PREFACE

Wendy L. Watson, Editor

The Emerald Amicus represents original research by University of North Texas undergraduate students. Each chose a petition involving a constitutional issue that was pending before the U.S. Supreme Court in January of 2018. Issues ranged from search and seizure to the death penalty to the Appointments Clause. While these cases served as a jumping off point, each student took a different approach to their topic. Some focused on history, others on policy, others stayed in a more traditionally legal framework.

All of them brought a unique voice and a wealth of hard work and creativity to the table.

Working as a team, they have created this volume of scholarship. They have done so with the support of the Department of Political Science and the Office of the Provost. In addition, they received extraordinary advice and support from Mr. Tyler Yates, without whom this project would have never come to fruition.
**TABLE OF CONTENTS**


Bennett, Laura,  *People vs. State*.

Bratek, Matthew,  *Will Mr. Palestine Please Take the Stand: Palestine as a Case Study for Anthropomorphic Statehood in International Law*.


Luquette, Anne M.,  *Lucia v. SEC: A Political Game That’s Just Begun*.

Nevarez, Victoria,  *Real Barriers of Entry: Analyzing the Resurgence of the Trespass Test*.


Wray, Cassidy,  *Challenges to the Modern American Death Penalty*.
INTRODUCTION

Every country in this world is organized under a specific form of government. The form of the government and how powerful the government is will vary from one country to another. Not only do the structure of the government and its construction and its power vary but that will also indicate the power of its constitution and how powerful the constitution will vary. In the United States, our governmental system is based on checks and balances. We have three different branches; the executive branch, the legislative branch and the judicial branch. Each branch is responsible for specific tasks, and all three branches are closely matched in power. For that reason, we have one of the most stable forms of government.

Our U.S. constitution is a codified constitution, which means that it’s a written, clear, single document that we can count its words. This is one of the most important reasons why we have a limited government and limited laws, because a limited government
is a constitutional government. The constitution helps set the fundamental structure of the political behavior, helps construct a clear political structure. It also helps provide a power-map, so we can locate where every power lies and how broad it is. Not only that, it also makes politics routinized to prevent major conflicts and force compromise.

Although we have a codified constitution. We still face challenges and we still have unclear constitutional issues in this country. When the framers formed the constitution, the most important thing in their minds was the prevention of tyranny, which they successfully prevented in our system, but this is on one hand. On the other hand, the framers formed and established the constitution on September 17th, 1787, which is from a very long time ago. This creates a big gap and lack of certainty in some of our current issues, and how they relate to the constitution. We have a lot of issues that are difficult to determine because they don’t exist in the constitution. For example: net neutrality, the right of internet privacy, and internet freedom of speech. Not only that, but who should be responsible in making these laws and how they should be applied. History:

The case of Berninger v. FCC was brought under the claim of the plaintiff that the FCC’s policies are violating the 1st amendment (freedom of speech). In this case, the focus is more on freedom of internet speech and whether it truly exists. But before discussing this, we must first know what the FCC’s power is in making policies and why they have such a power. To explore something like that, the history is very important and helpful. The Federal Communications Commission “FCC” regulates interstate and international communications by radio, television, wire, satellite, and cable in all 50 states, the District of Columbia and U.S. territories. As an independent U.S. government agency overseen by Congress, the Commission is the federal agency responsible for implementing and enforcing America’s communications law and regulations.

In 1934, President Franklin D. Roosevelt passed the communication act which changed the Federal Radio Commission with the Federal Communications Commission (FCC) to oversee all interstate and foreign communications. It was intended to streamline the regulatory process and expand affordable access to communication services. In 1972, congress passed the Federal Advisory Committee Act to ensure that advice by advisory committees is objective and accessible to the public. So, it’s clear that the FCC has
responsibilities and authority given by the federal government to regulate the internet or any other form of communication.

**The issue:**

The issue is very interesting and a very challenging constitutional question. Daniel Berninger is the founder of Voice Communication Exchange Committee (VCXC). He founded a new company to deliver voice services. On some websites, his voice services will provide people the opportunity to directly speak with other people from anywhere in the world. He wanted to provide high quality voice conversation between people anywhere in the world, as long as they’re on the same website or forum. He called the new service “Hello Digital”.

Title II of the 1934 Communications Act requires telecom companies to pay 20% of their revenue to the government to pay for universal broadband. This means that such a fee would fall onto Berninger’s “Hello digital” service. Additionally, Title II prohibits telecom providers of prioritizing any traffic. This means that Berninger’s service will not benefit from any “paid prioritization”, which he claims is needed for the quality of this service. For these reasons, Berninger is suing the FCC. His claim is that these rules will hurt his business.

He is also claiming that this is a violation of the first amendment. He claims that by hurting his new communication platform, the FCC is holding back new channels for free speech on the internet, which is the biggest communication network today. Therefore, in his view, this regulation of the internet is considered regulating of freedom of internet speech.

The last claim is that some agencies can rule or create regulations but in his case, he argues that the FCC is using more power that they were given and that should not be the case. His claim is that congress is the entity that should make the law not the FCC, and that the FCC overstepped its power.

*What is Net Neutrality?*
Net Neutrality is the principle that internet service providers “ISPs” should enable access to all content and applications regardless of the source, and without favoring or blocking particular products or websites. Favoritism under this concept also includes any “paid prioritization” such as the one sought by Berninger. This concept and principle has come under a lot of controversy since the internet has become such a popular commodity.

One of the very important distinctions that we have in this case is that the issue is not about social communication websites that we visit or use every day, such as Facebook, Twitter, Google, etc. The issue is focused more about the companies that actually deliver the internet. They’re known as Internet Service Provider (ISPs) - for example: Time Warner, Verizon, T-Mobile and AT&T. Since these companies are responsible for delivering the internet to the people, regulating them or setting the rules (by the FCC) has turned out to controversial and challenging. Under Title II of the 1934 Communications Act, The ISPs cannot provide for some websites faster internet access just because the website is paying them more. For example, if Facebook pays them more than Snapchat, then users would get faster or better internet access when using Facebook than Snapchat. And that’s what is prohibited under Title II.

The arguments and ramifications:

The issue in this case is very interesting because it affects multiple important concepts: the extent of internet regulation, internet neutrality, freedom of speech, and the free market. These concepts are explored as follows.

According to Daniel Berninger, his new service requires additional speed for better quality, and he was willing to pay the additional fee for that. However, due to Title II rules, he was not able nor allowed to achieve this. From his point of view, by preventing him from creating the new company he is claiming that the FCC is not allowing new communication technologies from advancing. Which leads into his claim of violating free speech. On the other hand, The FCC is claiming that all ISPs should treat all internet traffic equally. In their point of view, this helps prevent ISPs from interfering with free speech or expression on the internet by favoring or blocking certain platforms.
There’s also the issue of free market. Berninger claims that by classifying the internet under Title II, the FCC is putting unnecessary regulation on the internet. His argument is that these regulations hurt innovation and the free market by making it more difficult for new services to attract investors to a regulated market. On the FCC’s side, an unregulated internet gives advantages to larger companies to pay for better quality access to their services. According to the FCC, this will lead to less competition and will prevent smaller innovative companies from rising. Each side argues that the other’s position will prevent new ideas and technologies from advancing.

**Conclusion:**

It’s easy to see why such a case made it all the way to the Supreme Court. Both Berninger’s and the FCC’s claims have merit. The case itself is tricky as it has effects on many constitutional issues, and its ramifications can be broad. As with anything relating to internet regulation, we’re still discovering how to set laws and rules to govern it. Whether it’s the Supreme Court, Congress, or the Executive branch, all of them will need to study the effects of their laws and actions carefully as the internet is becoming more and more an essential part of our lives that many of us depend on.
Citation:

“Supreme Court Should Free the Internet from the FCC.” High Tech Forum, 3 Nov. 2017, hightechforum.org/supreme-court-should-free-the-internet-from-the-fcc/

Berninger V. Federal Communications Commission


“Supreme Court Should Free the Internet from the FCC.” High Tech Forum, 3 Nov. 2017, hightechforum.org/supreme-court-should-free-the-internet-from-the-fcc/.


Baltzell, George W. “Constitution of the United States - We the People.” Constitution for the United States - We the People, constitutionus.com/.

INTRODUCTION

The justice system is run by imperfect humans attempting to preserve the integrity of the Constitution by upholding its laws and values--especially that of due process. But what happens when errors become so numerous that it begins to be unclear as to what is an actual mistake and what is simply an erroneous oversight? These errors and oversights
are usually preventable, and what has failed to be recognized is that even “harmless” errors have the potential to adversely affect one’s due process.

In this paper, I explore the relationship between defendant and prosecutor in the hopes to better understand why these errors occur and what should be done to prevent them. I examine two cases: one where the error was resolved before sentencing and one where the error was not acknowledged until after a man’s life, liberty, and property were taken away. Although the justice system is designed in a way that favors defendant's, it is prosecutors who often have the upper hand.¹ This is not only due to their vast knowledge and understanding of the way America’s judicial system works, but also because of the unchecked power they wield.² I aim examine the various errors prosecutors make and the effect it has on defendants, their cases, and the justice system as a whole. In doing so, I hope to discover what keeps America’s prosecutors accountable in a sphere where it seems they have dominion.

**WHAT IS THE GOAL OF THE CRIMINAL JUSTICE SYSTEM?**

In a law review by Michael J. Fisher, he posits that the purpose and overall goal of America’s criminal justice system is to “provide for the effective enforcement of the criminal law through the detection, apprehension, conviction, and punishment of guilty persons.”³ Though Fisher’s goal is admirable and important, it will become meaningless if it is achieved through negligent or pernicious legality. Procedural justice plays the most crucial role, because if the processes and procedures are not applied equally and fairly to all, true democracy would fail to live up to its fundamental purpose.⁴

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⁴ “The government of the Union,...is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.” Chief Justice Marshall’s opinion in *McCulloch v. Maryland*, 17 U.S. 316, 404-5, (U.S. March 6, 1819).
WHAT IS DUE PROCESS?

Due process is the fortification put in place to protect those being assessed under the microscope of the law. Its goal is to ensure that persons accused are judged fairly by placing a check on those doing the judging. The due process clause of the 5th amendment restricts the federal government from infringing on its citizens’ rights similar to how the clause within the 14th amendment provides that same restraint on the states. Generally speaking, due process is the procedures that the various levels of government must abide by in order for any legal action against an accused person to be deemed constitutional. There are two types of due process that need to be understood: procedural and substantive.

Procedural due process requires that the government administer certain procedures to a person before their life, liberty, property—or any other right provided by the constitution—can be taken away. In 1976, the Supreme Court established a way to assess due process through the case of Mathews v. Eldridge. In creating what is commonly referred to as the Mathews Balancing Test, Supreme Court Justice Lewis F. Powell stated: “Due process is flexible and calls for such procedural protections as the particular situation demands. Accordingly, resolution of the issue whether the administrative procedures are constitutionally sufficient requires analysis of the governmental and private interests that are affected.”

The test stipulates three factors lower courts must adhere to when determining if someone has received their procedural due process, as stipulated in the Constitution. First, courts must assess the nature of the private interest—the individual’s constitutional right to life, liberty, and property—and how it will be affected once action is taken. Second, the procedure in question must be evaluated in order to assess whether the

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5 at least after the 5th amendment underwent incorporation in 1897 under Chicago, B. & Q. R. Co. v. Chicago (166 U.S. 226).
6 For example, being read Miranda rights or the right to a fair trial. Although the procedures due process requires are not explicitly listed, Judge Henry J. Friendly created a list of ten processes that could likely be considered as “due”. See Some Kind of Hearing by Henry J. Friendly. Retrieved from https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=5317&context=penn_law_review.
7 424 U.S. 319.
8 Id.
9 Id. at 332-5.
person has been erroneously deprived of their interest. Finally, the government’s interest in the situation must also be considered. Explaining the purpose behind the balancing test design, Brett V. Beaubien wrote:

The test is inherently designed to scrutinize governmental procedure, as courts are tasked with determining whether the competing interests of the individual and the government are in harmony with the protections required by the Constitution.

In short, the balancing test is a way for government and individuals to ensure that their respective interests are not being infringed upon in a way that would be deemed unconstitutional.

Contrastingly, substantive due process takes a closer look as to whether the government is being just, fair, and reasonable in contravening a citizen’s right(s). It provides two standards in which government action is questioned. The first standard is the Strict Scrutiny Standard and it focuses on the fundamental rights—whether a law enforced was necessary to achieve a compelling government interest or purpose. The second standard is Rational Basis (also known as Minimum Scrutiny Standard) and it covers other rights that are not recognized as constitutionally fundamental but still treated as essential to an individual. The rights to work, to marry, or to have children are just a few examples of rights individuals would consider essential, yet not expressly listed in the Constitution. Under this second standard, the responsibility lies with the individual challenging the law to prove that a specific law is not rationally related to a legitimate government interest.

**Types of Errors and Their Possible Effects**

Despite the justice system being constructed in an asymmetrical way, errors still occur, often frustrating the original intentions of its design. It is because of this design...
that “the government bears most of the risk of error in a criminal trial.” Mistakes, whether intentional or unintentional, affect both the government and the individual. William M. Landes, a professor of law, and Richard A. Posner, chief judge of the U.S. Court of Appeals Seventh Circuit said of prosecutorial errors:

The prosecutor’s incentive to induce or avoid errors at the trial that make it more likely that the defendant will be convicted depends on the sanctions the appellate court imposes on him if he commits an error. If the appellate court reverses a conviction when error occurs, a prosecutor will have a greater incentive both to refrain from committing intentional and deliberate errors and to invest resources in preventing inadvertent errors from occurring than if the court, invoking the harmless error rule, declines to reverse.

An example of a prosecutor intentionally erring would be if, during their closing argument, the prosecutor attempted to sway the jury by reminding them of the defendant’s refusal to testify, consequently implying the defendant’s guilt. A more pernicious example of intentional error would be a prosecutor concealing exculpatory evidence in order to ensure a win. Despite the latter example being the more conspicuous of the two, it can often take time (usually away from the defendant’s life) for intentional errors to come to light, making the situation far more damaging in the long-run. Because not only did it detract from the life of the wrongly accused person and their family, it also detracted from the justice system’s integrity and in turn, future victims of wrongful conviction.

Unintentional errors, on the other hand, are mistakes that are considered to be accidental; however, the costs and effects of both are weighty. Depending on the error and innocence (or guilt) of the defendant, errors can range from reputational losses and

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reduced earnings to wrongful convictions and inadvertent acquittals. The idea that an innocent person could go to prison or a criminal could walk free seems appalling, but it is not entirely inconceivable. An error could even potentially make a punishment too harsh or not harsh enough. It would be impossible to list the number of potential errors that could occur—intentionally or otherwise—and as a result, it is equally impossible to predict the scope of potential consequences that would likely ensue.

