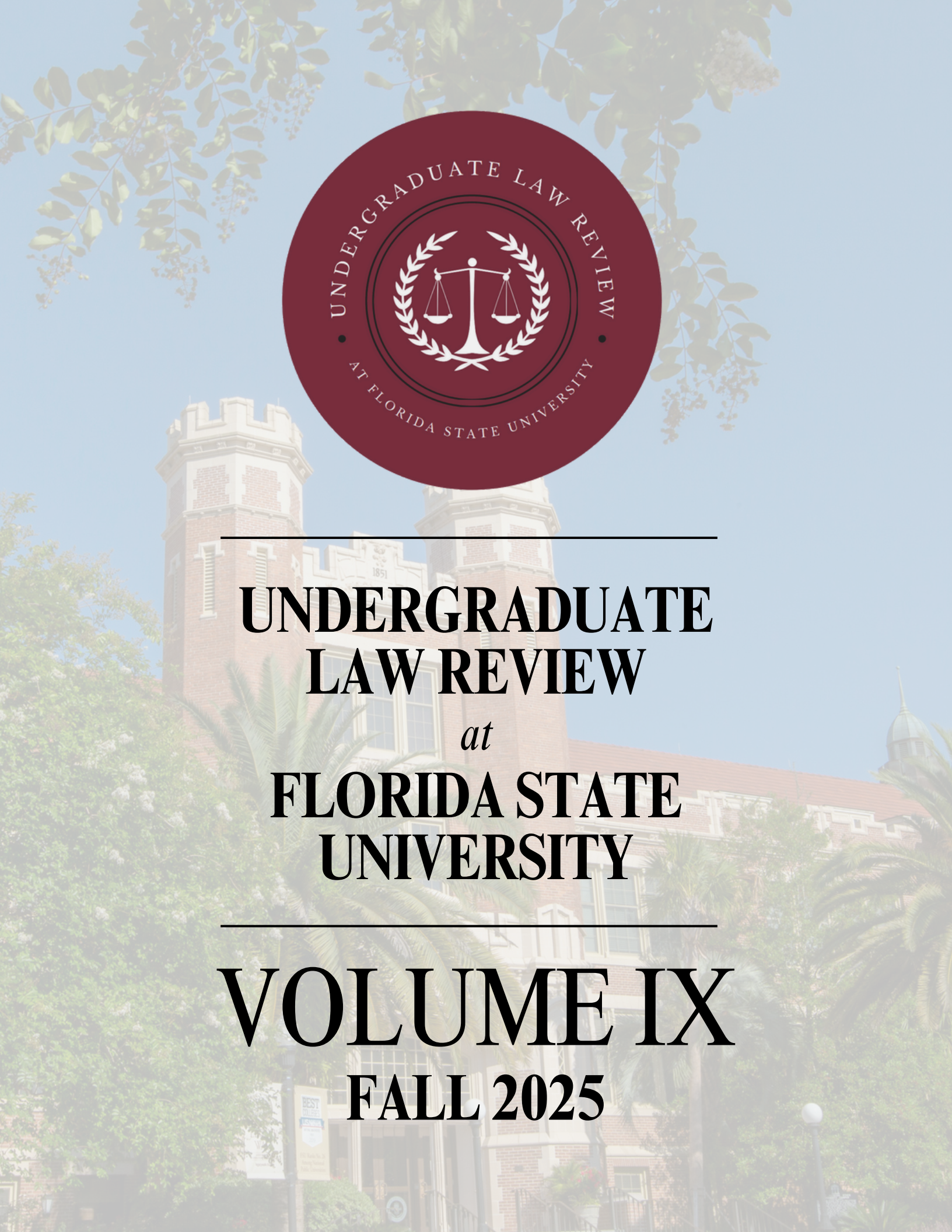

UNDERGRADUATE LAW REVIEW

at

FLORIDA STATE UNIVERSITY

VOLUME IX

FALL 2025

UNDERGRADUATE LAW REVIEW AT FLORIDA STATE UNIVERSITY

Blog Vol. II	*FALL 2025 MASTHEAD*	*Print Vol. IX*

UNDERGRADUATE LAW REVIEW AT FLORIDA STATE UNIVERSITY

Dear reader,

I am beyond thrilled to share this semester's publication with you. Our writers and editors have worked tirelessly over the course of this past fall to create and perfect this journal. I am particularly proud of Volume IX, and I believe that it features some of our best work to date.

This volume focuses not only on local matters within the state of Florida such as judicial involvement in Duval County plea negotiations, but also national and international issues, such as birthright citizenship and tribal law in the United States. Some articles take a look back into history, examining, for example, the doctrine of *kirisute-gomen* in Tokugawa era Japan and its relationship to qualified immunity in the contemporary United States. This volume also examines international climate policy, involuntary expatriation in the U.S., the tumultuous history of constitutional redrafts in Chile, and so much more. Each article contained herein has undergone the highest level of scrutiny and careful review, and each author has contributed something meaningful to a unique area of legal discourse.

To the writers and staff of Volume IX, I cannot thank you enough for your tireless devotion to your work. Being a part of the ULR at FSU is no small feat; you all are critically engaging with complex legal issues, whether that be in your position as a writer in researching and writing your piece or as an editor in providing feedback on complex articles. I am endlessly thankful to have been surrounded by a wonderful team this fall.

Volume IX marks the end of my time with the Undergraduate Law Review, but the organization will always hold a special place in my heart, and it has been a formative part of my university experience. I joined the ULR at FSU back in the fall of 2022 as a freshman, and at the time, we did not even hold regular meetings. I could see so much potential in the organization, and I knew I wanted to be an agent of change within it. Now, I am so honored to have served as the President and Editor-in-Chief of an organization that has been with me every step of the way in my collegiate experience.

Most importantly, I could not do what I do without the help of the Executive and Editorial Boards and without the contributions of those that came before me. Madison Tilton and Anya Finley, the past two presidents of the ULR at FSU, helped pave the way for the organization's current successes, and they are a big part of why the ULR is what it is today. I firmly believe that the work contained herein is a continuation of the organization's exponential growth in the past couple of semesters, and I am certain that it will continue to flourish even more in the coming semesters. I depart from the ULR at FSU immensely proud of our team and excited to observe the organization's future successes as an alumni.

Sincerely,

Madelyn Luther

President & Editor-in-Chief
Undergraduate Law Review at Florida State University

UNDERGRADUATE LAW REVIEW AT FLORIDA STATE UNIVERSITY

Founded in 1996 and reestablished in 2020, the Undergraduate Law Review at Florida State University is the premier student-run undergraduate legal publication on campus. Our mission is to provide an outlet for all students interested in engaging with legal discourse. We aim to foster academic collaboration across Florida State and beyond, providing a platform for undergraduates to delve deep into current legal events. Our organization is entirely student-run, edited, and published, and it consists of many talented writers, editors, and the Executive Board. Volume IX contains ten impressive works written by current undergraduate students at Florida State University and across the country.

We are proud to engage in cross-campus legal dialogue by frequently publishing guest writers from other universities and through collaboration with partner organizations. This fall, we are publishing articles authored by three guest writers, a record for our organization: one from Tulane University, one from the University of Chicago, and one from Yale University. These authors and their institutional affiliations are denoted by an asterisk on the title page of their article. We are also organizational partners with Undergraduate Mock Trial at Florida State University and the Florida Undergraduate Law Review of the University of Florida. This fall, we are so happy to have participated in the Intercollegiate Undergraduate Law Review Conference hosted by Fordham University and extend a warm thanks to their incredible team.

We are committed to peer learning and uplifting undergraduate voices. We believe that the writers of today will become the leaders, lawyers, and judges of tomorrow, and our organization seeks to cultivate mentorship and scholarly discussion amongst students. We hold that opinions expressed in this volume are novel and timely, and that in creating this publication, our writers and staff have meaningfully explored the role of law in shaping our culture and society.

Any questions regarding the Undergraduate Law Review at Florida State University, Volume IX, or its contents may be referred to ulr.fsu@gmail.com. You can read our past work, including shorter form legal research in the medium of blog articles, at ulrfsu.org.

UNDERGRADUATE LAW REVIEW AT FLORIDA STATE UNIVERSITY

VOLUME IX
TABLE OF CONTENTS

Drafting Democracy: Chile's Constitutional Saga from 2020 to 2025

Written by Alaina Babb

Article Editor: Ana Molina

Associate Editor: Claire Lowenstein

Abstract:

Since 2020, Chile has explored multiple avenues in replacing its Pinochet-era constitution. A relic from a Chilean autocratic and military dictatorship's past, the mark of this period persists through the nation's inability to decide upon a new constitution. After an overwhelming majority of Chilean citizens agreed on the replacement of the constitution, two separate drafts on either side of the political spectrum were consequently rejected over the course of five years. This paper will explore the necessity of a new constitution within the nation, the journey of two separate referenda and plebiscites, and what lies in store for the nation.

I. Introduction

Over the past six years, Chile has been facing an unprecedented legal dilemma. A protest in 2019 served as the critical juncture that led to three national referendums and two proposed and rejected constitutional drafts for the nation.[1] The mission to redraft Chile's constitution has been a tumultuous one, and it has spanned across three administrations—including those that fall on the right or the left of the political spectrum. The country's current constitution is a relic from a thirty-year-long dictatorship.[2] The historical past of Chile is vast and complex, and the echoes of corruption and authoritarianism still resonate throughout the nation, particularly within its legal framework. Though most agree that the way for Chile to move past this dark historical time lies within a new constitution, this article will enumerate the complexities that arise when attempting to replace a country's constitution. It will then conduct a deep dive into the political landscape within a historical context, particularly since 2019, and examine Chile through the lenses of democratic contestation and institutional legitimacy. It ultimately argues that the 2019 mass mobilization effort challenged longstanding elite control in Chile, and that the two constitutional drafts and their ultimate failures exposed institutional fragmentation and brought about public distrust that will continue to reverberate across the nation today.

II. Estallido Social (2019–2020)

In October of 2019, a three percent price hike in public transportation fares caused a mass mobilization across Chile.[3] Although social and political unrest is not atypical in Chile, what made the situation so anomalous was its breadth and depth, and the fervor with which protesters acted. Known as the *Estallido Social*, or "Social Explosion," the protest was ignited after a hike

[1] Víctor Hugo de la Fuente & Libio Pérez, *¿Qué Queda del Estallido Social Chileno?*, Le Monde Diplomatique (2025).
[2] Charis McGowan, *Celebrations as Chile Votes by Huge Majority to Scrap Pinochet-Era Constitution*, The Guardian (Oct. 2020), https://www.theguardian.com/world/2020/oct/26/chile-vote-scrap-pinochet-constitution.
[3] Jonathan Franklin, *Chile Protesters: 'We Are Subjugated by the Rich. It's Time for That to End'*, The Guardian (Oct. 2019), https://www.theguardian.com/world/2019/oct/30/chile-protests-portraits-protesters-sebastian-pinera.

in subway fare prices, which was relatively minor, amounting to a mere thirty Chilean pesos—a figure that translates to approximately three cents.[4] Thus, the motto of the protest became "It's Not 30 Pesos, It's 30 Years," in reference to the relatively recent reinstitution of Chile as a democratic country, with the Pinochet dictatorship ending only three decades ago.[5] The remnants of the almost two decade long dictatorial regime of Augusto Pinochet still linger within the governmental framework of the nation, most notably and significantly in their constitution.[6] Although the start of the protest was concerned with a small and pointed issue, its aftershock was quite the opposite, amounting to a broad stroke of epic proportions that demands major structural reform.[7] The turnout of the *Estallido Social* was staggering. In a single day, one million protesters mobilized in the capital city of Santiago;[8] in the first twelve days of protest, eighteen deaths and 7,000 arrests occurred;[9] and by December, 2,500 individuals suffered injuries.[10]

Perhaps most important of all, however, was the response to the national referendum conceded by then-President Sebastián Piñera to redraft the Pinochet-era constitution.[11] According to the results of the plebiscite,[12] seventy-eight percent of all voters voted in favor of drafting a new constitution that would meet the demands of the protesters, in turn scrapping at that moment a four-decade-old dictatorial framework.[13] The nation at this moment was evidently ready for a transition away from its dark and despotic history of Pinochet, and the government was ready to

[4] Terri Gordon-Zolov, *Chile's* Estallido Social *and the Art of Protest*, 17 Sociologica 41, 42 (2023).
[5] *Id.*
[6] Amanda Taub, *'Chile Woke Up': Dictatorship's Legacy of Inequality Triggers Mass Protests,* N.Y. Times (Nov. 2019), https://www.nytimes.com/2019/11/03/world/americas/chile-protests.html.
[7] *Id.*
[8] *Id.*
[9] Franklin, *supra* note 3.
[10] Brent McDonald, *'It's Mutilation': The Police in Chile Are Blinding Protesters*, N.Y. Times (Nov. 2019), https://www.nytimes.com/2019/11/03/world/americas/chile-protests.html.
[11] McGowan, *supra* note 2.
[12] A plebiscite as defined by the Merriam-Webster is "a vote by which the people of an entire country or district express an opinion for or against a proposal especially on a choice of government or ruler." *See generally* Merriam-Webster Dictionary, *Plebiscite* (last accessed Dec. 2025), https://www.merriam-webster.com/dictionary/plebiscite (providing a general definition of the term).
[13] McGowan, *supra* note 2.

listen. Prior to understanding the true sagacity of Piñera's decision to yield to the protesters' desires of reform, the extent of the Pinochet dictatorship and its emergence must be understood.

III. Chile under Augusto Pinochet (1973–1990)

In November of 1970, much to the chagrin of the Cold War-era United States, Chile swore in Salvador Allende as its President—a self-proclaimed Marxist and a member of the Socialist Party of Chile.[14] Although far from the only reason for the coming coup that would overthrow the democratically elected president, the United States Central Intelligence Agency (CIA) at the time invested effort into preventing an Allende presidency, as was the United States' typical interventionist behavior in many Latin American countries during the Cold War period and beyond.[15] When Allende's presidency proved unavoidable, the new goal for the CIA was to make governing for Allende as difficult as possible to diminish the threat of this perceived enemy who aligned with the likes of American adversaries such as the Soviet Union and Cuba.[16] At this point, Chile was a politically divided nation with multiple failed attempts at insurrection. The final, and successful, military coup occurred on September 11, 1973.[17] Five days after said coup, former Secretary of State Henry Kissinger was quoted as telling President Richard Nixon: "We [the United States] didn't do it. I mean, we helped them. [sic] created the conditions as great as possible."[18] A military junta led the coup, and at the forefront was General Augusto Pinochet.

---

[14] James Doubek, *The U.S. Set the Stage for a Coup in Chile. It Had Unintended Consequences at Home*, Nat'l Pub. Radio (Sept. 2023), https://www.npr.org/2023/09/10/1193755188/chile-coup-50-years-pinochet-kissinger-human-rights-allende.

[15] *Id.* The CIA has orchestrated many foreign interventionist projects in Latin America aimed at regime change. These include but are not limited to its attempt to oust Cuban president Fidel Castro during the Bay of Pigs Invasion, efforts in Ecuador to José María Velasco Ibarra and his predecessor Carlos Julio Arosemena Monroy in the early 1960s, and backing the 1964 Brazilian coup d'état against social democrat João Goulart, among others. *See generally* Thomas E. Skidmore, *Brazil: Five Centuries of Change* (1999) (providing background context on Brazil's military coup); *see also* Samuel Absher et al., *The Consequences of CIA-Sponsored Regime Change in Latin America*, 80 Eur. J. Pol. Econ. 1 (2023) (analyzing various CIA interventionist efforts in Latin America during the Cold War era).

[16] Doubek, *supra* note 14.

[17] *Id.*

[18] *Id.*

La Moneda Palace, Chile's presidential palace, and other major governmental and historical buildings were attacked by airstrikes and seized, prompting President Allende's suicide.[19] What followed was the internment, disappearance, and murder of thousands of citizens by the ruling military junta under Pinochet's reign.[20]

Pinochet's dictatorial rule lasted almost seventeen years in Chile and was fraught with human rights abuses such as the torture and execution of dissidents.[21] Pinochet's reign ended in 1990 when he allowed elections to be held for eight-year terms and subsequently lost reelection by a narrow margin, which began a period of democracy in Chile led by Christian Democrat Patricio Aylwin.[22] However, Aylwin's election did not result in the complete abandonment of the abusive relics of the prior government. Perhaps the strongest evidence of this is the enduring 1980 constitution of Chile, the constitution that called for this election and allegedly brought about democracy.[23]

IV. First Constitutional Convention

Following the overwhelming vote for a constitutional redraft, the first of two constitutional conventions was held in May 2021, with a remarkably diverse legislative body.[24] The chosen Constitutional Convention was entirely made up of elected officials, seventy-eight of whom were men and seventy-seven of whom were women.[25] The Convention also included seventeen reserved seats for Indigenous peoples elected in a parallel ballot, many officials

[19] Jonathan Haslam, *The Nixon Administration and the Death of Allende: A Case of Assisted Suicide* (2005).
[20] Greg Beyer, *Augusto Pinochet's Brutal Rule: A Look Inside His Regime*, The Collector (Oct. 2024), https://www.thecollector.com/augusto-pinochet-rule-regime/.
[21] Gloria Lotha et al., *Augusto Pinochet*, Encyc. Britannica (Sept. 2025), https://www.britannica.com/biography/augusto-pinochet.
[22] *Id.*
[23] McGowan, *supra* note 2.
[24] Marcela Ríos Tobar, *Chile's Constitutional Convention: A Triumph of Inclusion*, U.N. Dev. Programme (June 2021), https://www.undp.org/latin-america/blog/chiles-constitutional-convention-triumph-inclusion. The United Nations Development Programme is a U.N. agency that is responsible for aiding nations in their efforts towards human development, economic growth, and the elimination of poverty.
[25] *Id.*

coming from non-elite socio-economic backgrounds.[26] These demographics are reflective of the voters who pushed for the redraft of the constitution,[27] and this Constitutional Convention marked a significant moment for representative democracy in Chile and internationally, as this institution marked the world's first constitution to achieve gender parity, or equal representation in a state.[28] After the November 2019 plebiscite led by Piñera, the progressive convention naturally focused on rhetoric that was reflective of the political forces that emerged from the *Estallido Social*, such as a strong focus on feminism, Indigenous rights, anti-elitism, and more progressive ideals.[29]

This shift, perhaps unexpectedly so, did not translate to a victory in the new constitutional draft, as the draft lost by twenty-five percent in the polls—critics citing its "Radical Octoberism" as reason for failure.[30] Radical Octoberism as used in this article refers to post-uprising politics that commit themselves to progressive and left-leaning policies and reforms, and it was a term used by opponents to many of the progressive facets of a new Chilean constitution at the time and a product of the *Estallido Social*.[31] Out of the 155 elected members of the Constitutional Convention, 103 had no prior political affiliation, and they represented a collective that lent itself toward this progressive agenda that would be referred to by the right-leaning opposition as Radical Octoberism, as they had hoped for the new constitution to prove a return to pre-uprising politics.[32]

It is also important to note that during the constitutional redrafting, there was a change in the federal administration of Chile.[33] Leftist candidate Gabriel Boric won the popular vote in

[26] *Id.*
[27] *Id.*
[28] McGowan, *supra* note 2.
[29] Gonzalo Larrain et al., *How Not to Write a Constitution: Lessons from Chile*, 194 Pub. Choice 233 (2023).
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*

December 2021, representing a further commitment of Chilean citizens towards a progressive nation in the image of the *Estallido Social* and a more staunch rejection of Pinochet-era politics.[34] The election of Boric is representative of the continuation of the so-called "Pink Tide" political phenomenon that swept across Latin America in the 1990s and 2000s, during which various nation-states across Latin Americans turned towards left-wing governments.[35] As Piñera left office, he urged Boric to act as the "President for all Chileans," alluding to the political polarization of the country, something that seems to have plagued Chilean politics since before the Pinochet regime.[36] Boric was a prominent and vocal supporter of the new constitutional draft, and therefore, its failure served as a significant political blow to his administration and its aspirations.[37]

Considering that the desire for a new constitution was a sentiment with such vehement bipartisan support, its rejection might seem unexpected. However, as the year-long drafting process proceeded, polling data began to suggest that voters were unlikely to accept the new draft.[38] Ultimately, the new draft was viewed as "too progressive" and overreaching in its goals towards a more progressive Chile.[39] Political analyst Kenneth Bunker also points out that many issues with the given draft of the constitution were less about the content and more about the drafting process itself, harkening back to the fact that the Constitutional Convention—although demographically diverse—was not representative of a large population of Chileans, as it was

[34] Katy Watson, *Leftist Gabriel Boric to Become Chile's Youngest Ever President*, BBC (Dec. 2021), https://www.bbc.com/news/world-latin-america-59715941.
[35] Daniel Lansberg-Rodríguez, *Life After Populism? Reforms in the Wake of the Receding Pink Tide*, 17 Geo. J. Int'l Aff. 56 (2016).
[36] *Id.*
[37] Eloise Barry, *Why Chileans Rejected a New, Progressive Constitution*, Time Mag. (Sept. 2022), https://time.com/6210924/chile-rejects-new-constitution-referendum/.
[38] *Id.*
[39] *Id.*

almost completely devoid of conservative voices in Chile, particularly conservative Indigenous voices within the nation, which comprise a numerically significant population.[40]

V. Second Constitutional Convention

Evidently, the nation's first attempt at a new constitution for Chile was not successful, but not entirely futile—citizens, as well as the Boric administration, were still committed to the initial goal of a new constitution for Chile.[41] Taking into account quite a significant disparity between those in favor of and opposed to the past constitutional draft, the strategy during the second constitutional convention in Chile differed greatly from the first attempt.[42]

When reaffirming his commitment to the cause of redrafting the Chilean constitution, Gabriel Boric told his constituents: "We have all learned that Chile will not be rebuilt overnight, Chile does not start from scratch."[43] The second attempt at this feat was indicative of the Boric administration's intention to act as a president for all Chileans, which echoed the sentiments of Piñera.[44] In contrast with the previous constitutional convention, the new framework consisted of two major bodies: the Expert Commission and the Constitutional Council, both of which would work together in creating a new constitutional draft that would be voted on by Chilean citizens.[45] The *Comisión Experta*, or Expert Commission, is composed of twenty-four congressionally appointed members and thus responsible for the preliminary draft of the constitution.[46] The responsibility of the Expert Commission was to create the preliminary draft of the constitution,

[40] Barry, *supra* note 37.
[41] Watson, *supra* note 34.
[42] Sebastián Soto, *Two Drafts, Three Referendums, and Four Lessons for Constitution-Making from Chile*, ConstitutionNet (Dec. 2023), https://constitutionnet.org/news/voices/two-drafts-three-referendums-and-four-lessons-constitution-making-chile.
[43] Franco Acchiardo, *Second Time's a Charm? A New Constitutional Process Ensues Again in Chile*, Clyde & Co. (July 2023), https://www.clydeco.com/en/insights/2023/07/second-time-s-a-charm-a-new-constitutional-process.
[44] Watson, *supra* note 34.
[45] Acchiardo, *supra* note 43.
[46] *Id.*

which differed greatly from the previous draft in many respects.[47] In particular, the Commission's draft on issues such as those that follow signified an ideological shift from the previous draft: "the coordination of the public and private sector; the structure of certain political institutions; the relationship between the President and Congress; the status of Indigenous peoples; the catalogue of guaranteed rights; and the regulation of gender parity."[48] This shift can be attributed to the makeup of the Expert Commission, which was cited to be far more right leaning than the previous constitutional convention.[49] The draft, in turn, was far more conservative than the first, particularly in establishing a lower gender parity in future legislative and governmental bodies within Chile, among its other priorities.[50]

After the vote occurred on the new conservative draft of the constitution, the draft was rejected with a 44.2% approval rate and a subsequent 55.8% disapproval rate.[51] After this second failure, Boric asserted after this Constitutional Convention that his administration was going to postpone discussions of a new constitution until at least 2025 and focus on current policy initiatives in Chile.[52] Now, the question remains: What is next for Chile?

VI. Future Outlooks

Javier Cuoso, law professor and legal expert at the Universidad Diego Portales in Santiago, posited that Chile will exist in a state of "frozen politics" and political gridlock until a new constitution is introduced.[53] The current constitution, as it stands, will prove to divide further rather than protect or govern the nation. A new constitution is imperative to a true

[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] Associated Press, *Chileans Reject Conservative Constitution to Replace Dictatorship-Era Charter*, Nat'l Pub. Radio (Dec. 2023), https://www.npr.org/2023/12/18/1219953871/chile-reject-constitution.
[51] *Id.*
[52] Maziar Motamedi, *Why Chileans Rejected Conservative Constitution, and What's Next?*, Al Jazeera (Dec. 2023), https://www.aljazeera.com/news/2023/12/18/why-chileans-rejected-conservative-constitution-and-whats-next.
[53] Javier Cuoso, *Trying Democracy in the Shadow of an Authoritarian Legality: Chile's Transition to Democracy and Pinochet's Constitution of 1980*, 29 Wis. Int'l L. J. 392, 415 (2012).

transition to democracy for Chile.[54] Conversely, others believe that Chile is not in the correct political moment to execute a new constitutional draft.[55] Journalist Boriv van der Spek postulates that the only way a new constitutional draft will come about promptly is another social uprising, reminiscent of the action that was prompted after the 2019 *Estallido Social*.[56] Otherwise, he argues, Chileans can expect to exist with the current divisive constitution that is not conducive to democracy.[57] What will come next for Chileans in their constitutional journey is quite difficult to anticipate. Data from a 2024 poll, five years removed from what might be considered the critical juncture of this saga, suggested that only seventeen percent of Chileans approved of the *Estallido Social* while over half of Chileans polled believed that it actively hurt the current state of the nation.[58] The desire for legal and political change still remains amongst many Chileans, but the fervor with which a large population of constituents wanted a more progressive Chile has greatly dissipated since.[59]

The future of Chile will be incumbent upon the next president, whose election will be held in November 2025.[60] Boric is ineligible to run again due to Chile's electoral law,[61] and he will be leaving behind an administration of broken promises—particularly his goal to be the harbinger of a new Chilean constitution.[62] The two frontrunners of the 2025 election could not exist on further opposite ends of the political spectrum in terms of their goals for Chile. The

[54] *Id.*
[55] Motamedi, *supra* note 52.
[56] *Id.*
[57] *Id.*
[58] John Bartlett, *5 Years After Massive Protests in Chile, What's Left of the Desire for Change?*, All Things Considered, at 4:10 (Oct. 2024), https://www.npr.org/2024/10/20/nx-s1-5158398/5-years-after-massive-protests-in-chile-whats-left-of-the-desire-for-change.
[59] *Id.*
[60] Please note that this article was written prior to the election of November 2025, and thus, an analysis of its results falls beyond the scope of this article.
[61] Constitución Política de la República de Chile [Constitution] 1980, art. 28. The Chilean Constitution has been translated into English in *World Constitutions Illustrated* (HeinOnline, Jefri Jay Ruchti ed., Anna I. Vellvé Torras et al. trans., 2010).
[62] *Id.*

current favorite among many polling predictions has Jeannette Jara, a member of the Communist Party of Chile, winning by a slight margin over José Antonio Kast, a member of the Republican Party of Chile who narrowly lost to Gabriel Boric in the last election cycle.[63] As can be gathered purely from the oppositional political leanings of either candidate, future iterations of a constitutional draft in Chile or even the mere pursuit of one are largely unpredictable.

VII. Conclusion

Regardless of political ideology, the replacement of Chile's current, dictatorial constitution is an indispensable step toward democracy for the nation. Chileans are entitled to a just constitution now, not ten years from now, and they should not have to wait around for a lengthy social upheaval to occur.[64] It may be most effective for Chileans to pursue a "goldilocks" approach for a constitution that avoids provisions that lean too far in one political direction. In this scenario, compromise without the sacrifice of basic rights and freedoms is the key to escaping the current status quo of "frozen politics."[65] While the political past of Chile might be dark, there is hope for its political future. However, as long as the governing document of the nation is a relic from Pinochet's corruption, authoritarianism, and violence, the country will still exist in the shadow of this bygone dictator.

[63] Jose Sanchez, *Polls on the Presidential Election in Chile as of October 2025, by Candidate*, Statista (Oct. 2025), https://www.statista.com/statistics/1551312/chile-election-poll-candidate/?srsltid=AfmBOopugoC2rtjU7mJjibDswBdpae9ohPsKnQmAvTBH9GYUOsaB9HfE.
[64] *But see* Motamedi, *supra* note 52.
[65] Cuoso, *supra* note 53.

Unaccompanied and Unprotected: The Case for Legal Counsel for Children in U.S. Immigration Courts

Written by: Isabella Brown

Article Editor: Sarah Bhalla

Associate Editor: Elizabeth Cortina

Abstract:

This article contends that denying government-funded counsel to unaccompanied minors violates the U.S. Constitution's guarantee of due process and undermines both statutory and moral commitments to protect vulnerable children. The argument proceeds in six parts. Section I defines the legal and demographic profile of unaccompanied minors, situating their vulnerability within broader patterns of violence and forced migration. Section II examines the complexity of the U.S. immigration system and the impossibility of self-representation by children. Sections III and IV assess the psychological toll of unrepresented proceedings and the inadequacy of statutory protections such as the Flores Agreement and the Trafficking Victims Protection Reauthorization Act (TVPRA), demonstrating that these measures remain ineffective without guaranteed counsel. Section V turns to constitutional foundations, arguing that due process under the Fifth and Fourteenth Amendments, as interpreted through U.S. Supreme Court precedent, requires appointed representation where liberty and safety are at stake. Finally, Section VI situates this issue within a broader global context, demonstrating that similar wealthy democracies recognize the right to counsel and guardianship for unaccompanied migrant children.

I. Introduction

Unaccompanied immigrant children arrive in the United States without their parents, often after fleeing violence, coercion, and extreme deprivation in their native countries.[1] For these children, the presence or absence of an attorney upon arrival is often determinative of their future in the country.[2] Representation increases their likelihood of remaining lawfully in the United States from roughly 15% to 73%, while unrepresented children are seven times more likely to be deported.[3] In many cases, legal counsel is the difference between safety and a return to life-threatening harm.

Unlike similar developed, wealthy democracies in the West, the United States provides no government-funded counsel to child respondents in removal proceedings.[4] The result is a system that is not only cruel but structurally unjust. Children must navigate one of the nation's most complex bodies of law, immigration, without English proficiency, legal knowledge, or the developmental capacity to self-advocate, and often represent themselves in court against highly trained government attorneys.[5] Globally, children comprise 40% of forcibly displaced people, and therefore immigration systems function, in substantial part, as systems for children.[6] Yet in the United States, these proceedings treat minors as if they were capable adult litigants, thereby denying them due process.[7]

The United States' refusal to provide free legal counsel to unaccompanied migrant children creates an unjust and unnecessarily traumatic system that fails to protect one of the most

[1] William A. Kandel, Cong. Rsch. Serv., R43599, *Unaccompanied Alien Children: An Overview* (2024).
[2] Alyssa Snider & Rebecca DiBennardo, Vera Inst. Just., *Representation Matters: No Child Should Appear in Immigration Proceedings Alone* 2 (2021).
[3] Transactional Recs. Access Clearinghouse, *Representation for Unaccompanied Children in Immigration Court* (2014), https://tracreports.org/immigration/reports/371/.
[4] Vanessa Sedletzki, U.N. Children's Fund, *Provision of Legal Aid to Children on the Move in Europe* 13 (2019).
[5] Snider & DiBennardo, *supra* note 2.
[6] U.N. High Comm'r Refugees, *Global Trends: Forced Displacement in 2024* 3 (2024).
[7] Snider & DiBennardo, *supra* note 2.

vulnerable populations—children—despite clear constitutional protections and legal precedent, international consensus, and demonstrable capacity for reform. Recognizing a right to counsel would not only address this inconsistency but also give meaning to existing statutory protections, reduce procedural error, and align American immigration practice with the rule of law it professes to uphold.

II. The Vulnerability and Demographic Profile of Unaccompanied Minors

An "unaccompanied alien child" is defined under 6 U.S.C. Section 279 as a person under eighteen years of age who has no lawful immigration status in the United States and no parent or legal guardian in the country able to provide care and physical custody.[8] This category represents one of the world's most vulnerable populations, who often view the dangerous journey north as their only escape from violence, abuse, and extreme poverty.[9] From 2009 to 2023, nearly 800,000 unaccompanied minors have been apprehended at the border between the U.S. and Mexico.[10] Their arrival patterns, ages, and experiences reveal a demographic marked by extreme precarity.[11] The average unaccompanied child crossing the border is only eleven years old, and officials report that many run towards border agents seeking protection rather than attempting to evade apprehension.[12]

These children are overwhelmingly from the "Northern Triangle" (El Salvador, Guatemala, and Honduras), a region characterized by sociopolitical unrest and violence.[13] Gang

[8] 6 U.S.C. § 279 (2018).
[9] Snider & DiBennardo, *supra* note 2.
[10] Chiara Galli & Tatiana Padilla, *New Data on Unaccompanied Minors in U.S. Immigration Court (2009–2023)*, Int'l Migr. Rev. 1 (2025).
[11] Snider & DiBennardo, *supra* note 2, at 3.
[12] Nat'l Conf. St. Legs., *Child Migrants to the United States* (Oct. 2014), https://kidsempowerment.org/wp-content/uploads/2022/07/child-migrants-to-the-united-states-2014.pdf [https://perma.cc/X9DG-3TP9]; Susan Terrio, *Dispelling the Myths: Unaccompanied, Undocumented Minors in U.S. Immigration Custody*, 31 Anthropol. Today 15 (2015).
[13] Rebecca Becker Herbst et al., *"They Were Going to Kill Me": Resilience in Unaccompanied Immigrant Minors*, 46 Couns. Psychol. 241 (2018).

violence, state corruption, domestic and sexual abuse, and extreme poverty and hunger are the primary agents that drive flight, forcing many to choose migration as their only means of survival.[14] A forensic medical study of asylum-seeking minors found that 78% experienced direct physical violence, 71% received death threats, 24% experienced forced gang recruitment, and 18% suffered sexual violence.[15] For over half of these children, the violence experienced was within their own family.[16] These are the depths of desperation that drive migration, forcing children to risk dehydration, trafficking, and death to reach perceived safety in the U.S.[17] In fact, the threat of sexual assault is so common that many young girls procure birth control injections before departure.[18]

Given these realities, it's sadly unsurprising that unaccompanied minors are at an elevated risk for post-traumatic stress disorder (PTSD), depression, anxiety, and other mental illnesses, which are further compounded by acculturative stress, ethnic and racial discrimination, and isolation once in the United States.[19] A convenience sample of unaccompanied migrant youth revealed roughly 60% met criteria for PTSD, 30% for depressive disorders, and 30% reported suicidal ideation in the past year.[20] These children are, in every sense, refugees with legitimate claims for asylum or Special Immigrant Juvenile Status.[21] Yet, many are denied these protections simply because they cannot afford legal representation, resulting in deportation, potentially back to life-threatening conditions in their home country. Expecting children to self

[14] *Id.* at 242.
[15] Chiara Galli, *Central American Youths Escape from Violence*, in *Precarious Protections: Unaccompanied Minors Seeking Asylum in the United States* 36–67 (2023).
[16] *Id.* at 42.
[17] Herbst et al., *supra* note 13.
[18] Terrio, *supra* note 12.
[19] Herbst et al., *supra* note 13.
[20] Jodi Berger Cardoso et al., *Integration of Unaccompanied Migrant Youth in the United States: A Call for Research*, 45 J. Ethnic & Migration Stud. 273 (2019).
[21] U.S. Citizenship & Immigr. Servs., *Special Immigrant Juvenile Status*, USCIS Glossary (last accessed Dec. 2025), https://www.uscis.gov/glossary-term/79402.

litigate in a complex legal system, often while reliving traumatic experiences, is not only unrealistic but fundamentally unjust. Their trauma heightens communication barriers and inhibits their ability to recall or explain the events that form the basis of their legal claims.[22] The presence of an attorney is therefore indispensable to elicit sensitive facts safely and accurately. Minors represented by counsel are far more likely to pursue viable claims and prevail in their cases, as attorneys can effectively frame their experiences within the legal standards governing relief.[23]

Moreover, approximately 90% of unaccompanied minors have relatives in the United States, but prolonged detention and bureaucratic delay often keep these children separated from their families for months or even years.[24] Appointing attorneys for all unaccompanied minors would accelerate family reunification and ensure that children are placed in safe, appropriate family settings rather than remaining in government custody. The circumstances that compel a child to travel alone to a foreign country, with no guarantee of asylum, are almost always extreme. Recognizing this reality demands more than sympathy; it requires a legal system that reflects the vulnerability of these children through guaranteed access to counsel.

III. The Complexity of Immigration Law

Few areas of the law in the United States are as complex as immigration law, which was once described by Judge Cabranes in *Drax v. Reno* (2003) as a "labyrinthine" and by Judge Reinhardt in *Castro-O'Ryan v. INS* (1987) as "second only to the Internal Revenue Code in complexity."[25] In *Padilla v. Kentucky* (2010), the Supreme Court held that criminal defense attorneys must consult immigration experts when advising clients because the field is too

[22] Shayla Chilliak et al., *Interviewing Asylum-Seeking Children: A Scoping Review of Research to Inform Best Practices*, 25 Trauma, Violence & Abuse 3680 (2024).
[23] Snider & DiBennardo, *supra* note 2, at 3.
[24] Herbst et al., *supra* note 13.
[25] Drax v. Reno, 338 F.3d 98, 99 (2d Cir. 2003); Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1987).

specialized for a general practitioner to navigate.[26] It is therefore indefensible that our legal system expects children, often without English proficiency or a formal education, to comprehend and defend themselves in proceedings that even experienced attorneys find challenging.

The structure of immigration adjudications compounds this complexity. Immigration hearings are adversarial proceedings overseen not by independent courts but by the Executive Office for Immigration Review (EOIR), an administrative body within the Department of Justice (DOJ).[27] Children often stand alone against trained attorneys from the Department of Homeland Security (DHS), even if they are toddlers.[28] No binding "child-friendly" procedures exist in immigration court, and children's cases are essentially treated like those of adults.[29]

These barriers extend beyond linguistic design and also include educational disparities. Only about 1% of unaccompanied minors are proficient in English, and a significant minority speak only indigenous languages for which interpreters are scarce.[30] Although more than two-thirds of unaccompanied migrant children speak only Spanish, most immigration judges have little proficiency in the language, which forces the system to depend heavily on interpreters.[31] These interpreters may omit consequential portions of testimony, as legal terminology is rarely reinterpreted in child appropriate language, and proceedings sometimes continue with faulty or completely absent interpretation.[32] Over half of unaccompanied minors have only an elementary-level education, leaving them ill-equipped to understand the system

[26] Johan Fatemi, *A Constitutional Case for Appointed Counsel in Immigration Proceedings: Revisiting Franco-Gonzalez*, 90 St. John's L. Rev. 915 (2016); Padilla v. Commonwealth of Kentucky, 559 U.S. 356 (2010).
[27] Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 Harv. J. on Legis. 331 (2013).
[28] Jennifer Huynh, *La Charla: Documenting the Experience of Unaccompanied Minors in Immigration Court*, 47 J. Ethnic & Migration Stud. 616 (2021).
[29] Chiara Galli, *Lawyering with Unaccompanied Minors: Helping Youths Apply for Asylum and Protections for Abandoned, Abused, or Neglected Children*, in *Precarious Protections: Unaccompanied Minors Seeking Asylum in the United States* 131, 140 (2023).
[30] Galli & Padilla, *supra* note 10; Huynh, *supra* note 28.
[31] Herbst et al., *supra* note 13; Huynh, *supra* note 28.
[32] Huynh, *supra* note 28.

deciding their fate.[33] Researcher Jennifer Huynh observed a child ask, "Who is that lady?" when the judge entered, and another responded, "She is the mother of our cases."[34] Likewise, in her study of the Los Angeles juvenile docket, Chiara Gallo noted that none of the children awaiting hearings could define "removal proceedings" when asked.[35] Such naive confusion underscores the impossibility of meaningful participation without age appropriate and qualified counsel.

The institutional maze of overlapping federal agencies further frustrates due process. Federal immigration authority is fragmented among the Department of Homeland Security, Health and Human Services, the Office of Refugee Resettlement, U.S. Customs and Border Patrol, and immigration courts, each governed by separate mandates and statutes.[36] Even lawmakers have expressed open disagreement about overlapping authority in recent years.[37] Navigating relief options is equally difficult as unaccompanied minors must decipher between the terms asylum, Special Immigrant Juvenile Status (SIJIS), U-visas, and T-visas, each with its own distinct evidentiary and procedural requirements.[38] Lawyers often pursue multiple forms of immigration relief for their client, therefore maximizing the likelihood of obtaining lawful status. Unrepresented minors, however, are frequently penalized due to bureaucratic timing that is no fault of their own, such as delays in Office of Refugee Resettlement (ORR) custody or because they have turned eighteen before their filing deadline.[39]

[33] Herbst et al., *supra* note 13.
[34] Huynh, *supra* note 28.
[35] Chiara Galli, *Access to Legal Representation: Representing Eligible Youths or Choosing the "Compelling" Case*, in *Precarious Protections: Unaccompanied Minors Seeking Asylum in the United States* 100, 100–01 (2023).
[36] *DHS Actions to Address Unaccompanied Minors at the Southern Border: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affs.*, 117th Cong. 6–12 (2021) (testimony of Alejandro N. Mayorkas, Secretary of Homeland Security) [hereinafter Mayorkas].
[37] *Id.*
[38] *DHS Actions to Address Unaccompanied Minors at the Southern Border: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affs.,* 117th Cong. 65–74 (2021) (statement of Kids in Need of Defense) [hereinafter KIND].
[39] Galli, *supra* note 35.

Expedited removal deepens systemic challenges by allowing DHS to deport children without a full hearing.[40] Along the Southwest border, "rocket dockets" push cases through with little or no notice, resulting in removal orders issued in *absentia*, which is when the child fails to appear.[41] Because U.S. law distinguishes between contiguous countries that share a border with the U.S. and noncontiguous countries that do not, many Mexican children are repatriated after brief interviews without ever seeing a judge or lawyer, effectively bypassing due process.[42] Children are frequently coerced into signing English language "self-deportation" documents they do not understand, sometimes even under threat of rape, jail, or family separation.[43]

Unaccompanied minors also face fraud from *notarios*, or unlicensed individuals who charge thousands for false legal services, usually leading to lost cases.[44] Sponsors, who are frequently undocumented or elderly, are unable to navigate court procedures or risk attending a hearing themselves.[45] Meanwhile, evolving case law and policy changes have made the system increasingly unstable, particularly amid presidential transitions. Under the Trump administration, reforms focused on exclusion were introduced at a rapid pace, heightening uncertainty of legal outcomes.[46] In this increasingly complex system, the absence of counsel is not merely a procedural oversight but a substantive denial of justice. Appointed legal representation is the only safeguard capable of translating this labyrinthine system into enforceable rights and ensuring that children's fates are decided by law rather than confusion, coercion, or chance.

IV. Re-Traumatization: The Psychological Costs of Unrepresented Proceedings

[40] U. Chi. Int'l Hum. Rts. Clinic, *Neglect and Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection* (2018).
[41] Huynh, *supra* note 28.
[42] Kandel, *supra* note 1, at 6; U. Chi. Int'l Hum. Rts. Clinic, *supra* note 40.
[43] U. Chi. Int'l Hum. Rts. Clinic, *supra* note 40.
[44] Galli, *supra* note 35.
[45] *Id.*; Galli, *supra* note 15.
[46] Galli, *supra* note 29.

The U.S. immigration system's approach to screening, detention, and adjudication of unaccompanied minors compounds the trauma they have already endured. Youths enter a system that prioritizes control over recovery.[47] Deprived of legal representation, they face unnecessary additional trauma in an already intense process marked by fear and confusion. There is no minimum age for appearing alone in immigration court—even infants and toddlers can receive notices to appear.[48] One immigration judge even boasted that he "taught immigration law" to three- and four-year-olds.[49] Unfortunately, the representation rate for children under age four is only 34.3%, leaving most to navigate these proceedings entirely alone.[50] Inside these courtrooms, the atmosphere is often crowded, chaotic, and impersonal. Some judges hear four cases at once, spending as little as three minutes on each.[51] Many children, too frightened or confused to speak, simply nod in response to questions they cannot understand.[52] Physical signs of anxiety and fear amongst children are pervasive in the courtroom, and many exhibit signs of shaking, wringing hands, and crying.[53]

Even the former Secretary of the DHS admitted that a Border Patrol station is "no place for a child."[54] Although mandates require that unaccompanied minors be placed in settings oriented toward child welfare, they are routinely detained in facilities run by law enforcement, which the children themselves describe as "fancy prisons."[55] It is within these detention facilities that abuse and policy violations run rampant. Reports show that 80% of unaccompanied minors

[47] Herbst et al., *supra* note 13.
[48] Huynh, *supra* note 28.
[49] *Unaccompanied Migrant Children: Social, Legal, and Ethical Perspectives* (Molly Greening & Hille Haker eds., 2021).
[50] Galli & Padilla, *supra* note 10.
[51] Huynh, *supra* note 28.
[52] Fernando Santos, *It's Children Against Federal Lawyers*, N.Y. Times (Aug. 2016), https://www.nytimes.com/2016/08/21/us/in-immigration-court-children-must-serve-as-their-own-lawyers.html.
[53] *Id.*
[54] Mayorkas, *supra* note 36.
[55] KIND, *supra* note 38; Galli, *supra* note 35.

lacked adequate food and water while in custody, 50% were denied medical care, 50% experienced verbal abuse, and 25% experienced physical abuse.[56] Some children described being tased while not resisting, as well as being threatened with death, kicked, or sexually assaulted.[57] Others slept for days on concrete floors in deliberately cold cells.[58] Detention is often prolonged due to bureaucratic inefficiency and the absence of legal counsel, with the average stay in Office of Refugee Resettlement custody lasting nearly two years.[59] During this time, minors experience limited access to education, healthcare, and familial reunification.[60] They are rarely advised on legal strategy or rights, and without representation, they cannot meaningfully advocate for release or relief.[61] Counsel is uniquely positioned to ensure that a child's best interests are protected in immigration proceedings. Attorneys are often able to secure release from custody, expedite adjudications, and ensure that due process is observed.[62] In contrast, children without representation are far more likely to languish in detention, miss critical deadlines, or accept removal from the United States.

Not to mention, unaccompanied minors are in a sensitive phase of cognitive and emotional development.[63] Scholars note that asylum procedures "diametrically oppose" trauma-informed principles, forcing children to repeatedly recount painful events.[64] Psychological studies show that the mental health of unaccompanied minors is directly tied to the

[56] U. Chi. Int'l Hum. Rts. Clinic, *supra* note 40.
[57] Herbst et al., *supra* note 13.
[58] U. Chi. Int'l Hum. Rts. Clinic, *supra* note 40.
[59] Herbst et al., *supra* note 13; Janna Ataiants et al., *Unaccompanied Children at the United States Border: A Human Rights Crisis That Can Be Addressed with Policy Change*, 20 J. Immigrant & Minority Health 1000 (2018).
[60] Herbst et al., *supra* note 13.
[61] Chiara Galli, *Enter the Bureaucratic Maze: The Legal Socialization of Unaccompanied Minors Begins* in *Precarious Protections: Unaccompanied Minors Seeking Asylum in the United States* 68 (2023).
[62] Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 Harv. C.R.-C.L. L. Rev. 247 (2010).
[63] *Unaccompanied Minors in International, European and National Law* (Ralf Roßkopf ed., 2016).
[64] *Id.*

trauma they experience upon arrival in the country of refuge.[65] This trauma undermines their ability to participate in proceedings or self advocate. Experts broadly agree that unaccompanied minors require trauma-informed legal services and mental health care.[66] Counsel reduces the length and uncertainty of proceedings, increases access to services, and helps avoid circumstances in which their trauma can be triggered in court.

V. The Limits of Statutory Protections

In response to systemic injustices, over the past several decades, the U.S. has enacted some policies to improve the treatment and legal protections of unaccompanied minors in government custody. The *Flores* Agreement established minimum standards of care by mandating safe and sanctuary conditions as well as release to the "least restrictive" setting.[67] The Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 directed the government to provide legal representation "to the greatest extent practicable" and appoint child advocates for especially vulnerable minors.[68] Despite these measures, implementation has been inconsistent and largely dependent on geography, nonprofit capacity, and agency discretion.[69] Reports continue to reveal instances of prolonged detention, unsafe conditions, and failures to report abuse, demonstrating that these statutory protections remain ineffective without guaranteed legal representation.[70]

Nonprofit legal aid organizations are often the only means by which unaccompanied minors can access counsel; however, they are chronically overextended and underfunded. Attorneys for these organizations routinely handle forty to seventy cases at a time, sometimes

[65] Claire Nolasco Braaten & Daniel Braaten, *Suffer the Little Children to Come: The Legal Rights of Unaccompanied Alien Children Under United States Federal Court Jurisprudence*, 31 Int'l J. Refugee L. 55 (2019).
[66] Herbst et al., *supra* note 13.
[67] Flores v. Barr, 407 F. Supp. 3d 909 (C.D. Cal. 2019).
[68] *Id.*; Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. § 1232 (2018).
[69] *Unaccompanied Migrant Children*, *supra* note 49.
[70] Galli & Padilla, *supra* note 10.

even more.[71] Paralegals instruct unaccompanied minors to contact a different attorney each day in the hope of securing counsel, yet most legal aid organizations do not even offer a waitlist.[72] Even when unaccompanied minors secure representation, attorneys often meet them only minutes before court and communicate solely in English, leaving the child with limited understanding.[73] These factors contribute to the unfairness of the overall system, as some children receive pro bono assistance over others for no good reason. Moreover, because attorneys often take only "safe" or clearly winnable cases, the asylum system remains narrow and unchallenged.[74] Guaranteeing counsel for all unaccompanied minors would diversify case types and expand the scope of humanitarian eligibility.

There is simultaneously a complete absence of accountability and compliance with existing safeguard laws in the immigration system. Oversight bodies such as the Office of Inspector General (OIG) and the Office for Civil Rights and Civil Liberties (CRCL) were found to have failed to investigate or enforce abuse complaints and to lack a uniform reporting system.[75] In addition, the CRCL and OIG can only issue recommendations and cannot discipline agents or provide remedies to victims.[76] Federal investigations have shown that the Department of Health and Human Services (HHS) repeatedly released unaccompanied minors to unsafe sponsors without proper background checks, which led to recorded instances of trafficking and exploitation.[77] These failures underscore the need for legal advocates to safeguard children from wrongful or dangerous placements.

[71] Galli, *supra* note 29.
[72] Galli, *supra* note 35.
[73] Huynh, *supra* note 28.
[74] Galli, *supra* note 35.
[75] U. Chi. Int'l Hum. Rts. Clinic, *supra* note 40.
[76] *Id.*
[77] U.S. Dep't of Homeland Sec., Office of the Inspector Gen., OIG-25-21, *ICE Cannot Effectively Monitor the Location and Status of All Unaccompanied Alien Children After Federal Custody* 4 (2025).

