders, cessation of the use of force, and the removal of military operations from Ukraine.[17] In this situation, the veto facilitated a profound abuse of power. As put by former representative of Norway to the U.N. Mona Juul after the vote, "A veto cast by the aggressor undermines the purpose of the Council. It is a violation of the very foundation of the Charter of the United Nations. Furthermore…as a party to a dispute Russia should have abstained from voting on the draft resolutions."[18] While the U.N. does not currently prohibit participation in meetings from involved parties,[19] Russia's ability to exercise the veto power on this resolution appears to be a direct violation of the United Nation's founding moral framework. While the veto was established to prevent the U.N. from violating its own ideals, it has functionally done the opposite by allowing permanent members to violate these ideals, showing the inadequacy of the current veto power.

III. Evaluation of Potential Reforms

A common suggestion has been to alter the existence of permanent members. There are a variety of more newly prominent states that seek out permanent membership, such as Germany, India, and Japan.[20] Proponents of adding members argue that the number of member states in the

[17] S.C. Res. 155 (Feb. 25, 2022).
[18] U.N. SCOR, Emergency Special Sess., 8979th mtg. at 7, U.N. Doc. S/PV.8979 (Feb. 25, 2022).
[19] U.N. Charter art. 32.
[20] Kara C. McDonald & Stewart M. Patrick, *U.N. Security Council Enlargement and U.S. Interests* 18 (2010).

U.N. has increased, and the Security Council should increase proportionally.[21] While this would aid representation, it would only be a temporary solution for the Security Council. The addition of any new members would proportionally dilute the power of current permanent members, while simultaneously doing very little to address the gridlock that the veto power contributes to. If anything, it would make gridlock worse. Giving more states a permanent seat only seems feasible if the veto is modified to some degree, but such a large degree of change is also not a viable option as there are too many required changes for the U.N. to reach a compromise on a charter amendment and pass such reforms. While there has been no official attempt to add a new member state, the decision on which new state permanent membership should go to would cause significant disagreement, as states would try to lobby for one of their allies to be admitted in order to gain influence.

In an opposite manner, the existence of permanent membership itself has been called into question. If the U.N. removed permanent member seats, it would completely eliminate the veto power. The problem is that neither expanding permanent member seats nor removing them altogether is practical. The states with permanent status are unlikely to give up this power because of the special powers that they are reserved, such as the veto. Any ratification of a U.N. charter amendment has to receive approval from all of the permanent Security Council members.[22] At the same time, the admission of new members could easily become a power scramble among different global ideals. The current five permanent states were selected to balance influence from different regions of the world. Admitting new states could tip the influence too strongly to one ideology, which would contradict the ideals of the U.N. to be as impartial and objective as possible.

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[21] *Id.*
[22] U.N. Charter ch. XVIII.

On the other hand, altering the veto itself is more impartial and considerably easier to accomplish because it is a modification of procedure. It might be against some states' current interests, like Russia's military operations in Ukraine, but in the long run, does not actively promote the interests of one state over another. If anything, it would actively make all states in the U.N. more equal. The best course of action is to find a way to modify the veto so that the change is feasible for a diverse body like the U.N. to pass and also effective enough to solve the UNSC's problems without having a greater negative effect.

One way to alter the veto is to temporarily remove the power of the veto when states are a party in the dispute. Standard voting procedure dictates that each member, permanent or not, has one vote.[23] All that a resolution needs to pass is nine votes out of a potential fifteen between the five permanent and ten other states on the council at a given time, with no formal quorum requirement.[24] Since temporary members do not have the ability to vote against a decision, they may only choose to abstain.[25] If a temporary removal of the veto for states discussed in a resolution was properly implemented, those states would be forced to abstain. This seems feasible for the U.N. to amend because it would not completely prevent any state from participating on the council, and they would only be barred from voting on limited matters that involve them. Article 32 of the charter specifies that "Any Member…which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion related to the dispute."[26] With a temporary prohibition of the power, this article would have to be amended to include UNSC member states.

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[23] U.N. Charter, art. 27.
[24] *Id.*
[25] *Id.*
[26] *Id.*

Interestingly, Article 27 of the charter specifies that "Under paragraph 3 of Article 52, a party to a dispute shall abstain from voting."[27] On the surface, it seems like a forced abstention is already part of the charter, but a close look at that paragraph reveals its limited nature. It is embedded into Chapter VIII, which pertains to regional agreements, and that paragraph specifically pertains to pacific settlement of disputes.[28] According to some policy advisors, "The abstention obligation of Article 27(3) applies only to the Security Council's Chapter VI 'pacific settlement of disputes' and not to the more coercive means authorized in Chapter VII."[29] This measure has been used so sparingly that it is estimated to have only been used around ten times, with the last one being in 1960.[30] However, the current existence of such an article may make it easier for the U.N. to draft an amendment to this article and expand it to apply to every applicable case instead of allowing noncompliance.