STATE V. STONE

In *State v. Stone*, an erroneous oversight caused what should have been an open-and-closed case to work its way up to becoming a petition for writ of certiorari before the Supreme Court. The State of Montana charged Joel Henrik Stone with committing partner or family member assault (referred to hereafter as PFMA) against a former girlfriend. In the State of Montana, the first two PFMA offenses are classified as misdemeanors with one year in jail, but the third offense is considered a felony with a minimum five-year-jail sentence. Everyone—the State, Stone’s counsel, and even the defendant himself—believed that Stone had been convicted of PFMA twice before, meaning that this charge would be his third, making it a felony. However, because of the persistent felony offender statute in Montana, Stone’s sentence could range anywhere from five to one hundred years in prison. Clearly, there were hefty consequences for Stone.

At his plea hearing, Stone pleaded guilty to a felony because, again, all parties believed this to be Stone’s 3rd PFMA conviction. When the court accepted Stone’s guilty plea they accepted it “as being voluntarily made with knowledgeable understanding and a waiver of [his] constitutional rights to a trial” with standard stipulations that he could not withdraw his plea later if he found himself unhappy with his sentence.  

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20 *Id.* at 694.
22 *Id.*
24 *Id.*
25 *Id.* at 695; emphasis added.
Before his official sentencing hearing, it was revealed that Stone did not, in reality, have two prior PFMA convictions, and Stone informed the court of this and argued that his sentence should align with that of a PFMA misdemeanor rather than that of a felony.\textsuperscript{26} It was Stone—not the State—that discovered this fact, despite the State having responsibility to understand what they are charging someone with.\textsuperscript{27} Because of this, the court agreed that the original guilty plea was not as knowledgeable as all parties had originally believed, and the judge allowed for everyone to return to their respective starting places.\textsuperscript{28} Stone was eventually sentenced to five years in jail.\textsuperscript{29}

**EXAMINING THE CASE**

This case illustrates the alarming speed and magnitude at which a person’s life, liberty, or property can be revoked. If the knowledge that Stone did not have two prior PFMA convictions had been readily available, it is unlikely that this case would have found itself as a petition before the Supreme Court. Stone would have, most likely, been convicted of PFMA assault in the misdemeanor range, meaning he would not have been subjected to persistent felony offender laws which generate a harsher sentence. Instead, Stone’s guilty plea would have been appropriately accepted with authentic knowledgeable understanding. There would have been no appeal and Stone would not been able to take the opportunity to lessen his punishment had there been no mistake to begin with. He would have been sentenced to one year in jail versus the five to one hundred possible years this error almost caused him to serve. It is no secret that Joel Henrik Stone is not an innocent; however, that being said, does such information allow room for careless mistakes? If the guilty are to be processed unfairly and unequally, what is to prevent the innocent from experiencing the same procedural injustices? Innocence and guilt set aside—how is the system that is designed to protect the innocent from being wrongly convicted going to shield them if said system’s integrity is not steadily upheld? A seemingly insignificant error has the power to wrongly sentence a person for life—this is not representative of the justice system America desires to depict.

\textsuperscript{26} Id. at 694.
\textsuperscript{27} Id.
\textsuperscript{28} Id. At 695.
\textsuperscript{29} Id.
The notion that one error could create a tragic ending raises some important questions about due process: who holds the State responsible for their erroneous actions? Do their small or large blunders bear any consequences?

The various objectives that underlie due process procedures, according to Michael J. Fisher, are: “maintenance of the adversarial and accusatorial systems, the assurance of respect for individual dignity, the minimization of erroneous convictions, the appearance of fairness, and the equal application of the law.”

Although the facts are not made clearer in his petition for writ of certiorari, it is safe to assume Stone’s criminal records were either improperly filed or simply not made available, making maintenance mismanaged. In doing so, respect for the not only the defendant’s dignity, but also the justice system’s dignity was damaged. A presumably petty mistake made by the State almost led to a wrongful conviction. This in no way appears as fair, nor as equal application of the law which again begs the question: who is held accountable here?

**BRIEF HISTORY OF ERRORS WITHIN THE COURTS**

In order to understand accountability within the court system, it is important to confront how far more malignant errors than those found in *State v. Stone*

31 have been handled—in fact, there are thousands of cases with errors that have impacted or shaped the way courts function today.

Originally, the United States’ justice system relied upon the *Exchequer Rule* to analyze errors made in court. The *Exchequer Rule* was adopted from English law and concerned itself primarily with the technical errors of even the most trivial of details, and because of this, many cases were declared as mistrials and allowed for reversal of convictions. *State v. Campbell* is one example of the courts’ extreme strictness with regard to error and is of one of the many cases that led to the eventual abandonment of the *Exchequer Rule* and the adoption of the harmless error statute. In *State v. Campbell*, a man who was accused of raping a woman, appealed the trial court’s conviction on the

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31 400 P.3d 692.
grounds that the word “the” was omitted in the phrase “against the peace and dignity of State”. 33 The trial court’s decision was reversed and the case was remanded. 34 With cases such as this, it is understandable as to why there was a vital need to reform the way errors were assessed and handled by the courts.

As numerous mistrials began to clog the court system and frequently reversed convictions allowed criminals to walk free, the Exchequer Rule seemed to be far more damaging to the justice system than beneficial. It was this kind of rationale that led Congress to pass the harmless error statute in 1919, which proclaims the following:

On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties. 35

In layman's terms, this statute essentially demands that any case appealed on the grounds of an error will be re-examined to see if the outcome would remain the same had the error not occurred initially. This was an attempt to preserve valid convictions and halt the ever-growing number of mistrials that materialized as a result of technical errors. If the error violates one’s substantial rights, the error is perceived to be harmful; however, if the outcome would have been the same with or without the error, the decision stands and the appeal is denied.

Despite the statute’s enactment in 1919, transformation truly began to take place when the Supreme Court granted certiorari to Kotteakos v. United States. 36 When a trial court chose to combine and convict several defendants cases involving unrelated conspiracies, the Supreme Court cracked down on the lower court’s ruling by expounding on harmless error:

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure

33 Id. at 709.
34 Id. at 715.
35 28 U.S. Code § 2111.
is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.37

By taking the opportunity to provide guidance to appellate courts, the Supreme Court was able to establish a list of considerations reviewing courts could contemplate when conducting a harmless error analysis. Reviewing courts were able to apply this logic to cases with error and if an error was of a constitutional sense, the case was reversed. Only cases with “errors falling short of constitutional import were susceptible to the harmless error rule.”38 It would be another twenty-one years before the Supreme Court revealed that constitutional errors could also be considered harmless.

In 1967, the Supreme Court granted certiorari to what would become a landmark case. In *Chapman v. California*,39 petitioner Chapman and a fellow co-defendant, were convicted by jury after a prosecutor made repetitive references to the fact that they chose not to testify, wherefore suggesting their guilt—something that was permissible by the California Constitution at the time.40 In the time between the trial and the petitioners’ appeal, the United States Supreme Court had decided on a case41 that would prohibit such a clause.42 In considering their eventual appeal, the California Supreme Court acquiesced to the point that they had infringed on the appellants’ 5th and 14th amendment rights, but argued that under the State’s harmless error provision, there was no “miscarriage of

37 Id. at 764-65
40 Id. at 19.
41 *Griffin v. California*, 380 US 609, (1965)
42 *Chapman* at 19.
In doing so, California upheld the petitioners’ convictions. Chapman, questioning the validity of this verdict, petitioned the Supreme Court asking if an error in violation of her constitutional rights could be considered harmless.

In answering this question, the Supreme Court acknowledged petitioners’ general desires that federal constitutional errors should be considered inherently harmful, but Justice Black was swift to renounce this sentiment. He stated, “…there may be some constitutional errors in which the setting of a particular case are so unimportant and insignificant that they may be…deemed harmless…” For an error to be considered harmless, it must be harmless “beyond all reasonable doubt.” The case was reversed and remanded, but this harmless error doctrine still affects decisions today.

Through Chapman, the Supreme Court was able to assert that constitutional errors can be harmless, yet when thought about, it seems to be somewhat of a paradox. How can a violation of a constitutional right ever be deemed as harmless? The following quote attempts to explain the justification for this practice, while also highlighting potential problems that stem from this belief:

When a court applies harmless error analysis in the constitutional context, that court is concluding that a constitutional right—a fundamental legal principle—was violated by the state. Yet it disregards the violation of that principle, at least sometimes. Likewise, a court applying harmless error doctrine is thereby acting particularistically; it is engaging in a fact-intensive, ad hoc, case-by-case approach....it is saying that notwithstanding the violation of a principle, the right result was attained.

If the government’s function is to protect the rights of its citizens—something which the Supreme Court has claimed—and then that same government passes legislation to excuse them from protecting these rights, what kind of government is that representative of?

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43 Id. At 18.
44 Id. at 20.
45 Id.
46 Id. at 21.
47 Id. at 22.
48 Id. at 24.
49 According to LexisNexis, this case has been cited by 25,496 cases.
delivering his *Chapman* opinion, Justice Hugo Black asserts that the Supreme Court must play the role of protector of its citizens:

> With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights. We have no hesitation in saying that the right of [the people] to not be punished for exercising their [constitutional rights] which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule.  

Justice Black recognized the danger in allowing states to create exceptions. In *Chapman*, the State of California was in the wrong when they chose to acknowledge their violation of their citizens’ rights while simultaneously pardoning themselves from that very responsibility.

However, since *Chapman*, courts have still found themselves struggling over the application of harmless error analyses. Much of the problem arises from the way in which harmless error is reviewed: speculatively. When a court reviews a case for harmless error, they are pressing a metaphorical rewind button. In order to stay objective, reviewing courts must become a sort of storyteller. They must craft a scenario in which an error did not occur—entirely opposite of reality—and predict the outcome. Then, according to *Chapman*, the court’s fictitious error-free scenario must be “beyond all reasonable doubt” harmless, and have had no adverse effect on the pseudo-verdict. As assistant Professor Sam Kamin put it so eloquently:

> ...the conclusions obtained can be no better than science fiction. We can argue about these conclusions—about whether a jury would have convicted the defendant without reference to the [error]—but the conclusions we come

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51 *Chapman* at 18.


53 *Chapman* at 24
to are no more satisfying than those we arrive at when arguing over the plot of a good novel.\textsuperscript{54}

In the end, harmless error analysis seems to be nothing more than speculation. In a courtroom of storytelling, no amount of objective analysis can erase the fact that there will \textit{always} be room for doubt.

\textbf{MISUSE OF HARMLESS ERROR STATUTE}

The creation of the harmless error statute was an attempt to preserve the integrity of the judicial system, but has it in reality undermined it? Steven H. Goldberg, a professor at the University of Arkansas at Little Rock School of Law, wrote of the abuse of harmless error within the court system:

\begin{quote}
At all levels of the criminal justice system, the harmless constitutional error rule dilutes the impact of most constitutional criminal procedure decisions of the last quarter century which preserve individual rights against contrary claims of necessity by the government. The rule allows an \textit{ad hoc}, after the fact, factual judgment by an appellate court which makes it difficult for an individual to attack it and diminishes the level of protection provided by specific constitutional provisions without affording any opportunity to argue the issue's merits.\textsuperscript{55}
\end{quote}

Goldberg is criticizing the harmless error statute for essentially providing the courts a ‘get-out-of-jail-free’ card for when an error is made on their behalf--they are the ones who review the mistake, after all. The system, and its myriad of errors, is protected rather than the individual whose life, liberty, and property are at stake.

In \textit{State v. Stone}, when the judge acknowledged the mutual mistake and allowed for the State and the defendant to return back to the starting line, this could easily be conveyed as the court abusing their power in relation to a mistake they allowed to happen. It was as if the error never happened. Once Stone announced his discovery of


missing prior PFMA convictions, the only benefit he received was a correct conviction instead of a wrong one—something he was always entitled to. When it is the State’s responsibility to know this kind of information and they fail to provide simple evidence relevant to a case, why did the defendant not receive some sort of leniency regarding his punishment? It is not that the defendant deserved to get off easy—not at least in respect to his innocence—but preserving the integrity of the justice system is far more important that prosecuting individuals to the fullest extent of the law. It is the principles that underlie the responsibility and accountability aspect of the relationship between the prosecutor and the defendant. The prosecutor is to ensure that justice is served, but when the defendant is the one doing their job, where is the reward? It is no wonder such a basic case ended up as petition for writ of certiorari.

**STATE EX REL. GRIFFIN V. DENNEY**

Reginald Griffin was an inmate at Moberly Training Center for Men in Missouri when he was accused of killing another inmate, James Bausley, over a television set on July 12, 1983. Two prisoners, Wyvonne Mozee and Paul Curtis, alleged to have both independently witnessed Griffin stab Bausley in the chest using a handmade knife with a cloth wrapped around the end. In addition, they stated that fellow inmates Doyle Franks and Arbary Jackson aided Griffin in the murder. Despite the investigation into Bausley’s death having been completed by September of 1983, no charges were actually filed until four years later.