Representation dramatically alters immigration outcomes amongst unaccompanied minors: 90% of unrepresented children are deported compared to only 18% for those with counsel.[78] Only half of unaccompanied minors were represented by an attorney at any time during their removal proceedings, a figure that continues to decline despite increased federal investment in legal aid.[79] Counsel not only protects due process but also improves system efficacy by reducing detention lengths, increasing appearance rates, and preventing filing errors.[80] Without legal counsel, unaccompanied minors remain vulnerable to system failure with no meaningful mechanism to hold the government accountable.

VI. Constitutional Foundations of the Right to Counsel for Unaccompanied Minors

The Sixth Amendment of the U.S. Constitution guarantees a right to counsel in criminal prosecutions, but unaccompanied immigrant children are denied the same right because removal proceedings are considered civil cases.[81] Nonetheless, the U.S. Supreme Court has long recognized exceptions where the absence of counsel renders a proceeding fundamentally unfair. In *Powell v. Alabama* (1932), the Court held that a denial of counsel is a denial of due process in any proceeding, even regarding civil matters.[82] However, the explicit constitutional basis for minors' right to counsel lies not in the Sixth Amendment but in the Fifth and Fourteenth Amendments, which guarantee due process to all "persons."[83] The Constitution explicitly distinguishes between citizens and noncitizens only in certain provisions, implying that all other rights in the document were written without citizenship restriction.[84] In *Zadvydas v. Davis*

[78] *Unaccompanied Migrant Children*, *supra* note 49.
[79] Galli & Padilla, *supra* note 10.
[80] *Unaccompanied Migrant Children*, *supra* note 49.
[81] Fatemi, *supra* note 26.
[82] Powell v. Alabama, 287 U.S. 45 (1932).
[83] U.S. Const. amends. V, XIV.
[84] Shani M. King & Nicole Silvestri Hall, *Unaccompanied Minors, Statutory Interpretation, and Due Process*, 108 Calif. L. Rev. 1 (2020).

(2001), the Court explicitly affirmed that the due process clause includes noncitizens.[85] The lack of legal representation for unaccompanied minor immigrants denies them of their constitutional right to due process.

Moreover, the Supreme Court has repeatedly acknowledged the grave consequences of deportation, recognizing it as a deprivation of liberty akin to criminal punishment. In *Bridges v. Wixon* (1945), the Court held that deportation may cause harm "as great if not greater than a criminal sentence."[86] Although there is limited data on long-term physical and mental well-being amongst minor deportees post-deportation, a Human Rights Watch report documented 138 cases of Salvadorans, including unaccompanied minors, who were killed after the U.S. government deported them.[87] This is further proof that although deportation is technically a civil proceeding, it has the same manner and consequences as a criminal one.

The right to counsel originates in the landmark 1963 Supreme Court case *Gideon v. Wainwright* and was extended to children in quasi-criminal cases through *In re Gault* (1967).[88] Similarly to the case of unaccompanied minors, the Court recognized in *In re Gault* that a child's age and vulnerability demand special protections.[89] The Court reaffirmed this sentiment in *Lassiter v. Department of Social Services* (1981), applying the *Mathews v. Eldridge* (1976) balancing test, which weighs the private interest, the government's interest, and the risk of erroneous deprivation (i.e., the likelihood that the individual will be wrongly denied a protected interest), in assessing whether due process mandates appointed counsel.[90] In immigration proceedings, where the stakes involve potential persecution or death abroad and the process is

[85] Zadvydas v. Davis, 533 U.S. 678 (2001).
[86] Bridges v. Wixon, 326 U.S. 135 (1945).
[87] Chiara Galli, *Exclusion and Protection in U.S. Immigration Law and Policy*, in *Precarious Protections: Unaccompanied Minors Seeking Asylum in the United States* 1, 33 (2023).
[88] Gideon v. Wainwright, 372 U.S. 335 (1963); *In re* Gault, 387 U.S. 1 (1967).
[89] King & Hall, *supra* note 84.
[90] Lassiter v. Department of Social Services, 452 U.S. 18 (1981).

exceedingly complex, the *Mathews* factors weigh heavily in favor of appointed counsel.[91] In addition, *Turner v. Rogers* (2011) held there is no categorical right to counsel in all civil cases, but limited that holding to simple disputes where both sides are unrepresented.[92] However, immigration law is the exact opposite. Indeed, the U.S. Court of Appeals for the Sixth Circuit acknowledged in *Aguilera-Enriquez v. INS* (1975) that "fundamental fairness" would be violated if an immigrant unable to self-represent was denied counsel at the government's expense.[93] The asymmetry in legal fluency and life-altering stakes of removal proceedings for unaccompanied minors heightens the risk of erroneous deprivation, far outweighing any cost concerns on the part of the government.

A similar line of reasoning extends to cases that involve mental incapacity, disability, or diminished intellectual competency in defendants, regardless of their age. In *Wade v. Mayo* (1948), the Supreme Court recognized that the vulnerability of certain defendants due to their age or mental capacity could compel heightened due process protections like appointed counsel.[94] In the ongoing class action lawsuit *Franco-Gonzalez v. Holder*, a federal district court required that the U.S. government appoint representatives for mentally disabled immigrants, recognizing that such individuals cannot meaningfully participate without counsel.[95] In *dicta*, the Court rejected the argument that immigration laws forbid appointed counsel as a means of ensuring fairness, noting that its reasoning could extend to other vulnerable populations.[96]

Perhaps most influential to the scope of this article, however, was the decision brought by *J.E.F.M. v. Lynch* (2016). *Lynch* was a class action lawsuit filed on behalf of all current and

[91] Mathews v. Eldridge, 424 U.S. 319 (1976).
[92] Turner v. Rogers, 564 U.S. 431 (2011).
[93] United States v. Aguilera-Enriquez, 516 F.2d 565 (6th Cir. 1975).
[94] Wade v. Mayo, 334 U.S. 672 (1948).
[95] Franco-Gonzalez v. Holder, 828 F. Supp. 2d 1133 (C.D. Cal. 2011).
[96] *Id.*

future unaccompanied minors, seeking recognition of their right to counsel.[97] Although dismissed on jurisdictional grounds, the Ninth Circuit observed that the United States Congress has a "moral obligation" to address the issue, therefore leaving the constitutional question open.[98] Together, these precedents affirm that due process protections under the Fifth and Fourteenth Amendments and inferred in the Sixth Amendment, as demonstrated through various case law, demand appointed counsel for unaccompanied minors who face deportation—an immigration proceeding that threatens liberty, safety, and life itself.

VII. Comparative Frameworks That Support the Right to Counsel

The United States stands nearly alone among wealthy democracies in denying unaccompanied migrant children access to state-funded legal counsel.[99] These existing frameworks prove that legal aid is both a practical feat and indispensable to due process. The countries offering these protections follow international standards set by the Convention on the Rights of the Child (CRC), which was adopted by the United Nations in 1989.[100] The United States, though a signatory to the CRC, remains the only nation to withhold ratification, even though its guiding "best interests of the child" principle influences much of U.S. child law and policy.[101] Its absence in immigration proceedings exposes a shameful inconsistency in American legal values.

The "best interests" principle, as outlined in the CRC, is rather self-explanatory: The outcome of any decision concerning a child should hinge on what is best for that individual child.[102] Unfortunately, federal U.S. immigration law lacks this standard and does not require

[97] J.E.F.M. v. Lynch, 837 F.3d 1026 (9th Cir. 2016).
[98] King & Hall, *supra* note 84.
[99] Sonia Lenegan, *Legal Representation of Unaccompanied Children: United Kingdom*, Asylum Info. Database (Apr. 2025); Eur. Council on Refugees and Exiles, *Quality Legal Assistance for Unaccompanied Children* (2014).
[100] Ataiants et al., *supra* note 59.
[101] *Unaccompanied Migrant Children*, *supra* note 49.
[102] Convention on the Rights of the Child, 1989, 1577 U.N.T.S. 3.

judges to weigh such factors in deciding on the immigration status of minors.[103] Articles Twenty and Twenty-Two of the CRC explicitly address unaccompanied migrant children, guaranteeing protection, humanitarian assistance, and state care equivalent to that afforded to any other child within the nation-state's jurisdiction.[104] The Committee's "General Comment No. 6" further clarifies these obligations, emphasizing that immigration enforcement interests must never override the child's best interests.[105] Paragraph thirty-three mandates that an independent guardian or legal representative, whose purpose is to advocate for the child, be appointed as soon as that child is identified.[106]

Unaccompanied minors receive legal representation in Australia, Canada, and most European Union (E.U.) countries, and several legal systems within those countries provide a legal guardian in addition to an attorney.[107] On top of providing guardianship and representation, the E.U. directives mandate child-sensitive policies, such as: the enforcement of detention as a last resort, guarantees of education and health care, and the establishment of youth welfare integration programs.[108] E.U. policy extends beyond legal representation by requiring child-sensitive policies, such as limiting detention to a last resort, in turn guaranteeing minors' access to education and health care and ensuring access to youth welfare and integration programs. These are not suggestions but codified obligations, which further highlights how the U.S. lags behind its peers in protecting unaccompanied migrant children. The U.S. immigration system for minors is in direct opposition to these international norms, which embody a global consensus on the necessity of legal counsel and guardianship to safeguard the due process of unaccompanied minors. The existence of such legal aid infrastructure abroad demonstrates that

[103] *Unaccompanied Migrant Children*, *supra* note 49.
[104] Ataiants et al., *supra* note 59.
[105] *Unaccompanied Minors in International, European and National Law*, *supra* note 63.
[106] *Id.*
[107] Huynh, *supra* note 28; King, *supra* note 27.
[108] *Unaccompanied Minors in International, European and National Law*, *supra* note 63.

implementation is fully possible within the U.S. and could even serve as a framework for reform. Recognizing a right to counsel would reconcile this gross inequality and affirm the nation's commitment to protecting the world's most vulnerable—children.

Opposing Florida H.B. 1505: Defending Healthcare Autonomy for Minors

Writer: Leilani Fries

Article Editor: Patrick Noble

Associate Editor: Molly Stinson

Abstract:

Proposed in the past 2025 legislative session, Florida House Bill 1505 aimed to require parental consent for minors to undergo treatment for sexually transmitted infections (STIs), which would overturn Florida statute and medical consensus. While H.B. 1505 did not pass, it is not an independent or fringe piece of legislation. In this article, the connection between H.B. 1505 and the history of parental rights will be discussed, arguing that H.B. 1505 is an extension of the increasingly popular, anti-egalitarian New Parents' Rights Movement. Ultimately, both the policies proposed by H.B. 1505 and the ideology upheld by the New Parents' Rights Movement should be rejected in favor of a social and political framework that embraces the personal rights of children.

I. Introduction

Florida House Bill 1505, titled "Parental Rights," was introduced during the 2025 Florida legislative session to much controversy.[1] The bill, abbreviated as H.B. 1505, aimed to increase parents' rights in their minor children's medical decisions by requiring parental consent for various medical treatments and surveys; most notably, H.B. 1505 required parental consent to receive treatment for sexually transmitted infections (STI) and to obtain a prescription for birth control.[2] The Kaiser Family Foundation, which is an independent health policy research organization, reports that as of September 2023, teenage minors in all fifty U.S. states could consent to STI testing and treatment, with variations in what age they could consent.[3] This bill's push to ban such a widely accepted medical standard exemplifies a major departure from medical guidelines set by the Centers for Disease Control (CDC) and the ability for minors to have autonomy over their own health.[4] But this prompts the question: Why would such legislation be proposed?

H.B. 1505 is a piece of what some scholars are calling the broader New Parents' Rights Movement, a more aggressive, anti-egalitarian offspring of past parental rights activism.[5] Parental Rights Florida, one of the state's largest parental rights organizations, describes that their mission is to expand a parent's ability to dictate "the upbringing, education, and care of their children."[6] In particular, the movement aims to shift the oversight of children's welfare

[1] H.B. 1505 had a Senate companion bill (S.B. 1288), which had similar language with minor differences. When this pair of bills was addressed, it was often under just H.B. 1505—which is what it will be referred to from now on. *See* S.B. 1288, 128th Leg. (Fla. 2025).
[2] H.B. 1505, 128th Leg. (Fla. 2025).
[3] Kaiser Fam. Found., *About Us* (last accessed Dec. 2025), https://www.kff.org/about-us/; Kaiser Fam. Found., *Minors' Authority to Consent to Sexually Transmitted Infection (STI) Services* (last updated Sep. 2023), https://www.kff.org/state-health-policy-data/state-indicator/minors-right-to-consent/.
[4] Ctr. Disease Control & Prevention, *Sexually Transmitted Infections Treatment Guidelines, 2021: Adolescents* (last reviewed July 2021), https://cdc.gov/std/treatment-guidelines/adolescents.htm.
[5] Kristine L. Bowman, *The New Parents' Rights Movement, Education, and Equality*, 91 U. Chi. L. Rev. 399, 400–01 (2024).
[6] Parental Rts. Fla., *Who We Are* (last accessed Dec. 2025), https://parentalrightsfl.org/about-us/.

away from the state and onto the parents. In recent years, Florida has positioned itself as a champion of parental rights and has passed multiple major pieces of legislation to further expand those rights.[7] Many of these earlier statutes focused on educational policy, leading the state to be ranked first in parental freedom in education by the Center for Education Reform.[8] Now, the Florida Legislature has set its sights on healthcare.

While the Florida Legislature was unsuccessful in passing H.B. 1505 this past legislative session, there still stands a great opportunity for such legislation to be passed in the coming year. H.B. 1505 and other pieces of parental rights legislation threaten the well-being of Floridian minors by taking away their personal and bodily autonomy. To best understand the monumental threat posed by the bill, the origins and operations of the New Parents' Rights Movement in Florida must first be explored to explain how H.B. 1505 arrived at the Florida legislature. Then, the implications and finer details of the bill must be discussed. After developing an understanding of H.B. 1505 and its context within the New Parents' Rights Movement, the importance of children's rights will be explained and offered as a framework for addressing future threats to the autonomy and well-being of minors. Floridians must mobilize in opposition to this legislation in the coming sessions to ensure that the rights of children and minors are protected and the nation should follow suit to ensure that all children in the U.S. retain bodily autonomy, particularly when it comes to healthcare.

II. Parental Rights and the New Parents' Rights Movement

The legal idea of parental rights originates within English common law.[9] English

[7] These pieces of legislation include the Parents' Bill of Rights, Fla. Stat. §§ 1014.01–1014.06 (2025), the Parental Rights in Education Act, Fla. Stat. § 1000.071 (2022), and the Stop W.O.K.E. Act, Fla. Stat. § 760.10(8)(a) (2022).
[8] Fla. Dep't Educ., *Center for Education Reform Ranks Florida #1 on the Parent Power! Index for 4th Year in a Row* (June 2025), https://www.fldoe.org/newsroom/latest-news/center-for-education-reform-ranks-florida-1-on-the-parent-power-index-for-4th-year-in-a-row.stml.
[9] Robert A. Sedler, *From Blackstone's Common Law Duty of Parents to Educate Their Children to a Constitutional Right of Parents to Control the Education of Their Children*, F. on Pub. Pol'y, 2007, at 2–3.

common law was first articulated by Sir William Blackstone in *Commentaries on the Laws of England* (1765).[10] In his work, Blackstone designates the duties of parents to their children to three particulars: their maintenance, protection, and education.[11] Early American laws, rooted in their origin as an English colony, adopted Blackstone's interpretation, and in particular emphasized a parent's responsibility in ensuring the education of their child.[12] Blackstone's definition continues to be used in the modern day, and the "Bill of Parental Rights" as codified in the Florida Statutes mirrors Blackstone's three particulars by defining parental rights as the "fundamental right of parents to direct the upbringing, education, and care of their minor children."[13]

Eventually, parental rights would not just become protected under national common law, but would be designated as a constitutional right.[14] In the 1920s, the U.S. Supreme Court established that parents have a right to dictate the education of their children; in *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925) the Court ruled that parents had the right to control the education of the child, be it in another language or at a private school.[15] A few decades later, *Wisconsin v. Yonder* (1972) reaffirmed the right for parents to make choices about their child's education in accordance with their religious freedom.[16] Parental rights are also protected under the right of privacy, commonly understood as an unenumerated right under the Ninth Amendment, which in this case is referenced to prevent the government from interfering in "decisions relating to marriage, family relationships, and child rearing and education."[17]

[10] Ann Kitchel, *William Blackstone's Enduring Legacy*, Creighton Law., 2007, at 30.
[11] Sedler, *supra* note 7, at 2.
[12] *Id.*
[13] Parents' Bill of Rights, Fla. Stat. § 1014.02 (2025).
[14] Sedler, *supra* note 7, at 9.
[15] *Id.*; Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925).
[16] Wisconsin v. Yoder, 406 U.S. 205 (1972).
[17] Fla. Stat. §§ 199.133–199.303 (2021); U.S. Const. amend. IX.

In comparison, the New Parents' Rights Movement is a more recent development. Many attribute the start of American parental rights movements in 1925 to the infamous Scopes trial, in which a Tennessee public school teacher was prosecuted for breaking a state law banning teaching students evolution.[18] However, the movement's current iteration in America is notably distinct from prior, historical examples. Dr. Kristine L. Bowman, an education law scholar, distinguishes this difference by contrasting how past parental rights movements focused "largely on parents opting their children *out*," while the current "New Parents' Rights Movement" focuses on imposing "anti-egalitarian views on all children in the name of parents' rights."[19] The New Parents' Rights Movement has found a particularly welcome home in Florida, especially since the passage of the Parents' Bill of Rights in 2021.[20] In 2022, Florida made national news after passing the Parental Rights in Education Act, colloquially known as the "Don't Say Gay" law.[21] The Act forbade any classroom instruction on sexual orientation or gender identity from kindergarten to third grade, and any instruction that is not age-appropriate or developmentally appropriate for students in all grades.[22] Florida also passed other notable pieces of legislation that further restricted education, such as the Stop W.O.K.E. Act and an expansion of the original Parental Rights in Education Act, also written as Florida H.B. 1069 (2023).[23] These bills embody the anti-egalitarian aim of the New Parental Rights Movement by prohibiting—i.e., disallowing

[18] Lauren Gambino, *'Parents Rights': Republicans Wage Education Culture War as 2024 Looms*, The Guardian (Mar. 2023), https://www.theguardian.com/us-news/2023/mar/24/republicans-parents-rights-education-culture-war; *see also* Scopes v. State, 289 S.W. 363 (Tenn. 1927); Daniel K. Williams, *Parental Rights: Conservative Evangelicals' Approach to Protecting Children in the 1970s*, 45 Fides et Historia 69 (2013).
[19] Bowman, *supra* note 5.
[20] *Id.*; *see* Fla. Stat. § 1014.02.
[21] Jaclyn Diaz, *Florida Governor Signs Controversial Law Opponents Dubbed 'Don't Say Gay'*, NPR (Mar. 2022), https://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis.
[22] *Id.*; Fla. C.S. for C.S. for H.B. 1557, 127th Leg. (Fla. 2022).
[23] Gambino, *supra* note 18; H.B. 1069 expanded the prohibition on instruction on gender identity and sexual orientation to pre-kindergarten to eighth grade, among other restrictions on changing gender identity in educational environments. *See* Fla. H.B. 1069, 125th Leg. (2023) (enacted); Parental Rights in Education Act, Fla. Stat. § 1000.071 (2022).

the opting out of—certain instructional material. H.B. 1505 is the next step of Florida's New Parents' Rights Movement.

III. What is H.B. 1505?

On February 28, 2025, H.B. 1505 was filed in the Florida House of Representatives. In its original form, H.B. 1505 gave parents the right to review and consent to a survey or questionnaire given to their minor child, gave parents the right to receive the answers of a survey given to their minor child, forbade the use of a "biofeedback device" in a healthcare setting without written parental consent, and struck down exceptions for healthcare practitioners to provide healthcare services and medical procedures without written parental consent.[24] One way H.B. 1505 accomplished this was by changing language that required consent "except as otherwise provided by law" to solely waiving consent in the vaguer circumstance of "emergency medical care."[25]

In other parental consent laws in Florida, the "except as otherwise provided by law" language was used to maintain "existing statutory exceptions to the parental consent requirement."[26] For example, in Florida's Parents' Bill of Rights the "except as otherwise provided by law" language continued a previous statutory exemption that did not require parental consent for a minor to be examined or treated for an STI.[27] While there is not an explicitly stated purpose for this statutory change, one sponsor of H.B. 1505, Representative Rachel Plakton, stated one of her goals was to remove a loophole in Florida Statute that allows minors to be prescribed contraceptives if the minor would, "in the opinion of the physician, suffer probable health hazards if such services are not provided." This sentiment and resulting changes serve as

[24] H.B. 1505.
[25] S.B. 1288 defines a biofeedback device as "an instrument or a sensor used to measure bodily functions, such as heart rate variability, brain waves, or breathing rate, outside of a health care facility or provider's office, for the purpose of improving performance. Fla. C.S. for S.B. 1288, 127th Leg. (2025); H.B. 1505.
[26] Jeff Scott, Fla. Med. Ass'n, *Treating Minors Under Florida's New 'Parental Consent' Law* (2021).
[27] *Id.*

further proof that the proponents of this bill treat medical professionals' judgment as "loopholes" to be closed in pursuit of total parental authority.[28]

In this original version, the requirement for written parental consent for healthcare services would have greatly impeded minor children from seeking an STI or STD (sexually transmitted disease) diagnosis, among other important health services they may need. After immense public backlash, both the House and the Senate versions of the bill adopted exceptions that allowed for minors to be examined for STIs, but required "the consent of a parent or guardian…for treatment."[29] H.B. 1505 was amended one more time, focusing on meticulously removing any further exemptions for minors within Florida law. This later revised version of the bill included the following changes:

- It eliminated the exemption that allowed physicians to prescribe contraceptives if in their professional opinion a patient would "suffer probable health hazards if such services are not provided";
- It removed an exemption that allowed a minor seeking outpatient crisis treatment to give informed consent;
- It added parental consent requirements for mental health crisis treatment;
- It revoked a minor's confidentiality of their records pertaining to substance abuse treatment; and
- It created a potential parental consent requirement for a minor to be voluntarily admitted to substance abuse treatment.[30]

[28] Jackie Llanos, *Legislature Nears Passage of Bill Requiring Parental Consent for STD Treatment, Birth Control*, Fla. Phoenix (April 2025), https://floridaphoenix.com/2025/04/22/legislature-nears-passage-of-bill-requiring-parental-consent-for-std-treatment-birth-control/; Fla. Stat. § 381.0051 (2025).
[29] C.S. for H.B. 1505, 128th Leg. (Fla. 2025).
[30] C.S. for C.S. for H.B. 1505, 128th Leg. (Fla. 2025).

These changes further illuminate the ultimate goal of H.B. 1505—to consolidate parental control over a minor's health decisions.

IV. Problems with H.B. 1505

The most glaring issue with H.B. 1505 is that it allows a minor to receive a diagnosis of an STI independently but requires parental consent for that same child to get treated for the infection. Teenagers and young adults are more likely than other age demographics to contract STIs; the fifteen- to twenty-five-year-old demographic makes up around half of STI cases in the United States.[31] Florida has also had a forty-two percent increase in STI rates this decade, which further increases the stakes of this problem in the state.[32] While diagnosing an STI is extremely important in reducing infection among further partners, it is even more important for the patient to receive treatment for their illness as soon as possible.[33] STIs are not the common cold—they often do not resolve themselves with time and rest.[34] Untreated STIs can lead to an array of health problems regardless of sex, including infertility, damage to organs and the nervous system, acquired immunodeficiency syndrome (AIDS), and ectopic pregnancies.[35] Teenagers are notoriously private about their personal relationships and often struggle to confide in their parents; moreover, for teenagers that are uniquely marginalized like those who identify as LGBTQIA+ or live in abusive situations, confiding in their parents may be even more difficult.[36]

[31] Ctr. Disease Control & Prevention, *Sexually Transmitted Infections Surveillance* (2023).
[32] Kayla Kissel, *The STD Surge: Florida Hits Record High Rates, Surpassing Pre-Pandemic Levels*, WUSF (May 2024), https://wusf.org/health-news-florida/2024-05-03/the-std-surge-florida-hits-record-high-rates-surpassing-pre-pandemic-levels.
[33] H.B. 1505.
[34] *See* Susan Tuddenham et al., *Diagnosis and Treatment of Sexually Transmitted Infections: A Review*, 327 JAMA 161 (2022).
[35] An ectopic pregnancy is a pregnancy that implants outside of the uterus; a pregnancy must be in the uterus to survive, therefore all ectopic pregnancies are unviable. Ectopic pregnancies can lead to a number of medical complications if not treated quickly, including internal bleeding and infection. *See* Krystle Y. Chong et al., *Ectopic Pregnancy*, 10 Nature Revs. Disease Primers 94 (2024).
[36] Holly Agostino & Alene Toulany, *Considerations for Privacy and Confidentiality in Adolescent Health Care Service Delivery*, 28 Paediatrics & Child Health 172 (2023); Ctr. Disease Control & Prevention, *Parents' Influence on LGBTQ Teens* (Nov. 2024), https://www.cdc.gov/healthy-youth-parent-resources/positive-parental-practices/parents-influence-lgbt.html.

The Children's Hospital of Philadelphia recommends that teenage patients "are more likely to discuss these issues with a healthcare provider when they feel confident their discussions are private."[37] Therefore, when minor patients are confident that they will be able to get medical treatment in privacy, they are more likely to disclose potential symptoms of STIs and get the preventative treatment they need.

H.B. 1505 ignores statistics and common logic. It allows minors to get diagnosed with STIs in confidentiality—which shows some understanding of the importance of privacy—but puts restrictions on treatment, often the only solution for an STI. H.B. 1505 would render child victims of sexual abuse unable to receive treatment without their abuser's consent if their abuser is a parent or guardian. Child sexual abuse is a pervasive problem within the United States, and some estimates reflect that as much as one in four girls and one in twenty boys are victims of this crime.[38] There are some caveats built into H.B. 1505 that narrowly account for the possibility of abuse. However, H.B. 1505 either requires a court order or an active criminal investigation into a parent for crimes committed against their child in order for a minor to get medical treatment without parental consent, and both avenues require the minor victim to have disclosed their abuse to an outside authority figure. Victims of childhood sexual abuse are already unlikely to disclose their abuse to a third party, and even more unlikely to tell a professional or an authority.[39] The process is not only potentially traumatizing for the victim, but the victim also faces the risks of not being believed or experiencing a lack of state interest in prosecuting their case. Children should not have to go through a gauntlet of tests in order to get treatment for

[37] Child.'s Hosp. Phila., *Why Doctors Ask to Speak Privately with Teen Patients* (Sept. 2019), https://www.chop.edu/news/health-tip/why-doctors-ask-speak-privately-teen-patients.
[38] Ctr. Disease Control & Prevention, *About Child Sexual Abuse* (May 2024), https://cdc.gov/child-abuse-neglect/about/about-child-sexual-abuse.html.
[39] Åsa Landberg et al., *Patterns of Disclosure and Perceived Societal Responses After Child Sexual Abuse*, 134 Child Abuse & Neglect 105914 (2022).

infections with life-altering consequences, nor should they have to prove abuse occurred to qualify for basic medical care.

Besides the poor policy consequences of H.B. 1505, there are clear legal issues with its enforcement. Executive Director of the LGBTQIA+ nonprofit PRISM, Maxx Fenning, describes the dilemma of ensuring child welfare while protecting parental rights. He argues:

> According to Florida Statutes neglect of a child includes if a caregiver fails to provide a child with necessary medical care to maintain a child's physical and mental health. Would you not consider STI treatment necessary to that child's well-being? Would a parent refusing to consent to treatment not constitute abuse or neglect, and if so, why are we giving parents the right to neglect their children?[40]

Fenning's assertion is right. The Florida Statutes define child neglect as "a caregiver's willful failure or omission to provide a child with the care, supervision, and services necessary to maintain the child's physical and mental health, including…medical services that a prudent person would consider essential for the well-being of the child."[41] A parent being able to opt out of a treatment implies that a parent knows the circumstances of their minor child's illness, therefore making the opting out of essential treatments such as STI treatment neglectful. How the state would enforce this is unclear. Would doctors accept an opt out form and then call child protective services if they thought the opted out treatment was essential enough? H.B. 1505 and current statute are in contradiction with each other, which will likely result in either the nullification of H.B. 1505—thus defeating the purpose of the legislation in the first place—or the relaxation of child abuse laws.

V. Why Children's Rights Are Important

Michael Freeman, a pioneer in children's rights scholarship, explains why it is so important to uplift children's rights; he states, "Rights are important because they recognise the

[40] H.B. 1505, 128th Leg. (Fla. 2025), *microformed on* Fla. House Educ. & Emp. Comm. (Fla. Channel).Public comments during the committee hearing are available for public view at: https://www.flhouse.gov/VideoPlayer.aspx?eventID=10385.
[41] Fla. Stat. § 827.03 (2025).

respect their bearers are entitled to. To accord rights is to respect dignity: to deny rights is to cast doubt on humanity and on integrity."[42] In the debate over H.B. 1505, proponents of the bill presented a false dichotomy when dealing with a child's healthcare—either a parent or a healthcare professional decides.[43] However, the most impacted party, the child, is left completely out of the picture. A child's autonomy is disregarded for many reasons, the most prominent two being the "inconvenience" of children's rights in decision-making and the idealized innocence of childhood.[44] The autonomy and voice of children is an important right that has been continuously reaffirmed by international human rights organizations, and is even enshrined in Article Three of the United Nations Convention on the Rights of the Child; the Convention states, "In all actions concerning children…the best interests of the child shall be a primary consideration."[45]

The Convention, drafted in 1989, is an international legal framework that lays out the rights and protections that should be afforded to children.[46] The Convention is "the most widely ratified human rights treaty in history" and has inspired international change towards improving the well-being of children.[47] Freeman emphasizes the specific importance of the rights afforded in the Convention: "A child deprived of the sort of rights accorded by the United Nations Convention will grow up very differently from one to whom such rights are granted. And some, because of the way parents conceive their obligation…will not grow up at all."[48] For example, in a situation where a minor requires parental consent for STI treatment, as would be required under

[42] U. Coll. London, *Tribute to Professor Michael Freeman FBA*, (July 2024), https://www.ucl.ac.uk/laws/news/2024/jul/tribute-professor-michael-freeman-fba; Michael Freeman, *Why it Remains Important to Take Children's Rights Seriously*, in *Children's Rights: Progress and Perspectives* 5, 8 (Michael Freeman ed., 2011).
[43] H.B. 1505.
[44] Freeman*, supra* note 42.
[45] G.A. Res. 44/25, Convention on the Rights of the Child (1989).
[46] U.N. Int'l Childs. Emergency Fund, *Convention on the Rights of the Child* (last accessed Dec. 2025), https://www.unicef.org/child-rights-convention#learn.
[47] *Id.*
[48] Freeman, *supra* note 42, at 12.

H.B. 1505, not having the right to consent to one's own treatment may cause them to grow up with various preventable health problems.

Ironically, the United States currently stands as the only country in the U.N. that has not ratified the Convention after the two holdouts of South Sudan and Somalia ratified it in 2015.[49] There are multiple potential factors contributing to the United States' decision to not ratify the convention, but the United States remaining the single non-ratified signatory after ten years indicates a greater problem with the country's attitude towards children's rights. H.B. 1505 is a symptom of that greater problem: Children's rights are ignored in the American political mainstream.

VI. Conclusion

H.B. 1505 is not the only piece of legislature promoting the New Parents' Right Movement. In the 2025 election cycle, Texas voters approved a state constitutional amendment that affirmed "that parents are the primary decision-makers for their children and bear the responsibility to nurture and protect their children."[50] The "traditional" parents' right movement is simultaneously expanding. Over the summer, the U.S. Supreme Court ruled in *Mahmoud v. Taylor* (2025) that the Montgomery County Board of Education violated parents' freedom to express their religion to disallow them from opting their child out from lessons that discussed LGBTQIA+ themes.[51]

H.B. 1505 in Florida marks a concerning departure from the "traditional" parents' right movement. Historically, the focus has been on a parent opting out their own child from

[49] U.N. Hum. Rts. Off. High Comm'r, *Status of Ratification: Interactive Dashboard* (last accessed Dec. 2025), https://indicators.ohchr.org/.
[50] Associated Press, *AP Race Call: Texas Voters Approve Constitutional Amendment Affirming Parental Rights* (Nov. 2025), https://apnews.com/article/texas-parental-rights-constitutional-amendment-cba037f171b863b316ad75a76ff8ada0.
[51] *Mahmoud*, 606 U.S.

something, such as sexual education courses or public school.[52] In comparison, the New Parents' Right Movement is focused on opting out all children from these things—which suggests that they ultimately aim to remove "controversial" subjects from the public conscience.[53] H.B. 1505 is the medical extension of this trend in the state of Florida. H.B. 1505 aims to close the loopholes that have allowed minors to access essential, yet politically controversial, medical care, particularly STI treatment. The danger of the legislative expansion of parental rights in healthcare like H.B. 1505 is that while the details of book bans and similar restrictions are plain and public, details of a child's healthcare is private—in some cases even to their own parents—which makes the effects of a widespread limit on children's rights even more harmful in that there are many confidentiality-related unknowns.

Moving forward, Floridians must ensure that H.B. 1505 and other similar legislation do not pass. The last time this bill was heard, masses of the concerned public showed up to give public testimony and make the danger of this bill known.[54] In order to cement the rights of children and prevent the future proposal of similar legislation, the United States needs to embrace a pro-children's rights framework and join the rest of the world in ratifying the Convention on the Rights of the Child. Children need to be seen as their own, autonomous actors, and not as property under the exclusive domain of their parents. However, this is not a call to embrace the other extreme and declare free rein for all children; only that "the best interests of the child shall be a primary consideration" when discussing their healthcare and their futures.[55]

[52] Bowman, *supra* note 5.
[53] *Id.*
[54] H.B. 1505.
[55] G.A. Res. 44/25.

The Power to Revoke American Citizenship: Its Past, Present, and Possible Future

*Writer: Leonardo Giorgini**

Article Editor: Marianne Ruschman

Associate Editor: Harper West

Abstract:

For as long as American citizenship has existed, there have been ways for people to have it taken away. This practice, known as involuntary expatriation, serves to remove a person from the political community and deprive them of the rights associated with citizenship. It also, as history has shown, has served to reflect popular sentiments in favor of restricting immigration, by enabling the removal of classes of people deemed too foreign or unlikely to be loyal to the United States. In times of nativism or isolationism, Congress has historically both made it harder for foreigners to become citizens and made it easier for Americans to be stripped of their citizenship. The courts have long grappled with the question of whether citizenship belongs to the citizen or to the state, leading to inconsistent rulings on the constitutionality of involuntary expatriation. This article tracks this dual legal and political history from the anti-Chinese sentiment of the 1880s to the isolationism of the interwar period to the contemporary immigration debate, and makes the case that the current administration may rely on historic practices in an attempt to restore the government's power to involuntarily expatriate its disfavored citizens. Such an attempt would be unlikely to succeed in light of current law, but could provide a vehicle for the courts to significantly weaken the protections of citizenship—a prospect that would leave the rights of every American less secure.

** Guest writer, University of Chicago. Leonardo Giorgini is pursuing a joint B.A./M.A. degree program in History and International Relations.*

I. Introduction

For some, American citizenship is a right inherent from birth. For those who attain citizenship through naturalization, it is the culmination of years of hard work for the ability to build a life in their chosen country. Today, as has been the case historically, immigration and the border are among the most contentious issues in the public arena. The current administration, led by President Trump, has made this debate central to its platform, both in terms of restricting entry to the United States and through mass deportation.[1] But there is a reverse side. The questions surrounding immigration—with all the attendant racial and political implications—are inextricably linked to the matter of citizenship. For as long as U.S. citizenship has existed, there have been ways for a person to lose theirs. Though mechanisms by which someone loses their citizenship status have remained limited and largely untested, they are far from irrelevant, given present legal and political developments. It is highly likely that, in the next four years, the courts will be forced to answer questions about the government's power over citizenship for those who already bear it, questions that they have largely not grappled with for decades, as the potential revocation of citizenship rears its head once again.

This article analyzes the ways in which the law has allowed the government to strip an American of their citizenship (a process known as involuntary expatriation), and how this power has evolved over the centuries.[2] It has been shaped by popular sentiments, by wars and other geopolitical events, and by court cases. It reached its zenith during periods of increased opposition to immigration, and has been weakened by a series of rulings in the 1950s and '60s.

[1] *E.g.*, Protecting American Communities From Criminal Aliens, 90 Fed. Reg. 18761 (2025).
[2] The term refers to the ability of the government to revoke a person's citizenship of that country without the person's consent, either automatically or following a formalized process. *See* Jack Wasserman, *The Involuntary Expatriation of Statutory Americans*, 5 Int'l Lawyer 413 (1971).

Nevertheless, involuntary expatriation is still written into our laws,[3] and is once again politically salient in the contemporary moment amidst the second Trump administration.

II. Antebellum Citizenship and its Limits

Congress has the power to make laws "to establish a uniform rule of naturalization," which has been read to confer a broad power over citizenship.[4] And the very first sentence of the Fourteenth Amendment provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."[5] Put together, these two provisions set the limits of how the law can define citizenship. The first federal law on the subject of citizenship was the Naturalization Act of 1790, which stipulated that only a "free white person…of good character" who had resided in the United States for at least two years could become a citizen.[6] To become a citizen, such a person must apply to a court of record in any state in which he had resided for at least one year, take the requisite oath, and be registered as a citizen.[7] While the main purpose of the statute was to facilitate naturalization, it also created a form of birthright citizenship, in that it provided that any child of a U.S. citizen born abroad would be deemed a citizen by birth.[8] That is still the law today.

But federal laws on their own do not account for the full story, especially prior to 1868. The antebellum United States perceived citizenship as both a state and federal matter, with Congress vested with the power to decide who could and could not enter the country, and the states responsible for setting their own laws regarding citizenship.[9] State laws on citizenship

[3] 8 U.S.C. §§ 1481, 1483.
[4] U.S. Const., art. I, § 8, cl. 4.
[5] U.S. Const., amend. XIV, § 1, cl. 1.
[6] 1 Stat. 108, § 1 (1790).
[7] *Id.*
[8] *Id.*
[9] Robert J. Hoerner, *Constitutional Law: Citizenship: Power of Congress to Effect Involuntary Expatriation*, 56 Mich. L. Rev. 1142, 1149–50 (1958).

varied in terms of their openness, especially on the subject of race. A minority of states recognized Black Americans as citizens; those that did were primarily concentrated in New England and had already abolished slavery, whether by law or by judicial ruling. The status of state citizen did not merely endow its holders with political rights at home, but also created the possibility of achieving some semblance of equality elsewhere in the young nation. Many free Black people, living in New England and the mid-Atlantic region, were employed at sea or in industries requiring them to travel between states. This left them liable to have their status change as they crossed borders, being a citizen in one state and a foreigner in another. Indeed, when Black seamen did leave their homes in northern states for southern ports, they faced the uncertainty of whether they would be allowed to return at all.[10] To remedy this, individuals and abolitionist societies brought suits making the case that a person recognized as a citizen of their home state, when present in another state, must be afforded the same "privileges and immunities" as that other state affords its own citizens.[11] In addition to ameliorating the conditions of Black Americans traveling on land and at sea, these suits served a more pragmatic, political purpose: They were envisioned by some benevolent organizations as a means of securing, by court order, equality nationwide absent federal legislation, at least among those already free from slavery.[12] Suits of this kind were not unheard of; in fact, it was well established in the state courts that people recognized as Americans by virtue of having citizenship of one state could exercise the civil rights held by citizens of any state.[13] Additionally, abolitionists emphasized that, should citizens of Massachusetts present in Louisiana suffer at the hands of Louisiana's laws, then that violated Massachusetts' sovereign prerogative to provide for the

[10] Maeve Glass, *Citizens of the State*, 85 U. Chi. L. Rev. 865, 867–68 (2018); *see also* Elkison v. Deliesseline, 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4366).
[11] U.S. Const., art. IV, § 2, cl. 1.
[12] Glass, *supra* note 10, at 886–87.
[13] Glass, *supra* note 10, at 889, and n.109.

protection of its own people, as well as the federal interest in comity between the states.[14] Even as the U.S. Constitution was silent about how a person could become a "natural born citizen," courts were forced to decide the matter.[15] When they did, the result was largely a reaffirmation of the status quo: Those Black Americans who were citizens of their state remained such, but could not expect to be recognized as such in other states. In other words, even if they were citizens by birth, their birthright citizenship was of a lower status than that of a person who could be recognized as a citizen in every state. Thus, the effective treatment of Black Americans' citizenship by birth, much like Congress' laws on citizenship by naturalization, bore the imprimatur of race discrimination, something that would come to be repeated in the following decades.

One notable absence in this antebellum understanding of American citizenship was whether a person could lose theirs, and, if so, what source of law would be responsible. In *Talbot v. Jansen* (1795), Justice Paterson held that a man who had renounced his allegiance to his home state of Virginia and subsequently became a naturalized citizen of France had not thereby lost his American citizenship.[16] Justice Paterson wrote, "Allegiance to a particular state is one thing; allegiance to the United States is another," continuing that, because no federal law provided for loss of citizenship in this case, none had occurred.[17] *Talbot* is an early case dealing with the question of whether a person who appears to transfer their loyalty to a body outside the United States is thereby cast out of the political fold. Talbot answered in the negative, primarily due to a lack of positive law on the subject. This question, too, would come to be repeated in Congress and in the courts.

[14] Glass, *supra* note 10, at 894.
[15] U.S. Const, art. II, § 1, cl. 5.
[16] Talbot v. Jansen, 3 Dall. (3 U.S.) 133 (1795).
[17] *Id.* at 153–54.

III. Involuntary Expatriation Under *Dred Scott v. Sandford* and the Fourteenth Amendment

The first major act of involuntary expatriation came in 1857. In *Dred Scott v. Sandford*, the U.S. Supreme Court held, among other things, that individuals of African descent could never be citizens of the United States.[18] While the case is mainly remembered for its legalization of slavery in the territories and its role in the buildup to the Civil War, it had the effect of nullifying the citizenship, at least at the federal level, of every Black person who had held citizenship under state law.[19] In reaching this conclusion, Chief Justice Taney asserted that a Black person "whose ancestors were imported into this country and sold as slaves" was never intended to become a member of the political community, regardless of subsequent legal developments.[20] Addressing the fact that by 1857, numerous states recognized Black Americans as citizens, the majority insisted that this only made them citizens of *a* state, not of *the United States*.[21] While a state had the power to set its own rules of citizenship, this only applied within its own borders; federal citizenship was based not on state citizenship or even on federal naturalization laws, but on the *Dred Scott* majority's interpretation of the racial dynamics at the time of the U.S. Constitution's ratification.[22] This was significant for two reasons. First, it federalized the question of citizenship, holding that whether a person held the privileges of United States citizenship was a question for the federal government, including the federal courts. And second, it created a disconnect between federal and state citizenship, in which a person could hold the latter yet be denied the former, with no legal avenue for obtaining it.[23] Because state citizenship was for each state to determine under its own laws and therefore out of the reach

[18] Dred Scott v. Sandford, 19 How. (60 U.S.) 393 (1857).
[19] *Id.*
[20] *Id.* at 403, 404–05.
[21] *Id.* at 405.
[22] Alexander M. Bickel, *Citizenship in the American Constitution*, 15 Ariz. L. Rev. 369, 372 (1973).
[23] *Dred Scott*, 19 How. (60 U.S.), at 575–76 (Curtis, J., dissenting).

of the Supreme Court, Black Americans living in states which recognized them as citizens continued to hold such citizenship. By 1860, free Black citizens of states could vote on the same terms as White citizens in Maine, New Hampshire, Vermont, Massachusetts, and Rhode Island, and in other states they could vote in certain cases.[24] And because all elections were then under state control, in the aforementioned states, a person specifically declared to be ineligible to federal citizenship had every right to vote in federal elections, including for the President and Vice President.[25]

Dred Scott denied American citizenship to a class of people who had previously enjoyed at least some of its benefits. While this decision was an example of judicial activism, namely, the use of the legal system to effect the majority's preferred outcome irrespective of the law itself,[26] subsequent acts of involuntary expatriation tended to stem from the legislative branch, with the courts reining it in. As a matter of constitutional law, *Dred Scott* was overturned by the Thirteenth, Fourteenth, and Fifteenth Amendments. The Fourteenth Amendment is the most relevant to the question of citizenship.[27] Its first sentence provides that by being born or naturalized in the United States and subject to its lawful jurisdiction, a person becomes a citizen both of the union as a whole and of the state in which they reside.[28] Now, beginning in 1868, there was a definition in the U.S. Constitution of what American citizenship entailed, marked by the ratification of the Fourteenth Amendment.[29] A new precedent emerged as state and federal citizenship were combined, and a person who held all the rights of one could not be denied the

[24] Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 UC Davis L. Rev. 2215, 2217, n.1 (2021).
[25] "Opinion of the Justices of the S. J. Court," in *Acts and Resolves Passed by the Thirty-Sixth Legislature of the State of Maine*, 101–02, 157–58 (1857).
[26] 19 How. (60 U.S.), at 581–82 (Curtis, J., dissenting).
[27] James C. Ho, *Defining "American": Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 Green Bag 2d 367, 369 (2006).
[28] U.S. Const., amend. XIV, § 1, cl. 1.
[29] Bickel, *supra* note 22, at 374.

other.

IV. Legislative Gatekeeping and Judicial Responses

A. Chinese Exclusion: Explicitly Race-Based Legislation

Even as the Fourteenth Amendment guaranteed birthright citizenship and sought to overturn the *Dred Scott* majority's act of involuntary expatriation, other federal laws, following the political tides of the time, went in other directions. Consider the Naturalization Act of 1870[30] wherein Section 7 of that law extended to "aliens of African nativity and to persons of African descent" all existing laws on the subject of naturalization.[31] That same law cracked down on fraudulent naturalization, fueled by a fear that foreigners, both Eastern European and Asian, were overwhelming the existing immigration system and falsely obtaining citizenship papers using documentation in other people's names.[32] Later, in the Chinese Exclusion Act of 1882, Congress forbade all entry into the United States by Chinese people, other than temporary travelers, teachers, students, and businessmen.[33] This represented the first time since *Dred Scott* that a branch of government attempted to shut out an entire racial group from American citizenship, as well as the first federal law that barred entry into the United States based on race.[34]

The conflict between constitutional citizenship and statutory restrictions on immigration came to a head in *United States v. Wong Kim Ark* (1898).[35] Wong Kim Ark was born in the United States following the adoption of the Fourteenth Amendment, and his parents were not employed by a foreign government.[36] Nevertheless, when he attempted to return following a trip to China, he was refused entry under the Chinese Exclusion Act. The Supreme Court applied the

[30] Pub. L. 41-254, 16 Stat. 254 (1870).
[31] Pub. L. 41-254, § 7 (1870).
[32] *Id.*
[33] Pub. L. 47-126, 22 Stat. 58 (1882).
[34] Erika Lee, *The Chinese Exclusion Example: Race, Immigration, and American Gatekeeping, 1882–1924*, 21 J. Am. Ethnic Hist. 36, 37 (2002).
[35] United States v. Wong Kim Ark, 169 U.S. 649 (1898).
[36] *Id.* at 658.

plain text of the citizenship clause and deemed him a citizen by birth, notwithstanding the fact that neither he nor his parents would otherwise be permitted to enter the United States.[37] In other words, while Congress was authorized to decide who could come to America, this did not affect the text of the citizenship clause or alter the common-law principle that citizenship is derived from place of birth and a citizen has the right to return to his own country.[38] This holding represents an early example of the courts rejecting efforts on the part of the legislature to exclude politically unpopular groups from citizenship.

B. Legal Treatment of Americans Deemed Less Committed

As "alien-ness" became codified in immigration statutes, so was it written into laws regulating the status of American citizens. The Expatriation Act of 1907 made several changes to the immigration laws, each with the purpose and effect of stripping citizenship from Americans deemed too adjacent to non-Americans.[39] Section Two of that Act provided that an American citizen would lose their citizenship by becoming a citizen of a foreign nation, swearing an oath of allegiance to a foreign government, or, in the case of naturalized Americans, residing for two years in their country or origin or for five years in any foreign nation.[40] Section Three provided that an American woman who married an alien would lose her citizenship in favor of the nationality of her husband.[41] The idea was that a woman who chose to marry a foreigner rather than a fellow member of the fold must herself be cast out, lest they have children who would have the rights of American citizenship and thereby permit the evasion of immigration controls. The Supreme Court upheld this provision in *Mackenzie v. Hare* (1915), holding that the constitutional grant of authority to regulate naturalization also implicitly included the power to

[37] *Id.* at 653.
[38] *Id.* at 653, 656–59.
[39] Pub. L. 59-93, 34 Stat. 1228 (1907).
[40] *Id.* at § 2.
[41] *Id.* at § 3.

provide for the loss of citizenship in cases involving international relations concerns.[42] And marriage, at the time, was considered sufficient to indicate not only one's personal allegiance to a spouse, but a decision to occupy one body politic and not another.[43]

Eventually, Congress passed another law manipulating the twin formulas of immigration and expatriation, aiming to create a comprehensive code. The Nationality Act of 1940 was signed into law by President Franklin D. Roosevelt barely a year into World War II, a war the United States had not yet joined, at a time of heightened isolationist sentiment.[44] In addition to European and Asian refugees fleeing the military theaters in their respective continents, many Jewish people were eager to immigrate to America and leave Nazi Germany and its occupied territories before they became victims of the unfolding genocide that would become known as the Holocaust. Antisemitism, which had long been present in the U.S., gained a loud voice in the nation in support of excluding Jewish people from settling. In line with this sentiment, the Nationality Act made several provisions restricting immigration to the United States.

It also broadened the government's power to involuntarily expatriate citizens, with a particular emphasis on Americans by naturalization. Section 401 provided a long list of acts which would result in the loss of citizenship, including: obtaining nationality of a foreign nation (subsection (a)), taking an oath of allegiance to a foreign nation (subsection (b)), serving in the military of a foreign nation under certain circumstances (subsection (c)), voting in an election or plebiscite held in a foreign nation or any subdivision of any such nation (subsection (e)), or deserting from the armed forces in time of war (subsection (g)).[45] Under section 402, an American who resided for six months or more in a nation in which that person or their parents

[42] Mackenzie v. Hare, 239 U.S. 299, 311–12 (1915).
[43] *Id.*
[44] Pub. L. 76-853, 54 Stat. 1137 (1940).
[45] *Id.* at § 401.

had been a citizen was presumed to have renounced their citizenship unless that person could prove that they had not, in fact, served in that nation's military or government.[46] The 1940 Act, however, also repealed the provisions under which American women who married foreigners lost their citizenship.[47] Though the 1940 Act was passed amid a time of isolationist sentiment, on the subject of expatriation, it appears to have been more concerned with voluntary acts evincing a transfer of allegiance to a foreign power than private domestic life.