Even if Article 27 positively applied to this situation, why was it not invoked? One reason might be that there are no real consequences that seem to follow from violating the article. Russia has received criticism for vetoing matters concerning its own interests, but the state has faced no tangible ramifications. One representative from Ukraine has stated that "It is a disgrace that paragraph 3 of Article 27 of the Charter—that a party to a dispute shall abstain from voting—continues to be blatantly ignored. It is imperative that clear proceedings be introduced for operationalizing and properly implementing this Article."[31] Since the abstention required under Article 27 has not been invoked since 1960 despite numerous applicable situations, it is clear that change is necessary.[32] There is no precedent for how the United Nations

[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] U.N. SCOR, 71st Sess., 7740th mtg., U.N. Doc. S/PV.8979 (July 16, 2016).
[32] John Ramming Chappell & Emma Svoboda, *Must Russia Abstain on Security Council Votes Regarding the Ukraine Crisis?*, Lawfare Media (Feb. 2022), lawfaremedia.org/article/must-russia-abstain-security-council-votes-regarding-ukraine-crisis.

could impose consequences, as the Security Council itself is usually responsible for imposing sanctions and other measures of that nature, and a state would be unlikely to punish itself. Perhaps it is the lack of such consequences that prevents Article 27's invocation. However, there seems to be no reason why the veto in these cases needs to be considered valid at all. If it was not cast legally, then it should not be considered sufficient to prevent a reform from being enacted, especially when it passes by the standard minimum of nine votes.

Another alternative is to get rid of the veto power altogether while keeping permanent membership. This would allow permanent members to retain their influence on global security decisions without making their vote disproportionately more authoritative than other states. According to David D. Caron, ad hoc[33] judge on the International Court of Justice and law professor, the veto erodes the legitimacy of the UNSC and directly violates the ideals of the United Nations by breeding inequality in the UNSC decision-making processes.[34] Additionally, removing the veto altogether would circumvent the problems with interpreting and applying Article 27. No state would have to be prevented from exercising the veto if no one has a veto right to begin with. The problem with completely abolishing the veto is that there is no good account for what any alternative system would look like.[35] If the concern is that resolutions might pass too easily, a potential safeguard could be increasing the number of affirmative votes required for a resolution to pass. Amending the procedure to require one extra affirmative vote would make the UNSC operate under a two-thirds majority vote, instead of the current strict majority.

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[33] "Ad hoc" in this context means to be used for a specific purpose rather than a wider application. *See generally* Merriam-Webster Dictionary, *Ad Hoc* (Apr. 2025), merriam-webster.com/dictionary/ad%20hoc (general definition of the term).

[34] David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 Am. J. Int'l L. 4, 552–88 (1993).

[35] Yating Chen et al., *The UNSC at a Crossroad: Urgency and Necessity for Reform*, 65 Lecture Notes in Educ. Psych. Pub. Media, 157–78 (2024).

It is also possible that the implementation of a procedural amendment overriding the veto would solve the issue. The required nine affirmative votes, veto power, and permanent member seats would all stay the same. The only difference would be the addition of a provision that specifies the opportunity to discuss the resolution further and vote again on the same issue. The same veto could not be issued, but rather, an increased number of affirmative votes, such as ten instead of nine, would be required to ratify the resolution in spite of a veto. It is important to note that multiple vetoes would not play a role in this process because then the required number of votes would not be met anyway.

IV. Feasibility and Implications of Procedural Change

The task of initiating and successfully implementing reform of the United Nations may seem daunting, given the complexity of the charter and variation for procedures among each organ. However, it is not impossible. The revisions to U.N. peacekeeping missions were vast and provide insight as to how to best approach other major revisions. First of all, the U.N. recognized the failure of what are now referred to as their traditional peacekeeping missions. These missions were mostly focused on monitoring interstate conflicts and were heavily constrained by the U.N.'s principles of non-interventionism.[36] Overstepping in a specific state's affairs with violent means would have been a violation of the organization's commitment to neutrality, but the missions were quickly losing support and validity. Reforms began through a reassessment of the U.N.'s key commitments, which allowed them to conclude that reform was in fact necessary to uphold peacekeeping responsibilities.[37] Modern peacekeeping missions are allowed to be more interventionist by aiding in government transitions and counter-insurgency efforts, which was strictly prohibited in old missions.[38]

[36] U.N. Peacekeeping, *Our History*, peacekeeping.un.org/en/our-history.
[37] U.N. Peacekeeping, *Reforming Peacekeeping*, https://peacekeeping.un.org/en/reforming-peacekeeping.
[38] U.N. Peacekeeping, *Action for Peacekeeping (A4P)*, peacekeeping.un.org/en/action-for-peacekeeping-a4p.

These changes were vast but demonstrate that the U.N. has the capability to alter its procedural framework to improve efficiency. The process of amending the U.N. Charter is outlined in Article 109, "Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council."[39] Since the topic of the veto has been contentious since its introduction and has become even more so in the modern political climate, the U.N. has great reason to meet to discuss alteration of the Charter. In fact, not doing so is a direct threat to the legitimacy of the organization as a whole. The only problem is the provision in Article 109 that specifies all the permanent members of the Security Council.[40] In order for the change to be agreed upon by countries with such diverse interests, it cannot be too drastic. It has already been established why the alteration of permanent member status would not be a popular method of reform—the allocation of permanent seats to new states would dilute the current power of the UNSC, and states that already have seats are unlikely to relinquish this power. If they are unwilling to relinquish their seats, then the Charter amendment would never pass anyway. Altering the veto is the best method for ensuring fairness without diluting the current influence of member states.

V. Conclusion

It is clear that if the U.N.'s special veto permissions for its five permanent states is not amended, then the United Nations Security Council will continue to lose legitimacy and efficiency. Its status as one of the main international peacekeepers would be tarnished and international security would also be compromised. Eliminating the veto entirely would be too

[39] U.N. Charter art. 109.
[40] *Id.*

drastic of a change to the UNSC's procedural framework, but the provision of a way to override the veto would decrease gridlock in decision-making and allow the council to act more efficiently in urgent global crises.