During trial, the State relied heavily on the testimonies of Curtis and Mozee, the two jailhouse informants who alleged to have witnessed the murder firsthand. Mozee, however, died six months prior to trial, but his preliminary testimony was read to the jury. Three inmate witnesses, Eddie Johnson, David Steele, and Leonard Rogers, testified at the trial in favor of Griffin. In fact, according to Rogers, the man that Curtis

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56 *State ex rel. Griffin v. Denney*, 347 S.W.3d 73, (Mo. August 2, 2011); hereafter cited as ‘*State ex rel. Griffin’*.
58 Id.
59 *State v. Griffin*, 848 S.W.2d 464, 466, (Mo. February 23, 1993); hereafter cited as ‘*State v. Griffin’*.
61 *State ex rel. Griffin* at 76.
and Mozee claimed to have seen running away from the scene of the crime was not Griffin.\(^62\) It was clear the jury did not believe them. By 1988, although there was no physical evidence linking him to the crime, Reginald Griffin was found guilty and convicted of capital murder and was subsequently sentenced to death based on the testimonies of two incarcerated witnesses.\(^63\)

In 1993, the Supreme Court of Missouri reviewed Griffin’s conviction of capital murder and death sentence, as well as the circuit court’s decision to deny him his motion to vacate conviction.\(^64\) Griffin sought to overturn his conviction on six grounds and all were affirmed with exception to one. Griffin claimed that the circuit court erred when they allowed the admission of several pieces of evidence—namely the criminal history record of a different Reginald Griffin.\(^65\) The Missouri Supreme Court found that it is “likely that the admission of an incorrect criminal record of a defendant in the penalty phase of a capital crime is not harmless error.”\(^66\) Recognizing that the State’s error played a significant role in sentencing Griffin to death, the Missouri Supreme Court reversed and remanded his sentence, but his conviction was upheld. His new punishment was no longer death, but rather life in prison without possibility of parole.\(^67\)

Griffin lost a lot of appeals over the years and things seemed dim for him until 2005 when he filed a petition for a writ of habeas corpus alleging that the State has concealed exculpatory evidence.\(^68\) The circuit court denied his petition so he then petitioned the Missouri Supreme Court for habeas relief.\(^69\) The State did not disclose to Griffin that minutes after the murder, prison guards caught inmate Jeffrey Smith leaving the scene with a sharpened screwdriver.\(^70\) In fact, Smith was eventually prosecuted by the State for unlawful possession of a weapon.\(^71\) Things truly came to light in 2007 when the State’s star witness, Paul Curtis, recanted his trial testimony, admitting that he was not present at the time of the murder because he was in a mechanics class—something prison

\(^{62}\) Id. at 78.
\(^{63}\) Id. at 79.
\(^{64}\) State v. Griffin at 472.
\(^{65}\) Id. at 471.
\(^{66}\) Id., emphasis added.
\(^{67}\) State ex rel. Griffin at 76.
\(^{68}\) Id.
\(^{69}\) Id.
\(^{70}\) Id. at 75.
\(^{71}\) Id.
records corroborated.\textsuperscript{72} Curtis admitted he had only testified against Griffin because the State offered to help him with parole and would pay his first month’s rent when he was released.\textsuperscript{73} Adding more fuel to the fire, Franks (the inmate that “aided” Griffin in the murder) actually confessed to killing Bausley back in 1989 (when Griffin made his first appeal for post-conviction relief), and testified that it was Smith, \textit{not} Griffin, who was with him at the scene of the crime.\textsuperscript{74}

The Supreme Court of Missouri deemed that Griffin had met his burden of proving he was entitled to habeas corpus relief and his conviction was vacated.\textsuperscript{75} He was officially exonerated in 2013—twenty-five years after having been wrongly convicted for capital murder.

\textbf{EXAMINING THE CASE}

This case seems to have been doomed before it even began. It took four years from the time the investigation was completed to the time charges were filed for trial proceedings to actually begin. In fact, in his motion to vacate conviction in 1993, Griffin claimed that his 5\textsuperscript{th} and 6\textsuperscript{th} amendment rights were violated because of the delay and that some of his key witnesses has passed away in the time between investigation and trial.\textsuperscript{76} It turns out that the prosecuting attorney for Randolph County, Missouri was running his office by himself, dealing with a prison uprising that left one guard dead, and was struggling with personal problems regarding his child’s health. All of these issues caused the prosecutor to eventually hand over Griffin’s case in 1986 where formal charges were filed the next year.\textsuperscript{77} Justice Duane Benton of the Missouri Supreme Court said of the delay:

\begin{quote}
While the reasons for the delay are understandable and one can feel compassion for the hardships faced by the local prosecutor, the state has the \textit{responsibility} to the victim, to society, and to the defendants not to allow such delays to happen. Justice is not served by a delay of this type,
\end{quote}

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\textsuperscript{72} \textit{Id.} at 79.
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{Id.} at 75.
\textsuperscript{76} \textit{State v. Griffin} at 467.
\textsuperscript{77} \textit{State v. Franks} at 547.
and such delays should not be tolerated by those responsible for assuring the swift prosecution of criminals in our society.\footnote{State v. Griffin at 466.} However, despite softly admonishing the State for not ensuring that justice was swiftly served, the Missouri Supreme Court did not find Griffin’s claims to meet the standard necessary for dismissal of charges in this instance. They went on further to say of Griffin’s lost witnesses: “the evidence that would have been offered would either have merely been cumulative or was flatly contradicted by the physical evidence.”\footnote{State v. Griffin at 467.} It feels problematic that the Supreme Court of Missouri would make such a statement given that “there was no physical evidence demonstrating that Griffin ever…participated in Bausley’s murder.”\footnote{State ex rel. Griffin at 76.} Prison investigators found a handmade knife with a cloth wrapped around the end near the gym, however, confirmatory testing established that there was no human blood nor proteins present.\footnote{Id.} This was the only “physical” evidence the State had and all of this information was relayed to the jury at court during trial—so, again, how would Griffin’s lost witnesses have “contradicted” the non-existent physical evidence the State had against him?

It was not lost on Chief Justice Teitelman as to just how destructive the State’s errors came to be. In delivering the opinion that led to Griffin’s eventual exoneration, Missouri Supreme Court Chief Justice Teitelman said:

…the prosecutor is “the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”\footnote{State ex rel. at 78; quoting Berger v. United States, 295 U.S. 78, 88, (U.S. April 13, 1935).}

By not disclosing to Griffin that Smith was found fleeing the scene of the crime holding a weapon, the State was in direct violation of \textit{Brady v. Maryland}.\footnote{373 U.S. 83, 87 (U.S. May 13, 1963). The United States Supreme Court held that concealment of exculpatory evidence favorable to the defendant, whether intentionally or inadvertently, is a violation of one’s due process if said evidence is essential to either guilt or punishment.} The State, in this case, cannot claim that they did not know about Smith’s apprehension, because it was the State...
that ended up successfully convicting Smith for unlawful possession of a weapon. Had this information been appropriately disclosed, it would have significantly bolstered the testimonies and credit of the three witnesses that defended Griffin, consequently impeaching Curtis and Mozee’s trial claims. Which brings up another issue—why were Curtis and Mozee’s testimonies considered to be more credible than the three witnesses that testified in favor of Griffin? All of them were inmates. All of them were guilty of different crimes, yet Curtis and Mozee were somehow deemed to be more trustworthy, notwithstanding the late fact their accounts were wholly and utterly fabricated. The fact that prison records even showed that Curtis could not have been at the scene of crime reeks of sloppy negligence.

Moreover, how does the State manage to successfully sentence a person to death using the criminal history record of the wrong person? This information came to light and Griffin’s sentence (not conviction) was finally reversed and remanded in 1993—five years after being placed on death row. For five years, Reginald Griffin faced certain execution for a crime he knew he did not commit. I do not have to continue to pick out the myriad of mistakes that were made by the State in this case—they speak for themselves. Chief Justice Teitelman left no room for (more) error when he explicated the State’s role:

In this case, the murder occurred in prison, and the prison guards were acting on the government's behalf. Therefore, the State had a duty to discover and disclose any material evidence known to the prison guards—even if the prosecutor is unaware of evidence uncovered by investigators, the State is under a duty to disclose that evidence because the investigators are part of the prosecution team…

It was the State that was expected to conduct a thorough investigation into James Bausley’s murder, as well as disclose any and all information surrounding it. How prison guards confiscating a sharpened screwdriver from a fleeing inmate goes unnoticed is

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84 *State ex rel. Griffin* at 78.
85 *Id.* at 79.
86 *Id.*
87 *State v. Griffin* at 464.
88 *State ex rel. Griffin* at 78; emphasis added.
baffling. Especially when he was caught only minutes after the stabbing. But somehow these particulars seemed irrelevant enough to the State that they chose not to disclose them, despite the fact that revealing them would have raised serious doubts about Griffin’s participation in the murder.

THE STATE’S ACCOUNTABILITY

Although it is clear how the people are held accountable for their errors, what is less clear is how the State is held accountable for their erroneous contributions during this process. When a person makes a mistake worthy of charging, they are sent to court; however, when the State commits an error, it somewhat feels as though it is overlooked.

In an report written by the Center for Prosecutor Integrity, a collective of nine studies “examined prosecutorial misconduct conducted at the both state and national levels from 1963 – 2013. Of the 3,625 instances of misconduct identified, these studies reveal that public sanctions are imposed in only 63 cases--less than 2% of the time.” In a country chock-full of checks and balances, laws and legislation, vetoes and voters it is perplexing how a public official is trusted with such laden responsibilities-- like taking away someone’s life or liberty--with no one to act as a steward over them. Law Professor Stephanos Bibas emphasized this when he said that “no government official in America has as much unreviewable power and discretion as the prosecutor”

So, how are these prosecutors being held accountable? In an opinion delivered by Supreme Court Justice Clarence Thomas wrote concerning the various consequences that attorneys of any jurisdiction may face: “[a]n attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment” Prosecutors are subject to these same standards and consequences just as

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89 Id.
other attorneys are, yet consequences are imposed “less than 2% of the time.”

Judges and fellow attorneys have an ethical obligation to report instances of prosecutorial misconduct per the American Bar Association’s various conduct manuals. However, both are hesitant to come forward. Why is that? According law professor H. Mitchell Caldwell, it is “because prosecutors wield significant power and influence over local criminal justice communities, both judges and defense counsel are often concerned about the possible backlash that a report of misconduct might generate.”

In the same opinion referenced earlier written by Justice Thomas, the Supreme Court (5-4) overturned a district court’s decision to award a man fourteen million dollars for his fourteen years served on death row. This man’s execution was only weeks away when knowledge that the prosecutor had concealed exculpatory evidence came to light.

In denying the award, the Supreme Court held that “a district attorney’s office may not be held liable for failure to train its prosecutors based on a single Brady violation.” A man’s constitutional right to due process was denied when the prosecutor committed a Brady violation in concealing exculpatory evidence, he consequently endured fourteen years on death row, was finally acquitted because of the violation and still, the prosecutor remains immune. A man was held accountable for a mistake he never made while the prosecutor that ensured his suffering walked away seemingly scot-free.

Despite the standards and ethical obligations that have been set, prosecutors do not seem to face any real consequences for their damaging actions. When errors occur, whether intentional or unintentional, it seems to be the people who pay the consequences. Who holds state and federal prosecutors accountable? It looks as though no one does. In fact, “the Supreme Court is of the view that a prosecutor's charging and plea bargaining

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97 Connick v. Thompson, 563 U.S. 51, 55-56.
98 Connick v. Thompson, 563 U.S. 51; emphasis added.
decisions are largely off limits from judicial review. How is this problem to be fixed? Perhaps actual enforcement of sanctions for professional misconduct would be a good start. Or creating incentives to reduce the number of unintentional prosecutorial errors. Or even placing an effective check or review on their power could even create a shift in the way the prosecution functions.

CONCLUSION

Although it may seem like this essay was designed to discourage people’s faith in the justice system, it was actually written to address a relevant problem that can be easily fixed once it is acknowledged. Further, this paper may seem to paint the prosecutor as the enemy but in reality, it is often ourselves—the average, uninformed American citizen—that ends up being that very enemy. We, the people, are obligated to know our rights, but it is our lack of effort to understand these rights and their various effects that becomes our undoing. If citizens are more educated about their own due process, they will be at less of a disadvantage and more capable of protecting themselves from prosecutorial error.

Our founding fathers put time and effort in creating a system that would function justly—and most of the time it does because of checks and balances that have been placed on the various powers and agencies within our governments. Although America’s justice system is inspired because of these processes, it remains imperfect. Death row exoneree, John Thompson, spoke of the injustice he encountered when prosecutors withheld the evidence that ultimately acquitted him:

This isn’t about bad men, though they were most assuredly bad men...It’s about a system that is void of integrity. Mistakes can happen. But if you don’t do anything to stop them from happening again, you can’t keep calling them mistakes.

Problems will continue to arise, but it is up to the people to empower themselves with knowledge concerning the justice system. In doing so, it will be the people who keep

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prosecutors, judges, and other authorities accountable. Without this action, the guilty will continue to be assessed and punished unjustly, and it will be the innocent who end up suffering.
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INTRODUCTION

The modern definition of statehood, while still relatively ambiguous, originates from the Peace of Westphalia in 1648. What ultimately came from the treaties signed during the Peace of Westphalia was the birth of modern ideology surrounding sovereignty.\(^1\) However, as time has passed, the definition has faced numerous obstacles

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such as borders and cultures and, ultimately the norms of international relations have evolved. One such obstacle that has stood the test of time has been the question of Palestinian statehood. Scholars from all corners of the globe have failed to reach a consensus on the legality of a Palestinian state, as the literature surrounding sovereignty and the definition of statehood has continued to evolve.

An exemplification of this quandary is seen in the case *Sokolow et al. v. Palestine Liberation Organization et al.* This case faces two critical issues that will be examined in this article: 1.) *Is Palestine a State?* and; 2.) *How can a State be sued in a domestic court?* This article aims to examine the social theory behind statehood in international law, using the *Sokolow et al.* case as a foundational question, and then applying it to domestic law and due process. First, a historical analysis of statehood will be provided, which will then give way to an examination of how “statehood” interacts with domestic law. The question of Palestinian identity, central to *Sokolow et al.*, will provide the pretext to examine “Anthropomorphic Statehood” and if such a notion could hold as an evolving norm within International Law, and introspectively, Domestic Law and Due Process.

**EXAMINATION OF STATEHOOD**

An integral part of understanding the rudimentary questions surrounding the Sokolow case is through a firm grasp of the contemporary definitions of a sovereign state. Since the Peace of Westphalia, many theories of statehood have emerged, but the Montevideo Convention, convened in 1933 in Montevideo, Uruguay, codified the Declarative Theory of Sovereignty to be the norm in international law. According to the Declarative Theory of Statehood, there are four main components to the criteria of statehood: 1) definitive territory; 2) permanent populace; 3) an established government, and 4) a capacity to enter into relations with other states.²

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While the Montevideo Convention’s ratification was limited to 16 states all located in the Americas, the Convention codified existing legal norms and was a reiteration of customary international law that applies to all nation states.³

However, this rudimentary definition of statehood does not satisfy all contemporary challenges, as seen in the prominent example of Palestinian statehood. Palestine does control a definitive territory within the West Bank and the Gaza Strip. In addition, Palestine has a permanent populace, an established government through the Palestinian Authority, and has a capacity to enter into relations with other states as demonstrated by its official relations with and recognition by 136 UN member states.⁴ Nonetheless, there are significant caveats to these metrics as it pertains to the case of Palestine, and a myriad of both internal and external political issues further complicates the future of a Palestinian state.

PALESTINIAN STATEHOOD

As previously discussed, the first critical piece to understanding the legal implications of the Sokolow case is understanding the quandary of specifically Palestinian statehood. In our modern geopolitical society, while customary international law points towards the criteria set forth by declarative theory, the social metric for state sovereignty is that of UN membership status. This is something that the Palestinian state has struggled to obtain for a variety of reasons. Even though Palestine is recognized by 136 of the UN’s members as a sovereign state, Palestine only holds a special status within the UN as a UN Observer State.⁵ While superficial examination of the case of Palestine may form a strong argument in favor of Palestinian statehood, closer scrutiny is vital. In order to truly understand the struggles behind Palestinian statehood, it is crucial to

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subsequently analyze the struggles behind full UN membership that are specific to Palestine.