Since 1952, the Immigration and Nationality Act has been the primary federal law concerning loss of U.S. citizenship.[48] Later developments removed the remaining race and national-origin based distinctions and provided that race, nationality, and other demographic factors would not bar anyone from being admitted to the United States.[49]

C. The 1950s and Beyond: Greater Limits on the Power to Expatriate

It was around the passage of the 1952 Act that the courts began to hear challenges to laws effecting involuntary expatriation, mainly invalidating them. In *Trop v. Dulles* (1958), the Supreme Court considered whether a soldier convicted of desertion during World War II could have his citizenship revoked.[50] The answer was no: Involuntary expatriation as punishment for a crime constituted cruel and unusual punishment, forbidden by the Eighth Amendment.[51] Writing for a plurality opinion, Chief Justice Warren stated that depriving a person of a country renders them effectively rightless in the eyes of the law, which violates the "evolving standards of decency that mark the progress of a maturing society," thereby creating a new standard for Eighth Amendment analysis.[52] While other justices disagreed on finer points, the rule since *Trop*

[46] *Id.* at § 402.
[47] *Id.* at § 504.
[48] Pub. L. 82-414, 66 Stat. 163 (1952) (codified at 8 U.S.C. §§ 1101–1537.).
[49] 8 U.S.C. §§ 1152(a)(1)(A), 1422; *see also* Trump v. Hawaii, 585 U.S. 667, 681–82 (2018).
[50] Trop v. Dulles, 356 U.S. 86 (1958).
[51] *Id.* at 92–93.
[52] *Id.* at 101.

has been that a person's wrongdoing, even if made criminal, does not sever the political bonds between citizen and state. Another case decided the same year, *Nishikawa v. Dulles*, reached a similar conclusion.[53] In *Nishikawa*, the petitioner was a dual citizen of the United States and Japan who had had the misfortune of being in Japan as a student at the time of its increasing militarization prior to the attack on Pearl Harbor. He wound up conscripted as a military mechanic in the Japanese war effort. Afterwards, he returned to the United States, and was informed that his citizenship had been revoked under section 401(c) of the 1940 Act. The Supreme Court restored his citizenship, on the grounds that the government could not prove that his service in a foreign army, even one at war with the United States, was voluntary.[54] This followed from a prior case, *Schneiderman v. United States* (1943), which had held that when the government sought to revoke a person's citizenship, it bore the burden of providing "clear, unequivocal, and convincing" proof that the person had voluntarily engaged in conduct which triggered expatriation.[55] *Schneiderman* concerned a naturalized citizen whom the government sought to denaturalize over a decade after he had obtained his citizenship, while *Nishikawa* concerned a citizen by birth, but one underlying principle applied. As established in *Trop*, "Citizenship is not a license that expires upon misbehavior,"[56] and when the government seeks to take it away, the courts must be wary.[57]

On the interrelated questions of disloyalty to the United States and loyalty to a foreign power, the Supreme Court originally took an interpretation that broadly permitted involuntary expatriation, and then turned in the other direction. The first such case was *Perez v. Brownell* (1958).[58] The petitioner in that case had lived in Mexico his entire life, but learned at nineteen

[53] Nishikawa v. Dulles, 356 U.S. 129 (1958).
[54] *Id.* at 133–34.
[55] Schneiderman v. United States, 320 U.S. 118, 135 (1943).
[56] *Trop*, 356 U.S., at 92.
[57] *Schneiderman*, 320 U.S., at 154, 159–60; Hoerner, *supra* note 9, at 1147.
[58] Perez v. Brownell, 356 U.S. 44 (1958).

that he had been born in Texas and was therefore an American citizen. When the United States entered World War II, he returned to Mexico, where he lived and, crucially, voted in the Mexican presidential election of 1946. Under sections 401(e) and 401(j) of the 1940 Act, he had lost his citizenship by voting in a foreign election and by leaving the United States to evade conscription. The Supreme Court affirmed his loss of citizenship on the grounds that Congress, empowered to regulate naturalization and also to conduct foreign relations and to wage war, possesses the incidental power to withdraw a person's citizenship when such act affects or is involved with any of those powers.[59] Crucially, Perez had repeatedly misrepresented his citizenship status, applying for temporary admission to the U.S. as an alien worker during World War II, as a means of continuing to avoid the draft.[60] Put together, the conclusion was that he had voluntarily expatriated himself, and was thus no longer entitled to his birthright citizenship.[61]

But in *Afroyim v. Rusk* (1967), the Supreme Court revisited the holding of section 401(e)'s constitutionality, and this time ruled for the putative citizen.[62] The petitioner, Beys Afroyim, was born in Poland and had become a naturalized American citizen in 1926.[63] Decades later, he moved to the newly established State of Israel, and, crucially, voted in its 1951 legislative election.[64] When he applied for a U.S. passport in anticipation of a return to the United States in 1960, he was informed that, under section 401(e), he had lost his citizenship. Afroyim then filed suit, seeking to have his citizenship restored. The Supreme Court ruled in Afroyim's favor, on broad grounds. First, it held that the Fourteenth Amendment's citizenship clause controlled the case. Because Afroyim had been "naturalized in" the United States and was

[59] *Id.* at 52.
[60] *Id.* at 46–47.
[61] The majority did not pass upon the constitutionality of section 401(j). *See* Hoerner, *supra* note 9 at 1143.
[62] Afroyim v. Rusk, 387 U.S. 253 (1967).
[63] *Id.* at 254.
[64] *Id.* at 254.

unquestionably subject to its jurisdiction, he was a citizen.[65] And second, it held that even though the Constitution empowered Congress to make rules about the acquisition of citizenship, neither this express grant nor any implied aspect of sovereignty permitted it to provide for a person's loss of citizenship without their assent.[66] Because Afroyim's vote in an Israeli election evinced only his entry into that country's body politic and not his decision to exit that of the United States, he was entitled to retain his U.S. citizenship.

The most recent case on the subject of involuntary expatriation, involving the downstream consequences of the Yugoslav Wars, is *Maslenjak v. United States* (2017).[67] This was a hybrid criminal-immigration proceeding, in that it was a prosecution for violating a criminal statute, a consequence of which is automatic denaturalization.[68] The defendant, Divna Maslenjak, was charged with unlawfully procuring her own naturalization by means of materially false statements on her application for citizenship.[69] When she and her husband came to the United States from Bosnia, she applied for refugee status and claimed to have been persecuted by both sides of the Bosnian War: By Muslims on account of the family's Serbian ethnicity, and by Serbs on account of her husband's apparent noncombatant status.[70] Having been granted refugee status, she was naturalized as a citizen in 2007.[71] As part of her application for naturalization, she was required to state whether she had ever lied as part of immigration

[65] *Id.* at 264–67.
[66] *Id.* at 256–57.
[67] Maslenjak v. United States, 582 U.S. 335 (2017). The Yugoslav Wars were a series of conflicts during the 1990s consisting of territorial wars, ethnic cleansing, and genocide that took place surrounding the dissolution of the Socialist Federal Republic of Yugoslavia. The Croatian War started in 1991 and the Bosnian War started in 1992. Both continued until 1995, after which the Kosovo War occurred from 1998 to 1999. *See, e.g.*, Eva Tamara Asboth, *"On Killing Serbs"—A. M. Rosenthal as Public Memory Dissent in Reporting on the Yugoslav Wars in the New York Times*, 70 Publizistik 235 (2025).
[68] The crime is unlawfully procuring a person's naturalization, in violation of 18 U.S.C. § 1425(a). The immigration consequence is that, when a person is convicted of this crime and the person whose naturalization was unlawfully procured is the defendant themselves, then the defendant's U.S. citizenship is automatically revoked, as provided in 8 U.S.C. § 1451(e).
[69] *Maslenjak*, 582 U.S. at 339.
[70] *Id.* at 338–39.
[71] *Id.* at 339.

proceedings, to which she claimed she had not. However, it thereafter transpired that her husband, rather than evading conscription into the Bosnian Serb Army, was known to have been in a unit linked to a series of brutal war crimes against the Muslim population of Bosnia.[72] When this was revealed, Maslenjak was prosecuted in federal court for illegally procuring naturalization, under a theory that her lie on her naturalization application, in which she falsely denied having lied on her refugee application, rendered her citizenship fraudulent. She was convicted, and the court granted the government's subsequent motion to revoke her citizenship. The Supreme Court held that her false statement on her naturalization proceeding—that she had never lied as part of an immigration proceeding—was not necessarily sufficient to support a conviction for unlawfully procuring naturalization, and, therefore, to denaturalize her. The false statement, the majority held, must be material and must be sufficient to deny an application for citizenship in the first place.[73] Of course, the lie itself could be made criminal, but that did not answer the question. The mere fact that a person has committed a crime is not enough to strip them of their citizenship, even if the crime was connected to their application for citizenship. To be sure, this was a criminal law decision, and its conclusion was reached in large part based on criminal law principles. But the fact remains: Involuntary expatriation is so suspect that even criminals are presumed to not be subject to this legal revanchism.[74]

Today, federal law does provide for a person's citizenship to be revoked for engaging in specified conduct apart from fraudulently obtaining it in the first place, but requires that the relevant act be conducted "with the intention of relinquishing United States nationality."[75] In the last two decades, even as Congress has been unable to pass new immigration laws, there have

[72] *Id.*
[73] *Id.* at 342–44.
[74] *Id.* at 351 (citing prior cases and stating that the court has "never read a statute to strip citizenship from someone who met the legal criteria for acquiring it").
[75] 8 U.S.C. § 1481(a).

been government proposals to provide for the involuntary expatriation of certain Americans. In 2010, a bipartisan bill introduced by Senators Joe Lieberman (D-Connecticut) and Scott Brown (R-Massachusetts) would have added membership in a foreign terrorist organization or enlisting in the military of a foreign nation engaging in hostilities against a United States ally as statutory grounds for loss of citizenship (although still with the requisite intent to relinquish U.S. nationality).[76] That bill, which would have effectively taken up Justice Paterson's 1795 call for a "statute of the United States relative to expatriation" in the case of allegiance to a foreign belligerent, as in *Talbot*, was not passed.[77]

V. Involuntary Expatriation in the Present Day

This complex history of citizenship in the United States—of citizenship depending on geography, of courts struggling to grant appropriate remedies for violations of the law, of xenophobia, of distrust of citizens deemed not American enough—is no less relevant now than in the past. And for that reason, the question of involuntary expatriation is one that is highly likely to resurface. Indeed, President Trump, elected first in 2016 and then in 2024 on platforms that emphasized restrictions on immigration, has taken measures that could very well lead to a resurgence of involuntary expatriation as government policy.

On January 20, 2025, President Trump issued an executive order purporting to limit the categories of people entitled to birthright citizenship under the Fourteenth Amendment.[78] This order was ruled unconstitutional by every court that considered it on the merits. However, in *Trump v. Casa, Inc.* (2025), the Supreme Court held that lower federal courts should not necessarily have invalidated the order altogether—through what is often referred to as a universal injunction—and instead issued more narrow forms of relief that affected the plaintiffs

[76] Terrorist Expatriation Act, S. 3327, 111th Cong., 2d Sess. (as introduced 2010).
[77] *Talbot*, 3 Dall. (3 U.S.) at 154.
[78] Protecting the Meaning and Value of American Citizenship, 90 Fed. Reg. 8449 (2025).

in those cases.[79] Notably, the Supreme Court did not suggest that the order was constitutional, nor that its interpretation of birthright citizenship had contracted since *Wong Kim Ark*. Instead, it merely held that a person's claim to citizenship—or their child's citizenship—must be adjudicated on a narrower basis than before, with courts only authorized to provide complete relief to the parties to the specific case, and no further than necessary for that purpose. The extent to which *Casa* affects birthright citizenship remains to be seen, as the executive order in question remains blocked nationwide, as the lower federal courts have all found that nothing less than a complete ban on its enforcement is necessary to provide relief to the states, organizations, and individuals who had brought suits against it.[80] Thus, it is possible that this decision by the Supreme Court could well have more of an effect on the practice of the federal courts than on citizenship and its loss.

As indicated by the early policies of the second Trump administration, a potential flashpoint for a legal case about involuntary expatriation is the thorny question of illegal entry. The legality or illegality of a parent's status in the United States does not affect their child's citizenship if the child is born in the United States.[81] While the January 20, 2025, executive order at issue in *Casa* only applies prospectively to people born after it took effect, it is not dissimilar to involuntary expatriation, in that it denies effective citizenship to people who would otherwise exercise it, and who are in fact entitled to it under the U.S. Constitution. Should the government attempt to go further and declare that people currently recognized as citizens on account of birth in the United States prior to the issuance of the order are not citizens, that would represent a major act of involuntary expatriation. Overnight, it would leave these Americans in legal limbo,

[79] Trump v. Casa, Inc., 606 U.S. 831 (2025).
[80] *See, e.g.*, Washington v. Trump, 765 F.Supp.3d 1142 (W.D. Wash 2025) (granting preliminary injunction); Washington v. Trump, 764 F.Supp.3d 1050 (W.D. Wash. 2025) (granting temporary restraining order); Barbara v. Trump, 790 F.Supp.3d 80 (D.N.H. 2025) (granting classwide preliminary injunction).
[81] Ho, *supra* note 27, at 374 (*Wong Kim Ark*'s "sweeping language reaches all aliens regardless of immigration status").

with the government not obligated to allow them reentry, and, in extreme cases, facing deportation to countries they themselves had never stepped foot in. Such an order would almost certainly be ruled unconstitutional, applying the reasoning in *Maslenjak*, in that a birthright citizen would not have committed any fraud in procuring naturalization because they would have been deemed a citizen automatically and not gone through the naturalization process.

Additionally, it would be difficult for the government to rely on the argument that the legal status of a parent's presence in the United States has any bearing on their child's citizenship by place of birth, considering the history that led to the adoption of the Fourteenth Amendment itself. The *Dred Scott* majority denied citizenship to Africans brought as slaves and to their descendants, but by 1857, a large number of enslaved passengers had entered the United States illegally, on account of successive federal laws abolishing and penalizing the slave trade.[82] Thus, when the first sentence of section 1 of the Fourteenth Amendment was ratified to undo *Dred Scott*'s pronouncement and thereby restore birthright citizenship, its proponents necessarily intended to extend citizenship to those whose parents were brought into the United States in violation of federal law and yet who were born in its territory and subject to its jurisdiction.

Another way the current administration could attempt to revive involuntary expatriation is in the context of foreign policy. Since World War II, the government has sought to denaturalize Nazis and Nazi collaborators who had since become U.S. citizens, based on their statutory ineligibility for citizenship and their false statements in obtaining naturalization. More ambitiously, the government could argue that people who hold political views likely to conflict with U.S. foreign policy or who privately agree with or support designated terrorist organizations had lied about that fact in their immigration proceedings and are therefore ineligible for citizenship. Even with *Maslenjak* remaining good law and continuing to be followed, this

[82] Chin & Finkelman, *supra* note 24, at 2223, 2225–26, 2236.

reading would likely allow for denaturalization. However, this would necessitate the courts accepting the applicability of the law refusing entry to individuals on account of their political activities.[83] Already the government has attempted to invoke this law to deport student protesters based on ostensible support for Hamas,[84] but this has been viewed with skepticism by the courts.[85] Or the government could rely on its recent designation of several Latin American criminal gangs as foreign terrorist organizations to denaturalize immigrants who had supposedly concealed or failed to mention connections with those gangs.[86] This strategy, however, faces significant legal obstacles. The first and most basic is that it is not clear that criminal organizations qualify as foreign terrorist organizations within the meaning of the relevant statute.[87] Second, given the difficulty of proving that a person is affiliated with a gang, a court would be unlikely to accept the argument that a photograph of two people wearing similar clothing proves anything, especially in light of the Supreme Court's pronouncement in *Maslenjak* that denaturalization is an extreme act that must be supported by exceedingly strong evidence.

The government could also seek to prune back *Trop*'s ruling that citizenship may not be revoked as a punishment. In 2020, in the waning days of the first Trump administration, the Department of Justice formed a section tasked with investigating citizens by naturalization who lied during the immigration process or failed to disclose criminal history or deportation records.[88]

[83] 8 U.S.C. § 1227(a)(4)(C)(i) ("An alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable").
[84] The Islamic Resistance Movement, or Hamas, is the militant governing entity in the Gaza Strip and a designated foreign terrorist organization by the U.S. Department of State.
[85] Khalil v. Joyce, No. 25-cv-1963, Dkt. 355 (D.N.J. 2025). If the law is held to be valid, then a noncitizen who falsely denies engaging in or planning to engage in political activities that would lead to them not being admitted to the United States in the first place would have fraudulently obtained naturalization.
[86] *E.g.*, Designating Cartels and Other Organizations as Foreign Terrorist Organizations and Specially Designated Global Terrorists, 90 Fed. Reg. 8439 (2025).
[87] 8 U.S.C. § 1189(a)(1)(B), (C).
[88] Debra Cassens Weiss, *Justice Department Creates Unit to Denaturalize Citizens Who Didn't Disclose Crimes*, Am. Bar. Assn. J. (2020), https://www.abajournal.com/news/article/justice-department-creates-standalone-unit-to-de

Sometimes, these investigations reveal cases in which perpetrators of serious crimes slipped through the cracks and obtained naturalization.[89] But even this has its limits as a form of immigration policy. It does not allow for the denaturalization of a person who obtains citizenship honestly and then commits a crime. Any effort to impose denaturalization as punishment for conduct which postdates the date of naturalization would face a strong equal protection challenge. And an effort to provide for U.S. citizenship to be revoked as punishment for a crime would run squarely against *Trop*'s famous holding.

If the government wishes to take a more extreme approach to involuntary expatriation, it may attempt to deprive the citizenship of Americans deemed too foreign. This would be in line not only with its stated mission of "America First,"[90] but also with its recent immigration raids, which have frequently included the arrest of U.S. citizens of apparent Hispanic origin.[91] One case the government may point to is *Rogers v. Bellei* (1971), a rare example of a later case blessing Congress' authority to expatriate.[92] The respondent in that case, Aldo Bellei, was born in Italy to an Italian father and an American mother. He was a citizen by birth; however, under section 301(b) of the 1952 Act (now repealed), his citizenship came with conditions. Specifically, in order to retain his citizenship, he would need to reside in the United States for five years prior to his twenty-eighth birthday; and when he failed to do so after being informed of this obligation, his citizenship was revoked.[93] The U.S. Supreme Court affirmed Bellei's involuntary expatriation on the grounds that he was not covered by the citizenship clause of the Fourteenth Amendment,

naturalize-citizens-who-didnt-disclose-crimes.

[89] *See, e.g.*, United States v. Smith, No. 24-cr-40 (D. Alaska, filed 2024) (defendant obtained naturalization despite previously committing sexually-motivated torture-murders of two women); United States v. Muchimba, No. 23-cr-393 (D.D.C., filed 2023) (defendant obtained naturalization at the same time he was allegedly engaging in a bank fraud scheme).

[90] U.S. Dep't of State, *100 Days of an America First State Department* (2025).

[91] Vasquez Perdomo v. Noem, 148 F.4th 656 (9th Cir. 2025).

[92] Rogers v. Bellei, 401 U.S. 815 (1971).

[93] 8 U.S.C. § 1401(b) (1971 ed.); *Bellei*, 401 U.S. at 819.

seeing as he was neither born nor naturalized in the United States.[94] This case is a curiosity, the rare example of a citizen by birth having fewer rights than a naturalized citizen, and of a citizen who registered for the draft despite living abroad having fewer rights than one who left the country to evade it.[95] While *Bellei* affirmed that Congress may impose conditions subsequent to citizenship that could result in involuntary expatriation, it is a very narrow case. It did not disturb *Afroyim*'s holding that a citizen, by virtue of birth in the United States or naturalization, could not be stripped of their citizenship without a voluntary act of expatriation on their part, meaning it would only be of use to the government in attempting to strip the citizenship of those born to U.S. citizens abroad. It would not be a useful complement to aggressive immigration enforcement, as naturalization provides more constitutional protection than enjoyed by Bellei. And finally, the majority emphasized that the former American would not be left stateless, as he was still an Italian citizen.[96] An attempt to deprive a person of citizenship and thereby leave them stateless would run counter to *Trop*'s condemnation of "the total destruction of the individual's status in organized society"[97] as well as a postwar international consensus.[98] But, as the legal developments since January 20, 2025, have shown, there is little the executive can now do that is truly unthinkable.

American immigration policy can be described as gatekeeping, a status set in motion by the first Naturalization Act's decree of White-only citizenship at the federal level, kindled by *Dred Scott*'s assertion that even Black people born in America would never enjoy its citizenship, and made most explicit by the racism of the Chinese Exclusion Act.[99] On the other hand, there

[94] *Bellei*, 401 U.S. at 827.
[95] Wasserman, *supra* note 2, at 420.
[96] *Bellei*, 401 U.S. at 836.
[97] *Trop*, 356 U.S. at 101.
[98] Similarly, in *Perez v. Brownell*, while Perez lost his American citizenship, his Mexican citizenship was unaffected. Thus, even treating *Perez* as good law, it would not necessarily bless the involuntary expatriation of someone who has no other country.
[99] Lee, *supra* note 34, at 43–44.

are the constitutional provisions guaranteeing citizenship, the laws allowing noncitizens to be adopted into the political fold, and the court decisions holding citizenship "priceless."[100] The gatekeeping machine, be it permissive or restrictive at any time, wields the tools of border control, deportation, and involuntary expatriation in tandem. When the government wants to keep people out, it also finds ways to expel those Americans who are seen as sharing too much with the "other." Involuntary expatriation should be understood not as some byproduct of the everlasting immigration debate, but as a central aspect of it in all its forms.

[100] Transcript of Oral Argument, *Maslenjak v. United States*, No. 16-309 (U.S. 2017), 55.

Plea Negotiations in Duval County, Florida: An Argument for Transparency and Flexibility in Criminal Proceedings to Protect Defendants' Rights

Writer: Kennedy Murphy

Article Editor: Francisca Puiatti

Associate Editor: Madeline Swaine

Abstract:

When an individual is arrested, they generally have two legal options they can pursue if the case is not dropped: plead guilty or go to trial. Plea negotiations are the step between the arrest and trial and final plea, because attorneys attempt to make a deal to avoid the risk of trial. In Duval County, one of the largest counties in Florida and one that has relatively high crime rates, a new problem has arisen in its criminal justice system—judges are implementing a blanket zero-involvement policy in plea negotiations. While this policy may seem like an equitable attempt to prevent judicial bias, a thorough review of relevant case law sheds light on the realities of plea negotiations in Duval County, Florida and reveals that a zero-involvement policy undermines the rights of felony defendants by increasing prosecutorial power, limiting informed decision-making, and operating without sufficient transparency or oversight.

I. Introduction

Duval County, Florida, sits at the top of the state as the largest county in Florida and has the fourth-highest violent crime rate per 100,000 people in Florida.[1] As such, it is essential to put the judicial system in this jurisdiction under a microscope and analyze the effectiveness of justice in the county. In the past five years, a trend has emerged as Duval felony circuit court judges (divisions CR-A to CR-H) have begun to adopt a zero-involvement policy in plea negotiations.[2] In other words, these judges do not indicate their sentencing stance before open pleas and do not take part in plea discussions, even if both parties invite the judge to plea discussions.[3] Zero-involvement judicial discretion policies in courtrooms are not unheard of, but case law on the matter is largely unexamined.[4] A blanket ban of judicial involvement in plea negotiations applies to every criminal circuit in the United States, with zero-involvement policies existing in at least fourteen states.[5] With limited case law and research on judicial involvement before open pleas, a more rigorous analysis of the operations in Duval is critical for due process not only in this county, but in all of the United States. While designed to safeguard due process by preventing the risk of unfair judicial discretion, Duval's zero judicial involvement policy simultaneously undermines the rights of felony defendants by increasing prosecutorial power, limiting informed decision-making, and operating without sufficient transparency or oversight.

II. Plea Process Background

[1] Fla. Dep't L. Enf't, *Violent Crime* (2020), https://www.fdle.state.fl.us/cjab/ucr/individual-crime/offenses/violent.
[2] Hon. Judge Mark Borello, Fourth Judicial Circuit Courts of Florida, *Standing Order Governing Pre-Trial/Trial Procedures*, at para. 1 (2023), https://www.jud4.org/getcontentasset/45d9ff45-c915-41a7-909e-a59afaa13956/135b97c9-84fa-4e82-b956-0fbccec4aa1f/cr-d-trial-order-for-website.pdf?language=en [hereinafter Borello].
[3] *Id.*
[4] Dylan R. McDonough, *In the Shadow of the Bench: Judicial Discretion to Reject Plea Agreements*, 57 Colum. J. L. & Soc. Probs. 633 (2024).
[5] *Id.*

A plea is the crucial step between arrest and trial where a defendant answers guilty or not guilty to the court.[6] Each side builds their case, and investigators collect evidence, all while determining if and when the other side will back down and accept a deal before trial.[7] Criminal defendants have the option to plead guilty and can often negotiate reduced charges or sentences in exchange for avoiding unnecessary expenditures on a trial.[8] This process is called "plea bargaining," and the agreed upon negotiation is called a "plea deal."[9]

The failure to reach an agreement between both sides, however, does not mean a trial is guaranteed. In Florida, criminal defendants have the ability to make an open plea to a judge.[10] In an open plea, a judge will review mitigating evidence presented by the defense and aggravating evidence presented by the prosecution.[11] Mitigating evidence is used to demonstrate the good character of the defendant, like the defendant's importance to their community and family, factors that generally minimize the severity of the crime, and any other reasons the defendant should receive a lesser sentence.[12] Aggravating evidence, on the other hand, is evidence presented by the prosecution to highlight the impact and severity of an offense; it presents reasons why the defendant should receive a more severe sentence.[13] After this evidence is presented, the judge decides the sentence.[14]

It is important to distinguish the difference between judicial sentences in an open plea and judicial sentences after a trial. There is a common risk that judges will sentence heavily after

[6] *Plea*, Black's Law Dictionary (10th ed. 2015).
[7] Shawn D. Bushway et al., *An Explicit Test of Plea Bargaining in the "Shadow of the Trial"*, 52 Criminology 723 (2014).
[8] A.B.A. Division Pub. Educ., *How Courts Work* (Nov. 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining/.
[9] *Id.*
[10] Joseph Soler, *What Is an Open Plea (Aka a "Straight Up Plea") in Florida?*, Soler Simon L. (2020), https://www.solersimonlaw.com/post/what-is-an-open-plea-aka-a-straight-up-plea-in-florida.
[11] *See* Cunningham v. California, 549 U.S. 270 (2007); Lockett v. Ohio, 438 U.S. 586 (1978).
[12] *See Cunningham*, 549 U.S.; *Lockett*, 438 U.S.
[13] *See Cunningham*, 549 U.S.; *Lockett*, 438 U.S.
[14] *See Cunningham*, 549 U.S.; *Lockett*, 438 U.S.

a trial.[15] This phenomenon is called the "trial tax," and often makes an open plea more enticing depending on the maximum sentence.[16] Thus, the offer of the prosecution, the potential decision of the judge at an open plea, and the maximum sentence are all vital factors for defendants to consider in making their decisions.

III. Duval County's Zero-Involvement Practice

In Florida, arrested individuals have two possibilities for which court they could be sent to: a county court or a circuit court.[17] Each county has a county court that oversees low-level criminal offenses, known as misdemeanors.[18] Circuit courts, on the other hand, often preside over multiple counties and exercise broader jurisdiction, presiding over felonies and any misdemeanors not assigned to a county court.[19] Circuit courts therefore possess greater judicial authority in both scope and function.[20] In Duval County, the relevant circuit court is Florida's Fourth Circuit Court.[21] Accordingly, analyzing the plea practices of the judges within the Fourth Circuit Court is key to understanding the standards of judicial discretion in Duval plea negotiations.

The criminal sector of Florida's Fourth Circuit has eight divisions, CR-A to CR-H, with a separate judge handling each division.[22] In the Fourth Circuit Court of Florida, each judge has publicly posted the rules they use in their courtroom on the Court's website.[23] While not every policy uses identical language, at least one explicitly states a zero-involvement policy in plea

[15] Brian D Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 Crime & Just. 313 (2019).
[16] *Id.*
[17] Fla. Courts, *Trial Courts—Circuit*, Florida Courts (last accessed 2025), https://www.flcourts.gov/courts-system/court-structure/trial-courts-circuit?.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] Fourth Judicial Cir. Ct. Fla., *Duval Judges* (last accessed Dec. 2025), https://www.jud4.org/ex-parte-dates-judge-s-procedures/duval-judges?.
[22] *Id.*
[23] *Id.*

negotiations.[24] A zero-involvement policy excludes a lot of common courtroom practices, among which includes the indication of a sentencing before an open plea; without an indication of the defendant's sentence before an open plea, defendants are left to gamble their future.

IV. Practical Consequences of Duval County's Rigid Practices

A. Defendant Psychology

A look into the psychology of criminal defendants illuminates their fragile state of decision-making, as well as how a lack of information can exacerbate judgment fallacies.[25] In particular, overconfidence and a self-serving bias causes defendants to incorrectly weigh the pros and cons of their decisions.[26] Defendants may have a skewed view in their favor, thinking odds at trial or a hearing are more likely to be in their favor than can realistically be relied upon.[27] While these biases exist in defendants regardless, in an open plea, this phenomenon can be exaggerated when the presiding judge does not provide comprehensive and relevant information to the defendant, an inappropriate practice that endangers the defendant, legally speaking. Overconfidence and a self-serving bias each originate from a lack of information regarding the matter at hand.[28] Less information further skews and impairs the decision-making ability of defendants.[29] While it is the responsibility of an attorney to manage the expectations of their clients, if defendants do not definitively know how judges will sentence in an open plea, they may be more inclined to take a risk with an open plea due to unmitigated overconfidence in the space of limited information.[30] Attorneys simply inform the defendants on what options are available; it is the defendants themselves who ultimately decides what path to take.[31] On the

[24] Borello, *supra* note 2.
[25] Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2464 (2004).
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Missouri v. Frye, 566 U.S. 134 (2012).
[31] *See* Jenia I. Turner, *Transparency in Plea Bargaining*, 96 Notre Dame L. Rev. 973 (2021).

other hand, if all defendants were equally and regularly informed of their legal situation, their decisions could be more grounded in fact. If defendants were granted an indication of how judges may sentence in an open plea, there would be less guesswork and likely less individual bias. Therefore, a zero-involvement policy in criminal courts impairs the decision-making ability of defendants.

B. Trial Tax

While the existence of a trial tax is denied and frowned upon by judges and prosecutors, it is an established norm in criminal law with overwhelming amounts of data supporting its prevalence across various jurisdictions in the United States.[32] Each time a defendant goes to trial, they face a systemic risk of a heavier punishment than what they may get from a plea negotiation or an open plea, a phenomenon commonly referred to as a "trial tax."[33] The gamble defendants take in their choice of plea is exacerbated in Duval County, Florida, in which defendants are often forced to weigh two unknowns against each other—an unknown sentence in an open plea versus an unknown sentence after a trial. Should judges indicate their likely sentence before an open plea, defendants can make more informed decisions. For example, if a judge indicates a sentence less than maximum, the defendant may be more inclined to do an open plea. On the other hand, if the judge indicates a maximum sentence will be given at an open plea, then the gamble of going to trial may be more enticing to the client. But if the defendant knows nothing, they are left basing the future of their liberty on guesswork.

C. Increased Prosecutorial Power

Prosecutors start on higher ground than defense attorneys in plea negotiations; unlike the defense, prosecutors can set the charges, offer and withdraw plea deals, and set expiration dates

[32] Alexander Testa & Brian D. Johnson, *Paying the Trial Tax: Race, Guilty Pleas, and Disparity in Prosecution*, 31 Crim. Just. Pol'y Rev. 500 (2020).
[33] *Id.*

on plea deals.[34] A zero-involvement judicial discretion policy in plea negotiations tips the scales of justice further towards prosecutors. While defense can offer plea deals as well, it is not the same.[35] The defense's plea deal is an offer the state does not have to accept and has no guarantee of being taken.[36] The prosecution's plea deal is the only option the defendant has to take beyond trial and an open plea.[37] A prosecutor can also refuse to negotiate, forcing a defendant to take an open plea or go to trial.[38] A defendant can also refuse to negotiate, but the difference lies in the autonomy of the defendant; their ability to have three different types of pleas and a route to a fair plea is negated.[39] In these cases, when a prosecutor does not offer a fair deal or one simply in line with the wishes of the defendant, the defendant faces two other options: an open plea, which is set by the judge, or a trial. When a judge refuses to indicate how they will sentence in an open plea, both the open plea and trial become unknowns, with the only available information on the consequences of these choices being guesswork. Thus, prosecutors offer the only controlled information to the defendant.[40] Defense attorneys have limited power to counter or pressure prosecutorial offers with the threat of an open plea hearing or trial when each of those routes could result in a worse outcome. Therefore, a blanket zero-involvement policy increases prosecutorial power in plea negotiations; the scales of justice are unbalanced.

V. Legal Framework for Judicial Involvement in Plea Negotiations

There are limited guidelines and case law surrounding judicial discretion for involvement in plea negotiations, but those that do exist give wide-ranging discretion to judges.[41] The basis of the legal framework arises from Florida Statutes, specifically the Florida Rules of Criminal

[34] Angela J. Davis, *The Hidden Law of Plea Bargaining*, 117 Colum. L. Rev. 1890 (2017).
[35] Bibas, *supra* note 25.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *See id.*
[40] *Id.*
[41] McDonough, *supra* note 4.

Procedure. Rule 3.170(g) clarifies that judges review and accept or reject plea agreements.[42] This standard is supported by recent Florida case law, as the most recent and relevant Florida case law regarding plea negotiations, *Frazier v. State* (2024), affirms that a court can reject negotiated pleas between parties.[43] In other words, both the defense and prosecution could agree to a deal and the judge could still reject the deal, demonstrating a broad scope of judicial discretion.

It should be noted that there is a caveat to this broad judicial discretion—while judges can reject negotiated pleas, these rejections become faulty once the constitutional rights of the defendant are put at risk.[44] There are a couple of ways in which plea rejections can become illegal and each are equally important to consider. These illegal rejections set a clear standard for judicial overreach, providing insight into the legitimacy of a blanket zero-involvement policy.

First, due process of law, as guaranteed by the Fourteenth Amendment of the U.S. Constitution, must be maintained throughout the plea process,[45] as a judge cannot reject a plea on the basis of a constitutional right.[46] As to how due process actually looks in practice, state case law has shaped an interesting yet nebulous process for the procedures of judges.[47] For example, a judge could not reject a plea because a defendant did not waive their right to appeal.[48] Furthermore, the plea must be knowing, voluntary, and intelligent.[49] In Florida courts, the judges ask the defendant a series of questions as they enter their plea in order to ensure this metric is met.[50]

[42] Fla. R. Crim. P. 3.170(g) (2025).
[43] Frazier v. State, 388 So. 3d 246 (Fla. 3d DCA 2024).
[44] Fallgater & Catlin, P.A., *Withdraw Plea—Challenge Illegal Search* (last accessed Dec. 2025), https://fallgatterlaw.com/legal-pleadings/withdraw-plea-challenge-illegal-search/.
[45] U.S. Const. amend. XIV, § 1.
[46] Fallgater & Catlin, *supra* note 44.
[47] Wilson v. State, 845 So. 2d 142, 150 (Fla. 2003).
[48] *Id.*
[49] Boykin v. Alabama, 395 U.S. 238 (1969); Fla. R. Crim. P. 3.170(g) (2025).
[50] Fla. R. Crim. P. 3.172(c)(6) (2025).

Second, judicial discretion on plea negotiations is limited if a judge overinvolves themselves in the plea negotiation process.[51] While the ability to have judicial discretion is clear, the defined legal form is nebulous on statutes alone; this raises the question of what sanctioned judicial participation in plea negotiations would look like beyond merely accepting and rejecting a plea. *State v. Warner* (2000) ruled that in order for the judge's participation to be fair and legal, they must follow the following guidelines: have been invited to the plea negotiations by both sides, maintain neutrality, refrain from bargaining with the defendant, and hear all the facts of a case before sentencing.[52] Thus, when properly performed in a limited capacity, judicial involvement can actually increase fairness in criminal trials.[53] Despite the refusal of Duval County judges to indicate their sway in a plea, this practice is constitutional. Duval's blanket abstention is a discretionary choice, not a legal mandate.

The precedent established in *Warner* has been further upheld and clarified in the decisions of lower-level appellate courts governing Duval County.[54] The Florida First District Court of Appeals clarified in *Huy N. Ha v. State* (2011) that judges can make a preliminary statement of an appropriate sentence given the available evidence.[55] Thus, there is no legal requirement or mandate for a zero-discretion policy. It is well within the powers of a judge to be involved with plea negotiations, given they are invited by both sides and do not impede the fairness of the case.

It is worth noting that while there is no case law preventing judges from being involved in plea negotiations or necessitating a zero-involvement policy, there also is no precedent in case law banning a zero-involvement policy either.[56] The distinction lies in the fact that case law

[51] State v. Warner, 762 So. 2d 507 (Fla. 2000).
[52] *Id.*
[53] *Id.*
[54] Huy N. Ha v. State, 56 So. 3d 834 (Fla. 1st DCA 2011).
[55] *Id.*
[56] McDonough, *supra* note 4.

explicitly allows involvement, but a wide-ranging zero-involvement policy is a case of first impression, meaning it has yet to be addressed in higher courts.[57]

VI. Constitutional Validity

Considering the merits of a legal process, both its practical effects and constitutional validity must be taken into consideration; the zero-involvement policy in Duval County is no exception. While there are no published Florida cases that explicitly address whether blanket judicial silence undermines the constitutional validity of open pleas, existing case law demonstrates extreme concerns in the validity of this mandate.[58] While the Duval mandate may not directly violate due process, its prosecutorial imbalance makes way for violations of due process in downstream proceedings.

While defendants are not required to have an indication of a judge's sentence to make an informed plea, the judicial silence renders the validity of due process dubious at best. The concept of due process originates from the Fifth Amendment and extends to all levels of the U.S. judicial system, mandating that no state can "deprive any person of life, liberty, or property, without due process of law."[59] In other words, state trial courts, not just federal courts, must give every citizen due process of law before infringing upon their rights.[60] In the context of criminal court, a government infringement on any constitutional right is treated as the sentence given after a guilty plea is entered.[61] In most cases, this would look like serving time in prison or doing probation. Due process is vaguely defined in the U.S. Constitution, and its application has been shaped primarily through case law. The courts have crafted two kinds of due process: substantive

[57] *See generally Primae Impressionis*, Black's Law Dictionary (12th ed. 2024) (general definition of the term) (a case of first impression "is a case of a new kind, to which no established principle of law or precedent directly applies, and which must be decided entirely by reason as distinguished from authority.").
[58] Boykin v. Ala., 395 U.S. 238 (1969); Brady v. United States, 397 U.S. 742 (1970); Missouri v. Frye, 566 U.S. 134 (2012).
[59] U.S. Const. amend. XIV.
[60] *Id.*
[61] *Boykin*, 395 U.S.

and procedural.[62] Substantive due process simply means the government must have some reason to infringe on an individual's right. Procedural due process, on the other hand, requires the government to follow a fair set of rules and procedures, where straying from the guidelines would deprive someone of their rights. Plea negotiations and the steps judges take during them fall under procedural due process, as they are part of the required steps to reach a just, fair sentence and conviction.

Still, the assertion that judges must simply follow procedural due process is not narrow enough to decide as to whether the Duval zero-involvement policy actually infringes upon due process; a standard of the role due process plays in the realm of plea negotiations is needed to determine if due process is violated. Case law suggests that this standard is an informed defendant. Specifically, *Boykin v. Alabama* (1969) established that constitutional rights are waived when a guilty plea is entered.[63] Thus, the plea must be knowing and voluntary.[64] *Brady v. United States* (1970) extended this standard, requiring that the defendant must comprehend the consequences and circumstances of their plea for procedural due process to have been met.[65] This standard alone, however, does not make a zero-involvement policy unconstitutional. In fact, the Florida Rules of Criminal Procedure have interpreted *Brady* to require only that the defendant know the minimum and maximum sentences going into an open plea, rather than the most likely sentence.[66] Additionally, it is the duty of a defense attorney to inform a defendant of these consequences, as established in the burden for effective counsel in *Missouri v. Frye* (2012).[67] A baseline constitutional analysis merits no problems with Duval's zero-involvement policy.

[62] *Due Process of Law*, Black's Law Dictionary (12th ed. 2024).
[63] *Boykin*, 395 U.S.
[64] *Id.*
[65] *Brady*, 397 U.S.
[66] Fla. R. Crim. P. 3.172(c) (2025).
[67] *Frye*, 566 U.S.

A defendant's right to effective assistance of counsel, however, becomes impeded with the zero-involvement policy. The Supreme Court clarified in *Frye* that defendants are entitled to not just general effective assistance of counsel, but specifically effective assistance of counsel during plea negotiations and the entering of a guilty plea.[68] Defendants have a constitutional right to have an attorney competently advise them throughout the course of criminal plea negotiations.[69] This decision was upheld in *Lafler v. Cooper* the same year, further solidifying that the right to effective counsel is not solely for trial, but that it extends to plea negotiations as well.[70] A zero-involvement policy substantially limits the impact an attorney can have on their client's case. Without all the proper pathways illuminated, attorneys are limited. When defendants are faced with two paths outside of trial—negotiate a deal or do an open plea—but lack the information to know how one of those paths (the open plea) will turn out, it becomes difficult to give clients the best advice possible.

It should be noted that due process, as established in the U.S. Constitution, is chiefly concerned with the defendant's ability to receive a fair trial rather than a fair negotiation. As long as defendants understand their rights and enter a plea voluntarily, prosecutorial power during negotiations is not inherently unconstitutional. However, this argument is an oversimplification of reality, as plea negotiations and trial tactics are not so cleanly separated. When plea dynamics are unbalanced, the fairness of a trial can be compromised. In fact, in *Santobello v. New York* (1971), the Supreme Court affirmed plea negotiations are an integral part of criminal justice; should the prosecutors behave unfairly and thus create a power imbalance, the Court asserted that justice would be skewed. Judicial silence, then, removes a key check on prosecutorial overreach at this stage. A second-level harm—i.e. imbalance rather than coercion—is found in

[68] *Id.*
[69] *Id.*
[70] Lafler v. Cooper, 566 U.S. 156 (2012).

Duval's zero-discretion policy. The constitutionality of this matter is not rooted in whether defendants understand their plea, as judicial silence does not inherently prohibit that, but in the increased power given to prosecutors in plea negotiations that can skew the trial. Furthermore, while a zero-involvement policy may not directly impede due process, it creates an imbalance that can distort later proceedings and harm overall procedural due process.

In full consideration of the constitutionality of a circuit-wide zero-judicial involvement policy, it is important to acknowledge that this case is a case of first impression. Duval's standard, wherein all judges explicitly prohibit judicial involvement in plea negotiations, has never been tried in the higher courts and has yet to be challenged as a violation of due process or right to effective counsel.[71] Should this issue be challenged in Duval, it would be a case that echoes across Florida and the entire nation. Felony convictions are possible in every county in America;[72] to set a new standard for due process within them—whether upholding or barring zero-judicial involvement in plea negotiations—would impact the rights of every U.S. citizen.

VII. Racism and Judicial Discretion in Duval County

Duval County, Florida, like every jurisdiction in the United States, has a long history of racism and prejudice embedded in its criminal justice system.[73] While not explicitly stated as a reason for a zero-involvement policy, it could certainly be argued that a policy of no judicial discretion prevents judicial biases and thus mitigates prejudice. This argument is well-intentioned and not without merit; Duval County's zero-involvement policy is far from a perfect solution, but analyzing the problems it may be attempting to solve can help to find a more equitable middle ground.

[71] McDonough, *supra* note 4.
[72] Bureau Just. Statistics, *Felony Sentencing and Jail Characteristics*, U.S. Dep't Just. (1989), https://bjs.ojp.gov/content/pub/pdf/fsjc.pdf.
[73] Larry Rohter, *Judge's Racial Remarks Leave Town in Turmoil*, N.Y. Times, Jan. 1992, at A12.

In recent history, Duval has had several controversial judges, some of whom made national news, for their racist conduct in the courtroom.[74] One of the first, and perhaps the most famous of these judges, was Chief Judge John E. Santora, Jr. of the Fourth Circuit Court of Florida, who served as chief judge from 1985–1992.[75] A Chief judge has significant influence over the county's criminal justice system, as they assign judges to divisions of the court, regulate the use of the courtrooms, and supervise the dockets and calendars of the courts.[76] In 1992, Judge Santora received national backlash for several racist comments he made, the least of which included blaming violence on school integration.[77] While some may have viewed these comments as isolated to Judge Santora, local leaders in Duval County such as former City Council President Warren Jones believed that Duval County faced a problem of systemic racism in their criminal justice system.[78] Judge Santora was not the last Duval County judge to get into a controversy of this sort.[79] In 2016, Judge Mark Hulsey resigned after admitting to making several racist comments to his subordinates.[80] Clearly, Duval County has received immense negative backlash for judges who have overstepped in terms of discriminatory courtroom behavior.[81] Though never formally cited as the cause, the zero-involvement policy may have emerged as an overcorrection for these incidents.

Racial bias in Duval County does not start and end with the judges; evidence of bias in jury selection hints that prejudice has also seeped into the state attorneys.[82] More specifically, a

[74] *Id.*
[75] *Id.*; *Judge Taken from Bench Dies at Age 73*, Tampa Bay Times (Oct. 1996), https://www.tampabay.com/archive/1996/10/13/judge-taken-from-bench-dies-at-age-73/.
[76] Fla. Stat. § 43.26 (2025).
[77] Rohter, *supra* note 73.
[78] *Id.*
[79] Gary Fineout, *Florida Judge Accused of Racist and Sexist Slurs Resigns*, AP News, (Jan. 2017), https://apnews.com/general-news-4a84e911fbd64dc49dac728206bc4c33.
[80] *Id.*
[81] Rohter, *supra* note 73.
[82] Letter from Jacinta M. Gau, Professor, U. Cent. Fla., to Brian W. Stull, Senior Staff Attorney, ACLU (2021) (on file with the ACLU).

2021 study found that in Duval County, Black prospective jurors were more than twice as likely to be removed as white jurors during the jury selection process.[83] While not overtly tied to the norms of Duval County plea negotiation practices, it is clear that racial bias is systemic within the State Attorney's Office of the Fourth Judicial Circuit. Moreover, given that many plea negotiations are influenced by how a case may fare before a jury, racially skewed jury selection can indirectly pressure defendants into unfavorable pleas.[84] Removing judges from plea negotiations not only strengthens the power of state attorneys but also relieves checks on prejudices and biases they may hold. Bias pervades the criminal justice system; addressing it requires a more balanced alternative to blanket judicial silence.

VIII. Policy Reform and Future Outlooks

The reasons behind a zero-involvement policy are not unwarranted; while judicial discretion can be a powerful force to increase fairness in the conviction process, it can also significantly impede justice.[85] Even cases that support judicial involvement in plea negotiations such as *Warner* caution against an overreach of powers.[86] This potential impediment, however, does not negate the significant concerns of a blanket zero-involvement policy. A breach of due process, ineffective counsel, and practical reductions of defendant autonomy in plea negotiations are all consequences of this hands-off policy. Thus, a middle ground is needed.

Existing case law provides a framework by which a just and equitable path forward can be pursued. *Warner* establishes a clear set of rules meant to ensure judicial involvement is fair and just.[87] To prevent judicial overreach, judges must be invited to plea negotiations by involved parties, maintain neutrality, refrain from bargaining with the defendant, and hear all the facts of a

[83] *Id.*
[84] Bushway et al., *supra* note 7.
[85] *Warner,* 762 So. 2d.
[86] *Id.*
[87] *Id.*

case before sentencing.[88] This may seem like many moving parts, but *Huy N. Ha* and *Warner* illuminate practical policy solutions for Duval County judges. *Huy N. Ha* clarifies potential applications of *Warner* in the plea process—judges can make a preliminary statement of an appropriate sentence given the available evidence.[89] This could prevent judicial overreach and ensure due process for defendants if the judge is invited by both parties to (1) give a tentative indication of their sentence before an open plea based on the current facts, and (2) make it clear to the defendant this sentence is not binding but simply a likely way the judge will sentence based on the current circumstances. While the defendant may still take a gamble in a plea, introducing these standards would make the process for defendants more informed and mitigate the chance of risky guesswork. When the liberty of a citizen is on the line, it is vital that the courts take every chance possible to follow due process.

IX. Conclusion

The Fourth Judicial Circuit Court of Florida has shown to favor an emerging trend—a blanket policy where judges have no involvement in plea negotiations.[90] While avoiding judicial overreach is a valiant effort, it presents the following negative follow-on effects: a violation of defendants' constitutional rights, a practical impediment on defendants' decision-making abilities, and an increase in prosecutorial power during the plea negotiation process. The constitutionality of a blanket zero-involvement policy is a case of first impression. Both federal and state case law focus on the impact of how far a judge can go in the plea negotiations process rather than suggesting a judge should leave the process altogether.[91] Judicial overreach is a

[88] *Id.*
[89] *Huy N. Ha*, 56 So. 3d.
[90] Borello, *supra* note 2.
[91] McDonough, *supra* note 4.

frequent concern in state and federal case law, but both support some judicial involvement, claiming it can increase fairness in the plea negotiation process.[92]

While a zero-involvement policy has not explicitly been addressed by the courts, it presents the grounds for vital constitutional violations. Procedural due process is put in jeopardy when clients do not have any indication of their sentence in an open plea, as defendants cannot fully understand the consequences of their plea if they do not know the outcome of their sentence. Additionally, federal case law has established clients have the right to effective counsel in plea negotiations.[93] If attorneys do not know the likely outcome of an open plea, their ability to advise the defendant is limited. Thus, the blanket policy is not constitutionally sound, as it presents a threat to both procedural due process and the right to effective counsel.

A look into the practical consequences of a zero-involvement policy showcases that this policy impairs defendant decision-making, forces a trial tax gamble on the basis of guesswork, and increases prosecutorial power. More specifically, overconfidence and a self-serving bias are present in the defendant psychology of plea negotiations, but their negative effects are skewed with the lack of information created in a zero-involvement policy.[94] Further, when clients face potentially heavier sentences after a trial but are not informed of their likely sentence in a plea, the future of their liberty is based on guesswork.[95] Along those lines, prosecutorial power is strengthened in these circumstances as the only definitive information a defendant can get on their future is the prosecutorial plea offer.[96] A zero-judicial involvement policy has several practical consequences for the fairness of defendants, which raises concerns about its fairness and legitimacy.

[92] *Warner,* 762 So. 2d; *Huy N. Ha*, 56 So. 3d.
[93] *Frye*, 566 U.S.; *Lafler*, 566 U.S.
[94] Bibas, *supra* note 25.
[95] Testa & Johnson, *supra* note 32.
[96] Davis, *supra* note 34.

A middle ground can be reached with the careful involvement of judges in the plea negotiations process. If judges are invited by the parties involved, then they can provide a non-binding indication of their sentence in an open plea given that it is made clear to the defendant this sentence is non-binding until the actual open plea hearing. Judicial discretion in the Fourth Judicial Circuit Court of Duval County, Florida has the chance to set an important precedent for not only residents of the state but the country writ large. The rights enumerated in the U.S. Constitution should be granted to every citizen, including alleged criminals; a critical examination of any and every judicial policy's impact on due process, even at the county level, is vital to a healthy criminal justice system across the nation.

Understanding Qualified Immunity Through Samurai Privilege: A Comparative Analysis Guided by Anthropological Theory

Writer: Nina Rayman

Article Editor: Simmi Purohit

Associate Editor: Dina Fakhar

Abstract:

The Tokugawa family rule of Japan (1603–1868) was defined by a feudal legal system of hierarchical military rule. The samurai sat on top of this hierarchical caste system, indoctrinated by the rules of *bushido* (ritual honor) and the legal privilege of *kirisute-gomen*. *Kirisute-gomen* allotted samurai the right to strike down subjects at any indication of disobedience. This article argues that, within the legal system of the United States, the jurisprudence of qualified immunity maintains a very similar function. Qualified immunity protects government officials in the United States by shielding them from civil suits unless their behavior warrants a violation of firmly established constitutional rights. Firmly established implies that the behavior has been previously tried in court and ruled to be illegal. This analysis compares the legality of qualified immunity in the United States with the samurai doctrine of *kirisute-gomen* through the lens of French sociologist Émile Durkheim's theory of collective consciousness.

I. Introduction

The Tokugawa *shogunate* was the presiding military government of Japan from 1603 to 1868 during the Edo, or Tokugawa, period, and it was a hierarchical system that operated under principles of political isolationism and feudalism.[1] Tokugawa law conferred special legal privileges on the samurai warrior class due to their elite status within the hierarchical social caste system.[2] For example, the samurai class had the right to kill commoners immediately if they were deemed disrespectful or dishonorable.[3] This practice was commonly known as *kirisute-gomen*, which loosely translates to "license to cut down."[4] Later, in a different legal tradition, American courts developed the doctrine of qualified immunity that protects a modern group of enforcers from private lawsuits. Qualified immunity shields public officials from civil responsibility when performing discretionary functions.[5] In *Pierson v. Ray* (1967), the U.S. Supreme Court acknowledged a "good faith" defense to Section 1983 claims against law enforcement officers.[6] Later, *Harlow v. Fitzgerald* (1982), decided by the U.S. Supreme Court, replaced subjective "good faith" with an objective "clearly established law" standard to "avoid

[1] The term "shogunate" refers to the militarized government and political system of the *shogun*. A *shogun* is a hereditary Japanese ruler that holds political power and oversees armed forces. Although legally subordinate to the emperor, the *shogun* exercises power over rulers of domains called daimyos. The *shogunate* was the active government in Japan from 1192–1867. There were three main periods of the *shogunate*: the Kamakura, the Ashikaga, and the Edo period. *Shogunal* rule ended with the Meiji Restoration in 1868. *See generally* Amy Vladeck Heinrich, *Japan: Timeline of Historical Periods*, Weatherhead E. Asian Inst. (2020), https://afe.easia.columbia.edu/timelines/japan_timeline.htm (shows and describes all time periods of Japanese history).

[2] In 1185 samurai replaced local and court governments as warrior administrators. Samurai were defined in terms of their hereditary status and could hold office. Samurai held class superiority over merchants and townspeople. *See* Asia for Educators, *The Age of the Samurai: 1185-1868,* Weatherhead E. Asian Inst., https://afe.easia.columbia.edu/special/japan_1000ce_samurai.htm (last accessed Dec. 2025) (examines the political position of samurai during their three periods of military rule); *see also* Douglas R. Howland, *Samurai Status, Class and Bureaucracy: A Historiographical Essay*, 60 J.Asian Stud. 353–54 (May 2001) (investigates the problem of samurai status during the Tokugawa period).

[3] Marius B. Jansen, *The Making of Modern Japan* 102 (2000).

[4] *Id.*

[5] Whitney K. Novak, *Policing the Police: Qualified Immunity and Considerations for Congress*, Libr. Cong. (Feb. 2023), https://www.congress.gov/crs-product/LSB10492.

[6] Section 1983 is a federal statute under the Civil Rights Act (1871) that allows individuals to sue state and local officials in civil court if they violate constitutional rights while acting under state law. *See* 42 U.S.C § 1983 (1871).

excessive disruption of government."[7] By resolving "insubstantial claims" early, qualified immunity has been consistently broadened to shield officials from litigation burdens and liability.[8]

From the beginnings of qualified immunity, the U.S. Supreme Court has made it clear that a right is "clearly established" only when its parameters are clear enough that every reasonable law enforcement official would know that the behavior is against the law.[9] To compare and apply theory to qualified immunity and *kirisute-gomen* sufficiently, the jurisprudential and social justifications in both Tokugawa era Japan and contemporary American policing systems must be taken into account. This comparison can reveal how different societies protect law enforcement officials explicitly via force and implicitly via soft power. The Tokugawa era expression of *kirisute-gomen* permitted samurai to execute commoners without any fear of legal repercussions. This article asserts that the United States has taken up a similar framework in the form of qualified immunity, which shields law enforcement and government officials from liability following wrongdoing and misconduct. Both of these jurisprudential norms and precedents demonstrate how legal systems, regardless of political or legal contexts, can place law enforcement at a level above the people they rule, with this privilege codified in the law itself. This normalization can be explained by French sociologist Émile Durkheim's concept of the collective consciousness. Despite taking on different forms cross-culturally, this legal tradition of law enforcement protection represents a universal need for social unity maintained by authority. The question of whether the United States can also eliminate its own

[7] Pierson v. Ray, 386 U.S. 547, 548 (5th Cir. 1967).
[8] Harlow v. Fitzgerald, 457 U.S. 800, 801 (D.D.C. 1982); Anderson v. Creighton, 483 U.S. 635 (1987); Pearson v. Callahan, 555 U.S. 223 (2009); Kisela v. Hughes, 584 U.S. 100 (2018).
[9] *Harlow*, 457 U.S. at 801.

"caste" of law enforcement officials can be investigated through examining the legal precedents of the Tokugawa era and the Meiji era eradication of samurai privilege.

II. History of the Samurai Under Tokugawa Law

The Tokugawa family's ruling class legal system lasted from 1600 to 1868.[10] The Tokugawa family gained rule over Japan after winning the battle of Sekigahara in 1600.[11] The Tokugawa *shogunate* was officially established in 1603.[12] Tokugawa leadership and caste hierarchy, while not operating under a formal, rights-based legal system, laid the foundation for modern Japanese law and social organization.[13] The Tokugawa legal system was an integration of the Confucian ethics of neighboring China and the ancient feudal hierarchy of Japan.[14] The samurai's privileged position was a central point of this order. Legal scholar Harold G. Wren holds that justice in this system was dependent upon the discretion of the ruler.[15] He contrasts this with other Western systems of law, where "truth" is purportedly revealed in the law.[16] The doctrine of *kirisute-gomen* was one of the most poignant examples of this legal imbalance between the samurai and lower castes.[17] This underlying principle gave samurai the authority to kill civilians on sight if they did anything perceived to be rude or performed actions indicating failure of proper respect.[18] As such, pure perception was enough for a samurai to justify lethal force.

---

[10] Andrew Gordon, *A Modern History of Japan* 9 (2002).
[11] The Tokugawa *shogunate* was founded by Tokugawa Iyeyasu. *Shoguns* following after him were his hereditary successors. For more background information on the Tokugawa family, see Japan Society, *The Polity of the Tokugawa Era*, Japan Soc'y (Nov. 2023), https://japansociety.org/news/the-polity-of-the-tokugawa-era/ (describes the Tokugawa system and explains how the *shogunate* exercised authority).
[12] Masayuki Tanimoto & R. Bin Wong, *Public Goods Provision in the Early Modern Economy: Comparative Perspective from Japan, China, and Europe* 13 (2019).
[13] For more on the *daimyo*, imperial institution, samurai, villagers and city dwellers, *see generally* Gordon, *supra* note 10, at 13–16 (provides in depth background on the different castes of society in Tokugawa Japan and their societal role).
[14] Dan F. Henderson, *Some Aspects of Tokugawa Law,* 27 Wash. L. Rev. & St. B. J. 103 (1952).
[15] Harold G. Wren, *The Legal System of Pre-Western Japan,* 20 Hastings L. J. 217 (1968).
[16] *Id.* at 221.
[17] Jansen, *supra* note 3.
[18] G. Cameron Hurst III, *Death, Honor and Loyalty: The Bushidō Ideal,* 40 U. Haw. Press 520 (1990).

This right to kill was derived from a collective understanding ingrained within samurai society. This counters contemporary American ideas of due process that bind a civilian to the law through jurisprudential institutions. Through its Fifth and Fourteenth Amendments, the United States Constitution acts as a contract that binds its citizens to a framework of law that, if broken, reaps consequences.[19] Put simply, the difference in legal exigencies lies within the government's desire to protect individuals (i.e., U.S. legal systems) as opposed to protect the overall cohesion of society (i.e., Tokugawa rule in historical Japan).[20]

The *Legacy of Iyeyasu* was a formal statement made by Tokugawa Iyeyasu and served as the rules of paternal government for Tokugawa successors.[21] This text essentially set a precedent for future Tokugawa rulers. It warned leaders to maintain kindness towards the weak while also stressing each individual's duty within their respective social caste to maintain society's overall stability. This contrasting nature of maintaining kindness while still upholding warrior duties as demonstrated in the text demonstrates the paradox that was deeply rooted in Tokugawa legality.[22] The rules demonstrated in the *Legacy of Iyeyasu* claimed to uphold moral principles of the samurai, but instead it functioned to legally shield samurai warriors from taking accountability for violent actions. Tokugawa Iyeyasu's rules encouraged interpretation of allowances that were not strictly defined within their social role as members of the military class.[23]

Despite these regulations, Tokugawa society became comfortable with the idea that the samurai's personal judgment of insult is enough to justify executional action, due to the warrior's

[19] U.S. Const. amends. V, XIV.
[20] Confucianism stressed social hierarchies through self improvement and putting the needs of a group above those of an individual. *See generally* Encyc. Britannica, *Neo-Confucianism*, https://www.britannica.com/topic/neo-confucianism-japanese-philosophy (last accessed Dec. 2025) (provides contextual information about Confucianism and its characteristics).
[21] Basil Hall Chamberlain and W. B. Mason, *A Handbook for Travellers in Japan: Including the Whole Empire from Yezo to Formosa* 74 (Kelly & Walsh 1901).
[22] Tokugawa Iyeyasu, *The Legacy of Iyeyasu* (J. F. Lowder trans., 1874), *reprinted in* J. H. Longford, *The Story of Old Japan* (1910).
[23] *Id.*

honorable nature.[24] Chapter fifty-two of the *Legacy of Iyeyasu* states that commoners with vengeance towards a samurai injury must give notice to the criminal court.[25] At face value, the requirement to report could have been seen as a way to help families of those wrongfully executed at the hands of a samurai to obtain justice for their deceased relatives. Marius Jansen's sweeping historical account in his book *The Making of Modern Japan* situates samurai privilege within the political framework of the Tokugawa *shogunate*. Jansen asserts that social stability relied on elevating the authority of those responsible for upholding that very same hierarchy.[26] From this viewpoint, *kirisute-gomen* reflects an overall legal philosophy of preserving order.

Another important function of Tokugawa law was keeping *daimyo*, the powerful feudal lords, in check. Historically, *daimyo* wealth and military power were a threat to the *shogunate*'s authority. To confront this, the Tokugawa family kept the *daimyo* at arm's length through a sort of dual control system, which combined strict rules with carefully planned ritual submission to Edo, the *shogun*'s capitol.[27] The most important part of this system was *sankin-kotai*, or alternate attendance.[28] As part of this deal, the *daimyo* were required to alternate their place of residence each year between their home domains and Edo, spending every other year at the *shogun*'s court.[29] This practice used up a lot of resources because lords had to pay for the travel expenses of their large groups of procession companions and keep two homes running.[30] It was meant to hurt the *daimyo* financially and make it harder for them to fight back or start a rebellion.[31]

[24] David L. Howell, *Geographies of Identity in Nineteenth-Century Japan* 22 (2005).
[25] Iyeyasu, *supra* note 22, at 804.
[26] Jansen, *supra* note 3.
[27] Edo functioned as both the capital and cultural center of Tokugawa Japan. The exchange of the *daimyo* here for alternate attendance generated urban growth in what is now present day Tokyo. *See generally* Constantine N. Vaporis, *To Edo and Back: Alternate Attendance and Japanese Culture in the Early Modern Period*, 25–30 (explains how Edo's population was dominated by *daimyo* due to the alternate attendance system).
[28] Mark Ravina, *To Stand with the Nations of the World: Japan's Meiji Restoration in World History* 40–41 (2017).
[29] Jansen, *supra* note 3, at 56–57.
[30] Jansen, *supra* note 3, at 134.
[31] Jansen, *supra* note 3, at 129.

Sankin-kotai was a way to keep an eye on subjects, rendering them dependent on the *shogunate*.[32] This ensured that loyalty was shown in regular visits to Edo and reinforced subordination to the *shogunate*.

The origins of this system can be traced back to historical practices requiring the *daimyo* to live within the *shogu*n's territory as a pledge of loyalty.[33] *Sankin-kotai* was reissued and made mandatory in the early seventeenth century, through *Buke Shohatto*, which was a Tokugawa legal document establishing regulations on the behavior of lords and warriors.[34] This document was issued in 1615, one year before Tokugawa Iyeyasu's death.[35] *Buke Shohatto* codifies *sankin-kotai* by saying that "the daimyo and shomyo shall do service by turns at Yedo."[36] *Daimyo* were expected to come to the capitol city every summer for service. Even when *daimyos* traveled for purely ceremonial reasons, this law limited their abilities to fight, placing that responsibility on the samurai class.[37]

The attendance system rendered Tokugawa law even more coercive. Wives and children of *daimyos* had to reside in Edo all year, which served to guarantee their lord would behave according to the standards of the capitol.[38] As demonstrated by *sankin-kotai* and codified in *Buke Shohatto*, the Tokugawa legal system was not concerned with dicing out individual rights and granting them to common people. Instead, this system functioned more on a structure of obligation bound by a ruler, with surveillance upheld by honor. The attendance system curtailed rebellion while simultaneously reinforcing the hierarchical notion that the *shogun*'s authority

[32] *Id.*
[33] *Id.* at 56.
[34] David J. Lu, *Japan: A Documentary History: The Dawn of History to the Late Tokugawa Period* 206–08 (2001).
[35] *Id.*
[36] Buke Shohatto [Laws for the Military House] 1663 (Japan) (promulgated by Tokugawa Iyemitsu). The code has since been reprinted in a contemporary periodical. *See* Ishii Shirō, *Kinsei Buke Shisō* 191 Asiatic Soc'y Japan (1974) (on file with Univ. Mich. and U.C.).
[37] Jansen, *supra* note 3, at 56–57.
[38] Ravina, *supra* note 28.

permeated the personal lives of his vassals. *Sankin-kotai* exemplified the Tokugawa characterization of legitimacy shaped by coercion. This constituted a limit on the *daimyo*'s freedom and autonomy through financial manipulation and coercion, in turn making them politically dependent. To the samurai, *sankin-kotai* was seen as a duty of service and an extension of their loyalty.

Additionally, the *Buke Shohatto* detailed a ban on building castles and fixing fortifications without *shogunal* permission, which serves as another example of how law and surveillance worked together in Tokugawa era Japan. *Daimyo* could still rule their lands, but their ability to fight back against the military was slowly taken away by the *shogun* through administrative restrictions. While the system of *daimyo* and their entourages helped the economy of Edo grow by stimulating increased spending during travel, this strict system also affirmed that Tokugawa law must be followed.[39]

In contrast to the contemporary American legal system, which aims to create laws and statutes that are equally enforced among and accessible to all citizens, the legal framework of Tokugawa Japan was predominantly a collection of prescriptive guidelines for officials. In the Western sense of the word, "legislation" did not exist. Instead, Tokugawa edicts were given to magistrates as instructions.[40] They were expected to decide cases by weighing the following criteria: the specifics of the dispute, the outcome of similar cases, and socially accepted rules that were already known.[41] Tokugawa law was primarily customary law, however there were some efforts to codify indigenous law, especially in criminal cases.[42] The Tokugawa political elite

[39] The term "entourage" refers to samurai military members and personnel permitted to accompany their *daimyo* in *sankin-kotai*. Sizes of entourages were determined by productivity of the specific domain. *See* Jansen, *supra* note 3, at 55–56.
[40] Wren, *supra* note 15, at 226.
[41] Wren, *supra* note 15, at 230.
[42] Early codifications such as the Taika Edict of 645 were verbatim copies of Chinese doctrine. These held little meaning for Japanese culture. *See* Wren, *supra* note 15.

looked to earlier examples of ancient Japanese legal code, such as the *Hojo Code of Judicature* (1232), for guidance on how to make rules that would help future magistrates.[43] Magistrates or *Shitayaku kyu* were officials that were responsible for investigating cases in town commissions.[44]

Aside from the *Buke Shohatto*, Tokugawa written law is primarily expressed by four foundational texts. *Kuge Hoshiki* (1615) details rules for the nobility of the imperial court.[45] *Buke Shohatto* and *Shoshi Hatto* (1632) are laws that govern the warrior class, which includes *daimyo* and lesser samurai.[46] Rules were displayed on *Kosatsu*, which were public notice board announcements that told common people what they could and could not do.[47] The *Edicts of 100 Articles* (1742) were a set of rules for criminals that Tokugawa Yoshimune gave to magistrates to help them deal with crimes.[48]

Aside from the documents above, civil law remained mostly customary. Common people depended on village arbitration and conciliation, which were often based on long-standing customs in the community. Civilians called government-issued laws "*tenka-hatto, mikka-hatto*," or three-day laws, because they thought that the laws would not last as long as established customs.[49] *Hyojosho*, or "Chamber of Decisions," served as the center of adjudicative processes in Tokugawa era Japan. It was composed of senior magistrates who had both administrative and adjudicative roles.[50] At the start of his reign, the Tokugawa *shogun* was implicitly expected to reenact the existing laws of his predecessor, evidenced in the repeated reenactment of the *Buke*

[43] Wren, *supra* note 15, at 226.
[44] Daniel H. Foote, *Summary of Tokugawa Criminal Justice,* 22 Wash. L. Rev. 115, 116 (1989).
[45] Henderson, *supra* note 14, at 90.
[46] *Id*.
[47] *Kosatsu with Edict Prohibiting Christianity* (photograph). The image is publicly available via Wheaton College's Stepping into Silence Exhibit, which is digitally accessible at: https://www.wheaton.edu/academics/the-liberal-arts-at-wheaton-college/christ-at-the-core-liberal-arts-at-wheaton/core-book/core-book-archives/2016-17-core-book-silence/stepping-into-silence-exhibit/kosatsu-with-edict-prohibiting-christianity/.
[48] J. C. Hall, *Japanese Feudal Law* 145 (1979).
[49] Wren, *supra* note 15, at 226.
[50] Wren, *supra* note 15, at 224.

Shohatto from *shoguns* 2 through 6.[51] This provided political and legal legitimacy for governmental authority and preserved the sentiment that the law in Tokugawa era Japan was the "foundation of all propriety."[52] In short, the Tokugawa legal system reflected a mix of socially constructed common law and formal, codified criminal laws. Community mediation and customs were used to settle private disputes, but criminal matters were becoming more and more formalized under *shogunal* authority.[53] Law served as an administrative guide for officials, grounded in Confucian principles of propriety and status.[54] The Confucian based moral legal system was held in place by a social hierarchy that afforded minimal consideration for individual "rights," as understood in contemporary Western legal systems.[55]

III. The Meiji Restoration

The Meiji Restoration of 1868 signified the beginning of one of the biggest paradigm shifts within national legal systems and society writ large in modern history.[56] This process, although called a restoration, is better exemplified by the term revolution. Particularly in terms of the shift from status based governance to institutionalized equality, which transformed legal status and privileges for samurai and commoners.

In 1853, Commodore Matthew Perry arrived on Japan's coast with a message: "[A]gree to trade in peace, or suffer the consequences of war."[57] Perry's arrival disturbed Japan's closed

[51] J. C. Hall, *The Tokugawa Legislation* 286–19 (1910).
[52] Wren, *supra* note 15, at 230.
[53] Wren, *supra* note 15, at 217.
[54] Henderson, *supra* note 14, at 103.
[55] The idea of individual rights in the Western legal sense did not emerge globally until World War II when the 1945 United Nations Charter and the 1948 Universal Declaration of Human Rights were created. During the Edo period, Japanese did not hold a concept of individual rights. Japan's legal theory was influenced by centuries of isolation prior to the Meiji restoration, which restricted exposure to Western legal systems. During this time, Japanese law focused more on relational obligations and societal harmony, rather than individual rights. *See* U.N. Charter art. 55, § 9; G.A. Res. 217A (III), U.N. Doc. A/810 (1948). *See generally* Elliott J. Hahn, *An Overview of the Japanese Legal System*, 5 Nw. J. Int'l L. Bus. 517, 518–20 (1983–84) (discusses how the legal system of Japan differs significantly from that of the United States).
[56] Gordon, *supra* note 10, at 58.
[57] *Id.* at 54.

country policy, and demonstrated that the Tokugawa government could not adequately defend Japan from Western imperialism.[58] Perry's demands were extremely unsettling, as Japan had just witnessed the effects of British imperialism in China when the Chinese were forced to accept unequal treaty concessions following the Opium War.[59] Tokugawa officials were afraid that if they did not negotiate, Japan would end up like China.[60] This feeling of looming threat pushed Japan to come to the conclusion that to survive amongst powerful imperial nations, institutional restructuring must occur. To restructure institutions, Japan looked to Western systems to adopt their strong points and avoid their shortcomings.[61] The *Iwakura Mission* was composed of Meiji officials and students visiting Western countries and learning from their institutions.[62] Meiji leaders intentionally embraced and looked to Western legal tradition, which can be exemplified in the Iwakura fact finding missions.[63]

Led by Emperor Meiji, the Meiji Restoration occurred at the tail end of the Edo period and continued through the beginning of the Meiji era.[64] At the hands of Meiji leaders, the samurai class were the most obvious target of the new changes under the restoration because their hereditary system and political privilege directly opposed the Meiji government's objectives to centralize the state and establish a conscript army in the future.[65] The government slowly

[58] Jansen, *supra* note 3, at 424.
[59] *Id.* at 273–74.
[60] *Id.* at 271.
[61] *Id.* at 318.
[62] Gordon, *supra* note 10, at 73.
[63] To add more nuance and recent interpretations to this conversation surrounding Japan's rapid "westernization," one can look to Mark Ravina's 2017 commentary. Ravina argues that Meiji leaders strategically redefined Western institutions to fit Japanese culture of the time. Ravina says further that the Restoration policymakers embraced so-called "Western" ideas to create the appearance of modernization to other nations, rather than just copying U.S. and European institutions. *See generally* Mark Ravina, *To Stand with the Nations of the World: Japan's Meiji Restoration in World History* 207–12 (2021) (provides the most recent full interpretation of Meiji Restoration motives).
[64] Gordon, *supra* note 10, at 73.
[65] Hidehiro Sonoda, *The Decline of the Japanese Warrior Class*, Japan Rev. 97–99 (1990).

stripped away their status privileges, which had been in place for hundreds of years.[66] Meiji reformers abolished the samurai class as a social hierarchy, ceasing samurai payments and relinquishing the right to carry ancestral swords.[67] This stripping of privileges forced the samurai class to enter competition for government and military positions at the same level as civilians. The abolition of samurai privileges signified that Japan was intentionally following Western standards of nation building as 'modern' states of the 1800s were redefining citizenship by equal status instead of inherited class.[68] Meiji reformers hypothesized that discarding feudal hierarchies would show that Japan was part of the emerging international order dominated by the West.[69] Forcing samurai to compete for employment along with everyone else marked a shift to merit-based authority, in line with Western bureaucracies of the nineteenth century.

The *haihan-chiken*, or "abolition of domains," was passed on July 14, 1871 and was the first and most important legal change under the Meiji Restoration.[70] This imperial order got rid of the *han* system and replaced about 280 feudal domains with seventy-two prefectures[71] that were directly controlled by the new, more centralized imperial government.[72] With this complete dissolution of feudal domains, *daimyos* in turn had to turn their land and census records back over to the emperor. These swift actions completely ended any legal basis for local military rule that was once held. By breaking down the old systems of domains protected by *daimyo* and

[66] Prior to the Meiji Restoration, samurai privileges included the following: control over fiefs and farming peasants, right to collect taxes or receive stipends, right to official roles, right to wear two swords, and overall prestige over commoners. *See* Gordon, *supra* note 10, at 9.
[67] Gordon, *supra* note 10, at 64–66.
[68] Western changes that set this precedent included the following: the abolition of the hereditary estates in the French Revolution, reforms to eliminate noble exclusivity in Prussian officer corps, and the end of the hereditary military rank system with Britain's Cardwell Reforms. *See* Georges Lefebvre, *The French Revolution: Vol. 1, from Its Origins To 1793* 130 (Colum. U. Press 1962); Christopher Clark, *Iron Kingdom: The Rise and Downfall of Prussia, 1600-1947* 31–13 (2006); John Laffin, *Tommy Atkins: The story of the English Soldier* 176–79 (2004).
[69] Ravina, *supra* note 28, at 207.
[70] Jansen, *supra* note 3, at 338.
[71] A "prefecture" is a district established by the Meiji administration in 1868, replacing *daimyo* controlled domains. Today, there are forty-seven prefectures in Japan. *See* Louis-Frederic, *Japan Encyclopedia* 780 (2002).
[72] Gordon, *supra* note 10, at 63.

samurai together, Emperor Meiji set a strong foundation for national conscription policies to come.[73] The abolition of domains also indicates the Meiji government's strategic use of Western state models. So-called "modern" nation states in Europe at the time were characterized by centralized administration with standardized territorial control and state control over taxation.[74] Japan's adoption of the centralized system of governance further legitimized their position in the international world order.

The new Meiji government also passed the Conscription Ordinance (*Chohei rei*) in 1873, which made it mandatory for all men to serve in the military when they turned twenty.[75] Additionally, the samurai could no longer hold or maintain a monopoly on weapons.[76] These ordinances demonstrate an increasing value of equality among all people, not just equality among the samurai or *shogunate*. Yamagata Aritomo, who designed the modern army during his tenure as the Assistant Vice Minister of Military Affairs, saw a conscript military as a way to show that all citizens were equal and must aid in protecting the country from foreign threats.[77] This policy went vehemently against the entire backbone of samurai identity. Because everyone was able to participate in the army, this stripped the samurai of the social distinction that initially set them apart from and above the general populace of Japan. More importantly, the conscription army transformed Japan's military into an entity that could rival armies like Commodore Perry's and other Western military systems. For example, France and Prussia had already adopted

[73] Yamagata Aritomo insisted that developing a conscript army was the key to disciplining a loyal populace. The government decreed conscription, under which males over twenty were required to serve for seven years. *See* Gordon, *supra* note 10, at 66.
[74] In 1789, France moved away from feudal domains, opting for a centralized administrative system under the National Constituent Assembly. Similarly, the Act of Union (1707) in centralized British territories into a single unified kingdom. *See* Marie-Laure, *La Fin du Pouvoir Provincial* 25–53 (2003); U.K. Parliament, *Act of Union 1707* (last accessed Dec. 2025), https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/act-of-union-1707/.
[75] Gordon, *supra* note 10, at 66.
[76] E. Herbert Norman, *Soldier and Peasant In Japan: The Origins of Conscription (Part II)*, 16 Pac. Affs. 149, 156–57 (1943).
[77] Jansen, *supra* note 3, at 397.

universal male conscription, strengthening their militaries.[78] Conscription allowed the Japanese to sufficiently defend themselves, as well as project an image of modernization via military power.

The *Haitorei* was a set of edicts issued early in the Meiji period that gradually eliminated sword carrying rights.[79] In 1870, the first *Haitorei* was issued, which forbade merchants and farmers from wielding swords or dressing like samurai.[80] The second *Haitorei* prohibited samurai specifically from carrying swords.[81] Finally, the third Haitorei in 1876 outright forbade the carrying of swords in public.[82] The Japanese sword lost its practical use as a result of these edicts.[83] By banning swords, Japan could further shift toward adopting traditional Western styles of dress, completing the projection of modernity to other nations.

In the same decade, hereditary stipends were turned into government bonds and slowly discarded.[84] Samurai stipends were creating a massive strain on the transitional economy, accounting for one-third of Japan's national revenue.[85] These steps of "progress" were a major blow to lower-class samurai, who often depended on stipends for food security.[86] Especially for lower ranking samurai, their classification was essentially the only marker that differentiated them from common people. The abolition of the samurai class shifted how average Japanese

[78] The *Levee en Masse* (1793) and the Law on the Introduction of Universal Military Service in Prussia (1814) decreed universal male conscription for France and Prussia. *See* Encyc. Brittanica, *Levee en Masse* (last accessed Dec. 2025), https://www.britannica.com/topic/levee-en-masse; German Hist. Documents Images, *Law on the Introduction of Universal Military Service in Prussia* (last accessed Dec. 2025), https://germanhistorydocs.org/en/the-holy-roman-empire-1648-1815/law-on-the-introduction-of-universal-military-service-in-prussia-signed-by-king-frederick-william-iii-hardenberg-and-minister-of-war-von-boyen-among-others-september-3-1814.
[79] Leon Kapp et al., *Modern Japanese Swords and Swordsmiths* 37 (2002).
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] Gordon, *supra* note 10, at 70.
[85] Jansen, *supra* note 3, at 373.
[86] During the Tokugawa period, samurai were paid in *koku,* which was a standard unit of five bushels of rice. The stipend was linked to rice rather than changing currency values, which made it a stable provision. A stipend based on koku ensured that samurai families had enough food. *See* Jansen, *supra* note 3, at 23.

civilians viewed themselves within their society, as well as how those in higher castes were viewed. At the same time, Meiji leaders set up a modern police force: The Home Ministry Police system was set up across the country during 1874.[87] The Home Ministry included police, family registers, public works, land surveys and internal business records.[88] This organization was intentionally modeled after European, especially French, institutions.[89] This illustrates the extent of Western bureaucratic norms being replicated in Japan. New police and a conscripted military took the place of samurai as peace and order keepers.

The Satsuma Rebellion of 1877, led by Saigo Takamori and thousands of unhappy former samurai, was the most drastic sign of opposition to these changes.[90] The Satsuma Rebellion signified large-scale grassroots mobilization and populist discontent with the Meiji Restoration. Because the samurai class held great social status in Japan at the time, this rebellion very well could have been successful. However, the imperial army, which consisted almost entirely of conscripts, was able to put down the rebellion.[91] Even in the early stages of conscription, Japanese nationalist indoctrination was already being dispersed into the conscript army, in turn creating a social force that quickly rivaled samurai ideology. While the conscript army certainly suffered losses during the Satsuma Rebellion, they were still able to crush the uprising as a new army.[92]

Strict domestic regulations, conscription ordinances, the sword ban, centralized police forces, and the suppression of the Satsuma Rebellion all contributed to the idea that the Meiji Restoration was thoroughly planned and shaped to align with Western traditions. The administration during the Meiji period demonstrated that caste privileges could be eliminated

[87] Wilhelm Rohl, *History of Law in Japan Since 1868* 98 (2005).
[88] *Id.*
[89] Jansen, *supra* note 3, at 401.
[90] Gordon, *supra* note 10, at 85.
[91] Jansen, *supra* note 3, at 369.
[92] Jansen, *supra* note 3, at 369.

through coordinated legal reform by dismantling the institutional foundations of samurai privilege and substituting them with bureaucratic authority.

The end of samurai status under Meiji leadership shows how legal reform can shift power of authority, while also protecting state power. Although grounded in different historical contexts, modern legal systems still struggle to find a balance between protecting interests of the state and holding law enforcement institutions accountable. The following section turns to the U.S. doctrine of qualified immunity to examine this tension.

IV. Qualified Immunity in the United States

Building on the Meiji tension between law enforcement protection and state control, the American doctrine of qualified immunity traces back to the U.S. Supreme Court's 1967 decision in *Pierson v. Ray*.[93] In this case, the Court held that police officers who arrested civil rights protestors under an unconstitutional "breach of peace"[94] law could use a "good faith" defense under Section 1983 of Title Forty-Two of the United States Code.[95] The Court said that officers could use "the defense of good faith and probable cause" if they reasonably believed the law they were enforcing was valid at the time of arrest.[96] *Pierson v. Ray* set the precedent that officers could avoid liability even if a constitutional violation was committed.

Prior to *Pierson v. Ray*, the precedent under U.S. Code Section 1983 held implicitly that if one violates the Constitution, one will be held liable. If an officer believed that they were truly legally correct, they could claim good faith, therefore avoiding liability. Fifteen years later, *Harlow v. Fitzgerald* (1982) changed the doctrine into what it is today. In this case, the U.S.

[93] Pierson, 386 U.S. at 548.
[94] Conduct deemed disruptive to public peace, such as fighting, obstructing traffic, resisting arrest or using obscene language in public is illegal under "breach of peace" laws. In the past, courts have delineated certain speech under these laws as "low-value" and therefore not protected by the First Amendment. *See* Ruth Ann Strickland, *Breach of Peace Laws*, Middle Tenn. State Univ. (Aug. 2023), https://firstamendment.mtsu.edu/article/breach-of-peace-laws/.
[95] Pierson, 386 U.S. at 548.
[96] Pierson, 386 U.S. at 556–57.

Supreme Court discarded the subjective "good faith" standard and determined that officials are protected from liability as long as their actions do not infringe upon rights that were already clear enough that any reasonable official should have known.[97] Following *Harlow*, the Supreme Court expanded the doctrine further in the 1986 case *Malley v. Briggs*.[98] This case determined that law enforcement officers seeking arrest warrants are not protected if a reasonably well-trained officer would have known that their grounds for arrest failed to establish probable cause.[99] This decision made it clear that officers who obviously and deliberately violate the law are not protected by qualified immunity.[100]

Though *Malley* appeared to make the doctrine stricter, later decisions moved the balance back towards trusting officers' judgment. In *Anderson v. Creighton* (1987), the Supreme Court redefined "clearly established" law. They said that a right must be defined clearly enough that any reasonable official would have understood when their actions violate that right.[101] This case turned the test into a narrow look at similar cases, and the Court made it difficult for plaintiffs to win Section 1983 claims by requiring them to show a previous case with nearly the same facts.

In *Saucier v. Katz* (2001), the Supreme Court made this framework even more rigid by instructing lower courts to follow a two-step process. First, the court must decide if a constitutional right was violated and then, they must decide whether that right was clearly established.[102] This procedural rule was meant to make constitutional law clearer; however, it created a strictly technical analysis that protected individuals from being tried. The Court said that immunity should be decided earlier in proceedings to save officers from the expenses of

[97] Harlow, 457 U.S. at 801.
[98] Malley v. Briggs, 475 U.S. 335 (1986).
[99] *Id.* at 336.
[100] *Id.* at 335.
[101] Anderson, 483 U.S. at 635.
[102] Saucier v. Katz, 533, U.S. 194 (2001).

trial."[103] They framed qualified immunity as an "entitlement not to stand trial."[104] Later, the Court in *Pearson v. Callahan* acknowledged that *Saucier*'s rigidity was "unworkable" and granted lower courts the discretion to address either aspect first, thereby enabling lower courts to circumvent the constitutional question in its entirety.[105] This made it easier for courts to make decisions, but also came with an external repercussion. When courts throw out cases at the second step without finding the underlying violation, no new precedent is established.

The narrow view of civil protections against law enforcement officials is evident again in *Ashcroft v. al-Kidd* (2011), in which the Supreme Court granted immunity to former U.S. Attorney General John Ashcroft in the wake of the September 11 attacks after finding no clearly established precedent that prohibited pretextual arrests of material witnesses.[106] Justice Scalia's majority opinion stressed that the qualified immunity standard shields reasonable mistakes regarding the legal limitations on specific police actions.[107]

The result of this lineage of cases is a doctrine that puts nearly impossible burdens on plaintiffs. Qualified immunity strengthens a legal system that protects state enforcement from being held accountable by requiring plaintiffs to meet an extraordinarily strict standard of evidence. This makes it nearly impossible to create new constitutional protections, which keeps the government in charge of civilian rights. This dynamic demonstrates a kind of legal privilege that is structurally similar to the protections given to the samurai class during the Tokugawa period. Qualified immunity creates a modern hierarchy in which law enforcement holds a significant amount of leeway. Rather than maintaining neutrality by following the same laws as everyone else, state officials gain a privileged position through qualified immunity.

[103] *Id.* at 200.
[104] *Id.*
[105] Pearson, 555 U.S. at 224.
[106] Ashcroft v. al-Kidd, 563 U.S. 731 (2011).
[107] Anderson, 483 U.S. at 635–37.

The doctrine of qualified immunity has seen several logical criticisms. Legal scholar and former Solicitor General of Texas Scott A. Keller, in writing for the Stanford Law Review, contends that permitting courts to confer immunity without determining the occurrence of a constitutional violation leads to legal stagnation and hinders the development of constitutional norms intended to inform future cases.[108] This dynamic is self-reinforcing, and now qualified immunity acts as a barrier to the rights that it was initially designed to promote. This reversal of jurisprudential objective goes against the standard procedure of constitutional evolution and facilitates premature dismissals that stagnate the advancement of civil rights and the law writ large.

Professor of civil law Joanna Schwartz has researched further empirical foundations and shortcomings of qualified immunity. She examined a whopping 1,183 Section 1983 cases and found that qualified immunity almost never served its intended function as a shield from discovery and trial and that only thirty-eight cases out of the 979 in which qualified immunity could be raised were dismissed on qualified immunity grounds.[109] She goes on to say that only seven cases were dismissed at the motion to dismiss stage and thirty-one were dismissed at summary judgment on qualified immunity grounds.[110] These findings undermine the policy justification for the doctrine, demonstrating that qualified immunity rarely resolves cases promptly, even though courts at the federal level characterize it as crucial to avert the burdens of litigation.

Schwartz also asserts that the doctrine does not have any historical or policy support. She says that qualified immunity has no common law basis and that it has been defined by

[108] Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. 1399 (2021).
[109] Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L. J. 2 (2017).
[110] *Id.*

"freewheeling policy choices" that we have previously disclaimed the power to make."[111] Common law refers to laws created through judicial decisions, opposed to enacted statutes.[112] Schwartz adds that the evidence currently available demonstrates that qualified immunity does not effectively shield individual officers from financial liability and almost never shields government officials from costs and burdens associated with discovery and trial in filed cases.[113] Schwartz comes to the conclusion that the Supreme Court should end the practice because the doctrine fails to achieve its intended policy goals and "renders the protections of the Fourth Amendment hollow."[114]

Schwartz's findings reveal a fundamental contradiction in qualified immunity's justification. The federal opinion of qualified immunity argues that the doctrine is essential to avoid excessive litigation burdens, but it rarely executes that function in practice. The failure of qualified immunity to meet the policy aims that were cited to explain it confirms the idea that its real purpose is to protect the power of institutions. Because the doctrine continues to exist even though it does not perform what it was supposed to, it continues protected legal status for law enforcement.

Others have also challenged the basis of qualified immunity. Legal scholar Alexander A. Reinert contends that the Supreme Court's contemporary qualified immunity doctrine is predicated on misguided application of an antiquated interpretive principle, known as the Derogation Canon, which mandated courts to rigorously interpret statutes that diverge from common law.[115] Because Section 1983 does not address immunity, the Court interpreted this as an indication that Congress intended to maintain common law immunities.[116] Reinert explains

[111] Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1798 (2018).
[112] Legal Info. Inst., *Common Law* (last edited Aug. 2025), https://www.law.cornell.edu/wex/common_law.
[113] Schwartz, *supra* note 111, at 1799–1800.
[114] *Id.*
[115] Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201 (2023).
[116] *Id.*

that this interpretive application has faced criticism for over a century and lacks a valid function in the interpretation of Section 1983.[117] Reinert's claims suggest that qualified immunity has persisted in the United States because the Court made an initial interpretive mistake and continued to build the doctrine on the same faulty foundation. This view implies that there is little statutory and historical justification for qualified immunity.

Recent experiments at the state level demonstrate active discussion regarding the doctrine's future. In 2020, Colorado established a statutory right to sue law enforcement officials for constitutional violations by eliminating qualified immunity for state claims.[118] As of 2025, Colorado, Montana, Nevada, and New Mexico have completely abolished qualified immunity to use as a defense in state court.[119] Following the murder of George Floyd in 2020 and the aftershock of his death amongst the general public, New York City and six states have limited or banned qualified immunity.[120] This development shows how a theory that was initially presented as a limited good faith defense has grown into a systematic safeguard for state power through procedure and a reduction in precedent requirements. Reforms at the state level demonstrate the disagreement between federal law and localized attitudes. While Colorado, Montana, Nevada and New Mexico have limited qualified immunity in their own courts, these changes do not alter the federal doctrine. Section 1983 is a federal precedent and plaintiffs with claims in federal court remain subject to the Supreme Court's qualified immunity interpretation. The existence of state reforms as the federal precedent remains stagnant demonstrates the lack of necessity in the doctrine. State experiments will not change how qualified immunity works in the federal system

[117] *Id.*
[118] Colo. Rev. Stat. § 24-31-902 (2023).
[119] Inst. Just., *Qualified Immunity State Reforms* (last accessed Dec. 2025), https://ij.org/qualified-immunity-state-reforms/.
[120] *Id.*

or make it less important in deciding constitutional issues. This further demonstrates that qualified immunity continues to exist primarily based on institutional considerations.

The Supreme Court continues to uphold qualified immunity and seems to remain disinterested in systemic change anytime soon. Any change in the future will need to settle the disagreements about qualified immunity's theoretical basis and the authority of institutions to change it.[121] The most likely way forward is slow destabilization through intensive research and micro-legislative changes.

The case law and limited scope of state-level reforms collectively indicate that qualified immunity has meandered into a doctrine that consistently favors enforcement authorities. Its framework inhibits the evolution of constitutional principles and protects authorities from accountability even in instances of recognized right violations. The result of this framework is a legal hierarchy that prioritizes state ability to maintain order over giving plaintiffs a chance for fair outcomes. This remains similar to the samurai protections of Tokugawa Japan positioning samurai above the rules to maintain social order. This prompts the question of why societies establish and maintain certain forms of enforcement privilege. To attempt to explain this, one can turn to the French sociologist, Émile Durkheim, and his theory of collective consciousness.

V. Émile Durkheim and Legal Universals

Early sociological and anthropological theory can help place these two very different legal and political systems in conversation with one another. To understand how social norms in Tokugawa era Japan and the contemporary legal landscape in the United States produced similar procedural doctrines, one can look to the scholarship of French intellectual Émile Durkheim. *The Division of Labour in Society*, published by Durkheim in 1893, dictates the idea that legal systems often reflect collective values in societies. Durkheim contends that law in itself is a

[121] Samuel L. Bray, *The Future of Qualified Immunity,* 93 Notre Dame L. Rev. 1795-1796 (2018).

potent and "visible symbol" of social solidarity and ensures mutual relationships.[122] In Durkheim's view, legality is constructed by what different societies view as offensive to the collective social order. An act is considered "criminal" only once it goes against the established "totality of beliefs and sentiments common to the average members of society."[123] Durkheim thinks of law as a social fact—one that can be the product of a collective moral existence that limits and articulates social structure. He asserts that social facts make up the "beliefs, tendencies, and practices of the group taken collectively."[124] These social facts exist "outside the individual" and exert pressure upon them. Law is a codified incarnation of these collective pressures and "indicates an observable form of morality operative at the level of the whole society."[125]

For Durkheim, legal doctrines are reflections of collective morals.[126] As societies move from what Durkheim calls "mechanical" to "organic" solidarity, the relationship between the moral and the legal changes.[127] In societies based on mechanical solidarity, the collective conscience is "all-embracing," providing a single moral code that is enforced through harsh penalties. In organic societies, the action of solidarity stems from people depending on each other and working together. Collective consciousness is more abstract in societies based on organic solidarity as there is a higher division of labor.

Although Durkheim's ideas about mechanical and organic solidarity are more theoretical rather than strict classifications of societies, understanding where Tokugawa Japan and the

[122] Émile Durkheim, *The Division of Labour in Society* 24 (Anthony Giddens ed., W.D Halls trans., Macmillan Press Ltd 1984) (1893).
[123] *Id.* at 38.
[124] Émile Durkheim, *The Rules of Sociological Method* 54 (Steven Lukes ed., W.D. Halls trans., Macmillan Press Ltd 1982).
[125] Roger B. M. Cotterrell, *Durkheim on Legal Development and Social Solidarity*, 4 Brit. J. L Soc'y 248 (1977).
[126] Lewis Coser, *Preface to the First Edition* of Émile Durkheim, *The Division of Labour in Society,* at xxv (1st ed. 1984).
[127] Sister Mechtraud, *Durkheim's Concept of Solidarity*, 3 Phil. Socio. Rev. 24–26 (1995).

contemporary United States fall on this scale can help us understand how they developed different legal systems, yet have similar protections for law enforcement. Tokugawa Japan's society fits mechanical solidarity as its legal system was based on communal ideas enforced through harsh punishments with a strict hierarchy. In comparison, the contemporary United States more closely follows organic solidarity, as its social cohesion comes from differences of labor and a legal system that focuses on individual rights. However, qualified immunity demonstrates isolated instances of mechanical solidarity within an organic legal system. This happens because qualified immunity reinstates parts of "restitutive" law that Durkheim linked to mechanical solidarity as it protects enforcers through uniform protections.[128] This is exemplified in qualified immunity as the law becomes restitutive, meaning it tries to maintain relationships as opposed to punishing people who break the law.[129]

Durkheim also stresses that the collective conscience does not go away, despite societies going through cycles of organic and mechanical solidarity.[130] It gets smaller and smaller until it focuses on core values, the most important being "respect for the human dignity of the individual."[131] Penal law remains foundational to a society even as restitutive law grows and this clarifies Durkheim's assertion that law and morality make up an integrated domain. This is distinguished mainly by the nature of the sanctions imposed.[132] With this being said, changes in

[128] Durkheim asserts that legal regulations can be divided into two types: repressive sanctions and restitutory sanctions. Repressive sanctions involve punishment for transgressions and deviance, while restitutive sanctions do not rely on punishment, but rather on righting a balance upset by the violation. *See* Coster, *supra* note 126, at xvii.
[129] Cotterel, *supra* note 125, at 242–43.
[130] When Durkheim proposed his theories of mechanical and organic solidarity he assumed that as societies modernized, they would move from mechanical solidarity to organic solidarity. However, since Durkheim's publication, scholars have argued that this assumption is reductionist. Bjørn Schiermer argues that Durkheim's model ignores how mechanical solidarity persists in modernity. *See generally* Bjørn Schiermer, *Durkheim's Concept of Mechanical Solidarity—Where Did It Go?*, 20 Durkheimian Stud. (2014).
[131] Cotterel, *supra* note 125, at 242.
[132] *Id.*

the law are always linked to changes in the way people conceptualize right and wrong. The law does not change randomly; the law changes with the collective conscience.

The Tokugawa government is an example of a system based on mechanical solidarity. Social life was organized by Confucian values, emphasizing ritualized order and shared norms.[133] The *Buke Shohatto* set rules for samurai behavior surrounding dress and loyalty.[134] This makes sense in a society where morality and law were "a comprehensive moral code expressed in and supported by penal law."[135] The focus on ritual observance corresponds with Durkheim's characterization of a social order in which individuals behave according to the whole of society. Institutions such as the *sankin-kotai*, which forced *daimyo* to live in Edo on a rotating basis, helped keep the elite in line by using ritualized control and making sure that the central government was always watching. The *shogunate*'s power was similar to what Durkheim says about mechanical societies, where government power is "an emanation of the inherent life of the collective conscience."[136] Tokugawa law combined legal and administrative control with shared ideologies. This demonstrates Durkheim's assertion that in traditional societies, law and morality are almost indistinguishable.

Durkheim's framework can also help explain the persistence of qualified immunity within the contemporary American legal system. While the United States is defined by organic solidarity and, primarily restitutive law, repressive law continues to be connected to the core of the collective conscience.[137] When states invoke qualified immunity, courts rationalize the absence of punishment to maintain institutional stability and security. This phenomena illustrates

[133] Henderson, *supra* note 14, at 103.
[134] Matthew Penney, *Promulgation of the Buke Shohattor and Kinchu Narabini Kuge Shohatto*, EBSCO Rsch. Starters (2022), https://www.ebsco.com/research-starters/history/promulgation-buke-shohatto-and-kinchu-narabini-kuge-shohatto.
[135] Cotterel, *supra* note 125, at 242.
[136] *Id.* at 244.
[137] *Id.* at 243.

Durkheim's idea that penal law endures where fundamental moral values and state authorities meet.

While Durkheim's theory is representative of both systems, it must be investigated critically. Again, qualified immunity permits courts to evade constitutional determinations, results in legal stagnation, and therefore erodes the principles of the Constitution.[138] Moreover, qualified immunity has proven to circumvent the protections of the Fourth Amendment, and some believe that qualified immunity seeks the end of this constitutional protection.[139] Durkheim would likely see these criticisms as proof that accepted morals are changing. According to Durkheim, when morals of a society change, it indicates that the collective consciousness is shifting and reorganizing around new accepted ideals, therefore sanctions will change.[140] The growing public and legislative scrutiny of qualified immunity, as shown by state level changes, suggests that Americans are less likely to blindly trust police authority and more likely to stand up for their own rights and hold the Constitution accountable. From a Durkheimian perspective, this signifies a shift of the moral agreement that formerly legitimized oppressive protections of law enforcement. The contradiction between institutional protection and growing demands for law enforcement accountability indicate a shift in the collective conscious of the contemporary United States.

Analyzing Tokugawa Japan and the modern U.S. legal system together shows how each society's understanding of social order influences the allocation of legal authority. Tokugawa Japan maintained order and unity by having a single moral code and hierarchy based on status. In contrast, the modern United States maintains order by having a social structure where people have varied roles, yet still depend on each other. Durkheim's model clarifies that mechanical and

[138] *Id.*
[139] Schwartz, *supra* note 111, at 1800.
[140] Durkheim, *supra* note 122, at 28.

organic solidarity generate distinct legal logic, but both preserve repressive authority where the social order is most vulnerable.