1. De facto and De jure Identity

One issue with modern definitions of statehood, as it relates to the Palestinian question, is that of de facto and de jure identity. De facto state sovereignty means that a state exists in law, while De jure state sovereignty means that the state exists in reality. The issue at hand with Palestine is that while the state exists in a de jure nature as defined by the Declarative Theory of Statehood, Palestine struggles to exist in a de facto sense. The territory that Palestine holds with relative authority is in reality under the de facto control of the state of Israel.

2. Government

Another obstacle to recognition that a sovereign state of Palestine faces is that of providing a relatively unified government. In an article published for Foreign Policy, Steven J. Rosen provides a look into the fractured government, or rather governments, which preside over the Palestinian territories. While Palestine is recognized by many to include both the territories in the Gaza Strip and the West Bank, each of these territories effectively has different governments. The Sunni fundamentalist organization “Hamas” controls a sphere of influence over Gaza Strip, while “Fatah” remains the dominant faction within the West Bank.6

The two factions effectively act as two separate governments of what is supposed to be a unified Palestinian state. While there have been some reconciliation attempts through signed agreements and dialog, the two groups remain effectively at odds with each other over the fate of the Palestinian state.7 This poses a major obstacle to the recognition of Palestine as a state because, with a divided populace and government, the legitimacy of a bid to UN membership is severely damaged.

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The other piece of this complicated puzzle is the existence of the Palestine Liberation Organization (PLO). The PLO is an organization that was founded in the 1960’s to liberate Palestine by using armed violence and militias.\(^8\) While Fatah and Hamas internally fought for power, the PLO became the dominant international face of Palestinian determination, and is recognized by over 100 states as the "sole legitimate representative of the Palestinian people."\(^9\) This includes the fact that Palestine’s observer status at the United Nations General Assembly is actually bestowed upon the PLO, as they are the representative of the Palestinian people, according to UN Resolution 3237.

3. **Definitive Territory**

As previously mentioned, Palestine does control two definitive territories, the Gaza Strip and the West Bank. However, the difficulty with using this as a metric for UN membership in the case of Palestine is that the borders in which the Palestinian state is encapsulated are not rigidly defined. In addition, it is crucially important to note the Israeli settlements that have severely impacted the Palestinians’ ability to secure its own “borders,” especially in the West Bank.\(^10\) As the borders of the Palestinian state are continuously compromised by what can be considered Israeli aggression, the likelihood of statehood under the UN Charter becomes complicated. According to Chapter 7, Article 39 of the UN Charter, the UN Security Council must decide measures to be taken in situations where there exists a “threat to the peace, breach of the peace, or act of aggression…” (Ch. 7, Art. 39, UN Charter). This means that the creation of a Palestinian state would more than likely need to arise from a comprehensive peace agreement between the Palestinians, the Israelis, and numerous other foreign entities.

For these various reasons, it becomes apparent that there are many obstacles in the way of Palestine becoming a fully functioning member of the United Nations. While Palestine has the social and rhetorical support of statehood by many states and

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organizations within the international community, the aforementioned concerns provide the basis for why Palestine is not considered a full-fledged state by the UN. While I would argue that Palestine possesses the necessary qualifications for statehood, there are factors that prevent this assertion being transformed from opinion to fact. Due to the aggression and subsequent socio-economic blockade of Palestine by the state of Israel\textsuperscript{11}, coupled with the internal inefficiency of the Palestinian government, the push for Palestinian statehood does not possess the momentum necessary to launch itself into statehood. Despite the historical claims to the land and sovereignty, the current geopolitical climate has the cards stacked against the people of Palestine.

However, Palestine is peculiar in the fact that through its UN Observer status, it enjoys some aspects of statehood within international relations, even with those states with which Palestine does not have an amicable relationship (i.e. The United States). This is apparent when considering the Sokolow et al. case and its overturning by the Second Circuit and its subsequent appeal dismissal by the Supreme Court. In the final consideration at the federal district court level, the case was decided in favor of the plaintiff and the Palestinian Authority was found to be a legitimate state that was not immune to civil suits due to the circumstances. However, the appeals court later decided in favor of the PLO and PA, citing that Palestine was not a sovereign state.\textsuperscript{12} The grey areas that exist in both the political and legal definitions of Palestinian statehood will further complicate the case analysis.

This all effectively gives way to two questions:

Q1: How is a “state” treated when being sued in Court?
Q2: How does this apply to Palestine in the Sokolow case?

ANTHROPOMORPHIC STATEHOOD

When we think of “people” we often think of living beings, human beings. However, there are many things that we give anthropomorphic, simply stated “people-


like”, qualities. For example, we often give our pets humanistic qualities, and many children’s shows and movies include animals that talk, sing, drive cars and even have jobs. However, one of the most prominent examples of anthropomorphism, specifically centered around the nature of US law, is the anthropomorphizing of corporations. The US Supreme Court has ruled, on numerous occasions, that corporations are afforded the same rights as an individual. For example, in the case *Citizens United v. The Federal Election Commission*, the court ruled that corporations have the right to spend money in candidate elections.\(^\text{13}\) Corporations, as an entity, are afforded the same constitutional rights as an individual, and in court are often referred to in an anthropomorphic manner. The same anthropomorphic qualities are included in international relations theories and are applied to states.

Early thinkers such as Thomas Hobbes and Baruch Spinoza gave us human analogies for the state, and Samuel von Pufendorf (1632-1694) gave the state “intellect” coupled with anthropomorphic vocabularies that made it a separate “being” from the sovereign.\(^\text{14}\) Taking influence from the work of Pufendorf, Christian Wolff (1679-1754) added to the doctrine of the fundamental rights of states through his proposal that states do indeed have individual rights.\(^\text{15}\) Emer de Vattel (1714-1767) subsequently took the ideas of Pufendorf and transposed them into international legal thought, perpetuating the idea that the state was a legal individual that possessed intellect.\(^\text{16}\)

While antiquated theories within international relations pointed towards the suggestion that states be treated as actors with people-like qualities, more recent scholarly works, such as those by Alexander Wendt, have solidified such accounts of state actors in the modern era. In his publication of *Social Theory of International Politics*, Wendt describes the state as “real actors to which we can legitimately attribute anthropomorphic


qualities like desires, beliefs, and intentionality.”¹⁷ In this case, Wendt assumes that the state as an “actor” and “person” are synonymous.¹⁸ Alexander Faizullaev demonstrates that this anthropomorphic identity given to states is most apparent in the journalism industry, as exemplified by the following headlines:


Thusly, it becomes apparent that in many ways, states are treated as “persons.” The most fascinating way that this comes to light is in the legal sense when sovereign states are plaintiffs in court.

DOMESTIC LEGAL APPLICATIONS OF STATEHOOD

As mentioned, a crucial aspect of the Sokolow et al. case is how sovereign states are treated under United States law, and how they are characterized in domestic court

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proceedings. The Foreign Sovereign Immunities Act, passed in 1976 by Congress, provides the basis for the limitations of sovereign states being sued in U.S. courts.\textsuperscript{19} Under FSIA, U.S. Code § 1603\textsuperscript{20}, a "'foreign state' is defined as an "agency or instrumentality of a foreign state" meeting three qualifications, one of which is "a separate legal person, corporate or otherwise…” (Figure 1.1). This, in turn, demonstrates that a state is considered a “separate legal person” under domestic law.

In order to bring a suit against a state that fits the aforementioned definition, a plaintiff must overcome the blanket immunity that the FSIA affords foreign states and their governments. The significant obstacle that a domestic plaintiff must overcome in order to file suit against a foreign state is demonstrating to the court that whatever harm that was inflicted was the direct result of tortious behavior, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.”\textsuperscript{21}

**ANALYSIS OF CASE LAW**

Using the above definition of a state, and how they can be sued in domestic courts, many subsequent acts of Congress and court cases have arisen. One of the legal actions taken that is most pertinent to the case of Palestinian statehood was the passing of the Justice Against Sponsors of Terrorism Act (JASTA)\textsuperscript{22} in September of 2016. The act amends the Foreign Sovereign Immunities Act and the Anti-Terrorism and Effective Death Penalty Act in regards to civil claims against a foreign state for injuries, death, or damages from an act of international terrorism. Before the passage of this act, US citizens were only permitted to file suit against a foreign state, on the basis of terrorism-related damages, if said state was designated a state sponsor of terrorism by the US Department of State. Despite being vetoed by President Barack Obama, the veto was overridden by

\textsuperscript{21} 28 U.S. Code § 1605A - Terrorism exception to the jurisdictional immunity of a foreign state
\textsuperscript{22} U.S.Cong., Senate Judiciary. (n.d.). Justice Against Sponsors of Terrorism Act (JASTA) (J. Cornyn, Author) [Cong. 114-222 from 114th Cong.].
both the Senate and the House of Representatives, and JASTA officially became law on September 28, 2016.\(^{23}\)

This case, and the cases that came before it, demonstrates the historical context for the issues surrounding suing “states” in domestic courts, and what essentially is the definition of a state according to US laws and customs. In addition, the definitions provide evidence that the anthropomorphic characteristics of states have survived the test of time and have permeated the domestic policies of the United States. *(Below are further examples of US court cases that have wrangled with the idea of suing a sovereign state in US courts)*

- **Dole Food Co. v. Patrickson, 538 U.S. 468 (2003)** - established that in order for a government-owned corporation to qualify as a Foreign State under the FSIA, a majority of its shares or other ownership interest are owned by a foreign state or political subdivision.
- **The Schooner Exchange v. M’Faddon, 11 U.S. 116 (1812)** - the Supreme Court concluded that a plaintiff cannot sue a foreign sovereign claiming ownership to a warship which had taken refuge in Philadelphia.
- **Republic of Austria v. Altmann, 541 U.S. 677 (2004)** – held that FSIA applies retroactively. As a consequence of Altmann, for lawsuits filed after the enactment of the FSIA (1976), FSIA standards of immunity and its exceptions apply, even where the conduct that took place prior to enactment of the FSIA.
- **The Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989)** - the Supreme Court held that the FSIA provides the “sole basis for obtaining jurisdiction over a foreign state”. In that case, a Liberian-owned oil tanker which was traveling outside of the “war zones” designated by the United Kingdom and Argentina during the Falklands War in 1982 was struck by an air to surface rocket fired by an Argentine jet. The shipping company sued Argentina in federal court claiming that Argentina’s actions violated the Alien Tort Statute 28 U.S.C. § 1350 and general admiralty law. Because the Court found that the FSIA provided the exclusive means of suing the foreign sovereign, the Court determined that the plaintiffs were not permitted to bring suit under the Alien Tort Statute or general admiralty law.

**SOKOLOW CASE**

Upon comprehensive examination of case law as it pertains to “states” being sued in domestic courts, and using the information gathered from the analysis of Palestinian statehood, an examination of the *Sokolow et al.* case is now both necessary and feasible. In this case, a group of US nationals brought a civil suit against the Palestine Liberation

Organization. The plaintiffs, in this case, were either injured in terrorist attacks perpetrated by “Palestine”, or relatives of those killed in these attacks. Utilizing the justifications under the Antiterrorism Act of 1991 and later JASTA, the group sued and demanded approximately $655.5 million in damages.24 The case was tried in the Manhattan federal district court in January and February of 2015. In the end, the PLO was found liable and ordered to pay the specified amount to the victims. However, on August 31st, 2016, the case was brought to Second US Circuit Court of Appeals in Manhattan, where the court dismissed the case, citing concerns over the lack of US jurisdiction abroad on civil cases. 25

The profoundly interesting fact from this decision was that the PLO itself argued that it was immune to suits under the Anti-Terrorism Act because it is not a state. While this may appear hypocritical for the PLO to take such a stance, the argument works because of US foreign policy and its attitudes towards Palestine. The US, officially, does not recognize Palestine, the PLO or the Palestinian National Authority as a state. This fact was solidified by the precedent set forth by a similar case, Safra v. Palestinian Authority.26 In this case, the Palestinian Authority was able to argue that because they are not a state under US definitions, they lack personal jurisdiction through their due process rights.

CONCLUSION

The case of Palestinian statehood has provided an effective example of the prolonged usage of anthropomorphic terminology in international relations, international law, and domestic law. First, the historical analysis of statehood demonstrates that many grey areas have existed surrounding the definition of the state and remain influential on contemporary standards as well. While the international community has attempted to codify the definition of the sovereign state on numerous occasions, present-day challenges prove detrimental to the cohesiveness of these attempts. An extraordinary

24 See (1)
example of these challenges is the manner in which sovereign states are treated under international law, and more significantly, domestic US law. Palestine offers a unique perspective into these challenges, as the numerous legal and geopolitical challenges that face the Palestinians prevent the multilateral agreement over the creation of a sovereign Palestinian state and complicate how the entity is treated in US law.

Much of the influence over the challenges to Palestinian statehood has come from Israel, and more importantly, the United States. As demonstrated, the domestic US law and its treatment of the sovereign state has recently evolved in an interesting manner. Because of the anthropomorphic tendencies of domestic law, sovereign states are treated as independent persons, which complicates how they are approached in civil proceedings. US lawmakers have attempted to provide both clarification and protection of sovereign state rights in domestic courts, but the remaining grey areas are highlighted by the case of Palestine. While the political propensity of the US government has seemed to evolve the precedent that the lack of Palestinian statehood recognition immunizes it from civil suits under the Antiterrorism Act, FSIA, and JASTA, clear gaps in both law and policy remain.

While the challenges to Palestinian statehood remain clear and convincing, I would argue that political evolution is the viable “medicine” for the Palestinian existential crisis. Aside from the grey areas, the legal norms of international law and the historical contexts argue in favor of Palestinian statehood. The clear obstruction to this argument resides in the complex geopolitical rift that exists between the Palestinians, Israel, the Arab world and the west. While the in-depth political analysis of this would be an appropriate topic for further research, the analysis completed here would argue in favor of reconciliation and an adherence to established international legal norms.

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28 U.S. Code § 1605A - Terrorism exception to the jurisdictional immunity of a foreign state


Court Throws Out $655.5 Million Terrorism Verdict Against Palestinian Groups, B. Weiser, Aug. 31, 2016, The New York Times


U.S.Cong., Senate Judiciary. (n.d.). Justice Against Sponsors of Terrorism Act (JASTA) (J. Cornyn, Author) [Cong. 114-222 from 114th Cong.].