While Durkheim's perspective suggests reasons why doctrines such as qualified immunity have persisted, his model does have limitations. Viewing state protective legal doctrines as reflections of the collective conscience can overlook societal complexities. Contemporary anthropological theory advises against using broad theories to generalize entire societies. Anthropologists like Clifford Geertz and Lila Abu-Lughod emphasize that a singular theoretical model cannot encompass the internal diversity and history of a culture.[141] This assertion appears to limit the collective consciousness theory's ability to explain similarities between Tokugawa Japan and the contemporary United States. However, this critique does not invalidate the application of collective conscious theory in this analysis. Geertz and Abu-Lughod correctly assert that no society can be reduced into a single theory. But, Durkheim's collective conscience theory does not need to be applied to every aspect of a society to successfully explain isolated phenomena. Therefore, collective consciousness can identify the particular moral commitments that a society regards as fundamental. In both Tokugawa Japan and the contemporary United States, one of those commitments is the idea that social order depends on protecting law enforcement institutions. Even though neither society functions as a homogenous entity, each can use collective consciousness to explain similarities in tradition. Collective conscience continues to be an effective framework to explain why two historically and culturally distinct societies use similar legal mechanisms to uphold state authority.

VI. Comparative Analysis

[141] Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1973); Lila Abu-Lughod, *Writing Against Culture,* in *Recapturing Anthropology: Working in the Present* 51 (Richard G. Fox ed., 1991).

Kirisute-gomen and qualified immunity arise from distinct legal traditions and cultures. However, both historical Tokugawa Japan and the modern United States have managed to protect their law enforcement officials from accountability that would be faced by a civilian in standard legal proceedings.

In Tokugawa Japan, this protection became solidified and viewed as normal, as it traces back to 792 C.E. when Emperor Kammu abolished conscription, creating the samurai class.[142] Death or dismemberment of commoners by samurai under *kirisute-gomen* was in practice up to the Meiji period and was held in place by a rigid caste system that prioritized nobles and samurai warriors.[143] Lower castes, such as merchants and peasants, reinforced the immovability of the caste system by continuing to produce food and pay taxes, freezing the samurai at the top.[144] In the United States, protection of law enforcement officers and government officials under qualified immunity is based more upon the recognized position of police officers as keepers of the law, and the U.S. legal system leans less on a formal caste hierarchy. The role of law enforcement is supported by cultural respect for the police existing in pockets of American societies.[145]

While these two legal systems are drastically different in historical, cultural, and political contexts, both have operated similarly in their lenient attitude toward violence perpetrated by law enforcement and government officials. Groups of people responsible for keeping order, such as samurai and the police, are given considerable moral and legal wiggle room in committing

[142] George R. Plitnik, *Rise of the Samurai*, EBSCO Rsch. Starters (2022), https://www.ebsco.com/research-starters/history/rise-samurai.
[143] Hurst, *supra* note 18, at 522.
[144] Charles D. Sheldon, *Merchants and Society in Tokugawa Japan*, 17 J. Pub. Pol'y 477 (2017).
[145] Civilians in the United States hold differing opinions about law enforcement depending on individual factors. The Council on Criminal Justice says that there is a "striking partisan divide," with Republicans more likely than Democrats to approve of the police. Steve Crabtree of Gallup says that more Republicans tend to support the police because they see them as protectors of "law and order." Democrats tend to disapprove of the police based on concerns of social justice and misconduct. *See* Council Crim. Just., *Public Perceptions of the Police*, (Oct. 2022), https://counciloncj.org/public-perceptions-of-the-police/.

violent acts. This similarity likely rests on the belief from state institutions that the authority of these groups is essential for social stability because they protect civilians from crime or warfare.[146] *Kirisute-gomen* gave samurai a license to kill when their honor was put in question. Qualified immunity in the United States gives a functional license to violate rights without facing civil consequences unless the victims can meet near-impossible standards of proof. Both show how civilians in Tokugawa era Japan and the United States see their world through social hierarchy, which in turn determines which members of society can act without fear of punishment.

The foundations of both systems arise from fears in each society regarding disorder.[147] In Japan, the samurai became a militarized ruling class following long periods of instability and lack of centralized control. The institution of samurai began in the Heian period as provincial warriors employed to protect aristocratic landholdings and neutralize threats in rural areas.[148] Under the Tokugawa regime, their role became institutionalized as a legally privileged class. In the United States, modern police forces emerged in nineteenth century urban cities experiencing high immigration and population density.[149] Municipal policing was implemented to reestablish social control in unstable urban environments and act as informal community watch systems.[150] Over time, both systems evolved into embedded institutions after initially just responding to

[146] The Council on Criminal Justice's survey results show that the public more consistently held a positive opinion of the police when it comes to "protecting people from crime." There is much less confidence in areas like force, treating racial and ethnic groups equally, and holding officers accountable. Samurai controlled small portions of land and engaged in warfare. *See id.*; Gordon, *supra* note 10, at 14–15.
[147] Japanese historian and philosopher Ogyu Sorai (1666–1728) describes Tokugawa society by saying that "The peasant cultivates the fields and feeds the people; the artisan makes utensils and the people use them; the merchant exchanges what one has for what one needs and helps the people; the samurai rules so that disorders will not arise." The original wording appears in Sorai's political writing but is most accessible in modern secondary sources. *See* Eman M. Elshaikh, *The Tokugawa Shogunate,* OER Project (last accessed Dec. 2025), https://www.oerproject.com/oer-materials/oer-media/html-articles/1750/unit1/the-tokugawa-shogunate; *see generally* Michael Sierra-Arevalo, *American Policing and the Danger Imperative*, 55 L. Soc'y Rev. 1 (2021).
[148] Laura Allen et al., *Medieval Japan Samurai: Real and Imagined* (2012).
[149] Jean-Pual Brodeur, *Early Police in the United States*, Encyc. Britannica (last accessed Dec. 2025), https://www.britannica.com/topic/police/Early-police-in-the-United-States.
[150] *Id.*

disorder. Using Durkheim's line of thinking, societies give discretionary authority to enforcers as the law functions through collective societal ideals regarding social cohesion.

The reverberating effects of these norms are expressed very differently in both societies. With the institutionalization of the military academy in Japan in 1870 and sword ban in 1876, former samurai were cast back to civilian life, and legal enforcement was shifted toward the new conscript army.[151] However, samurai privilege did not completely dissipate; instead, samurai privilege was replicated in the disciplined militarism that was enforced in imperial Japan.

The fact that a mere four U.S. states have abolished qualified immunity shows that this redistribution of power will be challenging because it is so deeply ingrained in cultural norms codified in American legal, political, and military institutions. Additionally there are significant societal issues that stem from singling out state-authorized law enforcement. In Tokugawa Japan, commoners faced potential death despite the possibility of innocence in a perceived disrespectful action. In the U.S., victims of state-sanctioned violence face red tape and obstacles in identifying an existing precedent for their case before claims can move forward. This precedent puts law enforcement's structural stability over moral and legal accountability for their violent and criminal acts.

In both Tokugawa Japan and the U.S., protecting enforcement can significantly erode the trust of the public. Prioritizing the authority of state law enforcement indicates that laws are not equally applied to civilians. Political legitimacy arises from the public perception of law enforcement agents as accountable and bound by equitable procedures.[152] When legal systems place more importance on protecting the power of law enforcement, rather than working to reach fair policies, civilians begin to see the law as serving the interests of the governing state instead

[151] Kapp et al., *supra* note 79; Sonoda, *supra* note 65, at 99–100.
[152] Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Univ. Chi. Press. 300 (2003).

of the community it presides over.[153] When this change occurs, civilians are less likely to abide by the law because they want to, and do so more out of fear of force.[154] This poses the question of whether or not maintaining order is worth turning the public against the governing body.

Durkheim does not address Tokugawa law and qualified immunity specifically, but his framework exemplifies the idea that legalized immunity for law enforcement can be explained by collective consciousness. Durkheim's model is a useful tool for analysis, but has clear limitations. In this circumstance, collective consciousness should be applied in a targeted and specific way, rather than as an explanation for societies as a whole. Used in this narrower sense, Durkheim's theories show the fundamental moral rationale that enabled both societies to justify protections for state law enforcement.

After investigating the scholarship, the question still remains: Is it possible for the United States to do away with qualified immunity in a way that is similar to how Meiji Japan got rid of samurai privilege? If examined only with a utopic consideration of the U.S. legal system, the answer is yes. Unfortunately, this may never be as simple when put into practice. The answer to this becomes significantly more convoluted when societal norms and public pressure are taken into account. Hypothetically, even if the doctrine of qualified immunity were no longer in place, remnants of it would likely still persist. The cultural attitudes in the United States surrounding policing, particularly the idea that law enforcement deserves respect, are too deeply rooted in American society for the broad systemic change that some may seek.

While it is true that some states have gotten rid of or limited qualified immunity, public sentiment surrounding law enforcement in the United States remains polarized, rather than consistently positive or negative. Public trust in the police varies based on ethnicity,

[153] *Id.* at 291.
[154] *Id.* at 290.

socioeconomic status, age, geographic locations, and political affiliations.[155] For example, some demographic subgroups, such as small business and military have high confidence in the police, while others such as adults aged eighteen to thirty-four and people of color hold the lowest police confidence rates.[156] If the doctrine were to change, it would still be ineffective without an overarching shift in the way Americans conceptualize law enforcement. Without a cultural transformation, it is possible that reforms may end up just reverting to the previous hierarchy. The abolition of samurai privilege in Meiji era Japan shows us that structural privileges can be ended, but a number of different catalysts, such as a need for militarization in World War II, can bring back this authority.

While the United States and Tokugawa Japan cannot be evaluated on the same principles, Tokugawa Japan may help us predict the future of qualified immunity in the United States. If there is no reconceptualization of what law enforcement should be responsible for among the average citizen, any changes to qualified immunity will be ineffective.

VII. Conclusions

Comparing *kirisute-gomen* and qualified immunity shows how societies continue to rationalize placing state enforcers above legal accountability. Despite large differences in culture and histories, Tokugawa Japan and the United States demonstrate that when maintenance of social order is a top concern, legal systems often align to protect those who are in charge of keeping this order. This tendency arises from moral frameworks that influence social perceptions of authority and stability. The Meiji Restoration exemplifies how a single legal system can push to dismantle entrenched systems of privilege. Meiji era reformers were able to gradually transform Japan from a feudal isolated territory to a modern imperial nation, making hereditary

[155] Council Crim. Just., *supra* note 145, at 129.
[156] Megan Brenan, *U.S. Confidence in Institutions Mostly Flat, but Police Up*, Gallup News (July 2024), https://news.gallup.com/poll/647303/confidence-institutions-mostly-flat-police.aspx.

privilege incompatible with morals that Japanese were willing to accept. The decline of samurai authority depended on the decline of the moral foundations that originally legitimized it. Japan needed to create a centralized modern legal system, and this need shifted the institutions that once seemed unbreakable.

In the United States, qualified immunity is presented as a doctrine essential for protecting officers from litigation and maintaining governmental efficiency. However, its practical application has progressively deviated from its initial objectives. Empirical research indicates that it rarely fulfills the task it is supposed to. Legal critiques also demonstrate that qualified immunity lacks historical or statutory sufficient justifications. Reforms at the state level show that there can be alternatives. However, these changes are still limited because state level changes cannot alter the federal doctrine.

While Durkheim's collective conscious theory does not directly assert that societies tend to protect authority, it still provides a framework for understanding why this occurs. Durkheim understood law as a mode for societies to protect its moral values. Legal systems tend to reflect and reinforce widely shared priorities such as stability and maintaining social order. In the contemporary United States, the continued existence of qualified immunity illustrates how outdated moral values influence the legal systems enforcement strategies.

However, Durkheim's model has limitations that are important to acknowledge. Modern anthropologists such as Clifford Geertz and Lila Abu-Lughod warn that no singular theory can comprehensively account for intricacies and historical diversity of societies. Collective consciousness can be used to explain how drastically different legal systems can have similar protections because it identifies that shared moral commitments help sustain specific legal consistencies. But collective consciousness cannot and should not be used to explain every

aspect of a society. Durkheim's collective consciousness theory reveals that Tokugawa Japan and the contemporary United States both preserved law enforcement protections to maintain moral order.

The Meiji Restoration shows that governments can dismantle societally entrenched enforcement privileges when they are no longer culturally justified. It also shows that structural change can occur when a society as a whole can redefine what kinds of authority it will accept. Qualified immunity endures because the Supreme Court's rulings have consistently equated national stability with privileged law enforcement institutions therefore reinforcing an outdated moral framework.

To see any change in the federal doctrine of qualified immunity there must be a shift in the underlying moral values that legitimize law enforcement exceptionalism, along with legal reform. Currently, some U.S. demographics view police authority as essential to social order, while others see qualified immunity as an ineffective and unfair elevation of law enforcement. Without a broader conceptual realignment of these competing moral values, any common law changes risk reinforcing these privileges. The comparison to Tokugawa Japan thus underscores that legal privileges for law enforcement endure when societies believe they are necessary and fade when the collective conscience can imagine stability without them. The American legal system can only follow the Meiji example once there is a new shared understanding of what law enforcement should be responsible for and what forms of state power a democratic society is willing to accept.

The Textual Bypass: Justifying Post-*Bruen* Weapon Bans With a Qualitative Definition of "Common Use"

*Writer: Jason Strauss**

Article Editor: Francisca Puiatti

Associate Editor: Molly Stinson

Abstract:

Just a few years ago, the U.S. Supreme Court case *New York State Rifle & Pistol Association, Inc. v. Bruen* (2022) cemented a novel standard for Second Amendment adjudication that left scholars and litigants alike curious about the future of gun regulation. More recently, a slew of Federal Court of Appeals cases has paved the way for interpreting and applying the Bruen standard to various state gun statutes, including a fifth case in the Third Circuit that is soon to be decided. These decisions are illustrative of how courts have grappled with the *Bruen* precedent and provide valuable insight into how courts are choosing to use or circumvent the standard. This article identifies a significant aspect of the post-*Bruen* landscape by analyzing two cases from the Fourth and Seventh Circuits that bypass the *Bruen* standard at its first textual application stage. Then, it defends this "textual bypass" by outlining and defending a qualitative definition of what it means for a weapon to be in "common use."

---

* *Guest writer, Tulane University. Jason Strauss is pursuing a Bachelor's degree in Political Science.*

I. Introduction

For most of American history, the Second Amendment remained a fiercely debated but seldom-litigated provision of the United States Constitution. For most of the twentieth century, the Supreme Court viewed the right to bear arms as inextricably linked to service in a militia, and that view remained unchallenged for decades.[1] However, the Court reversed course in 2008, establishing a fundamental, individual right to bear arms in the home, and it extended that right to the states in 2010.[2] These two cases created a new era of Second Amendment rights, but they lacked guidance for how to evaluate other, out-of-home gun regulations. Then, in 2022, the United States Supreme Court's decision in *New York State Rifle & Pistol Association v. Bruen* fundamentally reshaped Second Amendment jurisprudence.[3] By instituting a history-based test for scrutinizing gun laws, *Bruen* was hailed a massive success by the pro-firearm community and was expected to nullify many state firearm restrictions.[4] Yet, in the years since, U.S. federal circuit courts have consistently upheld state-level bans on assault weapons.[5] While the outcomes are uniform, the reasoning is different, creating a complex and intriguing legal landscape.

This article argues that this reasoning is a legally and logically justifiable way to litigate Second Amendment claims. Sections II and III provide context on the influential Second Amendment Supreme Court cases as well as relevant federal Circuit Court cases. The first part of

[1] United States v. Miller, 307 U.S. 174 (1938).
[2] District of Columbia v. Heller, 554 U.S. 570, 597 (2008); McDonald v. Chicago, 561 U. S. 742, 780 (2010). An individual right is one that applies to every citizen. In a Second Amendment context, an individual right allows all eligible individuals to bear arms, independent of any military obligation. This view contrasts with a collective right, where the right only applies in a larger, communal context. The collective right view of the Second Amendment was dominant in the time between *United States v. Miller* and *District of Columbia v. Heller*, and that view only recognized a right to bear arms when one was collectively serving in a militia with others.
[3] New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022).
[4] *Id.*
[5] *See* Kolbe v. Hogan, 849 F.3d 114 (4th Cir. 2017) (en banc); Bevis v. City of Naperville, 85 F.4th 1175, 1125 (7th Cir. 2023); Bianchi v. Brown, 111 F.4th 438 (4th Cir. 2024); Ocean State Tactical, LLC v. Rhode Island, 95 F.4th 38 (1st Cir. 2024); Hanson v. District of Columbia, 120 F.4th 223 (D.C. Cir. 2024).

Section IV explains the qualitative definition of "common use" utilized by U.S. courts and provides three defenses for it; then, the second half addresses counterarguments. Finally, Section V summarizes the article's argument.

II. Precedential Overview

Understanding the current legal landscape requires outlining the Supreme Court's two landmark Second Amendment precedents: *D.C. v. Heller* (2008) and *New York State Rifle & Pistol Association, Inc. v. Bruen* (2022). After years of embracing a collective right to bear arms, these two cases established an individual right to bear arms in and out of the home. Moreover, *Bruen* instituted a new legal standard for evaluating firearm regulations that is still in effect today.

A. *D.C. v. Heller*

In response to statistics about dangerous firearm usage, and in an effort to reduce gun crimes in the city of Washington D.C. by lowering firearm availability, the city passed the Firearms Control Regulations Act of 1975, which prohibited the purchase, sale, transfer, and possession of handguns by D.C. residents.[6] The law also mandated that all handguns within the home be disassembled or bound by a trigger lock.[7] These regulations were substantial steps towards reducing general firearm access and preventing accidental gun injuries in the home. They were also highly restrictive, both in what they prohibited and what they regulated, as handguns were widely used firearms. Dick Heller, a licensed security official alleging that the law violated his Second Amendment rights, sued the District in 2008.[8]

In reviewing the D.C. law, the U.S. Supreme Court considered whether the right to bear

[6] D.C. Code §§ 7–2501.01(18), 7–2502.01(a), 7–2502.02(a)(4), 7–2507.02 (2001). The law also excluded law enforcement or military personnel from the prohibition.
[7] *Id.*
[8] WUSA9, *DC Rejects Handgun Application* (July 2008), https://web.archive.org/web/20080718201434/http://www.wusa9.com/news/local/story.aspx?storyid=74036&catid=158.

arms was an individual or collective right.[9] The Court, utilizing primarily textualism and originalism, ruled that the laws were unconstitutional under "any of the [heightened] standards of scrutiny that the Court has applied to enumerated rights."[10] The Scalia-led majority reasoned that, because the Second Amendment's prefatory clause ("[a] well regulated militia") did not limit the scope of its operative clause ("[t]he right of the people to keep and bear arms"), the Amendment codified and protects an individual's preexisting right to possess firearms outside of militaristic purposes for self-defense.[11] In doing so, the Court recognized handguns as "arms" for Second Amendment purposes.[12] The Court also relied on the Amendment's drafting history to identify an original intent for an individual right to bear arms. The majority's arguments were heavily criticized, especially by liberals who offered a dueling originalist argument and concluded that the framers intended to limit the Amendment's scope.[13] Furthermore, Scalia was chastised for framing his argument as absolute while allegedly misconstruing and dismissing contrary historical evidence.[14]

However, the Court knew that the "right secured by the Second Amendment is not unlimited."[15] Recognizing the dangerous realities inherent in widespread firearm usage and the irrationality of protecting all firearms, the Court clarified that "[T]he right was not a right to keep and carry any weapon whatsoever in any manner…and for whatever purpose."[16] This exemption

[9] District of Columbia v. Heller, 554 U.S. 570, 579 (2008).
[10] *Id.* at 628. Textualism and originalism are two methods of Constitutional and statutory interpretation. Textualism seeks meaning in vague laws by exclusively analyzing the law's words, syntax, and context, without considering any other factors. Originalism, conversely, derives a law's meaning by assessing either the original intentions of the law's authors, how the law's text would be originally understood by individuals at the time of the law's passage, or both.
[11] *Id.* at 578.
[12] *Id.* at 581.
[13] *Id.* at 637 (Breyer, J., dissenting).
[14] Michael Henry Ishitani, *Today's Brandeis Brief? The Fate of the Historians' Brief Amidst the Rise of an Originalist Court* 2 J. Am. Const. Hist. 1 (2024).
[15] *Heller*, 554 U.S. at 626.
[16] *Id.*

was aligned with precedent regulating "dangerous and unusual weapons."[17] In *Miller v. United States* (1938), the Court upheld provisions of the National Firearms Act that regulated short-barreled shotguns because the weapons lacked "any reasonable relation to the preservation of efficiency of a well-regulated militia," notably because they would not have been a weapon supplied and commonly used by a militia.[18] *Heller*'s exemption reaffirmed the principle in rulings like *Miller* and was a significant qualification on the Court's ruling.

B. *New York State Rifle & Pistol Association, Inc. v. Bruen*

Over a decade after *Heller*, New York state passed a law restricting the public carry of handguns.[19] It required citizens to obtain a concealed handgun license for public carry by demonstrating proper cause.[20] To show cause, an applicant had to "demonstrate a special need for self-protection distinguishable from that of the general community."[21] Because determinations for granting such licenses were subjective, New York state residents were subject to a "may-issue" regime for handgun possession.[22] In suing the state, plaintiffs contended that the regime violated their Second Amendment rights.[23] The Court grappled with the constitutionality of the New York statute and, implicitly, whether *Heller*'s holding extended to self-defense outside of the home.[24]

The Court held that the New York law was unconstitutional because it placed a highly discretionary impediment to an individual's Second Amendment rights.[25] The Thomas-led majority highlighted the asymmetry between the Second Amendment and other rights, noting that

[17] *Id.* at 627
[18] United States v. Miller, 307 U.S. 174, 178 (1938).
[19] N.Y. Penal Law §400.00(2)(f).
[20] New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 2 (2022).
[21] *Id.* at 6.
[22] *Id.* at 1 (Kavanaugh, J., concurring).
[23] *Id.* at 1.
[24] *Id.* at 24.
[25] *Id.* at 2 (Kavanaugh, J., concurring).

"The constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'"[26] Moreover, the Court determined that an individual's self-defense rights extended beyond the home, seeing that such a right was a logical extension of *Heller*'s holding.

In reaching this conclusion, the *Bruen* Court had to determine the appropriate level of scrutiny for evaluating firearm regulations and Second Amendment claims. Prior to *Bruen*, the New York Federal Circuit Courts of Appeals, lacking guidance from *Heller*, developed a quasi-intermediate scrutiny approach: After determining whether the conduct in question fell within the Second Amendment's purview, they would apply either strict or intermediate scrutiny "depending on the nature of the conduct being regulated and the degree to which the challenged law burdens the right."[27] This approach aligned with the principles of *U.S. v. Carolene Products* (1938) and was applied in many cases post-*Heller*.[28] However, the *Bruen* majority rejected this means-end scrutiny, reasoning that a reliance on history is "more legitimate, and more administrable," than other interest-balancing tests that forced judges to adjudicate issues they were relatively uninformed about.[29] With that, a new bipartite *Bruen* standard was born that combined a textual threshold with historical analysis.

First, the standard begins with a textual analysis. Judges must determine whether the Second Amendment's "plain text" covers the conduct at issue.[30] Thomas elucidated this point,

[26] *Id.* at 62 (quoting McDonald v. Chicago, 561 U. S. 742, 780 (2010) (plurality opinion).
[27] Kolbe v. Hogan, 849 F.3d 114 (4th Cir. 2017) (en banc).
[28] In *United States v. Carolene Products Company*, Justice Harlan Stone's majority opinion included in Footnote four that "there may be a narrower scope for operation presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments…" 304 U.S. 144, 152 (1937). This dicta came to facilitate the use of strict scrutiny in evaluating some constitutional claims, and its guidance influenced the standard lower courts created in evaluating state gun legislation post-*Heller*. *See, e.g.*, Ezell v. City of Chicago, 651 F.3d 684, 702–03 (2011); *Kolbe*, 849 F.3d at 133.
[29] New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. 1, 16 (2022).
[30] *Id.* at 8.

declaring that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms."[31] This threshold inquiry is "rooted in the Second Amendment's text, as informed by history," and asks whether these weapons fall "with[in] the historical understanding of the scope of the right."[32] The word "when" creates a conditional statement that predicates the test's applicability on a notion of what the Second Amendment covers.

Second, the burden shifts to the government, which then must "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[33] In essence, individual state actions must comport with the spirit of historical gun regulation, potentially by presenting historical analogs to their contemporary regulations. The Court provided two example proxies for making such determination: "First, whether modern and historical regulations impose a comparable burden on the right of armed self-defense, and second, whether that regulatory burden is comparably justified."[34] However, as identified by a member of the Court's majority, Justice Barrett, these standards are both vague. Notably, she questioned in her concurrence "the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution," and whether the correct historical benchmark is the 1791 ratification of the Bill of Rights or the 1868 ratification of the Fourteenth Amendment.[35]

III. Recent Circuit Courts of Appeals Decisions

Four recent federal Circuit Courts of Appeals have applied *Bruen*'s two-part test and all upheld their respective gun laws, albeit with diverging processes. Two cases from the First and D.C. Circuit, *Ocean State Tactical v. Rhode Island* (2024) and *Hanson v. District of Columbia*

[31] District of Columbia v. Heller, 554 U.S. 570, 582 (2008).
[32] *See Bruen*, 597 U.S. at 10.
[33] *Id.* at 15.
[34] *Id.* at 3.
[35] *Bruen*, 597 U.S. at 1–2 (Barrett, J., concurring).

(2024), respectively, upheld state gun laws at *Bruen*'s second stage by engaging in historical analysis.[36] The other two cases, *Bianchi v. Brown* (2024) from the Fourth Circuit and *Bevis v. City of Naperville* (2023) from the Seventh Circuit, took a unique approach, providing a glimpse into one way lower courts are grappling with *Bruen*.[37]

A. *Bianchi v. Brown*

In 2013, the state of Maryland enacted the Maryland Firearms and Safety Act, prohibiting the sale and possession of "assault weapons," including the AR-15 and AK-47, two widely known and used semiautomatic assault rifles.[38] The statute defined "assault weapons" to include more than forty-five enumerated long guns and their "copies."[39] A violator of this statute faces up to three years of imprisonment. Multiple appellants sued, seeking a declaratory judgment and an injunction on the Act's enforcement. Notably, the Fourth Circuit Court considered and affirmed this statute en banc in *Kolbe v. Hogan* (2017).[40] However, they reheard the case after the Supreme Court remanded it for reconsideration following the *Bruen* decision. Ultimately, the Fourth Circuit Court found that the law was constitutional and that "The assault weapons at issue fall outside the ambit of protection offered by the Second Amendment."[41]

B. *Bevis v. City of Naperville*

This case from the Seventh Circuit is a consolidation of twenty-six plaintiffs and six related cases, including *Bevis v. City of Naperville* (2023), *Herrera v. Raoul* (2023), and *Barnett v. Raoul* (2023). It concerns the Protect Illinois Communities Act, which bans the "[m]anufacture,

[36] Ocean State Tactical, LLC v. Rhode Island, 95 F.4th 38 (1st Cir. 2024); Hanson v. District of Columbia, 120 F.4th 223 (D.C. Cir. 2024).
[37] Bevis v. City of Naperville, 85 F.4th 1175 (7th Cir. 2023); Bianchi v. Brown, 111 F.4th 438 (4th Cir. 2024).
[38] Md. Code Ann., Crim. Law §§ 4-303(a), 4-301(d).
[39] *Id.*
[40] Kolbe v. Hogan, 849 F.3d 114 (4th Cir. 2017) (en banc).
[41] *Bianchi*, 111 F.4th.

possession, delivery, sale, and purchase of assault weapons, .50 caliber rifles, and .50 caliber cartridges," and the "[m]anufacture, delivery, sale, and possession of large capacity ammunition feeding devices."[42] Portions of the law reference all AK-type weapons and some AR models. Appellants filed suit and requested preliminary injunctions in multiple federal district courts with mixed success.[43] Upon review, the Seventh Circuit concluded that the law lacked a strong likelihood of success on the merits, subsequently affirming the district court orders that denied injunctive relief and vacating those that granted it.[44]

C. The Textual Bypass

The cases' core similarity is that they bypassed the *Bruen* standard's more difficult and subjective historical analysis by declaring the laws in question outside the Second Amendment's scope as a threshold matter.[45] They did so by not categorizing the weapons as protected "arms." Because the substantive analytical step is *Bruen*'s second historical step, not passing the first textual stage is tantamount to eschewing the test altogether. This maneuver can be considered a "textual bypass."

To reach this conclusion, the Fourth Circuit began by providing context on the *Heller* exception and *Miller*.[46] Then, the Court explained that, because the Second Amendment codifies a "pre-existing right," the Amendment has a particular contextual meaning that must be understood and applied accordingly.[47] Analogizing with the First Amendment, the Court contended that the relevant Second Amendment meaning involves qualifications to the right. Combining an

[42] Protect Illinois Communities Act, Pub. Act 102-1116.
[43] Bevis v. City of Naperville, 85 F.4th 1175, 1185–87 (7th Cir. 2023).
[44] *Id.* at 1203.
[45] *Id.* at 1203 (2023); *Bianchi*, 111 F.4th at 442.
[46] *See Bevis*, 85 F.4th at 1185–86.
[47] *See Bianchi*, 111 F.4th at 444.

examination of the Amendment's purpose and relying on the legal philosophy outlined in William Blackstone's *Commentaries*, a widely influential eighteenth century treatise on common law in England, the Court described how the weapons at issue are not necessary for self-defense, not proportional to self-defense needs, and not practical for that purpose, ultimately concluding that the "most relevant limitation…is upon what arms may be kept and carried."[48]

With this argument established, it was easy for the Court to employ the textual bypass. Because the regulation prohibited weapons unnecessary for self-defense, it fell outside the scope of the constitutional right and could "peaceably coexist with the Second Amendment."[49] Lastly, the Court explained that *Bruen* did not abrogate their prior ruling on the matter in *Kolbe*.[50] The Supreme Court merely rejected the Fourth Circuit's use of means-end scrutiny; it did not concern the Circuit's textual bypass conclusion.[51]

Similarly, the Seventh Circuit began by "looking at the 'plain text' of the Second Amendment to see whether the assault weapons and large-capacity magazines…fall within the scope of the 'Arms' that individual persons are entitled to keep and bear."[52] This inquiry allows for a more nuanced understanding of the text by assessing the meaning of "bearable" and "arms." Beginning with "bearable," the Court used machine guns as an exemplar for their analysis.[53] A machine gun is technically bearable in that it can be held, but there are established machine gun prohibitions. The existence of these bans on certain weapons under a more literal reading of "bearable" shows that the word's meaning must transcend definitions like "transportable" or

[48] *Id.* at 450. *See also* William Blackstone, *Commentaries on the Laws of England* (Wayne Morrison, ed., Cavendish Publ'g 2001) (1765).
[49] *Bianchi*, 111 F.4th at 446.
[50] *Id.* at 448.
[51] *Id.*
[52] *Bevis*, 85 F.4th at 1200.
[53] *Id.* at 1201.

"capable of being held."[54]

The Court applied a similar filter to the word "arms."[55] *Heller* notes that "The traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense."[56] The Court inferred from this fact that the Second Amendment right is limited to weapons "typically possessed by law-abiding citizens for lawful purposes."[57] Accordingly, the arms protected by the Second Amendment do not include weapons that may be reserved for military use, which comprises the weapons proscribed by the Illinois law. This interpretation harmonized with precedents like *Miller* while conforming to "the historical understanding of the scope of the right."[58] This conclusion also meant that the regulations fell outside the Second Amendment's scope and the *Bruen* test, making them independent from one's right to self-defense and constitutional.

Despite the variations between the two courts' logic, they both arrived at the same conclusion with largely similar reasoning. These two decisions have massive implications for future Second Amendment litigation because, unless the Supreme Court weighs in on *Bianchi* and *Bevis* and closes the textual bypass, the Federal Courts have an established roadmap for upholding state level rifle bans. These precedents also provide a model legal justification for States seeking to regulate assault rifles or enshrine anti-firearm constitutional amendments. However, this logic has not emerged unchallenged. Some critics assert that the textual bypass and its examination of weapon characteristics illicitly reverts to the type of interest balancing *Bruen* forbade. Specifically, they claim that it merely utilizes means-end scrutiny for the test's first step,

[54] *Id.*
[55] *Id.* at 1202.
[56] District of Columbia v. Heller, 554 U.S. 570, 624 (2008).
[57] *Id.*
[58] New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. 1, 10 (2022).

as determining a weapon's suitability for self-defense inherently requires balancing its proportionality for the task with state's regulatory interests. Others, including dissenters in those cases, criticized the majority's reading of "bearable arms." However, sound logic exists for the majority's conclusion in a proper definition of "common use."

IV. Justifying the Textual Bypass

At the heart of rationalizing the textual bypass in professional and academic contexts is defending the qualitative definition of "common use." In addition to explaining this meaning, there are three factors legitimizing the Circuit Courts' behavior in *Bianchi* and *Bevis*: alignment with Second Amendment purpose, practical suitability, and similarity with existing legal tests.

A. Defining "Common Use" Qualitatively

The definition of "common use" is at the crux of the Circuit Courts' reasoning and the larger legal issue. Whether or not a weapon has the common use designation can mean the difference between legal restriction and protection. The first aspect of this justification is properly defining "common use" in qualitative terms.

In essence, qualitatively understanding "common use" requires a characteristic assessment of a weapon's features to determine its suitability for self-defense.[59] This contrasts with a quantitative definition, which solely examines a weapon's societal circulation and literal use in self-defense scenarios.[60] A quantitative definition is a functional analysis that defines a weapon's status based on inherent characteristics. It considers the objective features of a weapon's design to determine if a weapon is ill-suited or disproportionate for self-defense. Overall, it treats the word

[59] *Heller*, 554 U.S. at 624.
[60] Bevis v. City of Naperville, 85 F.4th 1175 (7th Cir. 2023). Note that none of the relevant judicial opinions have officially coined the term "qualitative definition of common use." Rather, that term is meant to embody the practice of assessing a weapon's common use through purely quantitative means like surveying its national usage and ownership rates.

"common" as a proxy for the more normative "appropriate."

This qualitative understanding is not novel. In *Heller*, the majority examined a "handgun's objective 'character' and 'nature'—such as its ease of usage in one hand, and its ease of storage—that make it the 'the quintessential self-defense weapon' and entitled to protection."[61] The court did the same in *Miller* by examining the nature of sawed-off shotguns and endorsing bans on them primarily because of those characteristics.[62]

While this qualitative inquiry is rooted in precedent, U.S. Circuit Courts employing the textual bypass have been more conclusory in their application than exhaustive in their justification. The Fourth and Seventh Circuits failed to provide a thorough defense of why the qualitative meaning is the correct interpretation of "common use." For instance, the Fourth Circuit notes that the Second Amendment codified a preexisting right of self-defense and thus does not protect arms "ill-suited and disproportionate to such a purpose."[63] However, it did not fully explain why this purpose-based limit should override a quantitative measure.[64] Similarly, the Seventh Circuit textually analyzed "bearable" and "arms" to justify their bypass, but their explanation does not fully address their critics who contend that their reading betrays the Amendment's plain text.[65] This article provides affirmative justifications that the circuit courts omitted and that warrants adopting the qualitative framework as the authoritative standard for adjudicating Second Amendment claims. Compared to the quantitative definition, the qualitative

[61] *See Heller*, 554 U.S. at 629.
[62] United States v. Miller, 307 U.S. 174, 178 (1938); *see also* United States v. One Palmetto State Armory, 822 F.3d 136, 142 (3d Cir. 2016) (agreeing machine guns warrant no protection given the "exceedingly dangerous" features that make them "primarily weapons of war" and "gangster-type weapons."). Note that a sawed-off shotgun is a traditional long-barelled shotgun that has had its barrel cut or "sawed" off, making it more discreet and suitable for close quarters combat.
[63] Bianchi v. Brown, 111 F.4th 438, 441 (4th Cir. 2024).
[64] *Id.*
[65] *Bevis*, 85 F.4th at 1201.

definition more closely adheres to Second Amendment purpose, has numerous practical benefits, aligns with judicial capabilities, and resists leading to logically unsound outcomes.

B. Adherence to the Second Amendment's Purpose

A qualitative framework is the only method that remains faithful to the Second Amendment's purpose. *Heller* and *Bruen* definitively established that the central component of the Second Amendment is the right to keep and bear arms for self-defense.[66] As with all constitutional rights, the right's purpose informs its scope. A proper reading of the text, therefore, must include some evaluation of whether a firearm serves the end that the Constitution protects.

This fact mandates a more purpose-driven, qualitative understanding of common use. The antecedent to determining if a regulation infringes on one's right to self-defense is determining what firearms are needed for self-defense. A qualitative analysis of a weapon's features is apt for this purpose. Assessing a weapon's features in relation to self-defense keeps the Amendment's purpose at the forefront, something the Fourth Circuit Court demonstrated well in *Bianchi*.[67]

Conversely, a purely quantitative test is purpose neutral and violates the Amendment's purpose in two ways. First, merely examining a weapon's ownership does not indicate whether that weapon is valid for self-defense. Instead, it severs the connection between the weapon and its use, treating the Second Amendment as a right to possess popular objects and ignoring its central holding. Second, a quantitative definition contradicts Supreme Court precedent. In *McDonald v. Chicago* (2010), the Court proclaimed that the Second Amendment is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees."[68] However, using the quantitative definition manifests that exact scenario. Relying on circulation for common

[66] *See Bruen*, 597 U.S. at 24; *Heller*, 554 U.S. at 599.
[67] *See Bianchi*, 111 F.4th 438 at 455–57.
[68] McDonald v. Chicago, 561 U. S. 742, 780 (2010) (plurality opinion).

use and legal protection has no footing in any constitutional doctrine; rather, it would cement Second Amendment exceptionalism, a principle the Court chastised.

Applying this definition at the first stage of the *Bruen* test and stopping there is not evading the test. It has been established that this definition is necessary for correctly applying the Second Amendment's purpose. To that end, using it aligns with *Bruen*'s proper application because it rightly reserves the historical analysis for regulations that burden arms within the scope of the right while correctly excluding from protection those arms that are functionally inconsistent with the right's core purpose. If the text covered every conceivable object, then the textual threshold would be unnecessary. Its existence testifies to the fact that some arms restrictions are independent of self-defense and can be upheld through the bypass. Therefore, the nuanced examination inherent in the quantitative definition is not only the proper way to approach *Bruen*'s first step; it is also central to approaching the Second Amendment broadly.

C. Practical Suitability

Another benefit of the qualitative definition of "common use" is its practical advantages. Utilizing this definition is more practical than other understandings for two reasons: consistency and workability. It lends itself to more stable and long-term applications compared to a quantitative definition. Moreover, it is better suited for judicial capabilities and lowers the chances for dishonest litigants to provide a court with misleading quantitative data.

1. Consistency

First, the qualitative understanding is more stable than the potentially fluctuating quantitative standard. The Supreme Court has emphasized that a precedent or standard's

workability is central to its validity.[69] Inherent in workability is consistency: "Our [Supreme Court] precedents counsel that another important consideration…is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner."[70] The Court has implicitly affirmed the importance of stability by invalidating rules deemed inconsistent. For example, the Court overturned the *Chevron* standard because its focus on identifying statutory ambiguity has "always evaded meaningful definition."[71]

The qualitative definition's consistency stems from judgments about weapon characteristics. These judgments can be easily applied to relevant classes of firearms because a ruling on one set of features provides a precedent for the next. They can also translate well to new inventions with similar characteristics, such as future rifle models, enhanced firing mechanisms, magazine expanders, and more. The presence of empirical, expert data makes juxtaposing two weapons' features and capabilities consistently easy, as it's clear what a weapon's capabilities are and how they compare to previous models. Additionally, the innate objectivity in determining a weapon's fitness for self-defense lends itself to consistent applications.

A further indication of the qualitative definition's consistency is that it resists becoming obsolete. Lest humans become bulletproof in the future, there is no indication that the required type or strength of firearm needed for self-defense will change. Therefore, because it is unlikely that weapons ill-suited for self-defense suddenly became necessary, judicial determinations about a specific weapon's suitability for self-defense are not subject to change. It is instead the case today that dangerous weapons disproportionate to self-defense proliferate before human defenses

[69] Janus v. AFSCME, Council 31, 585 U.S. 878 (2018).
[70] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 220 (2022); *see, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 792 (2009); Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 283–84 (1988).
[71] Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 375 (2024).

can catch up.

Conversely, a quantitative standard is antithetical to consistency because its foundation is dynamic and unpredictable. Notwithstanding the obvious difficulties in determining a threshold definition for "common use" in terms of nationwide ownership, an uncommon weapon could become common in a matter of months. Similarly, common weapons could become uncommon due to technical advances or changing sentiment among the firearm community. This fact makes predictability for citizens and litigants nearly impossible. A weapon someone legally purchases now could become illegal a week later. Moreover, weapons that receive bipartisan condemnation for being overly dangerous could presumably be covered under the Second Amendment by virtue of widespread ownership.[72] This reality poses an unacceptable public safety threat.

This inconsistency lends itself to illogical outcomes. For example, if a majority of Americans bought rocket launchers for self-defense, classifying those weapons as being in common use and legally protected would be practically illogical due to safety concerns. It would also make Second Amendment protection dependent on the same type of unpredictable factor, market forces, that the *Bruen* majority found unconstitutional in New York's may-issue regime. These safety concerns and inherent contradictions are why sales and the vagaries of consumer trends cannot be dispositive in determining common use. To argue otherwise is to suggest that manufacturers, not the Constitution, define the scope of the right. Moreover, it would create a circular system where a law's validity depends on the speed with which a legislature can act before a firearm becomes in common use. These fallacies are another reason for dismissing this

[72] Weapons that would receive bipartisan condemnation include weapons that have been historically heavily regulated and would therefore pass the *Bruen* test and be validly restricted. For instance, short-barelled shotguns with a barrel below eighteen inches or with an overall length of less than twenty-six inches (*see* 26 U.S.C. §§ 5845(a)(1)-(2)(d)). Classified military-style weapons with uniquely advanced technology unavailable to the public may also fall into this category.

definition. The *reductio ad absurdum* that is the quantitative definition is surely not of the high "quality of its reasoning" required to validate a legal test.[73] As stated by Justice Stevens in *Exxon Mobil Corp.* and Justice Marshall in *Gulfstream Aerospace*, "A rule of law that is so wholly 'in the eyes of the beholder' invites different results in like cases and is therefore 'arbitrary in practice.'"[74]

2. Workability

The second shortcoming of a quantitative definitional approach is in its jurisprudential workability. Specifically, assessing a firearm's characteristics and making determinations about its legal protection is squarely within the judicial role. The heart of qualitative analysis is applying a standard to a set of facts, something courts often do in many legal disciplines.[75] For example, if a contract for the sale of goods limits a buyer's remedies, a judge may decide if that remedy fails for its "essential purpose."[76] A court would not consider how many contracts include this clause. Rather, they would make a judgment based on the nature and function of the remedy in that context. Likewise, the substantial similarity test from intellectual property law is a quintessential qualitative test. These standards play to the judiciary's institutional strengths, and doing so is important for a few reasons. It lowers the risk of mistakes inherent in performing tasks one is untrained for. Using familiar, workable standards also encourages efficient case

[73] *See Janus*, 585 U.S. at 917. A *reductio ad absurdum*, also known as a proof by contradiction, is an argument that seeks to discredit a claim by showing that following the claim's logic leads to an absurd outcome. *See also* Nicholas Rescher, *Reductio ad Absurdum*, Internet Encyc. Phil. (last accessed Dec. 2025), https://iep.utm.edu/reductio/.
[74] *Raimondo*, 603 U.S. 369, 408 (2024) (quoting Gulfstream Aerospace Corp v. Mayacamas Corp, 485 U.S. 271, 283 (1988).
[75] Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L. J. 557 (1992) (exemplifying the fact that applying standards, which are qualitative analyses, require adjudicators to supply the law's content, and discussing how judges apply standards to past conduct).
[76] U.C.C. § 2-719.

management and saves time. Lastly, it is key for maintaining judicial legitimacy. Judges who wade into making empirical judgments risk appearing as legislators, damaging their appearance as neutral arbiters of law in the process.

The quantitative definition again falls short in this regard. Adhering to such a practice would force judges to make arbitrary choices concerning what is "common." There are no established or conceivably superior legal principles to make that determination. Moreover, population changes would further hinder these decisions, as what may at one point be a large subset of the population may fall as the population grows. Generally, courts are averse to statistical analysis.[77] Employing the quantitative definition is more than merely considering empirical evidence; it is tantamount to unguided judicial activism. It is troubling that there is no guidance or historical precedent governing how to choose the magic number at which a firearm would receive inviolable constitutional protection.

Lastly, broader institutional problems hinder the quantitative test's workability. An ostensibly trivial footnote in *Bruen* observed that "In our adversarial system of adjudication, we follow the principle of party presentation," and "courts are thus entitled to decide a case based on the historical record compiled by the parties."[78] This regime of party reliance is problematic. A judge's inability to make quantitative judgments is exacerbated when the data they rely on is subject to manipulation, exaggeration, and cherry picking.[79] Additionally, this principle could

[77] Statistical analysis is generally outside the realm of judicial capabilities. While judges at the trial level engage in fact finding, they do not typically do so through statistical analysis. Considering that appellate courts exclusively handle questions of law, they are even more adverse to deliberate statistical analysis. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 204 (1976) ("[i]t is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique"); Jonathan Klick, *The Value of Training in Quantitative Methods for Judges*, in *Economic Evidence in EU Competition Law* 43–50 (Kovac Mitja & Vandenberghe Ann-Sophie, eds., 2016).
[78] New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. 1, 17 n.6 (2022).
[79] *See, e.g.*, Darrell A. H. Miller & Joseph Blocher, *Manufacturing Outliers* 49–79 (2022); Lorianne Updike Schulzke, *Law Office Originalism* (2020).

create a self sustaining issue as it induces lawyers to submit misleading data, knowing judges can safely rely on their briefs. Considering firearm cases are incredibly salient and significant, the possibility of data manipulation and misguided outcomes validates avoiding the qualitative definition altogether.

In conclusion, the qualitative definition's consistency underpins its workability. Meanwhile, the inconsistency in common use's alternative meaning creates absurdity and is intrinsically unworkable. However consistent the qualitative meaning's application may be, though, a workable standard necessitates an objective benchmark for measuring a firearm's suitability for self-defense. Luckily, established standards for such decisions exist not only in common sense but in common law, too.

D. The Reasonable Person Standard

This article's final justification for the qualitative definition comes from a hallmark of tort law: the reasonable person standard. While the Fourth and Seventh Circuits correctly employed the qualitative, feature-based analysis, their reasoning may appear conclusory. Specifically, they do not fully articulate the legal methodology that explains why the qualitative judgment is a legitimate inquiry as opposed to an *ad hoc* standard designed to uphold weapons bans. However, the U.S. Supreme Court's logic is more an unstated application of an established objective qualitative standard that courts are familiar with. The qualitative definition of common use is analogous to the reasonable person standard in numerous ways. In this sense, it supports and is the logical extension of a qualitative reading.

The reasonable person is a tort law standard that seeks to evaluate what action a

reasonable person would take in the pertinent circumstances.[80] A reasonable person will weigh things such as the foreseeable risk of harm their actions create, the extent of this risk, the likelihood that such risk will cause harm, and any alternatives. The actions of reasonable people are to be considered as if they were in a defendant's position. In that respect, those circumstances may create limitations for one's expectations of reasonable action. The standard originated in *Vaughan v. Menlove* (1837), in which a defendant was found negligent after leaving his haystacks in an ignitable fashion near his neighbor's cottages, leading them to combust and destroy the property.[81] The English Court of Common Pleas opined that the defendant's actions required "[I]n all cases a regard to caution such as a man of ordinary prudence would observe."[82]

This standard aligns well with the qualitative assessment of firearm characteristics. After reviewing a weapon's capabilities, judges can ground their determinations of what is suitable for self-defense based on a reasonable person's needs. In doing so, judges resist improperly defining reasonable self-defense needs and behavior from potentially biased party submissions. Comparing a weapon to established definitions of a reasonable person will ensure greater consistency than adhering to what either party in a lawsuit may define as necessary for self-defense. This is because the standard sets a normative benchmark for reasonable self-defense behavior, the same thing a qualitative "common use" analysis seeks to uncover.[83] There is also legal precedent with the standard being applied to self-defense scenarios, where Courts examined whether a reasonable person would have used a specific tool for their desired purpose.[84] For instance, in *People v.*

[80] Legal Info. Inst., *Reasonable Person* (last accessed Dec. 2025), https://www.law.cornell.edu/wex/reasonable_person.
[81] Vaughan v. Menlove (1837), 132 Eng. Rep. 490 (C.P.).
[82] *Id.*
[83] Legal Info. Inst., *supra* note 80. A qualitative "common use" analysis also seeks to be an objective benchmark by measuring concretely whether something is needed or proportional to the task of self-defense.
[84] People v. Goetz, 68 N.Y.2d 96 (N.Y. 1986).

Goetz (1986), Bernhard Goetz shot four men who he believed were about to rob him. The New York Court of Appeals grappled with whether his use of deadly force was proportional to the threat when compared with a reasonable person's actions.[85] Ultimately, they held that an objective element like the reasonable person standard is necessary for judging an exercise of self-defense.[86] Similarly, in evaluating an excessive force claim from law enforcement, the Supreme Court in *Graham v. Connor* (1989) noted that the proper inquiry "is one of 'objective reasonableness.'"[87] These cases are just two of many displaying the reasonable person standard's suitability for applying the *Bruen* test's first step and assessing a weapon's coverage under the Second Amendment.

Ultimately, grounding the qualitative inquiry in the reasonable person standard would supplement the Seventh and Fourth Circuit Courts' opinions by anchoring their logic in established legal practice. It demonstrates that the textual bypass is a legitimate application of a familiar and fundamental mode of judicial reasoning. By assessing a weapon's suitability for self-defense, courts can avoid a purely statistical test and engage in the kind of qualitative analysis that is central to their institutional competence. This standard of reason is the key to justifying dangerous firearm regulations in the wake of *Bruen*.

E. Counterarguments

1. Prima Facie Application of the Second Amendment

Critics rebut the qualitative definition of "common use" because of its allegedly counterintuitive nature. They chiefly cite Justice Thomas's point in *Heller* that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that

[85] *Id.* at 107.
[86] *Id.*
[87] Graham v. Connor, 490 U.S. 386, 400 (1989).

were not in existence at the time of the founding," including "any thing that a man…takes into his hands, or useth in wrath to cast at or strike another."[88] Additionally, they contend that the plain text first step makes no distinction between common and uncommon arms and that such differences must be derived through historical analysis.

While a superficial reading of the Second Amendment does indicate that rifles are "arms," such an inclusive reading is improper because it cannot be squared with *Heller*'s explicit approval of machine gun prohibitions. The Supreme Court itself has said that "to strip a word from its context is to strip that word of its meaning."[89] Again, considering the Seventh Circuit's example, a machine gun is conceivably and literally a "bearable arm" in that it can be held. Yet the *Heller* court found the idea of such prohibitions being unconstitutional to be "startling" and affirmed their validity without indulging *Bruen*'s second step.[90] If the textualist view were correct, machine guns would be presumptively protected, yet *Heller*'s exemption expressly identifies "dangerous and unusual" weapons like machine guns as unworthy of coverage generally.[91] How can categorically unprotected arms simultaneously be presumptively protected? Such an interpretation that has weapons pass the first stage only to outlaw them in the second stage defeats the purpose of the textual threshold.

The solution is to recognize a more expansive reading of "bearable arms" that considers the weapon's purpose and suitability for self-defense, thereby incorporating the qualitative reading of "common use" and reserving *Bruen*'s second step for weapons whose legal status is unresolved. This approach rightly gives independent meaning to the textual step and prevents the

[88] District of Columbia v. Heller, 554 U.S. 570, 581 (2008).
[89] Biden v. Nebraska, 600 U.S. 477 (2023) (Barrett, J., Concurring).
[90] *See Heller*, 554 U.S at 624.
[91] *Id.* at 627.

illogical outcomes *Heller* sought to avoid.

2. Quantitative Definitions of "Common Use"

The second key counterargument is that defining "common use" hinges on a weapon's circulation. Earlier portions of this article describe the logical issues this definition poses. However, in addition to this meaning, supporters further posit that if a weapon is by definition in common use for lawful purposes, it is necessarily not dangerous and unusual. Therefore, because "[a] weapon may not be banned unless it is both dangerous *and* unusual," these firearms would fall outside of *Heller*'s exception under the quantitative reading and be subject to heightened scrutiny in *Bruen*'s second step.[92] Importantly, it is the "unusual" part of the *Heller* exemption that is more subjective, as it is universally agreed that all weapons are inherently dangerous. As said in *McLaughlin v. United States* (1986), "A gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous even though it may not be armed at a particular time or place."[93]

However, these critics are equivocating the meaning of "unusual." A firearm can be statistically common and not unusual in that sense while still being "unusual" in the context of suitability for self-defense. The M388 Davy Crockett nuclear weapon system is an illustrative example. Even if the Crockett's fifty-one-pound nuclear warhead were in widespread circulation, its use for self-defense would remain definitionally "unusual" due to its profound disproportionality to the task of defending oneself.[94]

Accordingly, the proper inquiry must be qualitative, and the relevant meaning of

[92] Caetano v. Massachusetts, 577 U. S. 411 (2016) (Alito, J., concurring).
[93] McLaughlin v. United States, 476 U.S. 16, 17 (1986).
[94] Bevis v. City of Naperville, 85 F.4th 1175, 1182 (7th Cir. 2023).

"unusual" must involve whether the firearm's characteristics are unusual for the end of self-defense. This reveals how the concepts of "dangerous" and "unusual" are inextricably linked; a weapon's extreme and disproportionate dangerousness is precisely what makes its use in a civilian context unusual. Rifles designed for military combat are qualitatively unusual for home defense, not because they are rare, but because their functional capabilities are unreasonable for that purpose. Therefore, being in common use and the "dangerous and unusual" exemption are not as mutually exclusive as made out to be.

V. Conclusion

The legal landscape in U.S. courts post-*Bruen* has been one of uncertainty and Circuit Court divergence. Still, a judicially manageable framework for analyzing modern firearm regulations has emerged. The textual bypass represents a significant milestone in contemporary Second Amendment litigation. As this article has argued, this approach is not a malicious circumvention of *Bruen*, but rather a valid application of its textual stage grounded in *Heller*'s principles.

By understanding "common use" not as a quantitative measure of market popularity but as a qualitative inquiry into a weapon's suitability for self-defense, courts can protect citizens' self-defense rights while maintaining rational gun restrictions. This qualitative framework is justified by its adherence to constitutional purpose, its practical benefits, and its ties to the "reasonable person" standard. It provides a stable and predictable standard for lower courts without resorting to means-end scrutiny. In doing so, it validates the textual bypass.

The future of Second Amendment jurisprudence remains dynamic. The U.S. Supreme Court may decide to weigh in and clarify their own precedents by elucidating *Bruen*'s textual

threshold or the scope of *Heller*'s exceptions. Until then, the textual bypass forges a powerful path forward. It demonstrates that the Second Amendment is not a second-class right, but a right whose boundaries can be understood and applied in a manner consistent with both its historical purpose and the enduring principles of American law.

Domestic Interests vs Global Responsibility: The United States' Inconsistency in International Climate Policy

Writer: Srinidhi Venkitasamy

Article Editor: Raquelle Elson

Associate Editor: Dina Fakhar

Abstract:

This paper analyzes the United States' inconsistent engagement in global climate agreements and its implications for international environmental governance by examining the Montreal Protocol, Kyoto Protocol, and Paris Climate Agreement. This history suggests that U.S. engagement with such agreements has been shaped by short-term economic and political interests rather than sustained environmental responsibility. This inconsistency has not only negatively impacted the effectiveness of the international agreements but also the country's reputation as a leader in climate governance.

I. Introduction

An analysis conducted by scientists at the U.S. National Aeronautics and Space Administration (NASA) found that 2024 was Earth's hottest year on record.[1] Two well known effects of rising global temperatures are prolonged droughts and more frequent and severe weather events, which uproot communities, worsen poverty, and jeopardize food security.[2] At a time when the population and life expectancy are increasing, it is less frequently discussed how climate change damages soil, decreases the amount of land available, and threatens agricultural sustainability—all of which lead to lower crop yields.[3] These realities underscore that global warming is not just an environmental issue but a humanitarian and economic one. As global warming continues to hit unprecedented highs, the need for change continues to grow. Global warming, as the name suggests, is a global issue, not a regional or national one. In order to successfully mitigate it, international commitment and cooperation amongst all nation-states is necessary—especially those that are top polluters.

Historically, the United States is a top emitter of greenhouse gases (GHGs).[4] This fact, along with the nation's size and economic power, emphasizes the crucial role the United States plays in international environmental policy. The United States' inconsistent engagement with internationally binding climate agreements—such as the Kyoto Protocol, the Paris Agreement, and the Montreal Protocol—reflects a tension between domestic political priorities and global

[1] Nathan Lenssen et al., *A NASA GISTEMPv4 Observational Uncertainty Ensemble*, 129 J. Geophysical Rsch: Atmospheres 1 (2024); NASA Goddard Institute for Space Studies, *GISS Surface Temperature Analysis (GISTEMP v4)* (last accessed Dec. 2025), https://data.giss.nasa.gov/gistemp/.
[2] Xiangning Yuan et al., *Impacts of Global Climate Change on Agricultural Production: A Comprehensive Review*, 14 Agronomy 1360 (2024).
[3] *Id.*
[4] Zhu Liu et al., *Global Carbon Emissions in 2023*, 5 Nature Rev. Earth & Env't 253 (2024); U.N. Env't Programme, *Emissions Gap Report 2024: No More Hot Air…Please!* vii, xiii (2024). Greenhouse gases are atmospheric gases responsible for causing global climate change and rising temperatures. The major GHGs are carbon dioxide (CO_2), methane (CH_4), and nitrous oxide (N_2O), though other GHGs that are less prevalent but are still very powerful include hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulphur hexafluoride (SF_6).

climate responsibilities. U.S. decisions in these agreements are shaped by its own economic interests. The United States' repeated withdrawal from or selective participation in international climate agreements undermines global efforts to combat climate change, prioritizes short-term domestic, political, and economic interests over long-term environmental responsibility, and delegitimizes its leadership in international climate governance.

II. Background: U.S. Environmental Policy and Global Climate Governance

Although the United States passed its first piece of environmental legislation in 1899, a more significant wave of laws calling for environmental reform began in the mid 1900s.[5] In 1962, marine biologist Rachel Carson's book, *Silent Spring*, was published and exposed the dangers of widespread pesticide use and raised national awareness about the risks of environmental contamination.[6] Public concern intensified in 1969 when the Cuyahoga River in Ohio caught fire due to water pollution.[7] While this river had caught fire multiple times in the past, this specific fire gathered national media coverage.[8] These two events served as catalysts for the environmental movement by sparking public outrage and spreading awareness about the effects of pollution. Following that, the Environmental Protection Agency was officially formed in 1970 to coordinate federal oversight and management of the environment.[9] That same year, the National Environmental Policy Act was signed into law, requiring federal agencies to consider the environmental impacts of their actions before making decisions.[10] Throughout the 1970s, landmark legislation, such as the Clean Air Act and the Clean Water Act,[11] significantly

[5] James Griffin, *Pre-EPA: US Environmental Laws before 1970*, Lion Tech. Inc. (Nov. 2016), https://www.lion.com/lion-news/november-2016/pre-epa-us-environmental-laws-before-1970.
[6] Rachel Carson, *Silent Spring* (Mariner Books 1962).
[7] Nat'l Park Serv., *The 1969 Cuyahoga River Fire*, (last accessed Dec. 2025), https://www.nps.gov/articles/story-of-the-fire.htm.
[8] *Id.*
[9] Env't Protection Agency, *The Origins of EPA* (last accessed Dec. 2025), https://www.epa.gov/history/origins-epa.
[10] Env't Protection Agency, *What is the National Environmental Policy Act?* (last accessed Dec. 2025), https://www.epa.gov/nepa/what-national-environmental-policy-act.
[11] Clean Air Act, 42 U.S.C. §§ 7401–7671 (1963); Clean Water Act, 33 U.S.C. §§ 1251–1389 (as amended 1972).

strengthened environmental protections. These reforms proved to be successful, as emissions of particulate matter, sulfur oxides, nitrogen oxides, carbon monoxide, volatile organic compounds, and lead declined by seventy-three percent following the passage of the Clean Air Act,[12] while U.S. water quality improved following the passage of the Clean Water Act.[13]

Despite these earlier domestic successes in the U.S., global greenhouse gas emissions have continued to rise since the late twentieth century,[14] highlighting that domestic regulation alone is not enough to address the climate crisis. The first major example of effective international environmental cooperation came in 1987 with the Montreal Protocol, which successfully phased out ozone-depleting substances and demonstrated the potential for coordinated global action.[15] Building on this, the growing recognition of climate change as a global problem requiring collective solutions ultimately led to the adoption of the United Nations Framework Convention on Climate Change (UNFCCC) in 1992.[16] The UNFCCC was founded:

> [T]o achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.[17]

Since its establishment, the UNFCCC has served as a basis for global climate negotiations and a

[12] Daniel S. Greenbaum, *The Clean Air Act: Substantial Success and the Challenges Ahead*, 15 Annals Am. Thoracic Soc'y 296 (2018).
[13] David A. Keiser & Joseph S. Shapiro, *Consequences of the Clean Water Act And The Demand For Water Quality*, 134 Q. J. Econ. 349 (2018).
[14] Env't Protection Agency, *Global Greenhouse Gas Overview*, (last updated Dec. 2025), https://www.epa.gov/ghgemissions/global-greenhouse-gas-overview.
[15] Env't Protection Agency, *Montreal Protocol One-Page Fact Sheet* (2007). Ozone-depleting substances are harmful because they damage Earth's stratospheric ozone layer, which protects life on Earth from increased exposure to ultraviolet radiation which is harmful to human health. Some commonly known substances include chlorofluorocarbons (CFCs) and hydrochlorofluorocarbons (HCFCs).
[16] Grantham Rsch. Inst. on Climate Change & Env't, *What is the UN Framework Convention on Climate Change (UNFCCC)?* (Oct. 2022), https://www.lse.ac.uk/granthaminstitute/explainers/what-is-the-un-framework-convention-on-climate-change-unfccc/.
[17] U.N. Conference on Environment and Development: Framework Convention on Climate Change, *in Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of the Second Part of Its Fifth Session*, INC/FCCC, 5th Sess., 2d Part, at Annex I, U.N. Doc. A/AC.237/18 (Part II)/Add.1 (1992) (entered into force 1994) [hereinafter Climate Change Convention].

rulemaking body that passed influential international legislation such as the 1997 Kyoto Protocol and the 2015 Paris Climate Agreement.[18] Together, these international policy milestones and others like them illustrate a global shift from domestic reforms to international climate cooperation, which laid the groundwork for the United States' complex and often inconsistent role in global climate governance.

III. Montreal Protocol (1987)

The ozone layer is a region of Earth's stratosphere with increased atmospheric ozone concentration.[19] It plays a vital role by absorbing much of the sun's harmful ultraviolet radiation, preventing it from reaching Earth's surface and protecting various life forms from its damaging and potentially cancerous effects.[20] In 1974, chlorofluorocarbons (CFCs) were identified by Mario J. Molina and F. Sherwood Roland, who would later go on to win the Nobel Prize in Chemistry for their research, to be harmful to the ozone layer.[21] CFCs are used in the manufacture of aerosol sprays, blowing agents, solvents, and refrigerants.[22] A decade later, British geophysicist Joe C. Farman and his colleagues identified a thinning of the ozone layer over Antarctica in 1985.[23] This phenomenon was referred to as the "Antarctic ozone hole" and was linked to the widespread use of CFCs.[24] This discovery, along with global efforts, led to the adoption of the Montreal Protocol in 1987.[25] The Montreal Protocol was an international treaty that intended to protect the ozone layer by phasing out the production and consumption of

[18] Grantham Rsch. Inst. on Climate Change & Env't, *supra* note 16.
[19] Thomas Peter, *The Stratospheric Ozone Layer—an Overview*, 83 Env't Pollution 69 (1994).
[20] *Id.*
[21] Mario J. Molina & F. S. Rowland, *Stratospheric Sink for Chlorofluoromethanes: Chlorine Atom-Catalysed Destruction of Ozone*, 249 Nature 810 (1974); Press Release, Royal Swedish Acad. Sci., *The Ozone Layer: The Achilles Heel of the Biosphere* (1995) (on file with the Nobel Prize Organization) (publicly available online).
[22] James W. Elkins, *The Chapman & Hall Encyclopedia of Environmental Science* 78–80 (David E. Alexander & Rhodes W. Fairbridge, eds.) (Kluwer Academic 1999).
[23] J. C. Farman, B. G. Gardiner & J. D. Shanklin, *Large Losses of Total Ozone in Antarctica Reveal Seasonal ClOx/NOx Interaction*, 315 Nature 207 (1985).
[24] F. Sherwood Rowland, *Chlorofluorocarbons, Stratospheric Ozone, and the Antarctic 'Ozone Hole,'* 15 Env't Conservation 101 (1988).
[25] Montreal Protocol on Substances that Deplete the Ozone Layer, 1987, S. Treaty Doc. 100-10.

ozone-depleting substances, most notably CFCs.[26] The U.S. ratified the protocol in 1988.[27]

The Montreal Protocol is now considered by some to be "the most successful multilateral environmental agreement."[28] Over ninety-eight percent of the production and consumption of controlled ozone-depleting substances has ended, and the abundance of ozone-depleting chlorine and bromine in the stratosphere is declining.[29] These levels are expected to continue decreasing, eventually returning to pre-Antarctic ozone hole levels by the middle of this century.[30] The United States' early commitment to phasing out CFCs largely contributed to this success.[31] Even before the Protocol was negotiated, domestic agencies like the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), and the Consumer Product Safety Commission had already banned the nonessential use of CFCs as aerosol propellants in 1978.[32] These early regulations not only demonstrated U.S. leadership but also spurred innovation in the private sector. By creating demand for CFC substitutes, U.S. restrictions gave producers both the incentive and the ability to push for international policy, while also giving the U.S. an economic advantage in manufacturing alternatives.[33] In this way, domestic action laid the groundwork for international cooperation and positioned the United States to benefit from the Montreal Protocol.

Although the United States was a major advocate for international regulation of CFCs on the basis of environmentalist interests, its participation in meaningful climate action since has

[26] *Id.*
[27] Off. Env't Quality, *The Montreal Protocol on Substances that Deplete the Ozone Layer*, U.S. Dep't of State (last accessed Dec. 2025), https://www.state.gov/the-montreal-protocol-on-substances-that-deplete-the-ozone-layer.
[28] Marco Gonzalez et al., *The Montreal Protocol: How Today's Successes Offer a Pathway to the Future*, 5 J. on Env't Stud. & Sci. 122 (2015).
[29] *Id.*
[30] *Id.*
[31] Peter M. Morrisette, *The Evolution of Policy Responses to Stratospheric Ozone Depletion*, 29 Nat. Resour. J. 794 (1989).
[32] Press Release, Env't Protection Agency, *Regulatory History of CFCs and Other Stratospheric Ozone-Depleting Chemicals* (1993), https://www.epa.gov/archive/epa/aboutepa/regulatory-history-cfcs-and-other-stratospheric-ozone-depleting-chemicals-1993.html.
[33] Elizabeth R. DeSombre, *The Experience of the Montreal Protocol: Particularly Remarkable, and Remarkably Particular*, 19 UCLA J. Env't L. & Pol'y 49 (2000).

been relatively lackluster. Recent developments threaten the legitimacy of the United States' role as a leader in global environmental policy. The Recissions Act of 2025 reduced funding for international organization assistance by $437 million, which includes contributions to the Montreal Protocol.[34] Cuts like these undermine the long-term progress achieved through international cooperation and could potentially slow the recovery of the ozone layer.[35] Continued U.S. engagement is essential to ensuring that the successes of the Montreal Protocol are sustained and that global efforts to protect the ozone layer remain effective. Additionally, by cutting support for this agreement, the U.S. risks undermining the very leadership it established through early domestic action. These recent shifts not only weaken U.S. credibility in environmental governance but also raise broader questions about the nation's commitment to long-term climate cooperation. Before this, the decades-long chronicle of the United States' indecisive attitude toward the Kyoto Protocol reflects how these inconsistencies unfolded on a wider climate stage.

IV. Kyoto Protocol (1997)

The Kyoto Protocol was the first addition to the United Nations Framework Convention on Climate Change, serving to implement the UNFCCC's objective of reducing the concentration of greenhouse gases (GHGs) in the atmosphere to address global warming.[36] The Protocol established individual targets for industrialized (Annex I) countries to reduce their GHG emissions by roughly five percent below 1990 levels and a system to monitor each country's progression.[37] Countries that failed to meet their targets could purchase "credits" from countries

[34] Recissions Act of 2025, Pub. L. No. 199-28, 139 Stat. 467; Ben Lieberman, *Latest Recissions Bill Finally Kills Spending on 1987 Montreal Protocol*, Competitive Enterprise Inst. (July 2025), https://cei.org/blog/latest-rescissions-bill-finally-kills-spending-on-1987-montreal-protocol/.
[35] Timothy Cama, *GOP Spending Cuts Hit Reagen-Era Ozone Treaty*, Politico (July 2025), https://www.politico.com/newsletters/power-switch/2025/07/18/gop-spending-cuts-hit-reagan-era-ozone-treaty-00462196.
[36] Encyc. Britannica, *Kyoto Protocol* (July 2025), https://www.britannica.com/event/Kyoto-Protocol.
[37] U.N. Framework Convention on Climate Change, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107 [hereinafter Kyoto Protocol].

that surpassed their goal under the protocol.[38] This served to incentivize countries to significantly reduce GHG emissions; however, the effectiveness of the Protocol is widely debated. Evidence does show a statistically significant decrease in GHG emissions in participating nations that would not have occurred otherwise.[39] This suggests that the treaty was a good first step for the UNFCCC to continue to build upon, but that more steps toward progress must be made. Many have reached the consensus that the Kyoto Protocol was an inadequate solution to address climate change. Specifically, the five percent target decrease in emissions was an underwhelming goal, and even then, participating states had difficulty meeting that.[40] But even if, hypothetically, states fully met the demands of the treaty, the change would still not be sufficient to have prevented the worsening of climate change.[41]

The Kyoto Protocol was a landmark piece of international legislation because it was the first legally binding international climate agreement.[42] Annex I encompasses the thirty-six industrialized countries that the UNFCCC originally identified for GHG emissions reduction, while Annex B refers to the more recent list of thirty-nine countries identified.[43] For the sake of this article, the countries that agreed to legally binding GHG emissions targets under the Kyoto Protocol will be referred to as "Annex B." These countries had been the most responsible for the rise in GHG emissions and were the most equipped to reduce emissions without causing a significant toll on their economies.[44] Despite this, there has been widespread debate over whether it was fair for the Kyoto Protocol's legally binding requirements to apply only to Annex B

[38] *Id.*
[39] Yoomi Kim et al., *Environmental and Economic Effectiveness of the Kyoto Protocol*, 15 PLOS ONE 1 (2020).
[40] Amanda M. Rosen, *The Wrong Solution at the Right Time: The Failure of the Kyoto Protocol on Climate Change*, 43 Pol. & Pol'y 30 (2015).
[41] *Id.*
[42] U.N., *Marking the Kyoto Protocol's 25th Anniversary*, (Dec. 2022) https://www.un.org/en/climatechange/marking-kyoto-protocol.
[43] U.N. REDD Programme, *Annex-I, Annex B Countries/Parties* (last accessed Dec. 2025), https://www.un-redd.org/glossary/annex-i-annex-b-countriesparties.
[44] Francesco Bassetti, *Kyoto Protocol*, Foresight (Dec. 2022), https://www.climateforesight.eu/seeds/kyoto-protocol/.

countries, as many argued that all nations contribute to global emissions and should share responsibility for addressing climate change.[45] The Bush administration eventually withdrew the United States from the Kyoto Protocol in 2001, citing so-called "unfairness" as a key factor.[46] More specifically, the administration argued that the treaty would harm the U.S. economy and was ineffective without the participation of developing countries like China and India, who, despite being among the world's highest GHG emitters, were not given binding emissions targets due to their classification as developing nations.[47] This decision not only reflected domestic, political, and economic priorities but also marked a turning point in global climate diplomacy, setting the stage for significant consequences on both international cooperation and the credibility of U.S. climate leadership.

U.S. withdrawal had significant implications for the future of the Kyoto Protocol. Japan, in particular, was doubtful about going ahead without the U.S. and attempted to convince them to rejoin.[48] Furthermore, due to U.S. withdrawal, the protocol now had to appeal to the interests of the remaining members.[49] In particular, Japan, Russia, Canada, and Australia did not accept the final compromise deal reached at the 2000 Hague Summit.[50] If a new deal was not reached, the Kyoto Protocol would die.[51] This led to the Bonn Agreement in 2001, which resolved key disputes that had stalled the implementation of the Kyoto Protocol.[52] The agreement reintroduced

[45] Sertaç Atabey & Zeynel Fuat Toprak, *A Criticism of the Kyoto Protocol with an Objective Approach*, 10 J. Adv. Res. Nat. Appl. Sci. 520 (2024).
[46] Steve Vanderheiden, *Justice in the Greenhouse: Climate Change and the Idea of Fairness*, 19 Soc. Philos. Today 89 (2003).
[47] Vivian Tsai, *Kyotastrophe—the Kyoto Protocol's Inequitable Failure*, Colum. Pol. Rev. (May 2015), https://www.cpreview.org/articles/2015/05/kyotastrophe-the-kyoto-protocols-inequitable.
[48] Suraje Dessai et al., *International Political History of the Kyoto Protocol: from The Hague to Marrakech and Beyond*, 4 Int'l Rev. Env't Strategies, 183, 189–90 (2003).
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] Kyoto Protocol, *supra* note 37.

flexibility mechanisms, such as emissions trading,[53] joint implementation,[54] and the Clean Development Mechanism,[55] allowing countries to offset their emissions by financing environmental projects abroad rather than reducing emissions domestically.[56] It also permitted nations to count carbon sinks,[57] like forests and land use changes, toward their reduction targets.[58] These compromises made it easier for industrialized countries to meet their obligations and helped rebuild international support for the Protocol after the United States' withdrawal. The Bonn Agreement was essential to the Kyoto Protocol's survival,[59] but it also significantly weakened the integrity of the Protocol.[60] By allowing countries to rely heavily on carbon sinks and flexible mechanisms, the Bonn Agreement reduced the need for actual domestic emissions cuts.[61] This shift diluted the Protocol's effectiveness by enabling targets to be met administratively rather than through substantive environmental action.[62] The agreement prioritized political compromise and ratification over environmental integrity. Essentially, the Bonn Agreement made Kyoto more politically palatable for countries hesitant to commit but at the cost of weakening its core objectives.

V. The Paris Climate Agreement (2015)

[53] *Id.* Emissions trading is a system under the Kyoto Protocol that allows Annex B countries who have either exceeded their emissions targets or fallen short to buy or sell emissions credits accordingly.
[54] *Id.* Joint implementation is a mechanism allowing countries within the Annex B party of the Kyoto Protocol to invest in greenhouse gas reduction projects in other developed countries to fulfill their treaty obligations, rather than reducing emissions domestically.
[55] *Id.* The Clean Development Mechanism allows countries within the Annex B party of the Kyoto Protocol to invest in greenhouse gas reduction projects in developing countries to fulfill their treaty obligations, instead of reducing domestic emissions.
[56] *Id.*
[57] A carbon sink is any location that stores substances containing carbon, especially carbon dioxide. *See generally* SAGE Publications, Inc., *Encyclopedia of Global Warming and Climate Change* 170–71 (S. George Philander ed., 1st ed. 2008) (providing a general definition of the term).
[58] Kyoto Protocol, *supra* note 37.
[59] Dessai et al., *supra* note 48, at 190.
[60] Hermann Ott, *The Bonn Agreement to the Kyoto Protocol—Paving the Way for Ratification*, 1 Int'l Env't Agreements 469 (2001).
[61] *Id.*
[62] *Id.*

The Paris Climate Agreement is another legally binding international climate agreement that established targets to limit global warming to under 2 degrees Celsius above preindustrial levels, with an overall goal of under 1.5 degrees Celsius.[63] The agreement seeks to achieve this goal through Nationally Determined Contributions (NDCs), which are climate action plans submitted by each participating nation outlining their specific targets and strategies for reducing greenhouse gas emissions.[64] While nations are required to submit NDCs, the fulfillment of these commitments remains voluntary.[65] The underlying expectation is that global cooperation, along with domestic and international scrutiny, will incentivize nations to adhere to and strengthen their commitments over time. The Paris Agreement operates on a five-year cycle aimed at continuous progress and accountability.[66] It required countries to submit their NDCs by 2020 and outline the specific actions they intended to take to reduce greenhouse gas emissions in alignment with the Agreement's goals.[67] Beginning in 2024, nations are expected to report on their progress toward these commitments.[68] After this reporting phase, global adherence to the Agreement will be evaluated, and countries will receive recommendations for additional measures to strengthen their efforts.[69] These recommendations will inform the next round of NDCs, encouraging nations to adopt increasingly ambitious climate targets in each subsequent cycle.[70] However, it is questionable whether these expectations were truly upheld.

The Paris Climate Agreement is unique because it encompasses both developing and developed countries committed to the specified goal of limiting global warming to under 1.5

[63] Paris Agreement to the United Nations Framework Convention on Climate Change, 2015, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement].
[64] *Id.*
[65] *Id.*
[66] U.N. Climate Change, *The Paris Agreement*, (last accessed Dec. 2025), https://unfccc.int/process-and-meetings/the-paris-agreement.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*

degrees Celsius above preindustrial levels, and 2 degrees Celsius overall while also allowing for the flexibility of each nation to choose its own strategy to tackle climate change.[71] The treaty was applauded for its inclusive structure, as the NDCs allowed each country to make goals based on their own domestic economic contexts.[72] This inclusivity advances justice by ensuring each party has a voice on climate justice, equity, and fairness, thus limiting opportunities for controversial perspectives to be suppressed.[73] Furthermore, the Agreement almost immediately received high participation, with 175 parties joining in 2016, allowing the agreement to enter into force in under a year after its adoption, which is a sharp contrast to the almost eight-year ratification process for Kyoto.[74] While these were great successes, the treaty also fell short on a variety of aspects. First, there was a collective inadequacy of the national agreements in relation to the goals of the agreement. For the 1.5 degrees Celsius target to be achievable, emissions must decline by at least forty-three percent from 2019 levels.[75] However, the most recent round of NDCs only aim for a seven percent reduction from 2019 levels.[76] This demonstrates the Paris Agreement's proven failure to meet its own goals.

Another perceived failure is the loss of momentum; specifically, the lack of increasing targets relative to the expectations set by the Agreement's first cycle. The original plan for the treaty was for participating nations to create increasingly ambitious goals each cycle.[77] However, the global warming predictions for 2100 have not improved since 2021.[78] This clearly highlights the Paris Agreement's stagnation, as nations have failed to strengthen their commitments or

[71] Ralph Bodle et al., *The Paris Agreement: Analysis, Assessment, and Outlook*, 10 Carbon & Climate L. R. 5 (2016).
[72] Cinnamon P. Carlarne & J. D. Colavecchio, *Balancing Equity And Effectiveness: The Paris Agreement & The Future Of International Climate Change Law*, 27 N.Y.U. Env't L. J. 107, 164 (2019).
[73] *Id.*
[74] *Id.* at 140.
[75] World Res. Inst., *The State of Nationally Determined Contributions: 2022* (2023).
[76] *Id.*
[77] Paris Agreement, *supra* note 63.
[78] Climate Action Tracker, *Warming Projections Global Update* (2024).

make measurable progress. This then reveals the Agreement's inability to sustain momentum and enforce meaningful climate action over time. Additionally, the wealthier, industrialized participating nations have failed to meet their "fair share" of the climate burden, while most of the poorer, developing countries have met or exceeded their "fair share."[79] This imbalance is of significance because the wealthier nations tend to contribute the most to GHG emissions, and are more equipped to implement change and thus should be doing more to reduce emissions.[80]

Within the agreement, developed countries agreed to mobilize $100 billion (USD) annually in climate finance to help developing countries, however, they have continuously failed to do so.[81] The Agreement's reliance on voluntary compliance, without strong enforcement mechanisms or meaningful consequences for noncompliance, has further weakened its effectiveness. While the Paris Agreement represents a monumental diplomatic achievement, its lack of enforceability and declining momentum have significantly undermined its capacity to achieve the climate goals it set out to accomplish.

The United States played a decisive role in shaping the Paris Agreement's design. When it comes to binding international treaties, U.S. federal law mandates Senate approval.[82] However, it was believed that the Senate was highly unlikely to approve the Paris Agreement.[83] As a result, under former president Barack Obama, American negotiators pushed to change the Agreement from a nonbinding "pledge and review" structure that could bypass ratification.[84] Furthermore, the U.S. also brokered cooperation with China; these major emitters gave legitimacy to the new framework.[85] The United States' intended NDC, submitted under the Obama administration,

[79] Carlarne & Colavecchio, *supra* note 72, at 161.
[80] Julie Bos et al., *Are Countries Providing Enough to the $100 Billion Climate Finance Goal?*, World Res. Inst. (Oct. 2021), https://www.wri.org/insights/developed-countries-contributions-climate-finance-goal.
[81] *Id.*
[82] U.S. Const. art. II, § 2, cl. 2.
[83] Manjana Milkoreit, *The Paris Agreement on Climate Change—Made in USA?*, 17 Persps. on Pol. 1019 (2019).
[84] *Id.*
[85] *Id.*

aimed for a twenty-six to twenty-eight percent reduction in GHG emissions from 2005 levels by 2025.[86] The subsequent administration under President Donald Trump moved to withdraw the U.S. from the Agreement in 2017.[87] The economic burden was a major factor in this decision.[88]

As of now, the U.S. is the only country to have withdrawn from the Paris Agreement.[89] This withdrawal can be partially attributed to the Trump administration's close ties with the fossil fuel industry.[90] These industries have significant political power over the Trump administration as well as the Republican party.[91] The Paris Climate Agreement is in direct conflict with the interests of fossil fuel companies as its aims to reduce GHG emissions, and fossil fuels are a leading contributor to GHG emissions. This displays how monetary interests can dictate national policy even at the expense of global climate action. Following this, former President Joe Biden reentered the agreement in 2021.[92] His new proposal doubled the United States' last commitment, aiming for a fifty to fifty-two percent emissions cut from 2005 levels by 2030.[93] While this was a strong step forward, Trump has once again withdrawn from the agreement on the first day of his second term.[94] This repeated withdrawal and reentry cycle has made the United States appear inconsistent and unreliable on the world stage, undermining its credibility as a global leader in climate policy. The Paris Climate Agreement ultimately stands as one of the clearest examples of the nation's growing bipartisan divide, as shifts in presidential power completely reverse environmental policy and leave international partners uncertain about

[86] Carlarne & Colavecchio, *supra* note 72, at 147.
[87] Jonathan D. Haskett, Cong. Rsch. Serv., R48504, *U.S. Withdrawal from the Paris Agreement: Process and Potential Effects* (2025).
[88] Kevin Dayaratna et al., The Heritage Found., *Consequences of Paris Protocol: Devastating Economic Costs, Essentially Zero Environmental Benefits* (2016).
[89] Lindsay Maizland & Clara Fong, *Global Climate Agreements: Successes and Failures*, Council on Foreign Rels. (2025), https://www.cfr.org/backgrounder/paris-global-climate-change-agreements.
[90] Hai-Bin Zhang et al., *U.S. Withdrawal from the Paris Agreement: Reasons, Impacts, and China's Response*, 8 Adv. Climate Change Rsch. (2017).
[91] *Id.*
[92] Maizland & Fong, *supra* note 89.
[93] *Id.*
[94] *Id.*

America's long-term commitment to addressing climate change.

VI. The Consequences of Inconsistent U.S. Climate Action

The Montreal Protocol demonstrates that when the U.S. aligns domestic policy with international cooperation, global progress is achievable. However, the funding cuts outlined in the 2025 Recissions Act show how easily this commitment can unravel, threatening to reverse decades of success.[95] The reason why the U.S. was so involved in the Montreal Protocol initially is that it benefited its economy, as the U.S. had an advantage in developing alternatives to CFCs because it had already begun phasing out CFCs prior to the Protocol's creation. However, it is argued that the Protocol no longer aligns with U.S. economic interests after the addition of the Kigali Amendment (2016). This amendment aimed to cut down the usage of hydrofluorocarbons (HFCs).[96] HFCs are greenhouse gases, commonly found in refrigerants, that are significantly more potent than carbon dioxide.[97] Ratification of the amendment would require the U.S. to commit roughly $1.3 billion to assist developing nations in phasing out HFCs.[98] Additionally, hydrofluoroolefins (HFOs), the replacement for HFCs, are significantly more expensive than HFCs.[99] This amendment signifies a shift in the protocol's alignment with U.S. interests.

Now that it is no longer of direct benefit, the U.S. is no longer interested in supporting the Montreal Protocol. Reduced U.S. funding[100] could slow the phasing out of HFCs in developing nations that depend on financial support from wealthier countries.[101] This illustrates that U.S. inconsistency undermines climate progress not only because it is a major emitter, but

[95] Rescissions Act of 2025, Pub. L. No. 119-21 (2025).
[96] U.N. Env't Programme, *Report of the Twenty-Eighth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, U.N. Doc. UNEP/OzL.Pro.28/12, Annex I (2016) [hereinafter Kigali Amendment].
[97] Env't Protection Agency, *What are HFCs?* (2021).
[98] David T. Stevenson, *Economic Impact of Kigali Amendment Ratification* 6 (2018).
[99] *Id.* at 5.
[100] *Id.* at 3.
[101] Elizabeth R. DeSombre, *The Experience of the Montreal Protocol: Particularly Remarkable, and Remarkably Particular*, 19 UCLA J. Envtl. L. & Pol'y 49, 70.

also because it deprives other nations of the resources needed to contribute to global climate action. This is just one example of the United States' tendency to prioritize short-term domestic economic competitiveness over long-term environmental commitments. As discussed previously, the Montreal Protocol's success can be attributed to the United States' previous commitment to phasing out CFCs. This shows that consistency works. Wavering commitment, however, undermines progress and credibility.

The U.S. signed onto the Kyoto Protocol in 1998 under the Clinton administration, but never officially ratified the treaty.[102] The U.S. later withdrew from the protocol under the Bush administration.[103] A major reason the Bush administration cited for withdrawing from the Kyoto Protocol is that it would harm the U.S. economy.[104] However, climate change will have devastating effects on the global economy. In fact, a one degree Celsius increase in the Earth's temperature causes a long-term twenty percent reduction in global GDP.[105] This once again displays how the U.S. continuously prioritizes short-term economic benefits over the long-term consequences of climate change. Another reason cited by the Bush administration for the withdrawal was unfairness, as developing nations were not obligated to reduce their emissions.[106] This reflects a pattern of deflecting responsibility rather than leading by example. Developing countries were not held to the same standard as developed nations under the Kyoto Protocol because developed nations had more resources to implement changes to reduce emissions.[107] This reasoning also deflects from the fact that the United States is responsible for a quarter of

[102] Bureau Oceans & Int'l Env't & Sci. Affs., *United States Signs the Kyoto Protocol*, U.S. Department of State (1998) [https://1997-2001.state.gov/global/global_issues/climate/fs-us_sign_kyoto_981112.html].
[103] Vanderheiden, *supra* note 46.
[104] Tsai, *supra* note 47.
[105] Adrien Bilal & Diego R. Känzig, *The Macroeconomic Impact of Climate Change: Global vs. Local Temperature*, Nat'l Bureau Econ. Rsch. no. 32450 (2024).
[106] Tsai, *supra* note 47.
[107] Bassetti, *supra* note 44.

historical emissions, having emitted more carbon dioxide than any other country.[108] This fact, along with the United States' economic and technological capacity, makes it clear that the U.S. holds significant responsibility for the state of the climate and thus is more obligated to contribute to environmental efforts. Additionally, there is speculation that the Clinton administration signed the Kyoto Protocol knowing the Senate would never ratify it, doing so largely as a symbolic gesture to appear environmentally committed and to strengthen Vice President Gore's prospects for election in 2000.[109] Regardless of whether this is true or not, it reinforces the view that the U.S. treats environmental policy as a political tool rather than a moral or scientific obligation, damaging its reputation and weakening international trust.

It is evident that the partisan divides in the United States have significantly contributed to instability in long-term climate commitments. This is displayed most clearly through the Paris Agreement. The U.S. entered the treaty in 2016 under the Obama administration, formally withdrew in 2020 under the Trump administration, reentered in 2021 under the Biden administration, and announced a second withdrawal in 2025 under Trump's second term.[110] This highlights that U.S. climate involvement relies on who holds office rather than national consensus, making it unreliable internationally. U.S. inconsistency directly threatens the collective movement toward addressing climate change, as it could potentially lead other countries to reduce their own efforts. Within the Paris Agreement, developed nations agreed to contribute funds to assist developing nations in making changes to reduce their emissions.[111] Countries may reduce or cease their climate efforts as a result of the lack of climate finance from

[108] Hannah Ritchie, *Who Has Contributed Most to Global CO2 Emissions?*, Our World in Data (Oct. 2019), https://ourworldindata.org/contributed-most-global-co2.
[109] John Hovi et al., *Why the United States Did Not Become a Party to the Kyoto Protocol: German, Norwegian, and U.S. Perspectives*, 18 Eur. J. Int'l. Rels., 130, 142–43 (2010).
[110] Maizland & Fong, *supra* note 89.
[111] Bos et al., *supra* note 80.

the United States.[112]

Disregarding the possible influence of U.S. withdrawal on other nations, its absence from international climate agreements severely undermines the collective global effort in addressing climate change. If the U.S. abandons its former commitment of achieving net zero emissions by 2050, it would increase the current global warming projection by a few tenths of a degree.[113] This would make it extremely difficult for the rest of the countries participating in the Paris Agreement to achieve its goal of limiting global warming to 1.5 degrees Celsius.[114] This exemplifies how much power the United States has and how its lack of commitment to the environment would affect climate change so drastically. Furthermore, domestic economic interests directly conflicted with environmental interests. In May of 2017, twenty-two senators under the Republican party wrote a letter to President Donald Trump pushing withdrawal from the Agreement.[115] Those twenty-two senators were reported to have collected $10 million USD from the fossil fuel industry since 2012.[116] Additionally, under the Trump administration, the proponents of the fossil fuel industry were able to secure high positions in government. In fact, out of 111 senior officials across nine federal agencies, forty-three were formerly employed by the fossil fuel industry.[117] This relationship between government and fossil fuel corporations reinforces policies that prioritize economic gain over environmental responsibility, making long-term progress increasingly difficult.

VII. Conclusion

The United States has shown time and time again that short-term domestic interests are

[112] Climate Action Tracker, *supra* note 78.
[113] Climate Action Tracker, *supra* note 78.
[114] Climate Action Tracker, *supra* note 78.
[115] Zhang et al., *supra* note 90.
[116] Zhang et al., *supra* note 90.
[117] Alan Zibel & Toni Aguilar Rosenthal, *Trump's Polluter Playground: Fossil Fuel Insiders & Ideologues Prop Up Dirty Energy & Derail Clean Power*, Pub. Citizen (2025).

prioritized over long-term environmental commitments, as displayed in the Montreal Protocol, Kyoto Protocol, and Paris Climate Agreement. Although the United States has historically emitted more than any other country, if it does not directly benefit its economy, the United States does not appear to be interested in international climate protocols. This pattern of selective engagement undermines the nation's credibility as a global leader and discourages other countries from maintaining their own commitments. It also prevents the development of consistent, long-term environmental strategies within the U.S. itself, as shifting political and economic priorities cause progress to stall or reverse. Ultimately, this inconsistency weakens collective climate action and delays the global transition to a more sustainable future.

The “End” of Universal Injunctions: The Great Wild West or a Return to Law and Order?

Writer: Laney Williams

Article Editor: Abigail Vinces

Associate Editor: Harper West

Abstract:

Universal or nationwide injunctions are court orders that enjoin the federal government, typically the president, from enforcing a law or policy. Some assert that they are grounded in English common law, and universal injunctions have become increasingly frequent in the contemporary United States, particularly during the Obama and Trump administrations. Universal injunctions had traditionally been used to provide relief to third-party plaintiffs harmed by national policy without the need for piecemeal class action lawsuits, that is, until the U.S. Supreme Court significantly restricted federal courts’ flexibility in awarding them with its landmark *Trump v. CASA* (2025) decision. This article examines the history of nationwide injunctions, interprets the Court’s ruling and alternative avenues for relief, and assesses its impact on the federal litigation system.

I. Introduction

Despite well-recorded political polarization within the United States legal system and in the sphere of national public discourse, a fundamental sentiment favoring fairness and equality remains deeply rooted within the American national conscience.[1] When the Framers crafted the Constitution, they meticulously devised a blueprint of checks and balances[2] and proper separation of powers[3] to govern the young nation through the precarious next few decades and beyond. Article Three of the U.S. Constitution vaguely defines judicial power over "all cases, in law and equity."[4] While the Framers foresaw countless areas for potential contention between the branches of government, they could not imagine the fragile balance that the federal government relies on today. Since the New Deal era, presidential activity has greatly expanded, and only brief intermissions of limitation on this power have been recorded since the early twentieth century.[5] In the tumultuous political climate of the United States, where the legislature is often too divided along ideological lines to produce cohesive, relevant lawmaking, the president has assumed the role of de facto policymaker.[6] In response, and as the crucial check on its respective branches, the judiciary has become increasingly active in the form of the universal injunction. A universal

[1] Elisa Shearer, *Most Americans Say Republican and Democratic Voters Cannot Agree on Basic Facts*, Pew Rsch. Ctr. (July 2025), http://pewresearch.org/short-reads/2025/07/30/most-americans-say-republican-and-democratic-voters-cannot-agree-on-basic-facts/.
[2] Legal Info. Inst., *Checks and Balances* (July 2024), http://law.cornell.edu/wex/checks_and_balances.
[3] Legal Info. Inst., *Separation of Powers* (Sept. 2024), http://law.cornell.edu/wex/separation_of_powers.
[4] U.S. Const. art. III, § 2.
[5] No president has issued less than one hundred executive orders since President Grover Cleveland's term. President Trump, nearing the halfway mark of his second term, has already nearly tied with the two hundred and twenty orders issued during his 2016 term). *See* 50 U.S.C. § 1541 (requiring the president to notify Congress that they have deployed troops within forty-eight hours of doing so, forbidding armed troops from being stationed for more than sixty days without Congressional approval, and intending to restrain President Nixon's military engagements in Vietnam); *see also* Am. Presidency Project, *Executive Orders* (Nov. 2025), https://www.presidency.ucsb.edu/statistics/data/executive-orders.
[6] The President has become increasingly active in shaping national policy to the point where no legislation is made without presidential involvement. President Trump ended the record-breaking forty-three day government shutdown, illustrating the unprecedented division within Congress rendering it ineffective and threatening to destabilize welfare benefits and flight travel. *See* Benjamin Ginsberg, *The Growth of Presidential Power*, Yale U. Press (2016), http://yalebooks.yale.edu/2016/05/17/the-growth-of-presidential-power/; *see also* Ana Faguy, *Trump Signs Spending Bill to End Longest Shutdown in US History*, BBC (Nov. 2025), http://bbc.com/news/articles/c891nvwvg2zo.

injunction is a nationwide order that prohibits the government from enforcing a law, regulation, or policy—that is, until the Supreme Court's groundbreaking decision in *Trump v. CASA* (2025).[7] Before the Court rendered its decision in *CASA*, the constitutionality of universal injunctions had been under scrutiny for several decades. For better or for worse, they had evolved as a vital tool for the judicial branch to counteract the executive branch. With this judicial injunctive authority now constrained, nationwide litigation—and the millions of plaintiffs these measures often represent—will be forced to cope with the wide-reaching consequences of this decision.

II. The History of Universal Injunctions in the United States

While not explicitly enumerated in the Constitution or the prior Judicial Act of 1789, the authority of the federal courts to mobilize universal injunctions to provide equitable relief became commonplace in concert with the wave of executive orders washing over the nation in the second half of the twentieth century.[8] It was not until 1907 that executive orders were formally numbered, and since the Grover Cleveland administration, no president has issued fewer than one hundred orders.[9] The increasing activity of the federal executive branch has prompted a response from the judicial system in the form of the nationwide injunction. Injunctions are the court's tools to remedy "irreparable harm" that monetary compensation cannot reconcile.[10] There are three kinds, each progressively more comprehensive.[11] Temporary restraining orders (TROs) are designed to maintain the status quo until a verdict can be reached, typically with a life span of only ten days.[12] Preliminary injunctions last slightly longer than

[7] Trump v. CASA, Inc., 606 U.S. 831 (2025).
[8] U.S. Const. art. III; Judiciary Act of 1789, ch. 20, 1 Stat. 73 (expanding on art. III of the U.S. Constitution and establishing general rules for the composition and procedures of local and federal courts); *see generally* Legal Info. Inst., *Equitable Relief*, https://www.law.cornell.edu/wex/equitable_relief (equitable relief is a "court-ordered remedy" that either requires or enjoins a party from a certain action rather than paying damages).
[9] Gerhard Peters & John T. Woolley, *Executive Orders*, U. Cal. Santa Barbara Am. Presidency Project (Nov. 2025), https://www.presidency.ucsb.edu/statistics/data/executive-orders.
[10] *Injunction*, Black's Law Dictionary (12th ed. 2024).
[11] Legal Info. Inst., *Injunction*, https://www.law.cornell.edu/wex/injunction.
[12] *Id.*

TROs, and here, the judge must consider the plaintiff's merits, whether they will suffer irreparable harm, and whether that harm would outweigh any harm inflicted on the defendant.[13] The permanent injunction, part of the court's final decision, must satisfy the highest standards of all, and in the case of the nationwide injunction, it has the power to block or allow a policy pertaining to the entire nation.[14] By the twentieth century, universal injunctions had become an effective tool for the federal court system to enjoin executive or legislative policy, and as their prevalence increased, critics began to question the historical merit of their judicial power.[15]

Until *Trump v. CASA*, the nationwide injunction had become the most common application of equitable relief in U.S. federal courts, a legal doctrine rooted in English common law.[16] The courts of colonial England offered bills of peace in order to provide comprehensive equity between parties—what proponents of universal injunctions often point to as a precursor to the tool.[17] Unfortunately, early legal documents lack clarification on what exactly falls within the umbrella of "equity." Although the word equity can be found in Article Three of the Constitution, U.S. federal courts are not granted specific equitable jurisprudential power to combat legislation or executive orders.[18] Given the ambiguity of the U.S. justice system as initially defined by the Constitution, the Judiciary Act of 1789 specified the structure of the Supreme Court and created a federal court system with the power to review "all suits…in

[13] *Id.*
[14] *Id.* The plaintiff must prove that (1) they have suffered irreparable harm, (2) legal remedies like compensation cannot reconcile that harm, (3) they have undergone more hardship than the defendant, and (4) that such an injunction would not adversely impact the public.
[15] *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 438 (2017); *see also* Hayden D. Presley, *A Universal Problem: The Universal Injunction*, 81 La. L. Rev. 627, 623 (2021) (arguing that universal injunctions over-extend the controversies that they relate to, encourage forum shopping, and hinder percolation through the courts); *and* Trump v. Hawaii, 585 U.S. 667, 721 (2018) (Thomas, J., concurring) (Thomas argues in his concurring decision that universal injunctions are "legally dubious").
[16] Legal Info. Inst., *supra* note 8.
[17] John Harrison, *Federal Judicial Power and Federal Equity Without Federal Equity Powers*, 97 Notre Dame L. Rev. 1911, 1924 (2022) (suggesting that bills of peace served as an equity practice similar to universal injunction during Framing-era colonialism).
[18] *Id*. at 1919.

equity."[19] Regardless of the exact language of the Constitution or the Judiciary Act, the judiciary had expanded its interpretation of equitable relief prior to *Trump v. CASA* in order to counterbalance the expanding activity of its fellow branches.

Legal scholars offer contradicting trajectories on the origin and evolution of injunctions, with some tracking their roots in English common law and others restricting them as a twentieth century development. First, Samuel Bray, whose work has frequently been cited by the Supreme Court, propounds that the injunction is a modern phenomenon, born out of an expanded interpretation of the judiciary's discretion.[20] He posits that no concept of the modern-day injunction can be found in English common law and tracks *Writz v. Baldor Electric Co.* (1963) as the first example of such an order.[21] He credits the increasing frequency of injunctions to a changing ideology in the courts, and in the years leading up to *CASA*, voices within the Supreme Court shared his perspective.[22] For instance, in the recent *Trump v. Hawaii* (2018) case regarding President Trump's Presidential Proclamation 9465 barring travel to the United States from certain specified nations, Justice Clarence Thomas dubbed injunctions as "legally and historically dubious" and suggested that the Supreme Court ought to intervene if "federal courts continue to issue them."[23] Similarly, in *Department of Homeland Security v. New York* (2020) Associate Justices Neil Gorsuch and Thomas both argued that universal injunctions "have little basis in traditional equitable practice."[24] While the Court had yet to directly address the validity of the expanded power, a clear line of reasoning can be traced in its concurring opinions leading to *Trump v. CASA*: Universal injunctions were not only unjustified under equitable remedy, they

[19] Judiciary Act of 1789, ch. 20, 1 Stat. 73.
[20] Bray, *supra* note 15, at 424 (2017).
[21] *Id.* at 438.
[22] *Id.* at 452.
[23] Trump v. Hawaii, 585 U.S. 667, 721 (2018).
[24] Dep't Homeland Sec. v. New York, 589 U.S. 1173, 1175 (2020).

were, in the eyes of some on the Court, becoming far too prominent. This interpretation was bound to shake the status quo that the federal court system had come to rely on.