UNGA 66th session, 11th plenary meeting (21 September 2011) UN Doc A/66/PV.11, at 23.
INTRODUCTION

Like so many minority groups in the United States, transgender individuals have faced an ongoing and contentious battle for civil rights and equal protection under federal and state law.\(^1\) While caselaw expanding transgender rights has made unprecedented positive developments over the last decade, whether or not federal non-discrimination statutes like Title VII of the Civil Rights Act of 1964 and Title IX of the Educational

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Amendments protect transgender individuals from sex-based discrimination remains uncertain, as disputes over the rights of transgender Americans continue to be actively litigated. In recent years, state legislatures across the country have taken extended steps to further restrict the rights of transgender Americans with the introduction and passage of several bills hostile to transgender rights. These bathroom bills, legislation that seeks to restrict access to public restroom, changing room, and other sex-segregated facilities based on a definition of gender dependent on the sex assigned to an individual at birth, infringe upon the ability of transgender Americans to utilize the public accommodations consistent with their gender identity, and pose a serious threat to the well-being and health of transgender individuals. The introduction of bathroom restrictions into public schools is especially troubling, as young transgender students are particularly vulnerable and already face significant barriers to educational success. This paper seeks to analyze current federal and state caselaw concerning transgender rights under Title VII, Title IX, and constitutional law, and the emerging trend of public bathroom and accommodations restrictions in educational and other public environments.

TERMINOLOGY AND HISTORICAL BACKGROUND

Due to the nature of this paper, I find it necessary to further define the terminology used surrounding issues of gender identity and discrimination against transgender individuals. According to the National Center for Transgender Equality, ‘transgender’ is a broad term that is used to describe individuals whose gender identity is different from the gender they were biologically born as. Gender identity is defined as a

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3 Title IX of the Educational Amendments. 20 USCA. Sec. 168, Title IX. §§ 1681–1688. 1972.
person’s internal knowledge of their gender, and the gender they personally identify as, while gender expression is the gender that a person outwardly expresses.\(^8\) An individual’s gender identity and gender expression do not always align, and large gaps between a person’s gender identity and the gender they are socially regarded as has been documented by medical professionals as leading to incredible emotional and psychological distress.\(^9\) For transgender individuals this is defined as Gender Dysphoria, a state in which a person experiences considerable psychological duress because his or her gender identity does not match their biological sex or outward gender expression.\(^10\) Transgender individuals may seek to transition from the gender they were born as to the gender they internally identify as in order to remedy this dysphoria, often choosing to transition either socially, physically, or both, from male-to-female, or female-to-male.\(^11\) Historically, the majority of transgender individuals in the United States and abroad have lacked access to comprehensive gender-affirmative healthcare, including gender-affirmative reassignment surgeries and hormone therapy, as these medical procedures either were unaffordable for the majority of transgender individuals and not widely available, or were yet to exist.\(^12\) Although gender-affirmative healthcare continues to be inaccessible for many, scientific studies continue to purport that gender-affirmative treatment and care can have significant implications for the well-being of transgender individuals.\(^13\)

Perhaps an even greater barrier to success and well-being, transgender individuals and other members of the LGBT (lesbian, gay, bisexual, and transgender) community have historically faced intense discrimination, bigotry, and criminalization in many instances. For gay individuals, homophobic sodomy laws existed as a part of many state’s criminal code until as recently as 2003 with the U.S. Supreme Court’s decision in

\(^8\) Id.
\(^9\) Claire M. Peterson et al. *Suicidality, Self-Harm, and Body Dissatisfaction in Transgender Adolescents and Emerging Adults with Gender Dysphoria*. Suicide Life Threat Behav, 47: 475-482. (2017).
\(^10\) Id.
\(^12\) Id.
Lawrence v. Texas, and same-sex marriage remained out of reach for gay, lesbian, and bisexual individuals in many states and jurisdictions until the decision of the court on Obergefell v. Hodges in 2015.14,15 Internationally, LGBT individuals still face the prospect of criminal punishment, including imprisonment and potentially the death penalty in many countries for their sexual orientation or gender identity.16 While gay and lesbian individuals have faced a horrific and ongoing battle for human rights, for many transgender individuals this battle for legal rights and social acceptance remains in its infancy. Attempts to document the history and experiences of transgender individuals in the United States are often unfortunately difficult and fruitless, as threats of violence and discrimination have historically discouraged many transgender individuals from outing themselves in their communities.17 In past centuries, American popular culture and society has often lacked the terminology and cultural competency to document the rich lives and histories of transgender individuals in a meaningful way. Medical professionals in the United States first began to recognize transgender and gender non-conforming individuals in the mid-to-late nineteenth century and began in many cases to label their behavior as pathological.18 The diagnosis of “transsexualism” first appeared in the third edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III), the diagnostic handbook used by mental health professionals around the world, and the manual continued to portray transgender individuals and gender non-conformity as some form of psychiatric disorder up until 2013.19 To date, one of the first known modern transgender individuals to write openly about the subject of gender non-conformity and the experience of transitioning before 1950 was Michael Dillon, a British physician who documented his experiences taking testosterone for the purpose of transitioning from

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18 Id.
female-to-male, and undergoing gender reassignment surgeries in his book *Self: A Study in Ethics and Endocrinology*. The infamous Stonewall riots of New York City in 1969 involved gay liberation and transgender activists Sylvia Rivera and Marsha P. Johnson, who helped ignite the riots and protests against the New York City Police Department’s anti-LGBT sentiments and targeted raids and police brutality against LGBT New Yorkers. While transgender Americans have struggled to simply survive violence and not be labeled pathological, social and legal victories in the battle for transgender rights have been few and far between in the United States. In many ways European countries have served as a better model for LGBT equality, as Sweden in 1972 became the first country in the world to explicitly legalize gender reassignment, paving the way for Swedish citizens to legally change the gender listed on their birth certificate and other government documents.

Today, transgender and non-cisgender individuals living in the United States, that is, individuals who do not identify with the gender they were biologically born as, remain in a precarious position in relation to the law. While being transgender is not explicitly criminalized under U.S. federal or state criminal code, existing as transgender is still not socially accepted or sanctioned in many communities across the United States, exposing transgender Americans to ostracization, social rejection, and potential victimization and hate crimes. Furthermore, as federal and state protections for transgender individuals remain in their infancy, transgender individuals who have been victimized because of their gender identity are often left with limited avenues for recourse.

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CASELAW

Unfortunately, like so many minority groups in the United States, transgender individuals have faced a difficult, seemingly endless road to attaining civil rights and equal protection under state and federal law in the United States. Caselaw concerning transgender rights remains in its infancy, and LGBT law has only recently emerged as a subdivision of civil rights law with any widespread prominence or notoriety amongst the general public. The lengthy legal and social battle for transgender rights has largely remained under the radar until recent years with the emergence of several notable transgender celebrities in the public sphere increasing visibility for transgender issues, and the introduction and passage of several state “bathroom bills”; bills proposed by several state legislatures that seek to regulate public restroom and changing room usage and, in many cases, are thinly veiled attempts to prevent transgender individuals from using the bathroom facilities that align with their gender identity. Many of the most influential cases involving transgender rights have been adjudicated over the last decade, and much of the federal caselaw in existence concerning transgender rights involves labor and employment law and wrongful termination suits, with legal victories in the struggle for transgender rights having been achieved as recently as March, 2018 with the appellate decision in *EEOC v. R.G. & G.R. Harris Funeral Homes*. In this particular case, Thomas Rost, the owner and proprietor of R.G. & G.R. Harris Funeral Homes, terminated the employment of one of his employees, Aimee Stephens, after she informed Rost that she was transgender and intended to transition from male-to-female. Stephens

26 D’Lane Compton & Tristan Bridges, #Callmecaitlyn and contemporary trans* visibility. Contexts, 15, 84, (February 2002).
30 Id.
filed a complaint with the Equal Employment Opportunity Commission (EEOC), the federal agency that enforces civil rights laws and investigates workplace and hiring discrimination, alleging that she had been wrongfully terminated as a result of sex discrimination. Following an investigation, the EEOC brought suit against the funeral home, charging the business with violating Title VII of the Civil Rights Act of 1964 by terminating Stephen’s employment on the basis of her status as transgender. The case originally appeared before the U.S. District Court for the Eastern District of Michigan in 2016, with the original district court judge ruling in favor of the defendant, as it invoked the Religious Freedom Restoration Act as a part of its defense, arguing that Rost had been within his religious rights to terminate Stephen’s employment. Upon appeal, however, the Sixth Circuit Court of Appeals reversed the lower court’s decision, establishing an overwhelmingly positive outcome for transgender individuals seeking recourse for wrongful termination on the basis of their status as transgender. Furthermore, the recognition of transgender rights as being protected by Title VII by the Equal Employment Opportunity Commission, a federal agency that plays a fundamental role in protecting the rights of minority groups in the workplace, is a monumental step forward for transgender rights, and provides substantial precedent to bolster future suits involving wrongful termination or workplace discrimination against transgender individuals.

Unfortunately, of course not every case has produced such positive outcomes for its transgender plaintiff, and the personal costs of enduring a lengthy trial and appeals process take a toll on the lives of the transgender individuals involved in the litigation. In 1984, the Seventh Circuit Court of Appeals denied the Title VII sex discrimination claim of a transgender woman in *Ulane V. Eastern Airlines Inc.*, narrowly interpreting “sex” discrimination as being discrimination against women and denying the transgender plaintiff’s womanhood. Several years prior in 1976, the New Jersey Supreme Court

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34 Id.

35 *Ulane V. Eastern Airlines*, 742 F.2d 1081 (7th Cir. III. August 29, 1984).
denied the appeal of a transgender plaintiff, Paula Grossman, in another Title VII sex discrimination suit involving the wrongful termination of Ms. Grossman’s position as a teacher after she underwent gender reassignment surgery and disclosed her status as transgender.\textsuperscript{36} \textit{Barnes v. City of Cincinnati} and \textit{Smith v. City of Salem} are both wrongful termination cases similar to \textit{EEOC v. R.G. & G.R. Harris Funeral Homes} involving local government and municipal employees who lost their careers in public service because of their status as transgender.\textsuperscript{37,38} In \textit{Barnes v. City of Cincinnati}, the Plaintiff, Philecia Barnes, had worked for the Cincinnati Police Department for over seventeen years as a dedicated officer before seeking a promotion within the department to the role of sergeant in July, 1998.\textsuperscript{39} Despite passing the promotional examination to become a sergeant, Barnes was ultimately denied the promotion on the grounds that several senior staff members believed her status as transgender indicated that she was unfit to lead.\textsuperscript{40} Barnes ultimately brought suit against the City of Cincinnati alleging that her failure to promote was due to illegal sex discrimination based on her status as transgender and failure to conform to traditional gender roles, violating Title VII and the Equal Protection Clause of the Constitution, with the U.S. District Court for the Southern District of Ohio and the Sixth Circuit Court of Appeals ruling in her favor.\textsuperscript{41} Despite this positive outcome in terms of establishing transgender rights, the personal costs to Barnes cannot be overstated, with the dispute ultimately ending her illustrious career with the police department and ending any hopes she may have had of continuing her career in law enforcement and retiring from the department with a pension.

Legal disputes involving transgender students have become more common in recent years, as public debates over transgender restroom restrictions have gained increasing prominence, and school districts across the country have either struggled or refused to change district policies to better accommodate transgender students. \textit{Dodds v.}

\textsuperscript{37} \textit{Barnes v. City of Cincinnati}, 401 F.3d 729 (6th Cir. Ohio March 22, 2005).
\textsuperscript{38} \textit{Smith v. City of Salem}, 378 F.3d 566 (6th Cir. Ohio August 5, 2004).
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
United States Dep't of Education took the battle over transgender rights all the way to the top, naming the U.S. Department of Education and then Secretary of Education John King among its defendants.\textsuperscript{42} This particularly distressing case centered around third-party plaintiff Jane Doe, an eleven-year old minor and special needs transgender student, who was barred from using girl's restroom and changing room facilities while attending school at Highland Local School District in Akron, Ohio.\textsuperscript{43} Doe's parents filed complaints with the Office of Civil Rights under the Department of Education, which found that Highland School District had impermissibly discriminated against Doe on the basis of her sex, violating Title IX of the Educational Amendments of 1972.\textsuperscript{44} The original Office of Civil Rights complaint included disturbing allegations of harassment that the 5th grader had suffered at the hands of school staff members, alleging that "staff members subjected Jane to harassment, including by referring to her as a boy and failing to use female pronouns when referring to her, and that the School District failed to respond appropriately when staff members were informed of student harassment toward Jane".\textsuperscript{45}

William Dodds, superintendent of Highland Local School District, along with the Highland Board of Education then filed suit against the Department of Education and Doe, seeking a preliminary injunction to allow the district to avoid complying with the Department of Education's demands that it remedy its discriminatory treatment of Doe.\textsuperscript{46} The U.S. District Court for the Southern District of Ohio originally heard arguments for the case and denied the school district's injunction, ordering Highland Local School District to treat Doe as the girl that she is, and comply with the Department of Education's Title IX standards.\textsuperscript{47} Upon appeal, the Sixth Circuit Court upheld the ruling, finding that plaintiff Doe stood to suffer irreparable harm if prohibited from using the girl's restroom, and that public interest weighed heavily in favor of protecting Doe's constitutional and civil rights, stating that:

Highland's exclusion of Doe from the girls' restrooms has already had substantial and immediate adverse effects on

\textsuperscript{42} Dodds v. United States Dep't of Educ., 845 F.3d 217 (6th Cir. Ohio December 15, 2016).
\textsuperscript{43} Id.
\textsuperscript{44} Title IX of the Educational Amendments. 20 USCA. Sec. 168, Title IX. §§ 1681–1688. 1972.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
the daily life and well-being of an eleven-year-old child (i.e. multiple suicide attempts prior to entry of the injunction). These are not distant or speculative injuries—staying the injunction would disrupt the significant improvement in Doe's health and well-being that has resulted from the injunction, further confuse a young girl with special needs who would no longer be allowed to use the girls' restroom, and subject her to further irreparable harm;

acknowledging the negative mental and physical health implications of preventing transgender children and teenagers from using the facilities that align with their gender identity in a landmark way.48

For the majority of transgender students, the right to use the public restroom and changing room facilities of one’s choosing remains up in the air, as the U.S. Supreme Court has stayed or dismissed several cases similar to Dodds v. United States Dep't of Educ.49 In 2015, the U.S. District Court for the Western District of Pennsylvania ruled against a transgender college student who had filed suit against the University of Pittsburgh for denying him access to men’s restroom and locker room facilities, dismissing the case and the student’s Title IX complaints.50 That same year, the state of Texas collectively with a group of fourteen other plaintiffs brought suit against the U.S. Department of Education and Department of Justice, challenging the department’s policy under the Obama administration of interpreting Title VII and Title IX as requiring that transgender students be afforded equal access to restroom and locker room facilities which match the student’s gender identity rather than their biological sex.51 The suit, State of Texas et al. v. United States of America et al., arose after the Departments of Education and Justice released a joint memo to school districts across the country with guidance on how to best uphold and protect the Title IX rights of transgender students, instructing schools to “allow students to use the bathrooms, locker rooms and showers of

48 Id.
the student’s choosing, or risk losing Title IX-linked funding". On August 21, 2016 the U.S. District Court for the Fifth Circuit, after hearing arguments for the case, granted a preliminary injunction preventing the Departments of Education and Justice from enforcing these Title IX guidelines as they apply to transgender students, and preventing the departments from initiating any future investigations into Title IX violations involving transgender students in the plaintiff states as long as the injunction remained in place.