Alternatively, legal scholar Mila Sohoni of Stanford Law argues that Article Three vests the power of the universal injunction well within the purview of the courts.[25] In fact, she claims that the Supreme Court was the first to issue such a decision in *Lewis v. Publishing Co.* (1913) when the solicitor general barred the enforcement of the Post Office Appropriation Act until the Supreme Court could render its decision.[26] Even prior to 1913, Sohoni contends that the Court granted lower federal courts "sitting in equity" to be allotted the right to a "comprehensive decree covering the whole ground of controversy."[27] In other words, the frequency and expanse of universal injunctions since 1913 is not only rooted in common law, but it is an extension of the judicial system's power to resolve disputes in equity. She suggests that attempts to clip the Court's historical and constitutional power stems from a "policymaking enterprise" rather than a constitutional one.[28] This raises larger questions about a potential shift in constitutional evaluation that stretches beyond the scope of this article.

Regardless of the precise moment in time that the nationwide injunction was born, the nature of both the executive and judicial branches has expanded and evolved dramatically since 1787. Such growth has raised crucial challenges. One could argue that if Congress intended for the universal injunction, or at least some concept of it, to be allotted to the federal courts, then they would have codified it in the Judiciary Act as part of equitable relief. Even if the first nationwide injunction was in 1913, as Sohoni propounds, the jump from English common law to the late nineteenth and early twentieth centuries struggles to illustrate a well-established

[25] Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 Harv. L. Rev. 920, 924 (2020).
[26] *Id.* at 924, 925; *see also* Post Office Appropriation Act, Pub. L. No. 84-467, 70 Stat. 92 (1957).
[27] Sohoni, *supra* note 24, at 999; *see also* Smyth v. Ames, 169 U.S. 466, 517 (1898).
[28] Sohoni, *supra* note 24, at 1001.

precedent in the nation's history. On the other hand, the potential tradeoff of hampering one branch while allowing another to march onward unimpeded must be considered. For instance, the loss of the federal injunction could leave unprotected classes vulnerable to potentially unconstitutional, sweeping executive orders where they may only be able to seek relief through individual suits. The court answered these questions in *Trump v. Casa*, but at what cost for the legal system?

III. *Trump v. CASA*

The plaintiffs, or the respondents in the case's final proceedings, filed three individual suits to enjoin Executive Order 14160 for violating Section One of the Citizenship Clause and Section 201 of the Nationality Act of 1940.[29] In each separate suit, three federal district courts of Washington, Maryland, and Massachusetts issued universal injunctions barring the order from applying to any citizen in the United States, and when the court of appeals of each respective jurisdiction denied the government's motion to stay the injunctions, the Trump administration brought the matter to the Supreme Court.[30] A critical distinction must be made before addressing the details of the Supreme Court's decision—the issue before the Court did not pertain to the constitutionality of Executive Order 14160, but rather, to whether the federal courts have the authority to universally enjoin such policy under the Judiciary Act of 1789.[31] As with many controversial Supreme Court decisions, the peripheral facts of the case, such as a potential violation of the Fourteenth Amendment, crowd media headlines.[32] In reality, the Court renders its

[29] Trump v. CASA, Inc., 606 U.S. 831, 831 (2025).
[30] *Id.* at 813.
[31] *Id.* at 831.
[32] *See* John Fritze, Devan Cole, and Dan Berman, *Supreme Court Limits Ability of Judges to Stop Trump*, CNN (June 2025), https://www.cnn.com/politics/live-news/supreme-court-decisions-06-27-25; Devan Cole and John Fritze, *Federal Judge Issues New Nationwide Block Against Trump's Order Seeking to End Birthright Citizenship*, CNN (June 2025), https://www.cnn.com/2025/07/10/politics/birthright-citizenship-hearing-rhode-island; Alison Durkee, *Supreme Court Limits Judges From Blocking Some Trump Policies–But Punts on Birthright Citizenship Rule*, Forbes (June 2025), https://www.forbes.com/sites/alisondurkee/2025/06/27/supreme-court-limits-judges-from-blocking-some-trump-policies-but-punts-on-birthright-citizenship-rule/.

decision on legal principles established by the Constitution and judicial precedent it has set in past case law.

As such, in the six-to-three opinion authored by Justice Amy Coney Barrett, the Court ruled that federal courts do *not* have the authority to issue sweeping universal injunctions under the Judiciary Act of 1789, and the right to decide "all suits in equity" only applies to actions "traditionally accorded by courts of equity during this country's inception."[33] The Court clarified that injunctions should be narrowly tailored to the parties involved in the case and that "partial stays will cause no harm to respondents."[34] Relief limited to the parties of the case in which a court presides is a fairly reasonable standard in theory; however, in practice, narrowly tailored injunctions may impose a significant burden upon the modern judicial system. If comprehensive executive orders continue to challenge well established constitutional freedoms, then, without the universal injunction, federal courts may be unable to render equity for the American citizenry. Relief may need to be sought on a case-by-case basis.

A. Majority and Concurring Opinions

Justice Barrett addressed the increased prevalence of universal injunctions during the Biden and Trump administrations as the impetus for the Court's long-awaited direct evaluation of the issue.[35] Despite Sohoni's argument that the 1890 Supreme Court set a precedent for a more flexible interpretation of equity,[36] the Court found that "Neither the universal injunction nor any analogous form of relief was available in the High Court of Chancery in England." In fact, the Court highlighted that it has more often than not refused relief beyond the boundaries of the

[33] Trump v. CASA, Inc., 606 U.S. 831, 832 (2025).
[34] *Id.* at 835.
[35] Trump v. CASA, Inc., 606 U.S. 831, 837 (2025).
[36] *See* Sohoni, *supra* note 24, at 928, 941 (referencing the *Smyth v. Ames* majority opinion: "[I]t is clear that the Supreme Court of the 1890s did not regard the equity power as so confined"); *see also* Smyth v. Ames, 169 U.S. 466 (1898).

parties involved in the case.[37] In addressing the dissenting opinion, which was authored by Justice Sonia Sotomayor, Barrett rebutted the claim that early bills of peace were evidence of universal injunctions and instead argued that they were early instances of class action lawsuits provided for under rule 23 of the Federal Rules of Civil Procedure.[38] The Court concluded that, regardless of the collateral policy damage from limiting universal injunctions, "the policy pros and cons are beside the point."[39] While the Supreme Court did not regard the potential disruption of the framework within which the federal court system had operated up until *Trump v. CASA* as its concern, plaintiffs and defendants must now adapt to a transformed legal landscape. In his concurring opinion, Justice Clarence Thomas added an important caution against assuming equitable relief as a duty in all cases rather than a ceiling for the maximum relief that the Court can provide.[40] In effect, the Supreme Court not only heavily restricted the scope of universal injunctions but it narrowed their use to the most extreme of circumstances. Lower courts must now interpret Justice Thomas's concurring opinion in deciding which cases necessitate maximum relief and which fall short.

B. Dissenting Opinions

Justice Sotomayor authored the dissenting opinion, siding with Justices Elena Kagan and Ketanji Brown Jackson. In the opinion, the dissent condemned the majority for ignoring the constitutionality of the executive order and defended its establishment within the nation's history.[41] Heavy emphasis was placed on the uninhibited power of the president and the excessive violations of Constitutional principles, contrary to the majority, which excluded the content of the executive order from the question presented before the Court. The dissenting

[37] Sohoni, *supra* note 24, at 840–41.
[38] *Id.* at 849.
[39] *Id.* at 856.
[40] Trump v. CASA, Inc., 606 U.S. 831, 863 (2025).
[41] *Id.* at 880–91.

opinion painted a bleak future for large classes of plaintiffs that might see the protection once afforded by nationwide injunctions disappear if not significantly fade. Justice Sotomayor argued for an alternative interpretation of common law, outlining courts that were designed to provide equitable relief beyond the traditional bounds of the judiciary.[42] She propounded that even though universal injunctions were uncommon, they certainly existed—especially in the case of tax law—and that restricting bills of peace to the interpretation of either a class action or a universal injunction contradicts the English Chancellor's perception of equity.[43] The dissent hammered home an emphatic message: "Until the day that every affected person manages to become party to a lawsuit and secures for himself injunctive relief, the Government may act lawlessly indefinitely."[44] The dissent certainly painted a dark picture of the potential implications of the majority's decision, and perhaps it is a reality that will now be thrust upon the nation. Whether limited injunctive relief will increase the percolation of cases through the court system or reduce the ability for vulnerable plaintiffs to acquire relief remains unclear. This article will explore what a post-*CASA* reality might look like for the federal litigation system, its plaintiffs and respondents, and the dynamic between the executive and judicial branches.

IV. Universal Injunctions: An Overstep or Countermeasure?

In its groundbreaking *CASA* decision, the Supreme Court clarified that any burden or relief that universal injunctions may impose on policy is not its concern, yet such consequences must nonetheless unfold in this new frontier of litigation.[45] An optimistic forecast of *Trump v.*

[42] *Id.* at 895.
[43] *Id.* at 901–07.
[44] Trump v. CASA, Inc. 606 U.S. 831, 917 (2025).
[45] *See* David Marcus, *The Class Action After Trump v. CASA*, 73 U. Cal. L.A. L. Rev. Discourse 2 (2025) (asserting that most challenges against the Trump administration can easily meet the standards of a class action, offering a viable avenue for relief); *see also* Trump v. CASA, Inc., 606 U.S. 831, 913 (2025) (Sotomayor, J., dissenting) (in her dissent, Justice Sotomayor warns of an overwhelmed judicial system post-CASA where plaintiffs rush to file individual suits); *but see* Trump v. CASA, Inc., 606 U.S. 868 (2025) (Alito, J., concurring) (conversely, Alito warns against abusing the class action as a "loophole" for universal injunctions. His words have sparked anxiety that federal courts may become increasingly restrictive in certifying classes).

CASA's impact calls for increased percolation through the court system, a reduction in the judicial system's political entanglement, and a higher standard of relief for only the most compelling of cases. Critics of the universal injunction often propose that they exempt plaintiffs from filing class action lawsuits, resorting instead to a practice dubbed "forum shopping." Writing for the Emory Law Journal, Joseph D. Kmak argues that universal injunctions allow for state attorneys to circumnavigate the restrictions imposed by class action lawsuits, and instead, seek out sympathetic district courts.[46] If a district court issues "a definitive ruling against the government, the development of law in regard to that issue is frozen," the Supreme Court is unable to draw on a matter's progression through the appellate system before it is called upon for ultimate review.[47] In theory, the Supreme Court ought to be able to draw upon a dense discourse to render the most informed verdict. Percolation may be particularly inhibited in cases where state plaintiffs seek a universal injunction against the federal government, leaving the Supreme Court without an understanding of the consensus of lower courts.[48] It has been argued that any lack of percolation can be accounted for by interested interveners and amici curiae, but whether these processes allow for the same depth of analysis remains highly contested.[49] In nonurgent matters, more time for percolation and review is likely a benefit to federal appellate courts and the Court of Last Resort, but in time sensitive cases, the value of thorough review must be weighed against any potential irreparable harm to the plaintiff.

A tailoring of extensive universal injunctions may also reduce the prevalence of claims brought by state actors lacking tangible injury. Under Article Three of the Constitution, a party

[46] Joseph D. Kmak, *Abusing the Judicial Power: A Geographic Approach to Address Nationwide Injunctions and State Standing*, 70 Emory L. J. 1325, 1328 (2021).
[47] Kmak, *supra* note 45, at 1329.
[48] Jonathan Remy Nash, *Federal Courts, Practice & Procedure: State Spending: State Standing for Nationwide Injunctions Against the Federal Government*, 94 Notre Dame L. Rev. 1985, 1993 (2019).
[49] *Id.* at 2002. *See generally* Legal Info. Inst., *Amicus Curiae* (June 2022), https://www.law.cornell.edu/wex/amicus_curiae ("Amicus curiae literally translated from Latin is 'friend of the court.'" This group or individual petitions the court so submit a brief outlining the case with the goal of influencing the court's decision).

must have sufficient standing, or justification, to present their case before a court.[50] Interpreted strictly, such standing would arise from direct injury to a plaintiff or a specific class of individuals—similar to the modern day class action lawsuit. However, *Massachusetts v. EPA* (2007) stretched the boundaries of what might constitute standing, particularly when the state "had surrendered its sovereign prerogatives" to either Congress or an agency.[51] Following *Massachusetts v EPA*, plaintiffs have begun seeking injunctive relief under quasi-sovereign standing for hypothetical harms rather than material ones—hence the charge of "forum shopping" to sympathetic courts by opponents of universal injunctions.[52] Amongst these opponents is former Fifth Circuit Judge Gregg Costa who warns that such a pattern "feeds the growing perception that the courts are politicized."[53] From this perspective, universal injunctions present as an overstretched tool for plaintiffs wishing to either circumnavigate class actions or lacking foundation for sufficient damages. Yet, as always, there is another side to the coin—or many coins.

In her dissenting opinion, Justice Sotomayor cautions that without the protection of nationwide injunctions, potential violations of the Constitution, such as Executive Order 14160, would prevent states from providing Social Security and Supplemental Nutrition Assistance Program (SNAP) benefits to naturalized immigrants or those devoid of birthright citizenship—a fallout she appropriately deems "chaos."[54] At the most extreme end of the spectrum, the removal of this check on the executive branch could enable future presidential administrations to "bypass

[50] Kmak, *supra* note 45, at 1348.
[51] *Id.* at. 1350. *See also* Massachusetts v. EPA, 549 U.S. 497, 519–20 (2007) ("The sovereign prerogatives are now lodged in the Federal Government…[g]iven that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis").
[52] Kmak, *supra* note 45, at 1354.
[53] Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, Harv. L. Rev. Blog (Jan. 2018), https://harvardlawreview.org/blog/2018/01/an-old-solution-to-the-nationwide-injunction-problem/.
[54] Trump v. CASA, Inc., 606 U.S. 831, 913 (2025).

the Constitution" in issuing executive orders.[55] Beyond the most severe implications, universal injunctions have traditionally provided a host of benefits to the legal system. Notably, they have the power to protect non-parties from discrimination or injury. Amanda Frost, cited by both Sohoni and Justice Sotomayor, points to school desegregation and "changes to policies that cross state lines—such as regulations concerning clean air and water, as well as some immigration policies" as instances requiring universal injunctions.[56] But the universal injunction does not merely protect non-party individuals from potential injuries—it can sometimes be the only practical avenue for relief when a class action lawsuit is overly difficult or untimely. Unlike the nationwide injunction, class actions are unable to provide immediate relief and are becoming increasingly difficult to certify.[57] Illustrating the prerequisites for a class action suit is time-intensive as courts continue to raise the evidentiary bar, increasingly denying certification on the premise of "class definition" and enabling defendants to further prolong the process through requests for "interlocutory review" under the Federal Rule of Civil Procedure.[58] Filing a class action requires the exclusive resources of time and money—tools that most anonymous, and potentially vulnerable, classes lack.

On a more practical note, universal injunctions can lower the burdens that narrowly tailored injunctive relief impress upon the legal system, reducing "the cost and confusion" that separate lawsuits in separate districts can result in.[59] Judge Costa, despite his caution against the

[55] *Id.* at 917.
[56] Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065, 1091 (2018).
[57] Frost, *supra* note 55, at 1095.
[58] *Id.* at 1096–97 ("In recent years, courts have started to deny class action if they think there has been a flaw in class definition" without giving plaintiffs an opportunity to amend their complaint); *also see* Fed. R. Civ. P. 23 (f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule"); Legal Info. Inst., *Interlocutory Appeal*, (March 2023), https://www.law.cornell.edu/wex/interlocutory_appeal ("An interlocutory appeal is an appeal of a non-final order issued during the course of litigation." To meet the requirement, the order "must have conclusively determined the disputed question," "resolve an issue completely separate from the merits of the action," and be "effectively unreviewable on appeal from a final judgment").
[59] Frost, *supra* note 55 at 1098–99.

potential for universal injunctions to empower individual district judges, acknowledges that "our usual preference for development of the law via percolation of issues sometimes gives way to a greater need for consistency."[60] To refer back to Frost's example of desegregation, if the U.S. president were to issue an executive order tomorrow declaring that all public schools must be segregated based on sex assigned at birth, a serious and immediate remedy would be necessary.[61] Without the universal injunction, such a swift response may be fragmented, disorderly, and ineffective in protecting citizens from irreparable harm. Even if one accepts the drawbacks of universal injunctions, the tradeoff of restricting them may be the Constitutional freedoms of the nation's vulnerable classes. But just how fatalistic is this view? Evidently, there are still practical avenues through which plaintiffs may seek relief.

V. Alternatives to the Universal Injunction

While the U.S. Supreme Court greatly restricted widespread nationwide injunctions and the form they had grown to take on, several avenues for relief remain on the table. Under the Federal Rules of Civil Procedure, plaintiffs may bring class action lawsuits that affect nonparties so long as they meet the four requirements to certify the class and can satisfy the requirement that the defendant has generally injured the class in a way that would justify injunctive relief.[62] In his concurring opinion, Justice Kavanaugh suggested that in the wake of the Court's ruling, "different district courts" will render "the functional equivalent of a universal injunction…by granting or denying a preliminary injunction to a putative nationwide class under Rule 23(b)(2).[63] Professor David Marcus of the UCLA School of Law argues that a great majority of the claims

[60] Costa, *supra* note 52.
[61] Frost, *supra* note 55, at 1091.
[62] Fed. R. Civ. P. 23 (a)-(b) (The prerequisites for a class action are the following: (1) a class so large that individual suits are impractical, (2) "questions of law" common in all the cases, (3) the claims or defenses are typical throughout the class, (4) the representatives of the class will fairly protect the class's interests).
[63] Trump v. CASA, Inc., 606 U.S. 831, 873 (2025).

brought against the Trump administration can evolve into viable class actions.[64] Just hours after the decision, plaintiffs from one of the original New Hampshire suits filed for class certification and received a favorable order within just ten days of their filing, defying the expectation that certifying classes will become an arduous burden on the legal system.[65] Nevertheless, significant anxiety persists regarding the protection of the class action as a work-around—particularly alarming was Justice Alito's warning against potential "loopholes in today's decision."[66] With nationwide injunctions greatly reduced, class actions have emerged as the most tangible alternative; if they too are constrained, then little hope remains for attaining relief for large classes of individuals. While the New Hampshire example encourages an optimistic attitude towards the ability for class actions to substitute as injunctions, many remain cautious of accepting it as the status quo going forward, especially given the language of the Supreme Court. Advocates for potential plaintiffs with the National Immigration Law Center worry that even if class actions continue uninhibited, they may not provide the comprehensive relief that universal injunctions once could, especially in the case of national immigration policy.[67]

As it stands, the constitutionality of a class action lawsuit representing plaintiffs injured by a state or federal policy remains well within the bounds of Federal Rule 23(b)(2), and an attempt to deny certification to such classes would misalign with the precedent that district courts have set. Even under *Wal-Mart Stores, Inc. v. Dukes* (2011), a case that many point to as the guiding principle on reigning in class actions, "'civil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what Rule 23(b)(2) is meant to

[64] Marcus, *supra* note 44, at 6.
[65] *Id*. at 19.
[66] Trump v. CASA, Inc., 606 U.S. 831, 868 (2025).
[67] Efren C. Oliveras, *Analyzing the Supreme Court's Dangerous Decision in Trump v. CASA*, Nat'l Immigr. L. Ctr. (June 2025), https://www.nilc.org/articles/analyzing-scotus-trump-v-casa/.

capture."[68] The crucial distinction here is that *Wal-Mart* concerned monetary compensation; in the case of *CASA*, a national policy was challenged. Therefore, provided that there is no radical reinterpretation of Rule 23 within the federal courts, class actions should suffice for the most egregious of constitutional violations that Justice Sotomayor warns of.

Justice Alito cites Section 706 of the Administrative Procedure Act as another safeguard against widespread constitutional violations.[69] Under Section 706(2), a reviewing court may "set aside agency action, findings, and conclusions" that violate the law, deny a constitutional right, violate procedure, or lack sufficient evidence.[70] Unlike the class action, Section 706 enables a court only to set aside a policy, not to render relief to the plaintiff.[71] In the case of *Trump v. CASA*, relief could be provided through the staying of Executive Order 14160. Citizens deprived of their birthright citizenship would no longer suffer from the deprivation of their constitutional rights. It is important, however, to consider the long-term implications for harmed classes. In situations where an executive order inflicts harm in such a way that requires extensive, widespread remedy, Section 706 may not suffice. Uncertainty remains as to whether the class action option would cause the chaos Justice Sotomayor foresees or if it will adequately pick up the slack of the pre-*CASA* universal injunction.

A final potential substitute are associational lawsuits. States, which are included within the umbrella of "associations," have traditionally filed suits on behalf of their citizens, a principle termed "associational standing."[72] Similar to the restrictions on the class action, the plaintiff must

[68] Wal-Mart Stores, Inc. v. Dukes*,* 564 U.S. 338, 361 (2011). *See also* Marcus, *supra* note 59, at 17 ("In no opinion published in the twenty-first century, even after *Wal-Mart*, has a federal court of appeals ruled against plaintiffs on Rule 23(b)(2) grounds in a case challenging a uniform, across-the-board policy").
[69] Trump v. CASA, Inc., 606 U.S. 831, 869 (2025).
[70] 5 U.S.C. § 706(2).
[71] John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 Yale J. Regul. 45 (2020).
[72] Christopher Walker, *What Trump v. CASA Means for the Future of Universal Relief in Administrative Law*, Yale J. Regul. (June 2025), https://www.yalejreg.com/nc/what-trump-v-casa-means-for-the-future-of-universal-relief-in-administrative-law/.

prove a close relationship with the rightsholder, and there must be a sufficient "hindrance" preventing the rightsholder from bringing its own claims to the court.[73] In a situation similar to that of *Trump v. CASA*, sufficient associational standing should permit a state to represent its citizens within this framework, but there are several limitations to this alternative. The first is state initiative. If the interest of a potentially national class of citizens is left to the states, then there is potential for uneven representation on a state-by-state basis. New Hampshire promptly filed a class action lawsuit just hours after the Supreme Court's decision; however, such swiftness may not prove to be universal. State actors are inevitably political in nature, and as a result, some states may fight for the protection of their population while others remain quiet. The second limitation is the possibility that lower federal judges might attempt to curtail associational standing in line with the Supreme Court's cautionary ruling. Once again, Justice Alito predicts and addresses the potential for states to abuse this avenue for relief: in his concurrent opinion in *CASA*, he warns that "federal courts should take special care to apply these limitations [associational standing requirements] conscientiously, including against state plaintiffs."[74] In light of this direct caution, judges may be less inclined to allot states with associational standing, and anonymous rightsholders may suffer. Without the universal injunction, effective measures of protection and remedy for massive classes of the American population might either be *threatened* at one end of the spectrum or be rendered *impossible* on the other. Likely, the ball will drop somewhere in between these extremes.

VI. Conclusion: The Future of Power Balance Post-*CASA*

Trump v. CASA may have laid to rest the debate over the justification of widespread universal injunctions within the bounds of equitable relief in the U.S., but discourse continues

[73] *See* Kowalski v. Tesmer, 543 U.S. 125, 129–30 (2004).
[74] Trump v. CASA, Inc., 606 U.S. 831, 866-867 (2025).

regarding the impact of a restricted federal judiciary in the midst of an increasingly powerful executive branch. Justice Barrett argues that the role of the federal courts is not to "exercise general oversight of the Executive Branch" and that "the answer is not for the court to exceed its power too" in response to an overactive executive.[75] Yet, under the principles of separation of powers and checks and balances, it is crucial that each branch retains viable tools to limit another from overstepping its boundaries. Contrarily, Justice Jackson asserts that "core values" of the judiciary's role in protecting "fidelity to law" and splitting the powers of the branches are "strangely absent" from the majority's ruling.[76] She warns that "the majority's ruling…gives the Executive the go-ahead to sometimes wield the kind of unchecked, arbitrary power the Founders crafted our Constitution to eradicate."[77] As discussed earlier, a rightly protected balance between the different federal branches of government—executive, judicial, and legislative—is among the most deeply cherished, uniquely American principles of a government of the people and for the people. Universal injunctions may not have been clearly sewn into the U.S. Constitution or the 1789 Judiciary Act, but neither were contemporary executive powers as exercised through executive orders, often in contradiction with the Constitution. Now, there exists a restricted federal court system and an inflated executive, an asymmetrical scenario that poses a very real threat to the stability of the federal government. Hopefully, Justice Sotomayor's prediction of disjointed justice is overly bleak, and David Marcus's confidence in the safety of class action lawsuits offers a more realistic prediction of how future litigation will adapt to this altered legal landscape.

Trump v. CASA is yet another example of the struggle in applying the Founders' original intentions for a young United States to the complex, global, and ever divided nation of the

[75] *Id.* at 861.
[76] Trump v. CASA, Inc., 606 U.S. 831, 922 (2025).
[77] *Id.*

present. Whether the federal courts will still be able to provide equitable relief through associational lawsuits, staying of executive orders, or class actions can only be answered with time. The most pressing question that arises out of this landmark decision is whether division of power can survive with the courts restrained on a tight leash whilst the slack for the executive branch continues to loosen. With universal injunctions restricted, the incumbent U.S. president is at liberty to define the Constitution within the bounds of their administration, even if that definition comes at the peril of the citizenry. Now, federal courts and the counsel of potential plaintiffs must grapple with the remaining alternative routes to justice to resist the ever more frequent flood of executive orders.

Native American Citizenship and Tribal Legal Sovereignty: Historical Precedent and Modern Challenges

*Writer: Cade Winter**

Article Editor: Patrick Noble

Associate Editor: Elizabeth Cortina

Abstract:

On January 20, 2025, President Donald Trump issued Executive Order 14160, denying birthright citizenship to individuals whose parents are not American citizens. Although the order is framed as targeting undocumented immigrants, its legal grounding relies on *Elk v. Wilkins*, an 1884 U.S. Supreme Court case that denied birthright citizenship to Native Americans on the basis of tribal allegiance. By invoking *Elk*, the Trump administration is arguing that Native Americans are primarily citizens of their sovereign tribal nations and then of the United States. Thus, they are not guaranteed American citizenship at birth. Despite the clear authority of the Indian Citizenship Act of 1924 and subsequent legal precedent recognizing Native Americans as citizens, the U.S. Department of Justice is arguing to uphold the order in courtrooms across the

---

** Guest writer, Yale University. Cade Winter is pursuing a B.A. in History and Political Science.* *Winter has given the following statement regarding the purpose and exigence for writing this article: "On July 9, 2020, the U.S. Supreme Court issued its landmark ruling in* McGirt v. Oklahoma*. Ruling in favor of McGirt, the Court stunned federal and state lawmakers by declaring that crimes committed on tribal land involving Native Americans could not be prosecuted in state courts. In my home state of Oklahoma, nearly half the state lies within reservation boundaries, so this decision dramatically reshaped the relationship between the State and Native tribes. For Native Americans, it also transformed their journey through the legal system. Overnight, scarce resources were reallocated from social services to judicial administration. As a citizen of the Muscogee Nation, born and raised on the Cherokee Nation reservation, I considered how this ruling affected incarcerated individuals and the handling of lower-level crimes. However, much has changed since that fateful July day. While tensions between the state and tribes remain unresolved, the federal perspective on tribal authority has shifted in alarming ways. Still, liberal lawmakers largely supported the* McGirt *decision, whereas conservative officials resisted it and sought to diminish tribal sovereignty. Today, under the Trump administration's leadership, federal efforts have escalated into a direct assault on tribal sovereignty and Native citizenship itself. By relying on the 1884 U.S. Supreme Court case* Elk v. Wilkins*, the Department of Justice has argued that Native Americans are not entitled to birthright citizenship. Five years after* McGirt*, I write this article as both a legal observer and a Native American, compelled to document the ongoing campaign to suppress the natural rights of indigenous people and the sovereignty of all tribes."*

country. The Trump administration's reliance on *Elk* highlights a broader political and legal effort to undermine tribal sovereignty and legal authority in the wake of *McGirt v. Oklahoma* (2020), which reaffirmed significant tribal jurisdictional authority over their territory. In the years since *McGirt*, state leaders, like Oklahoma Governor Kevin Stitt, have sought to limit the decision's impact and reassert state control. The current challenge to Native American citizenship is a dangerous convergence of two legal fronts: the erosion of constitutional guarantees of birthright citizenship and the systematic reduction of tribal sovereignty. Together, these efforts represent the most significant assault on Native American legal and political status in the U.S. in nearly a century.

I. Introduction

In December 2023, a chaotic scuffle erupted as tensions finally reached a breaking point between state jailers and the Lighthorse Tribal Police Department, the law enforcement agency of the Muscogee Nation. When Lighthorse officers attempted to formally admit a man accused of fentanyl possession into the Okmulgee County Jail, jailers refused to take custody. Eventually, the Lighthorse officers insisted the jailers lacked authority to reject the booking and proceeded with it themselves, further exacerbating tensions. A physical altercation ensued, during which a Lighthorse officer was struck in the face. The next day, a state jailer was charged with battery, and a warrant was issued for his arrest. Yet when Lighthorse officers arrived at the jail to carry out the arrest, county officers refused to cooperate, sparking a public standoff.

Though the situation was troublesome for both parties, neither ceded their position. Eventually, the Okmulgee County Criminal Justice Authority acknowledged their mistake and agreed to process the man.[1] Located entirely within the Muscogee Nation Reservation, Okmulgee County remains at the heart of a contentious legal battle. In 2020, the Supreme Court ruled that the Muscogee Nation has legal jurisdiction over all criminal cases involving Native Americans on tribal lands, leaving Oklahoma powerless over these individuals. Although agreements between the tribe and state have mitigated the conflict, legal jurisdiction remains fiercely debated. However, the tribal courts remain untouched by compromise. As a result, the courtroom has become a battlefield where sovereignty, justice, and governance are contested. Within this pivotal conflict between the sovereign Muscogee Nation and the state of Oklahoma, tensions run high. Yet the stakes are even higher for thousands of Oklahomans and Native Americans nationwide.

[1] Lex Rodriguez, *Tribal Law Expert Explains Jurisdiction Confusion Between Muscogee Lighthorse Police And Okmulgee Co. Jailer*, News on 6 (Dec. 2023), https://www.newson6.com/story/6585024d22b56d2d528e0324/tribal-law-expert-explains-jurisdiction-confusion-between-muscogee-lighthorse-police-and-okmulgee-co-jailer.

Today, the Cherokee, Chickasaw, Choctaw, Muscogee, and Seminole Nations possess more legal sovereignty and authority than at any time since before Oklahoma's statehood. For the first time in centuries, these tribes can fully prosecute their own citizens on their own lands, an essential function of self-governance. Instrumentally, the U.S. Supreme Court's ruling in *McGirt v. Oklahoma* (2020), which affirmed the enduring status of reservation lands, made the unprecedented restoration of legal power possible. Yet, it was *Sharp v. Murphy* (2020) that brought forth the jurisdictional questions that *McGirt* would ultimately answer. Still, government officials and much of the general public across the country vehemently oppose Native sovereignty. Even as this article was written, the Department of Justice, with support from political leaders like President Donald Trump and Oklahoma Governor Kevin Stitt, was engaged in ongoing legal efforts aimed at dismantling tribal authority and the reservation status altogether. This article explores the historical backgrounds and foundations that led to these decisions, examines their legal and political consequences, analyzes the previous and ongoing efforts to undermine and reverse their impact, and explains why the Trump administration's claim is baseless and incorrect.

II. Historical Background: The Rocky History of Native American Diplomacy

The Cherokee, Chickasaw, Choctaw, Muscogee, and Seminole Nations have a tumultuous relationship with the federal government and the state of Oklahoma. These tribes, hereinafter referred to as the Five Tribes, are the primary focus of this article, particularly in light of the recent affirmation of their legal sovereignty in *McGirt v. Oklahoma* (2020) and the Trump administration's challenges to birthright citizenship.[2] While the Supreme Court's decision occurred only five years ago, the legal foundation was laid long ago with the establishment of the United States. However, the modern disparities between Native American tribes, the federal

[2] Washington v. Trump, 145 F.4th 1013 (9th Cir. 2025).

government, and the state of Oklahoma began even earlier. While this historical summary is not intended to be a comprehensive narrative of these tribes' long and rich histories, it provides a background to the legal and political developments that will be explored in this article. Although these Nations are commonly referred to as the "Five Civilized Tribes," this denotation is rooted in colonialist language and values.[3] Therefore, this article will instead refer to them simply as "the Five Tribes." Understanding history is vital to grasping the current conditions of the underrepresented and suppressed, especially Native American tribes.

Shortly after establishing overseas colonies in the Americas, European powers launched a bloody and ruthless campaign against Native peoples through genocide, enslavement, forced removal, and the erasure of culture. Approximately ninety-five percent of all Native Americans died due to Western intrusion, ethnic cleansing, and the spread of diseases from Europe like smallpox.[4] After gaining independence, the newly formed United States faced the monumental task of navigating competing claims to land and sovereignty by Native American tribes. Clashes between states and tribes were inevitable. For tribes whose territory had already been absorbed into the United States, the courtroom became a potential avenue for asserting sovereignty. In response to territorial and jurisdictional disputes with the state of Georgia, the Cherokee Nation sued, seeking full recognition of its independence. Unexpectedly, the U.S. Supreme Court ruled in favor of the Cherokee Nation in the landmark case *Worcester v. Georgia* (1832).[5] The Court ruled that Georgia had no authority to enforce state laws within Cherokee Nation territory and upheld the tribe's right to self-governance, including drafting and enforcing its own laws.[6]

[3] Andrew K. Frank, *Five Civilized Tribes*, Okla. Hist. Soc'y (Jan. 2010), https://www.okhistory.org/publications/enc/entry?entry=FI011.
[4] Jamie E. Ehrenpreis & Eli D. Ehrenpreis, *A Historical Perspective of Healthcare Disparity and Infectious Disease in the Native American Population*, 363 Am. J. Med. Sci. 288 (2022).
[5] Worcester v. Georgia, 31 U.S. 515 (1832).
[6] *Cherokee Nation History*, Cherokee Nation (last updated Aug. 2023), https://www.cherokee.org/about-the-nation/history/.

Outraged, President Andrew Jackson defied the Court's ruling and signed the Indian Removal Act, expelling the Cherokee to "Indian Territory" (modern day Oklahoma). Alongside the Cherokee, Jackson also banished the Chickasaw, Choctaw, Muscogee, and Seminole Nations.[7] Between 1838 and 1840, these tribes endured the harrowing Trial of Tears, a journey characterized by immense suffering, disease, and death.[8] Overall, the Indian Removal Act initiated a long and contentious legal battle over tribal sovereignty that has extended into the present day. However, further removal efforts expelled thirty-four other tribes to Indian Territory.[9] At present day, only the Five Tribes have retained significant jurisdiction. For the additional tribes, the struggle for full recognition and self-determination is far from over.

Between the Indian Removal Act and the formal establishment of Oklahoma in 1907, the federal government systematically undermined tribal sovereignty by targeting Native citizenship, land ownership, tribal governments, and legal systems.[10] Seeking full assimilation, federal officials pushed tribes to operate like states, stripping away their distinct political identities. Upon arrival in Indian Territory, the Five Tribes began developing constitutions, forming governments, and crafting legal frameworks. However, as these institutions grew stronger, the federal government became increasingly concerned.[11] Targeting tribal authority, U.S. Congress passed the Dawes Severalty Act of 1887 and the Curtis Act of 1898, which devastated tribal sovereignty and Native way of life.[12] Traditionally, Native peoples have viewed land as

[7] Indian Removal Act, Pub. L. No. 105–06, 4 Stat. 411–12 (1830).
[8] Jeffrey Ostler, *Trails of Tears, Plural: What We Don't Know About Indian Removal*, Humanities (2024), https://www.neh.gov/article/trails-tears-plural-what-we-dont-know-about-indian-removal.
[9] *See* Addison Kliewer et al., *Trails to Indian Country Define Oklahoma*, Gaylord News (Dec. 2021), https://ou.edu/gaylord/exiled-to-indian-country/content/trails-to-indian-country-define-oklahoma.
[10] Joel T. Helfrich et al., *No More Nations Within Nations: Indigenous Sovereignty after the End of Treaty-Making in 1871*, 20 J. Gilded Age & Progressive Era 325 (2021).
[11] Erin Blakemore, *Sequoyah, the U.S. State That Almost Existed*, National Geographic (Sept. 2023), https://www.nationalgeographic.com/premium/article/sequoyah-american-state-almost-existed.
[12] The Dawes Severalty Act of 1887 is also known as the General Allotment Act. *See* Indian General Allotment Act, 24 Stat. 388 (1887); Nat'l Archives, Dawes Act (1887), Milestone Documents (Feb. 2022), https://www.archives.gov/milestone-documents/dawes-act.

something to be shared and stewarded collectively. The Dawes Act forcibly dissolved this communal relationship by breaking up reservations into individual allotments. Although Native individuals were assigned parcels of land, the federal government retained legal ownership, holding the land in trust.[13]

To receive land allotments and citizenship, Native Americans were required to enroll on the Dawes Rolls, an official government list designed to record tribal affiliation, percentage of Native blood, and other personal information.[14] Enrollment often meant a loss of cultural identity as many abjured their tribal allegiances. Additionally, Native Americans were only granted partial citizenship with the passage of Jim Crow Laws in the wake of the Civil War during the Reconstruction era, and they often faced discriminatory segregation that restricted their social mobility.[15] Gradually, many Native individuals lost their allotments. Speculators and federal officials exploited legal loopholes to purchase land from Native owners at low prices, only to later resell it to non-Natives for a huge profit. Native landowners were frequently defrauded or pressured into selling their land.[16] Sometimes, Natives were killed for their land and wealth. Today, the buying, selling, and transferring of allotment land remains tightly controlled by the federal government. Allotments must still be verified and approved for sale by the government. Between 1854 and 1890, the federal government seized nearly half of the Five Tribes' western lands through war and questionable treaties.[17] In an effort to legitimize these annexations, officials organized land runs, which were public events where settlers raced to claim plots of

[13] Indian General Allotment Act, 24 Stat. 388 (1887).
[14] *See* The Comm'n & Comm'r to the Five Civilized Tribes, The Final Rolls of the Citizens and Freedmen of the Five Civilized Tribes in Indian Territory (Mar. 1907), *available at* https://s3.amazonaws.com/naraprodstorage/lz/dc-metro/rg-048/608958/300321.pdf [hereinafter Dawes Rolls].
[15] Laura J. Feller, *Being Indigenous in Jim Crow Virginia: Powhatan People and the Color Line* (2022).
[16] Indian Land Tenure Found., *Land Tenure History* (last accessed Dec. 2025), https://iltf.org/land-issues/history/.
[17] Sarah Pruitt, *Broken Treaties With Native American Tribes: Timeline*, History (Nov. 2020), https://www.history.com/articles/native-american-broken-treaties.

former Native land.[18] Ultimately, the Five Tribes received no compensation for their losses. Instead, the tribes were forced to watch as unwanted settlers poured into their once sovereign territories.[19]

Having already targeted tribal power, property rights, and cultural practices, the federal government turned its attention to dismantling tribal governments and legal jurisdiction. Congress remained wary of the tribes' continued political autonomy despite having reduced the Five Tribes' territorial holdings and significantly eroded their power. The Curtis Act of 1898 delivered a major blow to tribal sovereignty by abolishing tribal legal systems, revoking tribal authority to pass and enforce their own laws, and transferring those powers to the federal and territorial governments.[20] Effectively, the Act dissolved the tribal governments of the Five Tribes, which undermined centuries of sovereignty and political structure. In a final effort to subvert federal intentions, the Five Tribes convened in 1905 to propose the formation of a new, Indigenous-led state named "Sequoyah."[21] Tribal leaders drafted a state constitution and designed a state legislature, which were ratified by eligible voters later that same year. Yet, Congress denied their request for statehood.[22] Refusing to recognize the Five Tribes' claims to the land or their authority to form a state, Congress delivered another crushing blow to tribal sovereignty. As a final knockout punch, Congress approved Oklahoma's statehood in 1907. For the Five Tribes, this marked a historic low point—their governments were abolished, their people were not full citizens of the United States, and their communities were subjected to continued land loss, exploitation, and systemic injustice. Put simply, sovereignty had all but vanished.

[18] Stan Hoig, Okla. Hist. Soc'y, *Land Run of 1889*, Encyc. Okla. Hist. & Culture (last accessed Dec. 2025), https://www.okhistory.org/publications/enc/entry?entry=LA014.
[19] Blakemore, *supra* note 11.
[20] Curtis Act of 1898, Pub. L. No. 55-517, 30 Stat. 495 (1898).
[21] Frank Jacobs, *"The Stillborn State of Sequoyah"*, Big Think (July 2010), https://bigthink.com/strange-maps/147-the-stillborn-state-of-sequoyah.
[22] *Id.*

Still, the federal government's campaign against Native identity did not stop. Across the country, a new front of cultural destruction emerged in the form of Indian boarding schools. The Indian Civilization Act of 1819 implemented the system, which rapidly expanded in 1869.[23] Boarding schools sought to remove children from their families and place them in institutions devised to erase their language, culture, and spiritual beliefs.[24] These schools, designed to "Kill the Indian, Save the Man," forcibly assimilated Native children into white American society.[25] Children were intentionally starved, beaten, sexually abused, and psychologically tormented in a deliberate effort to sever their connection to Native ways of life.[26] Such atrocities left generational scars, contributing to cycles of trauma, cultural disconnection, and overall mistrust. Alcohol became a widespread coping mechanism, and to this day Native communities continue to turn to substance abuse, as reflected in disproportionate rates of alcoholism among these communities.[27] Shockingly, some of these boarding schools still exist today. Attendance is no longer mandatory, but their dark legacy continues to impact Native communities across the United States.[28]

With the conclusion of World War I in 1918, the global emphasis on self-determination and sovereignty began to influence domestic policy in the United States.[29] Congress initiated a new era of Native American diplomacy by introducing sweeping changes to federal policies concerning Native citizenship, land, and tribal sovereignty. A major turning point came in 1924

[23] The Act of March 3, 1819, 3 Stat. 516, ch. 85 (commonly known as the "Indian Civilization Fund Act of 1819").
[24] *See id.*; *see also* Melissa D. Zephier Olson & Kirk Dombrowski, *A Systematic Review of Indian Boarding Schools and Attachment in the Context of Substance Use Studies of Native Americans*, 7 J. Racial & Ethnic Health Disparities 62 (2020).
[25] Olson & Dombrowski, *supra* note 24.
[26] Ostler, *supra* note 8.
[27] Teresa Evans-Campbell et al., *Reconceptualizing Wellness Among American Indian Older Adults Using the Indigenous Health Service Access Framework*, 38 PMC, 421, 424–26 (2017).
[28] Sequoia Carrillo & Allison Herrera, *Federal Indian Boarding Schools Still Exist, but What's Inside May Be Surprising*, All Things Considered (June 2023), https://www.npr.org/2023/06/06/1155723922/federal-indian-boarding-schools-still-exist.
[29] Norwich U., *Isolationism and U.S. Foreign Policy After World War I* (last accessed Dec. 2025), https://online.norwich.edu/online/about/resource-library/isolationism-and-us-foreign-policy-after-world-war-i.

when President Calvin Coolidge set the precedent for change by signing the Indian Citizenship Act, which granted citizenship to all Native Americans.[30] The Act meant Native Americans no longer needed to be enlisted on the Dawes Rolls to gain citizenship, a giant leap in Native rights. Roughly forty percent of all Native Americans were not citizens at the time of its passage.[31] Despite being the continent's original inhabitants, Native Americans were the last ethnic group to receive American citizenship. Another important policy change was passed with the Indian Reorganization Act of 1934, which repealed the Dawes Act and officially ended the allotment era.[32] Encouraging tribes to adopt self-governance, revive traditional practices, and return to communal land ownership, the Act represented a new chapter for Native Americans. However, this era of change was short lived. Generations of cultural destruction through boarding schools, forced assimilation, and the dominance of Western values had deeply changed Native communities. Many tribal members did not want to sacrifice their own private property. While the Act permitted communal land ownership, decades of assimilationist policies meant that this land management system had become increasingly rare.

Despite launching seemingly progressive reforms to expand tribal powers, the federal government simultaneously worked to undermine the very sovereignty it claimed to support. With the passage of the Indian Termination Act of 1953, Congress renounced the sovereign status of dozens of federally recognized tribes. By redefining what counted as a "tribe," the Act stripped many Native nations of recognition, effectively declaring them nonexistent.[33] Without formal recognition, the federal government seized tribal lands and cut promised welfare services to their members. Vast quantities of formerly protected Native land were opened to industry,

[30] Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)).
[31] *Id.*
[32] U.S. Dep't Interior, Indian Aff's, *Federal Law and Indian Policy Overview: History of Indian Law and Policy* (last accessed Dec. 2025), https://www.bia.gov/bia/history/IndianLawPolicy.
[33] H. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953) (enacted).

prompting deforestation, resource extraction, and other large-scale environmental degradation. Tribes suffered devastating economic losses as communal lands and farmlands were confiscated or sold off. Tribal courts and legal systems were also dismantled, which left Native communities without mechanisms of self-governance or legal recourse.[34] Nationwide, tribal sovereignty was consistently eroded.

During the termination era, the federal government also set their sights on Native identity and cultural longevity. Between 1958 and 1978, the Indian Adoption Project sought to assimilate Native children into white families under the guise of child welfare.[35] On several occasions, children were forcibly taken from their families and communities, often without due process.[36] Many adoptees grew up isolated from their heritage as the federal government tore apart families and weakened tribal involvement. Federal officials intentionally dispersed Native populations in order to eliminate identity, culture, and political power. Native families and communities are still affected by this program to this day, especially by the boarding school program.

Today, the federal government and Native American tribes remain locked in a protracted struggle over land rights, treaty obligations, and tribal sovereignty. Across the country, courtrooms have become battlefields where unresolved legal questions and broken promises are contested. Yet outside the courts, little meaningful progress has been made toward reconciliation. Native nations were once promised huge tracts of land through treaties, but many now face land loss and legal marginalization. In recent years, tribes have begun challenging long ignored treaties and raising historical grievances that remain unaddressed. One prominent example is the

[34] U. of Alaska Fairbanks, *Termination Era, the 1950s, Public Law 280*, Dep't of Tribal Governance, https://www.uaf.edu/tribal/academics/112/unit-2/terminationerathe1950spubliclaw280.php.
[35] Indian Adoption Projects Hist., *Indian Adoption Project*, U. of Oregon Dep't Hist., https://pages.uoregon.edu/adoption/topics/IAP.html.
[36] P. J. Randhawa, *'Indian Orphan Nobody Wanted Gets Parents': The Dark History of the Indian Adoption Project*, KING 5 (June 2023), https://www.king5.com/article/news/community/facing-race/indian-adoption-project-dark-history/281-a21a5d07-b405-4342-a6d7-ba3d0a01921f.

case of Badger-Two Medicine, a sacred site within the Blackfeet Nation's ancestral territory. Despite cultural and spiritual significance, Congress leased the area to oil and natural gas companies in the 1980s. Following decades of anticolonial and environmental activism and legal resistance, the Blackfeet secured a crucial victory in 2023 when a federal court ruled in favor of protecting the land.[37] Another ongoing effort centers on the 1835 Treaty of New Echota, which led to the forced removal of the Cherokee Nation from Georgia along the Trail of Tears. Article Seven of the treaty guaranteed the Cherokee Nation a delegate in the House of Representatives, which Congress has yet to honor.[38] Recently, the Cherokee Nation has renewed its campaign to have this promise fulfilled. Both Badger Two Medicine and the Treaty of New Echota are examples of the federal government blatantly ignoring their promises to Native Americans. For the Blackfeet community, the national government and private companies attempted to infringe their tribal sovereignty by ignoring their governance.

In courtrooms and state legislatures across the country, tribal nations are increasingly asserting their legal and political rights. These efforts aim not only to reclaim land, but also to revive sovereignty and uphold agreements. Yet, the future of tribal self-determination remains uncertain. Recent political shifts, most notably since Donald Trump assumed office for a second presidential term, have reinforced resistance to tribal sovereignty and legal authority. Under the Trump administration, efforts to limit tribal jurisdiction, reduce federal support on welfare for Native communities, and terminate Native citizenship have cast a shadow on the future of Indigenous rights in the U.S. At the state level, politicians like Oklahoma Governor Kevin Stitt have only further dwindled the flame of legal sovereignty.

[37] *Sacred Badger-Two Medicine Area Protected*, Native Am. Rts. Fund (Sept. 2023), https://narf.org/badger-two-medicine/.
[38] Treaty with the Cherokee, U.S.-Cherokee Nation, 1835, 7 Stat. 478.

III. *Sharp v. Murphy* and *McGirt v. Oklahoma*

In 1997, Jimcy McGirt was convicted of raping and molesting a young child in Wagnor County, Oklahoma. He received two consecutive five hundred-year sentences along with life imprisonment without the possibility of parole.[39] Although his condemnation appeared final, McGirt later found hope from the most unlikely of sources: convicted murder Patrick Murphy. Murphy, a citizen of the Muscogee Nation, had been convicted of killing George and Patsy Jacobs in Henryetta, Oklahoma in 1999. The court sentenced Murphy to death, which he later appealed.[40] Rather than contest his guilt, Murphy challenged Oklahoma's jurisdiction over his case. He argued that the crime occurred within the historical boundaries of the Muscogee Nation reservation.[41] Under the United States Code, major crimes involving Native American defendants in "Indian Country" fall under federal—not state—jurisdiction.[42] Since he believed the Muscogee Nation qualified as "Indian Country," Murphy appealed his sentence. Even though Oklahoma appellate courts rejected his plea, the Tenth Circuit Court of Appeals agreed to hear the case. There, Murphy would assert that the Muscogee Nation reservation had never been formally disestablished by Congress and thus retained jurisdiction.[43]

Murphy's case primarily rested on the Treaty with the Creeks of 1866, the Enabling Act of 1906, the Major Crimes Act of 1885, and 18 U.S.C. Section 1151.[44] After the Civil War, Congress sought to reestablish peaceful relations with the Five Tribes. In 1866, Congress signed a treaty with the Muscogee Nation that affirmed the Nation's territorial boundaries and guaranteed legal protections for American citizens within this area. Importantly, the treaty

[39] McGirt v. State, No. F-1997-967 (Okla. Crim. App. 1998); *see also* Brief in Opposition at 6, *McGirt*, 140 S. Ct. 2452 (2020) (No. 18-9526).
[40] Murphy v. State, 2002 OK 24, 47 P.3d 876; *cert. denied*, 538 U.S. 985 (2003).
[41] Brief for Respondent at 27–29, Carpenter v. Murphy, 586 U.S. 1046 (No. 17-1107) (2018).
[42] 18 U.S.C. § 1151.
[43] Murphy v. Royal, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom.* Sharp v. Murphy, 591 U.S. 977 (2020) (per curiam).
[44] *Murphy*, 591 U.S.

recognized Muscogee land as a reservation, placing it under federal protection.[45] Thus, Murphy argued that subsequent federal laws did not disestablish this reservation. Specifically, he pointed to the Enabling Act of 1906, which paved the way for Oklahoma's statehood. Instead of abolishing the Muscogee Nation reservation, the Act actually protected it. In fact, the Act explicitly stated that Oklahoma could not "limit or impair the right" of tribal property.[46] Furthermore, the Act identified the territories of the Cherokee, Chickasaw, Choctaw, Muscogee, and Seminoles Nations as land outside state and federal ownership. Effectively, the Enabling Act defined the Five Tribes' respective territories as distinct legal and political entities, reaffirming the 1866 treaty's recognition.[47]

Complementing the Enabling Act was the Major Crimes Act of 1885, which granted the federal government exclusive jurisdiction over major crimes, including murder, committed by Native Americans in "Indian Country."[48] Murphy's legal team contended that, since his crime occurred within Muscogee territory, only federal courts had authority to prosecute him. Yet, Murphy still needed to prove that the Muscogee Nation reservation qualified as "Indian Country." To do so, Murphy cited 18 U.S.C. Section 1151, which defines "Indian Country" as land designated by Congress as a reservation, allotment, or tribal communal property.[49] Relying on prior treaties and federal statutes, Murphy contended that the land fell within the statutory definition of "Indian Country." Therefore, Murphy asserted, the state of Oklahoma lacked jurisdiction over his case. By invoking the Treaty with the Creeks, 1866 and these federal laws, Murphy argued the Muscogee Nation had decreed a reservation which had not been disestablished.[50]

[45] Treaty with the Creeks, U.S.-Creek Nation, 1866, 14 Stat. 785.
[46] Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906).
[47] *Id.*
[48] Major Crimes Act, ch. 341, § 9, 23 Stat. 385 (1885).
[49] Act of June 25, 1948, ch. 645, 62 Stat. 757, 757 (codified as amended at 18 U.S.C. § 1151).
[50] McGirt v. Oklahoma, 591 U.S. 894 (2020).

After careful deliberation, the Tenth Circuit Court of Appeals ruled in favor of Patrick Murphy. The court held that the state of Oklahoma lacked the jurisdiction to prosecute his case. Citing the Major Crimes Act, the judges determined that only the federal government could prosecute murders committed in "Indian Country." Additionally, the court relied on the Enabling Act of 1906, which expressly prohibited Oklahoma from diminishing tribal property or legal sovereignty.[51] Since Congress had never formally disestablished the Muscogee Nation reservation or repealed these laws, the judges concluded that the land remained legally recognized as a reservation. Thus, Oklahoma lacked legal authority to prosecute major crimes committed in "Indian Country" by Native citizens, such as Patrick Murphy. The ruling not only secured Murphy's victory but also raised broader jurisdictional questions about whether the state held any legal authority over Native Americans living on reservations. Although Oklahoma appealed the decision to the U.S. Supreme Court, the outcome of Murphy's victory opened a temporary legal pathway for Jimcy McGirt to challenge the validity of his own conviction.

Following Murphy's legal success, Jimcy McGirt sought post-conviction relief. He argued that his conviction was illegitimate because the state of Oklahoma lacked jurisdiction over him. As a citizen of the Seminole Nation, McGirt maintained that his alleged crimes occurred on reservation land and, thus, fell under federal authority. The Major Crimes Act of 1885 had already granted the federal government jurisdiction over serious offenses such as murder and sexual assault committed in "Indian Country," but McGirt wished to extend this argument further. Ultimately, he claimed that Oklahoma lacked jurisdiction over all crimes committed by Native Americans on tribal land. Oklahoma courts refused to hear his case, but McGirt petitioned the U.S. Supreme Court, which agreed to hear his appeal. Consolidated on the same docket as Oklahoma's appeal of *Sharp v. Murphy*, the Court was now forced to answer a

[51] 34 Stat. 267.

landmark question. One docket would determine the future for the Five Tribes' reservations in eastern Oklahoma and their sovereign legal authority over them.

McGirt's argument closely mirrored Murphy's, but incorporated deeper historical context. He first pointed to an 1856 treaty between the Muscogee Nation and the federal government that secured the tribe the "unrestricted right of self-government" and "full jurisdiction" over tribal members and their property.[52] The treaty, McGirt contended, guaranteed the Muscogee Nation indubitably protected legal sovereignty free from interference by state governments.[53] Since Congress had never nullified the treaty or its guarantees, its terms remained legally binding and entrenched in law. Although the agreement primarily addressed tribal control over lesser offenses, *McGirt* maintained that the Major Crimes Act and subsequent federal laws supplemented this authority by assigning jurisdiction over serious felonies to the federal government. Together, the treaty and the Major Crimes Act established exclusive tribal and federal jurisdiction over Native Americans on reservation land, leaving no role for the state.[54]

Despite the Supreme Court's conservative direction, the justices ruled in favor of McGirt by a slim five-to-four margin.[55] The Court determined that only Congress, not states or courts, had the power to disestablish a reservation. As a result, the Muscogee Nation still legally existed and Oklahoma had overstepped its jurisdiction in McGirt's case. Upon the ruling's announcement, the Muscogee Nation regained its lost legal sovereignty and jurisdiction. Due to similar existing treaties with the Cherokee, Chickasaw, Choctaw, and Seminole Nations, these tribes likewise reclaimed legal authority. In total, the state of Oklahoma lost jurisdiction over

[52] *Id*.; *see also* Treaty with the Creeks, *supra* note 45.
[53] *See McGirt*, 591 U.S. at 940.
[54] *Id.* at 928.
[55] *Id.*

roughly forty-three percent of its territory.[56] Enraged, Oklahoma lawmakers and conservative commentators swiftly denounced the ruling.[57]

Similarly, Murphy narrowly prevailed in the Court, winning by a narrow five-to-four margin.[58] As a result, his prior conviction was overturned and a new trial process began in federal court. Under federal jurisdiction, Murphy was no longer eligible for the death penalty. In 2021, Murphy was convicted and sentenced to two life terms without the possibility of parole.[59] Meanwhile, McGirt also entered a new phase of legal proceedings. Though currently incarcerated for violating probation, further legal disputes surrounding his original conviction and broader jurisdictional questions remain unresolved.[60] Together, *Murphy* and *McGirt* fundamentally reshaped the legal landscape of tribal sovereignty and established a new precedent that reaffirms the authority of tribal nations over their own lands and people. However, despite these victories, political opposition and ongoing legal challenges continue to threaten these restored liberties.

IV. Tribal Sovereignty and Oklahoma Governor Kevin Stitt

Following the Court's ruling in *McGirt v. Oklahoma*, the Muscogee Nation and other Native American tribes in Oklahoma regained the authority to arrest, prosecute, and sentence Native Americans for crimes committed on tribal land. In contrast, local and state law

[56] *See* Louise Red Corn, *Nation's Legal Battle over Reservation Status Reignites After Two Decades*, Osage News (Apr. 2025), https://osagenews.org/nations-legal-battle-over-reservation-status-reignites-after-two-decades/.
[57] Chris Polansky, *Tribes, State Officials React to Historic SCOTUS Ruling on McGirt v. Oklahoma*, Pub. Radio Tulsa (July 2020), https://www.publicradiotulsa.org/local-regional/2020-07-10/tribes-state-officials-react-to-historic-scotus-ruling-on-mcgirt-v-oklahoma.
[58] Supreme Court Justice Neil Gorsuch initially recused himself on the *Murphy* decision, but then the Court added the case onto the same docket and he rejoined the case the second time around, thus making a five-to-four decision possible. *See* Cherokee Phoenix, *Supreme Court to Rehear Murphy Case* (July 2019), https://www.cherokeephoenix.org/news/supreme-court-to-rehear-murphy-case/article_4f3d5ef3-9043-5ad1-91bf-6f3e0e50e5a9.html.
[59] *Oklahoman Whose Case Led to McGirt Ruling Gets Life Sentence*, AP News (May 2025), https://apnews.com/article/us-supreme-court-oklahoma-patrick-murphy-muskogee-c91760bf37006a01dc9b8eb332985351.
[60] Press Release, U.S. Att'ys Off. for the E. Dist. Okla., *Jimcy McGirt Pleads Guilty to Sex Offender Registry Violation* (2025), https://www.justice.gov/usao-edok/pr/jimcy-mcgirt-pleads-guilty-sex-offender-registry-violation.

enforcement agencies lost jurisdiction over such cases within reservation boundaries.[61] However, the Muscogee Nation soon faced significant logistical and legal challenges in exercising its expanded authority. The Muscogee Nation and other tribes voluntarily ceded certain powers, such as detention and incarceration privileges, while adjusting to their newfound authority. Through cross-deputization agreements with local and federal law enforcement agencies, the state regained equal jurisdiction to arrest and process Native individuals.[62] Yet, despite relinquishing some aspects of sovereignty, the Muscogee court system has remained untouched by stipulations and restrictive measures. These courts were swiftly adapted to prosecute criminal offenders.[63] Today, these tribal courts represent one of the few spaces where the Muscogee Nation exercises complete and total legal sovereignty.

Although appearing cooperative, both the Muscogee Nation and the state of Oklahoma continue to battle for jurisdictional authority over tribal lands. Following the Supreme Court's 2020 ruling, Oklahoma Governor Kevin Stitt launched an aggressive campaign to undermine the decision and reassert state control over the criminal justice system. He has repeatedly attempted to extend state jurisdiction into tribal affairs by supporting legal and political efforts aimed at diminishing tribal legal jurisdiction. These efforts have largely failed, but Stitt has persisted in his mission. As tensions escalate, his strategies have grown increasingly adversarial to the Five Tribes. Instead of pursuing cooperation, he has consistently sought to reclaim jurisdiction and

[61] *Id.*; McGirt v. State, 591 U.S. 894 (2020).
[62] Cross-deputization agreements enable both tribal and state law enforcement agencies to arrest and ticket Native and non-Native American suspects regardless of ethnicity or location.
[63] *Justice on the Rez*, Muscogee Nation (last accessed Dec. 2025), https://www.muscogeenation.com/attorney-general/justice-on-the-rez/.

challenge the scope of tribal sovereignty reaffirmed by the *McGirt* decision.[64] Nevertheless, courts have repeatedly sided with the Five Tribes.[65]

While Governor Kevin Stitt and several Oklahoma lawmakers have expressed concerns about rising crime rates, lenient sentencing, and inadequate resources for tribal law enforcement, these fears are largely unfounded. In fact, crime rates within the reservations of the Five Tribes have dropped since 2020.[66] Although some say this is due to poor policing, the decline can be attributed to the larger trend in Oklahoma of decreasing crime rate.[67] Additionally, tribal courts do not operate outside the law. Tribal courts remain bound by nationally mandated standards such as the Indian Civil Rights Act and the Tribal Law and Order Act, which mandate procedural protections and sentencing guidelines.[68] No credible evidence suggests that tribal courts are more lenient than their state counterparts.[69] Nevertheless, Governor Stitt has continued to publicly attack tribal courts and challenge the legitimacy of Native legal sovereignty altogether. Rather than Native sovereignty presenting a legal problem, the core issue appears to be political, as Native sovereignty presents a serious challenge to Oklahoma's traditional power structure.[70]

Over the years, the federal government has made numerous promises to Native nations, which remain mostly unfulfilled. A notable example is the aforementioned Treaty of New Echota, which guaranteed the Cherokee Nation a seat in Congress. As tribes increasingly assert their rights through historical treaties and federal law, Oklahoma lawmakers have begun to raise

[64] James M. Wirth, Esq., *United States Supreme Court Declines Oklahoma's Request to Overturn* McGirt, Wirth L. Off. (last accessed Dec. 2025), https://www.wirthlawoffice.com/tulsa-attorney-blog/2022/01/united-states-supreme-court-declines-oklahomas-request-to-overturn-mcgirt-2.
[65] Alex Rosa-Figueroa, *U.S. Supreme Court Rejects Overturn of McGirt Ruling*, KSWO-TV 7News (Feb. 2022), https://www.kswo.com/2022/02/24/us-supreme-court-rejects-overturn-mcgirt-ruling/.
[66] Amanda Watford, *Despite What Some Politicians Say, Crime Rates Are Decreasing*, Okla. Voice (June 2024), https://oklahomavoice.com/2024/06/28/despite-what-some-politicians-say-crime-rates-are-decreasing/.
[67] *Id.*
[68] Indian Arts and Crafts Amendments Act of 2010, 25 U.S.C. § 305.
[69] Barbara Creel, *Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing*, 58 U.S.F. L. Rev. 46 (2011).
[70] Watford, *supra* note 66.

a pressing question: If Native tribes can reclaim jurisdiction through legal mechanisms from the nineteenth and twentieth centuries, what might they seek next? With Native reservations comprising nearly half of Oklahoma, some officials fear a future in which tribal authority rivals that of the state itself. Unsurprisingly, *McGirt v. Oklahoma* triggered deep political anxiety among state leaders. Since entering office, Governor Stitt has persistently attempted to cut funding and resources, refused to cooperate on agreements, urged the Court to revisit *McGirt*, and supported legal challenges aimed at restraining tribal sovereignty. Beyond legal maneuvers, Stitt's approach has frequently turned personal with ad hominem attacks. He has publicly insulted tribal leaders, criticized federal lawmakers who support tribal rights, and even rebuked U.S. Supreme Court justices for refusing to hear cases opposing *McGirt*.[71] More broadly, he has encouraged supporters to petition the federal government to dissolve tribal rights.[72] As a result, negotiations between the state of Oklahoma and the Five Tribes have deteriorated significantly. While not entirely at a standstill, critical discussions regarding gaming compacts, toll road access, motor vehicle enforcement, taxation, and other key issues have stalled.[73]

One of the most controversial facets of Governor Kevin Stitt's opposition to tribal sovereignty is the fact that he is a member of the Cherokee Nation.[74] At first glance, one might assume that his Cherokee ancestry would foster trust and cooperation between the governor and the Five Tribes. Instead of drawing on his heritage to offer an informed perspective, Governor Stitt has invoked his background to publicly downplay and delegitimize tribal citizenship and

[71] Carmen Forman, *Oklahoma's Five Tribes Won't Join Gov. Kevin Stitt's New McGirt Task Force*, Okla. Voice (Jan. 2024), https://oklahomavoice.com/briefs/oklahomas-five-tribes-tribes-wont-join-gov-kevin-stitts-new-mcgirt-task-force/.
[72] Rachel Monroe, *How Tribal Nations Are Reclaiming Oklahoma*, The New Yorker (Aug. 2024), https://www.newyorker.com/magazine/2024/08/12/how-tribal-nations-are-reclaiming-oklahoma.
[73] Carmen Forman, *Gov. Kevin Stitt Continues to Clash With Oklahoma's Tribes in Second Term*, Okla. Voice (Dec. 2023), https://oklahomavoice.com/2023/12/26/gov-kevin-stitt-continues-to-clash-with-oklahomas-tribes-in-second-term/.
[74] Monroe, *supra* note 72.

sovereignty. During an appearance on Tucker Carlson's former *Fox News* talk show *Tucker Carlson Tonight*, Stitt claimed that anyone with "blonde hair and blue eyes" could easily become a member of a tribe.[75] Doubling down, he later asserted that tribal membership functions as a get out of jail free card and that his own success shows "how easy it is to cheat the system."[76] By using his Native ancestry to suggest that the system can be easily manipulated, Stitt is insinuating that Native Americans benefit from undue legal protections simply by virtue of their identity and that some tribal members are not truly Native Americans. These remarks are deeply troubling, especially in light of the centuries of systemic oppression, displacement, and genocide endured by Native American communities. Reducing tribal citizenship to a legal loophole ignores the cultural, historical, and legal significance of tribal identity. His comments also reflect an individualistic and opportunistic view of Native heritage, which prioritizes personal and political gain over the collective well-being of tribal nations. Ultimately, Governor Stitt has prioritized his personal, political, and business ambitions over the well-being of his tribe, a stance that stands in stark contrast to the traditionally communal values that have long guided Native governance. Yet in 2022, he received a partial vindication of his position through *Oklahoma v. Castro-Huerta*.

V. *Oklahoma v. Castro-Huerta* and Its Impact on Tribal Jurisdiction

In 2015, Victor Castro-Huerta, a non-Native man, was arrested and convicted for child neglect while residing on the Cherokee Nation reservation. He was sentenced to thirty-five years in prison, but soon sought to challenge the legitimacy of his conviction by invoking the decisive *McGirt* ruling.[77] Unlike earlier cases involving Native defendants, Castro-Huerta argued that Oklahoma lacked jurisdiction because the victim was a Native American child and the crime

[75] Darren Thompson, *Oklahoma Governor Faces Pushback from Native Americans for 'Indian Card' Comments Made on Fox News*, Native News Online (Apr. 2022), https://nativenewsonline.net/sovereignty/oklahoma-governor-faces-pushback-from-native-americans-for-indian-card-comments-made-on-fox-news.
[76] *Id.*
[77] Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022).

occurred within "Indian Country." Castro-Huerta's legal team contended that *McGirt* solely permitted federal prosecution of crimes involving Native victims on tribal land, regardless of the perpetrator's identity. Following his sentencing, Castro-Huerta appealed his conviction, which ultimately reached the U.S. Supreme Court in 2022. Here, Castro-Huerta argued that the state had jurisdiction over all non-Native offenders, even if the crime was committed against a Native American. In this case, tribes would have legal authority over misdemeanor cases with Native American defendants on tribal territory while the federal government would have jurisdiction over all felony cases.

In his appeal, Victor Castro-Huerta argued that under the General Crimes Act, jurisdiction over any criminal case involving a Native American in "Indian Country" rests with federal or tribal courts.[78] Since Congress has never directly conferred jurisdiction over crimes committed by non-Natives against Native Americans in "Indian Territory" to state courts, he maintained that Oklahoma lacked the legal authority to prosecute him. Similar to the legal reasoning employed in *McGirt v. Oklahoma*, Castro-Huerta closely examined the diction and intent of federal law. Specifically, Castro-Huerta emphasized that the General Crimes Act delegated "sole and exclusive jurisdiction" to federal and tribal authorities for crimes occurring in "Indian Territory," with the exception of cases in which both the perpetrator and victim are non-Native.[79] Thus, Castro-Huerta contended that his conviction was invalid and that he should have been originally prosecuted by the federal government.[80]

On the contrary, the state of Oklahoma argued that the General Crimes Act never explicitly prohibited states from exercising jurisdiction over crimes involving non-Native

[78] The General Crimes Act bestows jurisdiction of felony crimes committed by Native Americans to the federal government, and it is codified at 18 U.S.C. § 1152.
[79] *Castro-Huerta*, 597 U.S.
[80] *See id.* at 629.

defendants and victims. Oklahoma further contended that the Act's grant of "sole and exclusive jurisdiction" only applied to federal authority, not to tribal or state courts.[81] According to the State's interpretation, the statute merely extended federal criminal law into "Indian Country" rather than excluding state jurisdiction entirely.[82] To support its position, Oklahoma cited the Supreme Court case *United States v. McBratney* (1881).[83] The case concerned McBratney, a non-Native man, was convicted in federal court for murdering Thomas Casey, another non-Native man, on the Ute reservation in Colorado. McBratney appealed the decision on the basis that the federal courts lacked jurisdiction because Congress had not explicitly conferred such authority in Colorado.[84] The U.S. Supreme Court agreed, declaring that the federal courts did not have the proper authority to prosecute McBratney. More importantly, the Court also held that due to the absence of specific congressional language bestowing jurisdiction to federal courts, the state retained authority over crimes between non-Native parties on tribal land.[85] Oklahoma emphasized that, like Colorado, its statehood laws did not provide federal courts jurisdiction over cases involving non-Natives defendants in "Indian Country." Relying on *McBratney*, the State asserted it retained jurisdiction over all crimes not involving Native defendants, including those with non-Native offenders and Native victims. By expanding on the logic of McBratney, Oklahoma sought to reclaim jurisdiction lost under *McGirt* and reassert control over a wide range of criminal cases on tribal lands.

Despite nearly two hundred years of legal precedent, the Court ruled five-to-four in favor of Oklahoma. Writing for the majority, Justice Brett Kavanaugh delivered a significant blow to tribal sovereignty by declaring that *Worcester v. Georgia*, which had affirmed tribal authority

[81] *Id.* at 630; *see also* 8 U.S.C. § 1152.
[82] *Id.* at 629.
[83] United States v. McBratney, 104 U.S. 621 (1881).
[84] S.B. 291, 38th Cong., 1st Sess. (1864).
[85] *Id.*; *McBratney*, 104 U.S.

over enforcing criminal laws on reservations, had effectively been "abandoned" in modern federal policy.[86] Rejecting Castro-Huerta's interpretation of the General Crimes Act, Kavanaugh argued that allowing states to prosecute non-Native offenders would not interfere with tribal governance. Accordingly, he held that Oklahoma had concurrent jurisdiction to prosecute non-Natives for crimes against Native victims on tribal land. His opinion reversed crucial elements of sovereignty restored in *McGirt* and greatly curtailed tribal legal authority. Before the ruling, tribes held broad jurisdiction over all cases involving Native Americans. For Governor Kevin Stitt and other opponents of tribal sovereignty, the outcome was a sweeping legal and political victory for state power.

Since their ruling in *Castro-Huerta*, the Supreme Court has not heard any new cases concerning tribal sovereignty. Nevertheless, many Oklahoma lawmakers remain outraged by the earlier decision in *McGirt v. Oklahoma*. Although Governor Kevin Stitt publicly labeled the *Castro-Huerta* ruling a "clear victory," he has continued to denounce *McGirt*, claiming it has caused a "criminal-justice crisis."[87] Even now, Stitt has persistently urged the Court to reverse the ruling and has grown increasingly hostile toward the Five Tribes. He routinely refuses tribal proposals and rarely engages in compromise. Yet, to Governor Stitt's dismay, the Five Tribes have strengthened their alliances, forging closer partnerships to defend their sovereignty.[88] While the governor has filed multiple legal challenges, he has faced significant setbacks in court. Most notably, after the Oklahoma Legislature negotiated and approved a compact with the Five Tribes regarding tobacco sales and motor vehicle registration, Stitt attempted to veto the agreement—an

[86] Oklahoma v. Castro-Huerta, 597 U.S. 629, 629 (2022).
[87] Off. of the Governor of Okla., Governor Stitt Celebrates Supreme Court Victory for Oklahoma (June 2022), https://oklahoma.gov/governor/newsroom/newsroom/2022/june2022/governor-stitt-celebrates-supreme-court-victory-for-oklahoma--na.html.
[88] Chad Hunter, *Five Tribes Gather, Take Aim at Governor*, Cherokee Phoenix (July 2025), https://www.cherokeephoenix.org/news/five-tribes-gather-take-aim-at-governor/article_d9b9e200-9ac0-4a2d-bede-5e78170fddef.html.

authority he does not possess. The Oklahoma Supreme Court ruled against him, confirming that the governor lacks the power to veto tribal compacts.[89]

Overall, Governor Kevin Stitt's public statements reveal his lack of a comprehensive grasp on Native American law. While he has continuously labeled the Supreme Court's decision in *McGirt v. Oklahoma* a "public safety threat," he has largely ignored the Tenth Circuit Court of Appeals' ruling in *Sharp v. Murphy*, the very case that laid the legal groundwork for *McGirt*. His selective outrage underscores his shallow grasp of the broader legal framework. Notably, *McGirt* and *Murphy* appeared on the same Court docket, yet Stitt has focused his attacks solely on *McGirt*. Although *McGirt* carries broader implications for state authority, it is hardly the sole pillar supporting tribal sovereignty. Native legal authority rests atop a strong foundation of treaties, legal precedents, and federal recognition. Even if *McGirt* were overturned, federal courts would still retain jurisdiction over major crimes committed by Native Americans on tribal land due to the Major Crimes Act. Cases such as *Williams v. Lee* (1959) and *Michigan v. Bay Mills Indian Community* (2014) have further affirmed tribal jurisdiction and the principle of sovereignty.[90] Both *Sharp v. Murphy* and *McGirt v. Oklahoma* recognized the reservation status of the Five Tribes. Stitt's effort to undermine tribal sovereignty would require a sweeping and unprecedented reversal of longstanding precedent by the Court.

VI. The Case Against Native American Birthright Citizenship: Executive Order 14160 and *Elk v. Wilkins*

Governor Kevin Stitt's views on tribal sovereignty are shared by many conservative lawmakers within the Republican party. Most notably, President Donald Trump not only agrees

[89] Oklahoma v. Castro-Huerta, 597 U.S. 629, 629 (2022).
[90] Williams v. Lee, 358 U.S. 217 (1959); Michigan v. Bay Mills Indian Community, 572 U.S. 782 (2014). *Williams v. Lee* ruled only tribal courts have jurisdiction over civil matters involving Native Americans on tribal land. The case determined that state courts lacked jurisdiction in these cases. *Michigan v. Bay Mills Indian Community* reaffirmed that states cannot sue tribes without Congress' explicit repeal of the tribes' immunity.

with Stitt but has pushed even further to dismantle Native authority. Following Murphy's victory in the Tenth Circuit Court of Appeals, Trump urged the U.S. Supreme Court to overturn the decision.[91] The Court later concurred with the Tenth Circuit, though Trump insisted that the reservations no longer existed.[92] Since then, the Trump administration has coordinated a systemic push targeting Native citizenship, sovereignty, and even basic living conditions. On multiple occasions, Trump has attacked protections on tribal sovereignty.[93] Beyond rhetoric, these efforts have taken shape in policy, particularly in attempts to redefine or restrict birthright citizenship.

During the 2024 presidential campaign, Donald Trump pledged to overhaul national security by securing borders and implementing mass deportations of undocumented immigrants.[94] Once in the Oval Office, Trump signed an executive order aimed at ending birthright citizenship for children born to undocumented immigrants to deter illegal immigration.[95] Critics quickly cited the Fourteenth Amendment and the Supreme Court's decision in *United States v. Wong Kim Ark* (1898) as clear protections of birthright citizenship.[96] However, Trump is seeking to circumvent these legal protections by reinterpreting a specific clause within the Fourteenth Amendment.[97] The amendment states that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

[91] Justin Wingerter, *Trump Administration Asks Supreme Court to Side with Oklahoma in Dispute Involving Muscogee (Creek) Nation*, The Oklahoman (Aug. 2018), https://www.oklahoman.com/story/news/crime/2018/08/05/trump-administration-asks-supreme-court-side-with-oklahoma-dispute-involving-muscogee-creek-nation/605096180007/?gnt-cfr=1&gca-cat=p&gca-uir=true&gca-epti=z116116d00----v116116d--68--b--68--&gca-ft=203&gca-ds=sophi.
[92] *McGirt*, 591 U.S.
[93] Levi Rickert, *Trump Administration Rolls Back Executive Order on Tribal Sovereignty and Self-Governance*, Native News Online (Mar. 2025), https://nativenewsonline.net/sovereignty/trump-administration-rolls-back-executive-order-on-tribal-sovereignty-and-self-governance.
[94] ACLU, *Trump On Immigration: Tearing Apart Immigrant Families, Communities, and the Fabric of Our Nation* 1–2 (2024).
[95] Protecting the Meaning and Value of American Citizenship, 90 Fed. Reg. 8449 (2025).
[96] United States v. Wong Kim Ark, 169 U.S. 649 (1898).
[97] BBC News, *Trump Has Vowed to End Birthright Citizenship. Can He Do It?* (May 2025), https://www.bbc.com/news/articles/c7vdnlmgyndo.

States and of the State wherein they reside."[98] While *Wong Kim Ark* held that birthright citizenship applies broadly to nearly all individuals born on American soil, Trump is arguing for a narrower reading of the Fourteenth Amendment. According to the Trump administration, the phrase "subject to the jurisdiction thereof" excludes children of parents who owe allegiance to a foreign power.[99] To bolster this position, Trump pointed to the Civil Rights Act of 1866, which conferred citizenship on "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed."[100] He contended that the phrase "not subject to any foreign power" supports the view that children of undocumented immigrants are excluded from birthright citizenship.[101] Trump further argued that *Wong Kim Ark* did not directly address this issue and is therefore inapplicable. Thus, Trump has insisted his executive order was constitutional and within his presidential authority.[102]

Immediately after President Donald Trump announced his executive order, news outlets and social media users erupted with outrage. Yet, one of the order's most significant implications has received little attention within public discourse. Within the language of the order, Trump challenged the validity of Native American birthright citizenship through the lens of tribal sovereignty. Since federally recognized tribes are considered sovereign nations, the Trump administration is arguing that tribal members are citizens of their respective nations first and of the United States secondarily. On that basis, Native Americans born into tribal nations, the administration claimed, owe allegiance to another sovereign nation at birth and therefore do not qualify for automatic citizenship.[103] To justify their position, the administration has invoked *Elk v. Wilkins* (1884), a U.S. Supreme Court decision holding that Native Americans are born under

[98] U.S. Const. amend. XIV, § 1.
[99] Trump v. Washington, No. 25-364 (9th Cir. filed 2025).
[100] Civil Rights Act of 1866, ch. 31, 14 Stat. 27.
[101] *Id.*; U.S. Const. amend. XIV, § 1.
[102] Protecting the Meaning and Value of American Citizenship, 90 Fed. Reg. 8449 (2025).
[103] Trump v. Washington, No. 25-364 (9th Cir. filed 2025).

the jurisdiction of sovereign tribal governments and not entitled to birthright citizenship.[104] According to the ruling, Native Americans are only able to become citizens through naturalization. However, later legal mechanisms, such as the Dawes Act of 1887 and the 1924 Indian Citizenship Act, extended full citizenship, rights, and protections to Native Americans. Until the passage of the Dawes Act, Native Americans were predominantly not recognized as citizens.[105] Trump's order is grounded in outdated legal precedent which reframes tribal allegiance as a barrier to citizenship and threatens to erode a century of progress in acknowledging Native Americans as full citizens of the United States.

An analysis of *Elk v. Wilkins* reveals how flawed and inconsistent Trump's order truly is. In 1880, John Elk, a member of the Ho-Chunk Nation living in Omaha, Nebraska, attempted to register to vote in the presidential election. Although Elk had left tribal life, renounced his tribal affiliation, and lived among primarily non-Native citizens, his registration was denied on the grounds that he had been born on the Ho-Chunk reservation. Elk argued that he had been born within the territorial bounds of the United States and was entitled to birthright citizenship under the Fourteenth Amendment. Local courts rejected his claim and the dispute eventually reached the U.S. Supreme Court in 1884. At its core, the case was centered on whether a Native American born on a reservation was entitled to birthright citizenship, and if ties to a sovereign Native nation meant Native people were excluded from the Fourteenth Amendment's protections.

Elk began his argument by citing several Court cases to demonstrate that Native Americans could qualify for citizenship regardless of birthplace. He referenced the infamous *Dred Scott v. Sandford* (1857) case, in which Chief Justice Roger Taney distinguished the

[104] Elk v. Wilkins, 112 U.S. 94 (1884).
[105] Libr. of Cong., "19th Century Perceptions," *Immigration and Relocation in U.S. History* (last accessed Dec. 2025), https://www.loc.gov/classroom-materials/immigration/native-american/19th-century-perceptions/.

difference between enslaved African Americans and Native Americans. While Taney denied citizenship to enslaved individuals, he acknowledged that Native Americans could, under strict federal supervision, obtain citizenship.[106] Building on this reasoning, Elk invoked the Civil Rights Act of 1866, which granted citizenship to "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed."[107] Thus, Elk emphasized his abandonment of tribal life, residence in Omaha, and employment as evidence of assimilation. Believing he qualified under the strict standard set by Taney, Elk contended he should be recognized as a citizen and entitled to voting rights. The Court, however, rejected his claim and maintained that Native Americans born into tribal nations were not citizens of the United States through birthright citizenship.[108]

Wilkins, the voter registrar who refused to register Elk, countered Elk's argument by asserting that neither *Dred Scott v. Sandford* nor the Civil Rights Act of 1866 had been intended to provide a pathway for Native Americans to gain citizenship. He argued that Elk had not genuinely abandoned his tribal identity or demonstrated true commitment to becoming an American citizen. According to Wilkins, Elk's primary allegiance remained with the Ho-Chunk Nation and that granting him citizenship posed a potential security risk by enabling Elk to use legal and political rights to resist federal encroachment on tribal lands. Wilkins also rejected Elk's interpretation of the Civil Rights Act of 1866, claiming that only those fully under the jurisdiction of the United States could be granted citizenship. Since Elk was a member of the Ho-Chunk Nation, Wilkins argued that he could not simultaneously be recognized as an American citizen.[109]

[106] Dred Scott v. Sandford, 60 U.S. 404 (1856).
[107] Civil Rights Act of 1866, 14 Stat. 27.
[108] *Id.*; *Elk*, 112 U.S. at 94.
[109] Bethany Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 Cardozo L. R. 1185 (2016).

Siding with Wilkins in a seven-to-two decision, the Supreme Court declared that John Elk was not an American citizen and could not obtain citizenship through birthright. Writing for the majority opinion, Justice Horace Gray concurred with Wilkins' assertion that Elk's allegiance to the Ho-Chunk Nation placed him outside the jurisdiction of the United States. Gray reasoned that Elk could not independently renounce his tribal allegiance or membership, which distinguished Native Americans from immigrants who could voluntarily abandon prior citizenship and undergo naturalization.[110] On this basis, Gray concluded that Native Americans lacked the ability to renounce tribal membership or obtain American citizenship through naturalization. According to the Court's ruling, Native Americans were bound by birth to their tribal nations and could only acquire American citizenship through explicit acts of Congress.

VII. Contemporary Applications and Contradictions in *Elk v. Wilkins*

As a result of *Elk v. Wilkins*, the U.S. Supreme Court established a precedent declaring that Native Americans were not American citizens and could not obtain citizenship through birthright under the Fourteenth Amendment. Since enrolled tribal members were considered subjects of their sovereign nations, they were deemed outside of federal jurisdiction. Today, the Department of Justice is defending Trump's executive order to terminate birthright citizenship, which extends this logic to strip Native Americans of their status as American citizens. However, Trump's attempt is both morally indefensible and legally flawed. Although *Elk v. Wilkins* initially excluded Native Americans from becoming American citizens, later congressional action overturned this precedent. Despite this, citizenship in law did not guarantee equal treatment. Many states continued to deny Native Americans the right to vote, own property, or access public services.[111] For example, in Virginia, Native Americans were classified as "legally Black"

[110] *Id.*; *Elk*, 112 U.S. at 94.
[111] *See* Berger, *supra* note 109, at 1231–32.

to justify the denial of rights under segregationist Jim Crow Laws.[112] Only with the passage of the Civil Rights Act of 1964 did Native Americans gain complete legal protection and civil liberties.[113] Trump and Stitt's statements suggest that they currently wish to return Native Americans to a similar legal status. Without citizenship or sovereignty, Native Americans would become a people without a nation or legal system.

Despite legislation protecting both Native American citizenship and tribal legal sovereignty, the Trump administration and Republicans leaders across the country like Oklahoma Governor Kevin Stitt are waging a war to dismantle these crucial legal frameworks. At the heart of their argument lies a dangerous contradiction: If tribal nations are sovereign, then their members cannot be fully subject to state or federal jurisdiction; yet if tribes are not sovereign, then Native Americans must be recognized as American citizens to ensure they remain subject to the federal legal system. Either Native Americans are sovereign tribal citizens governed by federal and tribal courts, or they are American citizens subject to federal jurisdiction. However, Native Americans cannot be denied both citizenship and sovereignty without being rendered stateless. By attacking both sovereignty and citizenship simultaneously, Trump and his allies are attempting to leave Native peoples within the territorial boundaries of the United States but outside the protection of its laws. This false dichotomy is both legally incoherent and deeply dangerous as it threatens to deprive Native Americans of natural rights, promised protections, and any access to justice. While many lawmakers focus their attacks solely on sovereignty, Trump has gone further to also target Native citizenship.

[112] Feller, *supra* note 15.
[113] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

The U.S. Department of Justice (DOJ) is currently entrenched in a legal battle over Native American citizenship, and its frontline has unfolded in *Washington v. Trump* (2025).[114] After President Trump signed Executive Order 14160, twenty-two different states, including Washington, filed lawsuits challenging its constitutionality.[115] In response, the DOJ has revived *Elk v. Wilkins*, regurgitating its arguments to claim that Native Americans are not entitled to birthright citizenship.[116] Citing the Fourteenth Amendment's "Indians not taxed" phrasing, federal lawyers have argued that this reflects a broader historical exclusion of Native peoples from citizenship.[117] More troublingly, the DOJ is leveraging this case to challenge the very principle of birthright citizenship altogether. However, their case lies on very weak footing. In the decades following *Elk v. Wilkins*, both Congress and the Supreme Court have repeatedly reaffirmed Native citizenship and tribal sovereignty through legislation and precedent. While the stakes are high, the legal foundation protecting Native rights remains firmly established.

As part of a broader attack on Native sovereignty, the DOJ has presented an extremely weak and contradictory argument. On one hand, tribal nations clearly possess legal sovereignty and the right to operate their own courts, which have been guaranteed by binding treaties, reinforced by federal legislation, and upheld by landmark Supreme Court decisions such as *Worcester v. Georgia*, *Sharp v. Murphy*, *McGirt v. Oklahoma*, and many more. Even *Oklahoma v. Castro-Huerta*, a case notorious for limiting tribal jurisdiction, reaffirmed that states lack authority to prosecute Native defendants in "Indian Country." No credible legal foundation exists

[114] *See* Jake Ellison, *Old Wounds, New Fears: How a DOJ Legal Brief Referencing an Outdated Native American Birthright Ruling Amplified Fears and Distrust Within Indigenous Communities About Citizenship and Deportation*, The Pulp (Feb. 2025), https://thepulp.org/native-citizenship-montana-trump-immigration/; *see also* Washington v. Trump, 145 F.4th 1013 (9th Cir. 2025).
[115] Mike Baker & Mattathias Schwartz, *Judge Temporarily Blocks Trump's Plan to End Birthright Citizenship*, N.Y. Times (Jan. 2025), https://www.nytimes.com/2025/01/23/us/politics/judge-blocks-birthright-citizenship.html.
[116] *Washington*, 145 F.4th. at 1032.
[117] *Id.* at 1029; *see also* Smith v. Turner, 48 U.S. 283 (1849); *see generally* The Kansas Indians, 72 U.S. 737 (1866) (background of similar precedent regarding state taxation on Native American tribal lands).

for dismantling tribal courts. Alternatively, the claim that Native Americans should not possess American citizenship is even more ridiculous. The Indian Citizenship Act of 1924 explicitly granted citizenship to all Native Americans born within the United States. No executive order, including Trump's, can overrule that statute. Even if one were to entertain the outdated reasoning of *Elk v. Wilkins*, the Indian Citizenship Act and nearly a century of subsequent legal reinforcement render such arguments obsolete. Notably, the Trump administration and its DOJ have yet to cite a single statue or Supreme Court ruling post-1924 to support their position.[118]

In essence, the attempt to revoke Native sovereignty and citizenship is strategically incoherent. Reversing centuries of treaty obligations, legislation, and judicial precedent would require dismantling an extensive legal framework embedded within the Constitution, federal statutes, and Supreme Court decisions. The legal foundation they seek to undermine is not simple, but a tangled knot pulled tight by hundreds of years of legal precedent. Ironically, by contesting tribal sovereignty and Native American citizenship in federal court, the DOJ itself is inadvertently affirming the existence of that very sovereignty—another contradiction. Moreover, the effort has wasted federal time, resources, and manpower. Rather than undermining tribal nations, this legal crusade underscores the strength and resilience of Native legal foundations, which continue to withstand the fiercest political assaults.

From a historical standpoint, claiming that North America's Indigenous people are not citizens reflects a continued expression of colonialism. Efforts to strip Native Americans of citizenship and sovereignty is a modern act of settler colonialism aimed at suppressing Native autonomy and erasing Native rights. Although legally hollow, these arguments are routinely

[118] Hailey Hill, *Coeur d'Alene Tribe Rejects Justice Department's Use of 1884 Case in Birthright Citizenship Debate*, KREM.com (Jan. 2025), KREM2 News, https://www.krem.com/article/news/politics/coeur-dalene-tribe-rejects-department-of-justice-use-1884-case-birthright-citizenship-debate/293-788ac04c-9793-4754-a7e0-e5a4f0ca79ab.

propagated by politicians across the country. Since the nation's founding, the federal government has failed to establish a consistent or respectful approach to Native American diplomacy. Over time, the federal government has shifted through eras of policy, which has built a legacy of confusion, betrayal, and broken promises. Even the Founding Fathers, who are often considered wise and principled leaders amongst the canon of American legal philosophers, shared ambiguous and contradictory views on Native sovereignty.[119] From one presidential administration to the next, Native American policy has been marked by disagreement and the outright reversal of commitments.

The federal government's inconsistency and disregard for precedent have profoundly damaged its relationship with Native nations. Time and time again, the inability and sometimes downright refusal to recognize Native tribes as sovereign equals has resulted in devastating consequences for Native tribes and their people. Federal policy has long resembled a pendulum, swinging between moments of limited support and outright hostility. Under the Trump administration, that pendulum has completely snapped. U.S. President Donald Trump's attempt to strip Native Americans of citizenship and dismantle tribal sovereignty is an unprecedented and a dangerous escalation of anti-Native sentiment, and his policies are openly hostile toward Native peoples. These abhorrent tactics are chillingly reminiscent of the racialized colonial norms of eighteenth and nineteenth century America. The Trump administration has attacked centuries of sharply contested legal recognition and the basic human dignity of Native communities. With constant risks to tribal governments and changes in Native American affairs, the federal government's inconsistency prevents tribes from fully utilizing their money, services,

[119] Monica Morales-Garcia & Melissa Harris-Perry, *Native American Roots in the U.S. Constitution*, The Takeaway (Apr. 2023), https://www.wnycstudios.org/podcasts/takeaway/segments/native-american-roots-us-constitution.

and sovereignty. Tribal governments build large cash reserves rather than investing in schools, healthcare, and law enforcement agencies due to their fears concerning national policy.[120]

VIII. The Future: Optimistic or Pessimistic?

With court battles intensifying and public dissent toward the executive order rising, the Trump administration has pursued new strategies to erode Native American sovereignty and citizenship. Among the most alarming is a proposed $911 million cut to tribal programs nationwide that targets essential services such as education, affordable housing, welfare programs, law enforcement, disaster relief, and even access to clean drinking water.[121] These cuts would devastate tribal infrastructure and deepen the already massive socioeconomic disparities between Native Americans and their non-Native counterparts. Right now, the administration appears to be preemptively enforcing its disputed birthright citizenship policy. Immigration and Customs Enforcement has increased its presence in and around Native communities, particularly within the Navajo Nation.[122] Tribal members are now being advised to carry passports, birth certificates, and other federally mandated documents to avoid potential detention. Reports of harassment and unlawful detainment by federal agents are rising, reportedly often without reasonable suspicion.[123] The growing federal pressure and looming legal uncertainty place Native Americans at significant risk. For the remainder of Trump's presidency, tribal nations face not only an existential threat to their sovereignty, but also to their very recognition as American citizens.

---

[120] Phil Gover et al., *Expanded Survey of Native Nations Pilot Advances Understanding of Tribal Public Finances*, Fed. Reserve Bank of Minneapolis (Sept. 2025), https://www.minneapolisfed.org/article/2025/expanded-survey-of-native-nations-pilot-advances-understanding-of-tribal-public-finances.
[121] Chez Oxendine, *Trump Budget Proposes Deep Cuts to Native American Programs*, Tribal Bus. News (May 2025), https://tribalbusinessnews.com/sections/policy-and-law/15123-trump-budget-proposes-deep-cuts-to-native-american-programs.
[122] Stephanie Cram, *Trump's Attempt to Overturn Birthright Citizenship Uses Century-Old Native American Case*, CBC News (Jan. 2025), https://www.cbc.ca/news/indigenous/trump-birthright-indigenous-citizenship-1.7444178.
[123] Andrew Hay, *Native Americans Say Tribal Members Harassed by Immigration Agents*, Reuters (Jan. 2025), https://www.reuters.com/world/us/native-americans-say-tribal-members-harassed-by-immigration-agents-2025-01-30/.

Meanwhile, in Oklahoma, Governor Kevin Stitt has continued his campaign against Native American tribes. By refusing to negotiate in good faith and actively attempting to block cooperation between tribal leaders and the state legislature, Stitt has drawn mounting criticism. His repeated pleas for the U.S. Supreme Court to overturn *McGirt v. Oklahoma* have been widely dismissed as acts of desperation. Earlier this year, Stitt suffered a pair of setbacks when the DOJ announced it would proceed with charges against two Oklahoma district attorneys who attempted to prosecute Native defendants in state courts for crimes committed in "Indian Country."[124] Despite pressure from both Stitt and President Trump to drop the charges, the DOJ has allowed the charges to move forward. These cases reaffirm that criminal jurisdiction over Native Americans in "Indian Country" rests with tribal or federal courts, not the state. Still, the DOJ's handling of the case also exposes the federal government's own inconsistencies. While the DOJ has defended Trump's executive order that undermines Native citizenship and legal sovereignty in a Seattle courtroom,[125] it is simultaneously upholding tribal sovereignty in Oklahoma. Ultimately, these contradictory legal actions leave tribes in a precarious limbo and uncertain as to whether federal support for their rights will endure or evaporate.

Nearing the end of his second and final term, Governor Kevin Stitt is running out of time to counter recent tribal victories. Yet uncertainty looms over what comes next. During his remaining months in office, Native American tribes fear that Stitt may feel emboldened to escalate his attacks on tribal governments without fear of political consequences. At the same time, the prospect of his successor raises new concerns. The next governor could prove to be even more hostile, deepening the conflict rather than mitigating it. For tribes across Oklahoma,

[124] United States v. Ballard, No. 24-0626, 2025 U.S. Dist. LEXIS 67510 (N.D. Okla. 2025); United States v. Iski, No. 24-0493, 2025 U.S. Dist. LEXIS 69388 (E.D. Okla 2025).
[125] Washington v. Trump, 765 F. Supp. 3d 1142 (W.D. Wash. 2025), *aff'd*, 145 F.4th 1013 (9th Cir. 2025).

especially the Five Tribes, this uncertainty and volatility is as troubling as Governor Stitt's ongoing antagonism.

Many tribes are also terrified of the largely conservative makeup of the U.S. Supreme Court. So far, the Court has not ruled favorably in several recent cases impacting tribal sovereignty and Native rights, such as *Castro-Huerta* and *Arizona v. Navajo Nation* (2023).[126] Amid such uncertainty, Justice Neil Gorsuch has been a glimmering bright spot in such a dark area. While staunchly conservative in most areas of law, Justice Gorsuch oftentimes joins the three liberal justices in support of Native American rights. In fact, Gorsuch has become a champion of Native American rights within the Court.[127] After graduating from law school, Gorsuch returned to his childhood home of Colorado and later served as a federal judge in the U.S. Court of Appeals for the Tenth Circuit.[128] His jurisdiction included many states with vast Native reservations, including New Mexico, Utah, and Oklahoma, which exposed him to complex legal questions surrounding tribal sovereignty and Native American law.[129] Gorsuch intensely devoted himself to gaining a deep understanding of the intricate legal history of Native American nations and their people.[130] Upon his appointment to the U.S. Supreme Court, Gorsuch brought a fresh and principled perspective to Native American affairs. Since that appointment, Justice Gorsuch has been a thorn in the side of those wishing to diminish tribal sovereignty and Native rights. He has remained a faithful ally to Native American tribes, consistently ruling in favor of Native liberties.[131] Offering a crucial voice for reason and balance, Gorsuch represents a

[126] *See* Arizona v. Navajo Nation, 599 U.S. 555 (2023).
[127] Desmond Mantle, *Tribal Sovereignty, Justice Gorsuch, and the Letter of the Law*, 77 Stan. L. Rev. Online 237 (2025).
[128] Memorandum from Richard Guest, Staff Attorney, Native American Rights Fund to Tribal Leaders and Tribal Attorneys, National Congress of American Indians (2017) (on file with the Native American Rights Fund).
[129] *See id.*
[130] Kelsey Vlamis, *Justice Neil Gorsuch's Background Primed Him to Break from the Other Conservatives on Native Law and Defend Tribal Sovereignty*, Bus. Insider (July 2022), https://www.businessinsider.com/why-neil-gorsuch-clashes-conservative-justices-native-law-tribal-sovereignty-2022-7.
[131] Mantle, *supra* note 126.

beacon of hope in an otherwise hostile legal landscape. Fortunately for Native Americans everywhere, Gorsuch has become a consistent and reliable ally amid the rising threats to their sovereignty and citizenship.[132]

To this day, many people remain confused and torn on the Supreme Court's ruling in *McGirt v. Oklahoma*. Despite federal rhetoric labeling the present day the "self-determination era," that promise has proven hollow.[133] Sovereignty is only honored when it aligns with federal interests, which is rare. Too often, innocent people are caught in the crossfire between tribal, federal, and state governments. The intricate relationship between Native nations and the United States has been forged through immense bloodshed, inhumane treatment, betrayal, and the steady erosion of sovereignty through legal maneuvering. Today, the war waged by the Trump administration and politicians such as Oklahoma Governor Kevin Stitt is not fought on battlefields, but in long, expensive, and litigious courtroom battles. Yet Native resolve has never wavered. After centuries of injustice, Native Americans, including myself, continue to demand the recognition, sovereignty, and guarantees long promised to us. Only time will tell whether those promises will be honored. In the end, the jailer who assaulted the Lighthorse police officer was arrested after tribal and state governments managed to cooperate.[134] While legal formality may have prevailed in this instance, the question remains: How much longer will it endure? For the Lighthorse Tribal Police Department, time is of the essence as both suspects and sovereignty risk vanishing into the thin, chaotic air.

[132] *Id.*
[133] U.S. Dep't Interior, Indian Aff's, *Self-Determination* (last accessed Dec. 2025), https://www.bia.gov/regional-offices/great-plains/self-determination.
[134] *Id.*; Lex Rodriguez, *Tribal Law Expert Explains Jurisdiction Confusion Between Muscogee Lighthorse Police And Okmulgee Co. Jailer*, News on 6 (Dec. 2023), https://www.newson6.com/story/6585024d22b56d2d528e0324/tribal-law-expert-explains-jurisdiction-confusion-between-muscogee-lighthorse-police-and-okmulgee-co-jailer.