Particularly concerning are cases involving sexual violence, mistreatment, and violent hate crimes committed against transgender individuals, which have become all too common in the United States. In 1999, a Washington D.C. area transgender woman named Tyra Hunter died after being denied medical care by first responders and medical staff at DC General Hospital because of her status as transgender. Hunter’s death became a rallying cry for activist members of the LGBT community, and her mother went on to file a civil suit against the District of Columbia, the first responder involved, and DC General Hospital alleging their negligence in Hunter’s death, and was awarded a $1.75 million-dollar settlement in Hunter v. District of Columbia et al. In 2000, Schwenk v. Hartford established that the Gender Motivated Violence Act, a statute allowing the victims of gender motivated violence to seek additional civil recovery after their assault, applied to targeted violence against transgender persons. The plaintiff in the case, Crystal Schwenk, suffered repeated instances of targeted sexual harassment,

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57 Id.

58 Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. Wash. February 29, 2000).

abuse, and attempted rape at the hands of a prison guard while she was incarcerated at Washington State Penitentiary, and went on to bring suit against prison officials and her abuser. In 2017, a Mississippi man became the first person to be criminally prosecuted under the Hate Crimes Prevention Act for targeting a victim because of their gender identity, after he pled guilty to the murder of Mercedes Williamson, a 17-year-old transgender girl.

While this is in no way an exhaustive list of U.S. federal and state cases involving transgender plaintiffs and legal questions involving transgender rights, the last decade of U.S. legal history has seen an encouraging expansion of LGBT rights through the development of federal caselaw. While the courts have taken to expanding civil protections for transgender Americans, many state legislatures and members of Congress alike have taken the opposite approach, seeking to limit and discredit the need for transgender rights through the passage of legislation hostile to transgender Americans. State ‘bathroom bills’ and other pieces of legislation that would preempt standing anti-discrimination laws pose a credible threat to the well-being and livelihood of transgender Americans. Furthermore, the ambiguity of the language used in civil rights and anti-discrimination statutes at the federal level, like Title VII and Title IX, leave civil protections for transgender Americans up to interpretation by the courts in many instances, determining as to whether these statutes can be interpreted as protecting against discrimination on the basis of gender identity. The slow and steady march of

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60 Id.
social progress through the courts can often take decades to produce substantive policy change at the national level, with the tangible lives of transgender Americans suffering the costs in the meantime.

**TRANSGENDER RIGHTS AND BATHROOM BILLS**

In recent years, state legislatures across the country have taken extended steps to further restrict the rights of transgender Americans with the introduction and passage of several bills concerning the usage of public restroom and changing room facilities. These ‘bathroom bills’, proposed under the guise of promoting public safety, seek to restrict access to public restroom, changing room, and other sex-segregated facilities based on a definition of gender consistent with the sex assigned to an individual at birth or ‘biological sex’, thereby excluding many transgender people from using the public accommodations that best correspond with their gender identity.66 In the 2017 legislative session sixteen states, including Texas, Alabama, New York, Washington, and Wyoming, considered legislation of this kind, with fourteen states considering legislation that would specifically limit the rights of transgender students in public schools.67 In March 2016, the North Carolina state legislature became the first to pass one of these bills, pushing House Bill 2, the Public Facilities Privacy and Security Act, through the legislature during an extended special session.68 The law, which has since been repealed, mandated that in government owned buildings, individuals could only use the restroom or changing room facilities that corresponded with the sex listed on their birth certificate, and outlined penalties for noncompliance.69 Similar bills have been introduced and debated in other state legislatures but have since failed to garner enough support and traction to be signed into law. In 2017, members of the Texas legislature introduced multiple bathroom bills, the harshest of which, House Bill 1748, would have made it a Class A misdemeanor, punishable by up to one year in jail and a maximum fine of $4,000, for any person over

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67 Id.
69 Id.
the age of 12 years-old to use a public restroom facility that does not match the "gender established at the individual's birth or by the individual's chromosomes", and a felony for the operator of any public building to refuse to comply with the statute.70 Another bill introduced in the legislature during that session, Senate Bill 6, included a provision intended to nullify city and municipal ordinances in the state of Texas that extend anti-discrimination protections to transgender individuals concerning public restroom usage, retroactively walking back protections enacted in major urban areas like Houston and Dallas.71 In Texas especially, the state with the second largest transgender population in the nation behind California, the personal implications these bills could have in the lives of transgender Texans is staggering.72

Perhaps even more concerning, debates over these bathroom bills and the renewed transphobic sentiment behind them can have far-reaching negative consequences in the lives of the transgender Americans impacted by them. Communities witnessing public opposition to transgender rights from members of state and federal governing bodies have seen marked increases in harassment and violence towards transgender Americans, whether directly related or not.73 Compared to other segments of the population, transgender individuals are at a greater risk of experiencing violence, and according to the United States Department of Justice more than half of transgender Americans will experience sexual violence in their lifetime.74 Anti-transgender bathroom measures also pose a significant public health threat to transgender populations, as research conducted by the Fenway Institute and the Center for American Progress indicates that public accommodation discrimination is significantly associated with negative mental health

outcomes for transgender individuals, and encourages negative health behavior, such as postponing bathroom use and purposeful dehydration to avoid public restroom usage and potential public harassment. For transgender students, who already face significant barriers to accessing quality education, bathroom and changing room restrictions in the educational environment only add to the sense of victimization and persecution these students experience, encountering severe harassment and bullying at the hands of their peers in some cases. The Gay, Lesbian, and Straight Education Network (GLSEN), an independent organization dedicated to the advancement of LGBT student’s rights, publishes an annual National School Climate Survey, seeking to report on the experiences of LGBTQ youth in schools, the most recent of which found that almost three-quarters of the students surveyed (70.8%) had experienced being verbally harassed at school because of their sexual orientation or gender identity, and 15.5% of surveyed students reported being physically assaulted at school. GLSEN’s 2015 survey also reported on the consequences of such harassment, stating that students who experience higher levels of victimization in school were more likely to develop depression and reported lower levels of self-esteem compared to students who had not experienced victimization at school.

Title VII and Title IX

For transgender Americans federal nondiscrimination statutes, including Title VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments, are the primary legal avenues providing relief that can be interpreted as prohibiting discrimination against transgender individuals, and both statutes have been evoked by legal experts as invalidating discriminatory local and state bathroom restrictions. Title

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78 Id. at pages 48-49.
VII’s prohibition of employment discrimination on the basis of sex in particular has been established by the courts through decades of caselaw as protecting transgender individuals in the workplace. 80 Title VII sex-based discrimination suits involving transgender plaintiffs hinge on the court’s understanding of sex and gender identity as being linked, and a living interpretation of Title VII sex-based discrimination protections. 81 Representative Howard Smith, the original architect of the amendment that added “sex” among the protected classes listed in Title VII, originally opposed the bill and proposed the addition with the hopes that including protections for women would shake support for the Civil Rights Act and prevent its passage entirely. 82 When the act was signed into law it was commonly accepted that the word “sex” was intended to prohibit discrimination against women as a minority group entering the workforce, but the ambiguous language of the statute has allowed courts to assume an expansionist view, extending Title VII sex-based protections beyond that. 83 The actual language of the statute holds that

It shall be an unlawful employment practice for an employer … to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin

making no obvious mention of sexual orientation or gender identity as being factors protected against workplace discrimination. 84 Certainly federal courts in the past have adopted a stricter interpretation of Title VII, as the Seventh Circuit in *Ulane v. Eastern Airlines, Inc.* interpreted that the plain meaning of Title VII precluded protections for transgender individuals, stating that the statute did not prohibit discrimination against “a

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82 Shaun D. Twing & Timothy C. Williams, *Title VII's transgender trajectory: An analysis of whether transgender people are a protected class under the term "sex" and practical implications of inclusion*. Texas Journal on Civil Liberties & Civil Rights, 15(2), 173-203. (2010).

83 Id. at pages 174,175.

person born with a male body who believes himself to be female”.

It would not be until several decades later that the court would expand its understanding of sex-based discrimination to include sex stereotypes and gender non-conformity, and find that a plaintiff’s Title VII complaint need not rest upon the plaintiff’s original sex at birth. However, no court thus far has held that transgender employees have a right under Title VII to use the restroom facilities that best align with their gender identity while at work.

Title IX of the Educational Amendments of 1972 however has been directly cited by plaintiffs in several cases involving transgender students being denied appropriate bathroom and locker room access by school administrators as prohibiting such discriminatory practices. Title IX, the federal statute that prohibits sex-based discrimination in schools that receive federal funding, specifically holds that

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance

yet the courts have struggled over the past decade with the issue of whether sex-based protections under Title IX apply to transgender students and prohibit instances of discrimination involving sex-segregated bathroom facilities. The U.S. Department of Education under the guidance of the Obama administration began interpreting Title IX as mandating equal access to gender identity appropriate bathroom facilities for transgender students, but the federal policy gave rise to significant litigation and was struck down in court, and has since been rescinded under the current Secretary of Education, Betsy

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88 Title IX of the Educational Amendments. 20 USCA. Sec. 168, Title IX. §§ 1681–1688. 1972.
Despite these changes in federal policy, several courts have since found that
Title IX does indeed prohibit school policies that prevent transgender students from using
their preferred facilities, while the U.S. Supreme Court has either stayed or dismissed all
cases concerning the issue up to this point.\textsuperscript{91}

\textit{The Equal Protection Clause}

Transgender students and adults facing discriminatory bathroom policies may also
have constitutional claims for relief, as legal scholars have argued that the Equal
Protection Clause of the Fourteenth Amendment protects against intentional and arbitrary
discrimination, including transphobic and unnecessary bathroom policies.\textsuperscript{92} The clause,
which provides that “no state shall… deny to any person within its jurisdiction the equal
protection of the laws” (US Const., Amend. XIV sec. 1), has been cited in several cases
involving transgender rights, including \textit{M.A.B. v. Board of Education of Talbot County}
and \textit{Glenn v. Brumby}, in which the U.S. District Court for the District of Maryland and
the Eleventh Circuit Court of Appeals both held that Equal Protection claims of
discrimination against transgender individuals constitute sex-based claims and require
intermediate scrutiny.\textsuperscript{93} If discrimination against transgender individuals is sex
discrimination, as has also been established by lower courts in claims relating to Title VII
and Title IX, then heightened or intermediate scrutiny is required of the court, requiring
the bathroom law in question to pass the three-pronged test for heightened scrutiny, as it
must 1) advance an important governmental interest, 2) the intrusion of which into the
rights of transgender people must significantly further that interest, and 3) the intrusion

\textsuperscript{89} Logan Casey & Elisabeth Mann Levesque, \textit{LGBTQ students face discrimination while
\textsuperscript{90} The Dear Colleague Letter released by the U.S. Department of Education notifying school
districts of the rescinding of its policy on transgender students can be found here:
\url{https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf}.
\textsuperscript{91} \textit{M.A.B. v. Board of Education of Talbot County}, 286 F.Supp.3d 704 (D. Md. March 12, 2018)
\textsuperscript{92} U.S. Const. amend. XIV.
must be necessary to further that interest.\textsuperscript{94,95} In cases involving transgender bathroom policies it is difficult to imagine what compelling governmental interest could be advanced by the state in denying transgender citizens access to gender identity appropriate facilities. Several school districts have asserted that allowing transgender students to use gender identity appropriate bathroom and locker room facilities would violate the privacy rights of other students, as displayed in \textit{Grimm v. Gloucester Cty. Sc. Bd.}, and privacy and public safety concerns have also been cited by state legislators as the primary logic behind the introduction of several state bathroom bills.\textsuperscript{96} However, the courts have time and again found that the simple presence of transgender people in public restroom facilities does not constitute an invasion of privacy for cisgender individuals, nor are bathroom policies targeting transgender individuals resting on privacy concerns sufficiently persuasive enough to pass heightened scrutiny standards.\textsuperscript{97} Furthermore, other constitutional rights have been extended to transgender Americans by the courts in the past, as the Seventh Circuit determined that the Eighth Amendment requires that transgender inmates be provided with gender affirmative healthcare and treatment throughout the duration of their incarceration.\textsuperscript{98}

A federal case exemplar of the difficulties facing transgender students, and legal reasoning that can apply Title IX and the Equal Protection Clause in favor of transgender student’s rights, is \textit{Kenosha Unified Sch. Dist. No. 1 v. Whitaker}.\textsuperscript{99} Ashton Whitaker, the transgender plaintiff in the case, was just sixteen years-old when he first began experiencing institutionalized discrimination at the hands of school administrators at

\textsuperscript{94} Witt, 739 F. Supp. 2d at 1313.


\textsuperscript{97} See both Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker, 841 F.3d 730 (7th Cir. Wis. November 14, 2016), and M.A.B. v. Board of Education of Talbot County, 286 F.Supp.3d 704 (D. Md. March 12, 2018). Both school districts in question cite privacy concerns, which each court found lack merit.


\textsuperscript{99} Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker, 841 F.3d 730 (7th Cir. Wis. November 14, 2016).
Tremper High School in Wisconsin. Under the leadership of then district superintendent, Sue Savaglio-Jarvis, and the district’s board of education, Kenosha Unified School District began instituting a policy preventing transgender students from using the bathroom, locker room, and changing room facilities that aligned with their gender identity and began monitoring the bathroom usage of Whitaker and other transgender students in the district. In order to avoid the public embarrassment and potential harassment that could accompany using the school restroom facilities that did not align with his gender identity, Whitaker began to restrict his water intake while at school, causing him to suffer potentially serious physical health consequences, and began to suffer from increased stress and anxiety because of the policy’s impact on his transition and daily life. School administrators within the district went so far as to consider mandating transgender students wear identifying wristbands so their daily restroom usage could more easily be monitored by school staff members. Whitaker went on to file suit against the school district and superintendent Jarvis alleging that the district’s policies violated sex-based discrimination protections outlined in Title IX as well as the Equal Protection Clause of the Fourteenth Amendment, with the U.S. District Court for the Eastern District of Wisconsin ruling in Whitaker’s favor, as well as granting injunctive relief to allow Whitaker to use gender identity appropriate restroom facilities for the remainder of his time in school. Upon appeal, the Seventh Circuit upheld the lower court’s decision that Whitaker had sufficiently demonstrated a likelihood of success on the merits of his claims, stating that:

Ash can demonstrate a likelihood of success … because he has alleged that the School District has denied him access to the boy’s restroom because he is transgender. A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that

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100 Id.
102 Id. at pages 5,6.
103 Id. at page 8.
individual for his or her gender non-conformance, which in turn violates Title IX.

upholding the rights of transgender students in a fundamental way.\textsuperscript{105} The school district almost immediately submitted a writ of certiorari, appealing the decision to the U.S. Supreme Court, and received amicus briefs in support of their claims from religious rights organizations such as the Michigan Association of Christian Schools and the Foundation for Moral Law, making arguments such as “the idea that one’s sex can be changed is a myth”, and claims that the Seventh Circuit’s decision endangers the religious liberties of students.\textsuperscript{106,107} However, on March 5, 2018, the U.S. Supreme Court dismissed the case, and both parties privately reached settlement on the matter.\textsuperscript{108}

**CONCLUSION**

Whether or not transgender individuals are protected under Title VII, Title IX, and other federal non-discrimination statutes unfortunately remains a contentious issue in the United States, as cases disputing the rights of transgender Americans continue to be actively litigated in the courts. As recently as July, 2018, the U.S. District Court for the Northern District of Georgia ruled that Title VII sex-based protections do not extend to LGBT Americans facing workplace discrimination on the basis of their sexual orientation or gender identity, and the Eleventh Circuit Court of Appeals affirmed the lower court’s decision, running contrary to decades of caselaw and decisions made by the Sixth and Seventh Circuits.\textsuperscript{109} With conflicting rulings like these across jurisdictions, and the U.S. Supreme Court’s denial of several cases concerning transgender rights under Title IX and Title VII, federal non-discrimination and constitutional protections for transgender

\textsuperscript{105} Id. at page 24.
students and workers in America remain uncertain. However, the U.S. Supreme Court’s dismissal of *Kenosha v. Whitaker* and other cases may not be an entirely negative outcome, as the current court’s conservative ideological leaning may have produced a negative outcome for transgender rights.

While this paper is by no means a comprehensive examination of the social and legal difficulties facing transgender Americans today, the battle to ensure the equal protection of transgender individuals under Title VII and Title IX is crucial to the advancement of transgender rights. Moving forward, attentive legislative tracking by private LGBT interest groups and government accountability bodies is necessary as state legislatures across the nation continue to introduce restrictive bathroom bills, hostile to the mental and physical well-being of transgender Americans.\(^\text{110}\) Further research into a plurality of transgender issues, including into the treatment of transgender service members and veterans by the Veteran’s Affairs Administration, further investigation into the treatment of transgender inmates in the United States criminal justice and correctional system, and future insight into the treatment of transgender students in public schools is needed to holistically determine the state of transgender rights in America. Finally, recognition on the part of the U.S. Department of Education of the court’s decision in *Kenosha v. Whitaker, Grimm v. Gloucester Cty. Sch. Bd.* and other cases extending Title IX protections to transgender students, as well as substantive policy change at the state and federal level is needed to ensure the development of future protections for transgender Americans.

The Complexity of Effective Counsel

Victor Eduardo Huertas
Department(s) of Political Science and Philosophy

TABLE OF CONTENTS

INTRODUCTION

I. INTERPRETING THE SIXTH AMENDMENT
   A. Right to Counsel
   B. Implications within the Sixth Amendment
      1. Fifth and Sixth Amendment Overlap
      2. Petty Misdemeanors
      3. Interrogations without Counsel
   C. Effective Counsel

II. THE CURRENT APPLICATION OF THE SIXTH AMENDMENT
   A. Duties of an Attorney
   B. Public Defenders
      1. Public Defender Systems
      2. Fundamental Issue of Public Defenders

CONCLUSION
INTRODUCTION

On December 15th, 1791, the adoption of the sixth amendment was ratified by the senate. The sixth amendment has been deemed as “the right to counsel” which provides individuals a safeguard against prosecutors who know more about the law than they do.\(^1\) Ensuring a fair, speedy trial and the right to counsel is something the founders knew was necessary to ensure equal protection under the law.\(^2\) These changes added to the constitution in the form of amendments are to ensure protections from the government. These rights ultimately take the form of self-preservation, whether it be in the in the right to bear arms or the right to a trial. That is the inherent value of the sixth amendment, the right to self-preservation under prosecution of the government. Without a proper defense the federal government would be able to prosecute whomever they liked. This amendment ensures individuals are protected and not defenseless facing the charges brought against them. The right to an attorney is the clause of the sixth amendment that will be under review.

In its early days, the amendment was not what it is today, the right merely extended to the federal government and not applying it through the state. The right to counsel, as it is understood today, has not always been interpreted the same way throughout the years. Today, the courts must provide effective counsel to indigent defendants by both the state and federal government. Starting in 1926 in the case of \textit{Herbert v. Louisiana} the fourteenth amendment would hold the key into incorporating the sixth amendment into the states.\(^3\) “State action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice” this phrase would hold significant meaning in the case of \textit{Powell v. Alabama}.

While today it is expected for a person to have assigned effective counsel it was not always the case. Defendants would more than likely receive underqualified counsel such as with the 1932 case of \textit{Powell v Alabama}.\(^4\) This case laid out the foundation for what the sixth amendment is recognized for today. In \textit{Powell}, several black men were

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\(^1\) Cornell Law School \textit{U.S Constitution ‘Sixth amendment’}  
\(^2\) Id at 2  
\(^3\) SCOTUS \textit{HEBERT v. STATE OF LOUISIANA} No. 24 (1926)  
accused of raping two white women. The defendants did not have access to a qualified attorney during their trial, it was the equivalent to that of having no counsel. Subsequently, they were convicted. This case was brought forward to the Supreme Court under a sixth amendment claim. The Supreme Court then threw out the convictions and made it so that anybody facing capital punishment would have access to a skillful attorney.

"In a capital case, where the defendant is unable to employ counsel and is incapable of making his own defense adequately because of ignorance, feeblemindedness, illiteracy or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law, and that duty is not discharged by an assignment at such a time and under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."5 – Justice George Sutherland

I. INTERPRETING THE SIXTH AMENDMENT

It is the duty of the Supreme Court to understand and interpret the intent of each and every amendment. In the case of Powell v Alabama, the Supreme Court made the interpretation that the sixth amendment should ensure fair trials in capital punishment cases to ensure that it equal under due process of the law. Through the incorporation of the fourteenth amendment with the precedent set by Herbert, the states would now be obligated to provide counsel for capital cases. This idea of ensuring a fair trial is what makes Powell stand out, with the idea of the Fundamental Fairness test.6 Making this a landmark Supreme Court case and changing how capital cases would take place for decades to come. This case would ultimately set the framework for sixth amendment claims to come forward.

5 Id at 287
6 Sixth amendment center, Understanding Powell v. Alabama (2018)
However, inconsistencies would then arise through this new found ruling that have not yet been discussed in legal theory; in 1942, the sixth amendment was now under stricter scrutiny when a divided court ruled in *Betts v. Brady*.\(^7\) When the petitioner, *Betts*, was not allowed counsel after requesting from a state judge to have one appointed to him, he brought his claim forward. The court then drew the distinction between *Powell* and *Betts*, that because *Powell* was capital case and not a robbery case such as *Betts*, that the holding in *Powell* was no applicable here. The Supreme Court held that the ruling in *Powell* did not compel the states to give counsel to every single defendant. In *Betts* there is a robbery charge, thus court was consistent with the ruling in *Powell* and were not obligated to provide counsel.\(^8\) This ruling would allow judges to deny council to defendants but not interfere with them pursuing a counsel.\(^9\) In a 6-3 decision, the court ruled that the state did not have to provide a council, when it dealt with cases other than capital cases.\(^10\)

This ruling while having a good legal basis and not being inconsistent with previous cases it completely defies the purpose of having the sixth amendment safeguard, if the sixth amendment is applicable to capital cases it should be applicable in all criminal cases were the government is seeking a conviction. The safeguards put in place by the sixth amendment has been undermined and would continue to be this way for the next 21 years until the most important sixth amendment case was brought to the Supreme Court. This case clearly defines “the right to counsel” setting great precedent and overturning the horrible standard set by *Betts*. The case that would set the tone of the sixth amendment to current times is *Gideon v Wainwright* decided in 1963.

**A. The Right to Counsel**

After 21 years, the Supreme Court was now presented with *Gideon v Wainwright*, where yet again a defendant, who could not afford his own counsel, was denied by the state an attorney and forced to represent himself.\(^11\) He was found guilty. The Supreme Court was now presented with the case of *Gideon v Wainwright*, where yet again a defendant, who could not afford his own counsel, was denied by the state an attorney and forced to represent himself. The court then drew the distinction between *Powell* and *Betts*, that because *Powell* was capital case and not a robbery case such as *Betts*, that the holding in *Powell* was no applicable here. The Supreme Court held that the ruling in *Powell* did not compel the states to give counsel to every single defendant. In *Betts* there is a robbery charge, thus court was consistent with the ruling in *Powell* and were not obligated to provide counsel. This ruling would allow judges to deny counsel to defendants but not interfere with them pursuing a counsel. In a 6-3 decision, the court ruled that the state did not have to provide a council, when it dealt with cases other than capital cases.

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\(^7\) Justia U.S Case Law, V.316 *Betts v. Brady*, 316 U.S. 455 (1942)
\(^8\) Id at 464
\(^9\) Id at 466
\(^10\) Id at 470
Court found themselves in a dilemma because they understood that, at the heart of the sixth amendment, it was for people who could not afford counsel and for individuals who were being prosecuted by the government.

“Since the Sixth Amendment does not distinguish on its face between capital and non-capital cases there is no reasoning to read that distinction into it and limit Powell v. Alabama to capital cases.”

Justice Clark

In ruling this way, the court would be forced to overturn the decision found in Betts. In a unanimous decision, the court overturned Betts and found it to be unconstitutional to deny an individual, who cannot afford attorney, the right to an attorney. The court found that not only should the state provide attorney to defendants, but they should also have effective counsel because denying effective counsel would also undermine their decision as well.

Having the court rule unanimously is an important feat in showing that the court was unified in this decision and not holding on to the ruling of Betts. Overturning a decision is not something the court does often; in fact, doing so is the same as telling the previous court that they had it wrong. That is why the court must be unified in overturning a decision so other individuals would not use any justice’s words that may have dissented against the court in the future. The court did this previously in the ruling in Brown v Board of Education of Topeka by ruling unanimously to overturn a bad precedent. While Gideon sets a great precedent for the 6th amendment with a great feat, this would also open a whole new issue to the courts about what it means to have “effective counsel” and how can anyone measure what it means to be effective as an attorney.

B. Implications within the Sixth Amendment

This again depicts how important it is for the Supreme Court to interpret what the founders would have wanted, and their intent placed behind each amendment. The phrase

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12 Id at 348
13 Id at 336
14 Id at 365
“Effective counsel” is not mentioned in the original sixth amendment. It the duty of the court to further explain and elaborate on how we, as a society, evolve with our constitution. For example, just as the Fifth Amendment does not specifically state “you have the right to remain silent”, the courts further the definitions of what it means to have these civil liberties and what it all entails.16

The court, before tackling the interpretation of what it means to have “effective counsel”, would have to deal with certain implications hidden with this new found ruling with future court cases, which would all lead to yet another landmark Supreme Court case. A year after Gideon was decided, the court was now faced with Escobedo v Illinois in 1964. Escobedo tackled a very important issue after deciding that individuals have a right to counsel. The issue in this case is deciding when they would have this right.17 The petitioner in this case, Mr. Escobedo, was denied his council during a police interrogation after repeating several times that he wanted to see his lawyer while in custody. The officers denied him his council while conducting their investigation; ultimately, he confessed to murder sealing his conviction.18 The question the court was faced with is whether or not a defendant had a right to their attorney while police conduct their investigation? The court found the answer to be yes; they do have a right to their counsel especially under these circumstances. The court started to realize was that the fifth and sixth amendment go hand and hand in some ways. This case would be first time the Supreme Court recognized “the ultimate right to remain silent” by Justice Goldberg.19

1. Fifth and Sixth Amendment Overlap

Finally, in 1966, the landmark Supreme Court case that changed not only how the courts would follow the sixth and fifth amendments but also how police would handle them. Miranda v Arizona establishes that every defendant needs to have their rights read as, what have now been deemed, our “Miranda rights”20. This case brought more than

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18 Id at 485
19 Id at 486
20 See Note 16
one petitioner, as they had all been wronged in this way. \(^{21}\) Chief Justice Earl Warren, in majority opinion, decided that these rights are so important the they have to be read to the defendant.

“You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand the rights I have just read to you? With these rights in mind, do you wish to speak to me?” \(^{22}\) — Miranda Warning

The court proceedings from 1963 to 1966 would build the foundation for what we know as our “Miranda rights”. The proceedings from 1963 slowly started from the sixth amendment and works its way to the fifth amendment stating if an individual no longer wants to speak without an attorney present, not only does he or she have the right to council but are also invoking their right to remain silent. This is not something that happened over night. The Supreme Court slowly started seeing this reoccurring problem, and it is important to understand the procedural history of *Miranda v Arizona* as it slowly laid the foundation of how the legal system functions today.

2. **Petty Misdemeanors**

A small extension was then added to the right to council in 1972, with *Argersinger v Hamlin* which was about a petty misdemeanor. The court was then left with the question, “Does the sixth amendment also applies to small offences?” \(^{23}\) The court found, in order to avoid what justice Douglass deemed “assembly line justice”, that the right for the state to appoint council was also to misdemeanors. \(^{24}\) The ultimate deciding factor is whether or not there is possible jail time. The Supreme Court uses its reasoning in *Gideon* to reinforce this idea. Even if it’s a small period such as a month, the state will have to provide council for any amount of jail time. This small detail distinguishes criminal cases and civil cases. This is why in a civil case you do not have

\(^{21}\) See Note 16 Id at 441

\(^{22}\) Miranda Warning, *what are your rights* (1966)


\(^{24}\) Id at 26
the right to an attorney allotted to you, and in a criminal trial, you will. Specifically, civil cases involve private individuals and not government prosecution.

3. Interrogations without Counsel

Following in 1977, a minor case comes forward to the Supreme Court in Brewer v Williams. This has been deemed the Christian burial speech case. This presents a trickier question before the court, “When does the right to council begin?” The court decided that it begins as soon as any judicial proceedings begin. This case even highlights that anything that could illicit an incriminating response from the defendant warrants the right to counsel. With the case facts presented, this makes it very clear that even when in the police vehicle, officers cannot question the defendant. In this case, the court held that because he was being charged and had not waived his right to silence that he could not be interrogated without his counsel present; he or she needs to have their counsel present unless otherwise waived.

The defendant in this case was accused of murdering a 10-year-old girl. Once taken into custody, the officer started to tell him to give up where the body was hidden, since the family wanted to at least give their daughter a “Christian burial”. The officer knew that the defendant was a religious man, so the defendant did show him the body. This evidence was then used at his trial; however, the Supreme Court found that questioning him in the cop car violated his right to council. This amounted to an interrogation found by Justice Potter Stewart. This is what Escobodo was hinging on to when the right to council begins, and if evidence should be allowed in, is it a violation of the sixth amendment. This case is important because it highlight what an interrogation is in simple terms; it is anything that could illicit an incriminating response from the defendant. In a concurring opinion, Justice Thurgood Marshall writes “that the detective who questioned Williams knowingly set out to violate Williams’ constitutional rights”.

27 Id at 388
28 Id at 399-401
29 See Note 17
30 See Note 26 Id at 416
The detective knew since he was a Christian would likely get the response that the officers wanted.

In the Supreme Court case of *Rhode Island v Innis*, the court would clear up further what it means to be in a custodial interrogation. Justice Potter Stewart again makes the majority opinion. First, an individual must be in custody which means they are not able to leave the police.\(^\text{31}\) In this case, the defendant was in the back of a police vehicle. Secondly, an interrogation must be conducted, the defendant did not need an attorney present because what occurred was not an interrogation. The Miranda safeguards were given to the defendant upon arrest, but he gave up information informally without their being an interrogation.

“The *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.”\(^\text{32}\) – *Rhode Island v Innis*

Anything that is the functional equivalent to a question is considered in the courts eyes an interrogation, much like in the case of *Brewer*. This furthers the courts understanding of when an individual is guaranteed their right to council and their Miranda safeguards. Up to this point, the court had still not made a standard for what an effective council is. A question that the court had not answered back in 1963, when *Gideon* coined the phrase “effective council”.\(^\text{33}\)

**C. Effective Council**

Not until 1984, does the court decide what “effective council” means in the case of *Strickland v Washington*. The court was presented with a petition by a man on death row who claims he did receive a council that effectively represented him in court and got

\(^\text{32}\) Id 298-302
him sentenced to death.\textsuperscript{34} The court then had to put forward a standard to determine what “effective counsel” really is. Justice O’Connor delivered the majority opinion in which it was decided that the standard should be:

“(a). When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. (b) With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” \textsuperscript{35} - \textit{Strickland v Washington}

This is now the standard being used by each sixth amendment claim that comes forth to the Supreme Court. With a two-prong analysis, the courts are now able to determine if a defendant had an effective counsel. Looking into what the first prong is, the objective standard meaning are there things that a reasonable attorney would do that were not done by this attorney. This usually consists of procedural matters. The court worded this very carefully as to not tell attorneys how they should approach cases and the strategies they should take. The second prong of this analysis is whether or not any of the matters not handled would have a different outcome. What the court is implicitly saying is “Did this really affect your case?”, and if not, there is no violation of your sixth amendment right to council.

\textbf{II. THE CURRENT APPLICATION OF THE SIXTH AMENDMENT}

These cases laid the foundations for what is perhaps one of the most important amendments. These are the landmark Supreme Court cases that we use today to determine whether there has been a violation. No new standards have been added since 1984, with the \textit{Strickland} ruling.\textsuperscript{36} Even so, there are still many sixth amendment claims being brought forward to the Supreme Court such as the case of \textit{Butts v Sellers}. Even though the Supreme Court has denied the petition for \textit{Butts v Sellers}, this case was about

\textsuperscript{34} Justia U.S Case Law, V.466 \textit{Strickland v. Washington}, 466 U.S. 668 (1984) at 670
\textsuperscript{35} Id at 670
\textsuperscript{36} Id at 670
an individual claiming his sixth amendment right. Robert Earl Butts was charged with Malice murder, felony murder, armed robbery, armed robbery, hijacking of a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun. Upon his conviction, he was given the death penalty. Bringing this before the Supreme Court of Georgia, they denied both claims brought forth by the petitioner: (1) the trial judge that sentenced him should have recused herself because she presided him in juvenile courts in earlier years (2) he had an ineffective counsel during the trial.

The Supreme Court of Georgia affirmed the lower court’s decision that there was no violation. Looking at the first claim, the court noted that it is common for trial judges to preside over an individual more than once. As for the second claim, the court traced his counsel’s trial history and found his council did not lack the proper skills to handle a death penalty case. On many occasions, his council has obtained lower sentencing for defendants, but because of the facts of this case, the court decided that even if he had a different counsel, the results would have been the same. The court decided this using the *Strickland v. Washington* analysis.

This petition, even while being denied, shows how the *Strickland v Washington* analysis takes place even today. The Supreme Court first looked at the first prong on the objective standard about whether the attorney had overlooked a proceeding and did not meet the reasonable attorney standard. This contention was only brought up by Mr. Butts because is counsel did not bring any character witnesses (especially his family) to his trial, but it was not because of the attorney not trying, it was simply because they did not want to represent Mr. Butts. Looking at Mr. Butts attorney’s history, they also deemed him as an adequate counsel with a good track record on death penalty cases. SCOUTUS only looked at this first prong of the *Strickland* analysis. Ultimately the petition was denied it can be assumed that the court did not think this issue was valid to overturn

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37 *Butts v Georgia* 273 Ga. 760; 546 S.E.2d 472; Ga. (2001)
38 SCOTUSBLOG, Butt v Georgia (2018)
39 See Note 37 Id at 16
40 Id at 7
41 See Note 38
This ruling in many ways still leaves a lingering thought, “How can a good attorney really be measured?”.

A. Duties of an Attorney

Being an attorney is more than the briefs they prepare or even the suits they wear. To be an attorney is to represent a client as if this were themselves on trial, and it is solving problems as they are presented because things can go wrong. Most importantly, it is respecting the law in which protects us all. There are stereotypes of lawyers being evil and greedy to which the founders would agree but disagree simultaneously. Lawyers are the ones who can make change possible, while it is the duty of a lawyer to apply existing rights it can also be the case that lawyers tackle civil rights issues that shape our country. Such famous cases that ended segregation (Brown v Board of education of Topeka) and allowed for gay marriage (Obergefell v Hodges). All this allows us to make change. On the same note, some lawyers are not interested in making changes on that scale rather just applying existing laws or cashing in on a pay check.42 A common phrase among society is “There are so many lawyers and doctors in the world, be something else”, and while there are many lawyers in the world, there are not enough good lawyers. This is the core of the sixth amendment, to be an effective counsel “a good lawyer”.

Which brings about another fundamental issue with the sixth amendment, with vast amounts of crimes occurring and defendants needing proper representation. How can the state possibly provide that many attorneys, and how can each attorney be considered “effective counsel”? Every state has tackled this issue differently: there is the public defender office, assigned counsel system (wheel system), and the contract defender system.43 Each system has their own unique benefits and faults, but what these systems do is attempt to provide adequate representation for indigent clients.

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B. Public Defenders

The first public defender’s office in the nation opened in 1913, in Los Angeles, by a woman named Clara Foltz.\textsuperscript{44} Even though \textit{Gideon} had not happened yet, Clara saw the need to provide indigent defendants the right to have counsel. Her idea was first introduced in the “The Foltz Public Defender Bill”. The idea was to bring together a group of qualified attorneys, so when they were needed, they could represent the defendants who could not afford an attorney.\textsuperscript{45} After the successful launch of the office, in 1921, the California legislator passed a Bill increasing the funding to cover all California state courts. After the success of \textit{Gideon}, public defender offices began to spring up everywhere. Then arises an issue that the most qualified attorneys were not going into these offices because of the pay, instead, the top percent of graduates would work for private firm or start their own firm in seek of better pay.\textsuperscript{46} The public defender’s office, as a whole, was not properly funded, while the district attorney’s office, in most states, was funded at least three times what the public defender’s office is.\textsuperscript{47}

A study conducted in 2017, found that 71\% of the American public believe their state is doing a poor job at providing an attorney for indigent people.\textsuperscript{48} The study continues to reveal other core problems with the system, finding that 80\% believes public defenders are over worked and cannot devote the appropriate amount of time to a case. Moreover, 55\% of the public also believe attorneys do not have the proper resources they need.\textsuperscript{49} The study finds that most people agree that the system sounds good, but in the underlying factors of funding, and attorneys without proper experience the system cannot work properly. Still, the system works to provide indigent defendants with attorneys, but whether that attorney is actually effective council is another story. Proper funding that

\textsuperscript{44} Univeristy of Miami Law School, \textit{The Public Defender Crisis in America: Gideon, the War on Drugs and the Fight for Equality} (2015)
\textsuperscript{45} Id at 185
\textsuperscript{46} Id at 185-187
\textsuperscript{49} Id at 6-9
attracts better qualified individuals may prevent the excess of 6th amendment claims that get filed. However, this is not the only approach to solving this issue.

1. **Public Defender Systems**

The assigned council system works well in getting individuals good lawyers, not so well at providing many attorneys. This system is based on a sign-up system of attorneys who are interested in doing this pro-bono work, usually they sign up in specific court rooms and work on those cases.\(^{50}\) This ensures good attorneys are taking these types of cases. In no way are these attorneys forced to sign up, but rather they do this with the intent of providing well, founded council. The problem lies within the numbers. There are few attorneys that will do this kind of work, and some already believe they have enough cases as it is; other simply are not interested. This system in theory could be the most effective if applied with more attorneys. There are simply not enough attorneys signing up to take on indigent clients.

A contractor attorney works a little bit different than the other two. Here we have a system where there is a set a fee. No matter how much or how little the caseload is, the amount being paid will be the same.\(^{51}\) Private practices ensure their attorneys have this in their contracts with the firm. This helps the public defender’s office and plays a crucial role in removing cases off the docket. Few states impose this type of system; Iowa is one of few. Iowa has made this system a crucial part of its justice system showing the system can work. This system fails is in the numbers of attorneys participating and the fixed amount of money the attorney receives. While working many hours, the attorney may find that the work is not worth the pay, and instead focus on other cases that will in turn make more money.\(^{52}\)

2. **Fundamental Issue of Public Defenders**

The fundamental problem with each system boils down to funding. The district attorney’s office, which prosecutes indigent people, are the most funded.\(^{53}\) Putting the

\(^{50}\) Marco Sampaolo et al. Encyclopediad Britannica *Assigned Counsel*(2018)
\(^{51}\) Office of The Iowa State Public Defender *Contracting process*
\(^{52}\) Elie Mystal, Above the Law *Contract Attorney Problems*(2013)
\(^{53}\) See Note 48
right people behind bars certainly is in the interest of the government and its citizens; however, denying individuals proper defense is to take advantage of the system. Lower income citizens are more likely to be put behind bars, and while many factors are taken into consideration (race, gender, ethnicity, area), the one that is most pertinent is the attorney they are given. Indigent people will receive a public defender and, in turn, be more likely to go to prison. This is no fault of the attorneys because being overworked and having hard-to-represent clients is always a challenge. The correlation stands that if individuals charged with the same crimes in same areas have different outcomes, the only factor is whether it was a private or public attorney. While great progress has been made for the sixth amendment, it has not reached a resolution to this problem. Until the courts acknowledge that people are still being denied their sixth amendment safeguard, it will not be fixed. This is an issue that goes back decades on figuring out how to provide proper representation.

Even with effective council, there are still sixth amendment claims being put forward such as in the case of Butts where the individual’s council, who was very qualified under the courts eyes, was still deemed ineffective by his client. Does the outcome of the trial determine whether or not your council was effective? Through the use of Strickland, no. The outcome of the trial should not have any bearing on whether the attorney did their job correctly; if this were the case, then there would be no guilty verdicts. Each trial is different. Every attorney is different, and while it is important to have adequate representation, it should not be at the discretion of a client. An attorney should be able to approach a case with their own tactics and abilities. This is what Strickland does so well. By using the two-part analysis, it allows attorneys to approach cases as they see fit. There is no right way to handle a case which is what the Supreme Court notes in Strickland, only standards that attorneys must follow.

54 Bernadette Rabuy and Daniel Kopf, Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned (2015)
56 Id at 2-6
57 See Note 34
CONCLUSION

It is up to the courts to interpret what the original intention of the sixth amendment is and how it should be interpreted. Ultimately, this amendment boils down to core idea that the government should not be able to undercut an individual. In the amendment’s original writing, “indigent people” and “effective council” were not mentioned, and these are interpretations of the court which deny the state the ability to prosecute anyone. While the court rejected its most recent sixth amendment claim in Butts, it has yet to make a ruling making the sixth amendment undeniably present meaning better representation, better funding for the attorneys, better application and a public defender’s office that function just as well as the D.A’s office.58

In order to guarantee every person their sixth amendment safeguards beyond merely providing an attorney, is pertinent to today’s world. This is still a problem that states have to fix, the Supreme Court has laid the foundation for what the sixth amendment should be, but it has not been applied the way it was originally intended. More than a century after its ratification the 6th amendment had been applied and interpreted multiple ways. It will be applied and interpreted multiple way more ways in the future. The constitution will continue to change, it is up to the people to determine how that change will affect us. As advocates it is our duty to ensure equal protection under the law for everybody. This is only possible through effective council guaranteed by the sixth amendment.

58 See Note 47
A FOOL’s NARRATIVE:
How David Daleiden Tricked the Pro-Life Movement.

Jordan A. Hyden
Departments of Political Science and English

TABLE OF CONTENTS

INTRODUCTION

I. THE HISTORY OF UNDERCOVER JOURNALISM

II. HATRED TOWARDS THE MODERN WOMAN

III. THE MANY “FREE SPEECH” SCAPEGOATS

IV. THE RIGHTS OF AN ACTIVIST

V. THE COURT’S VISION FOR THE FIRST AMENDMENT

CONCLUSION

INTRODUCTION

There is a certain nobility about fighting against authoritarian powers. This sentiment has inspired countless pieces of literature, including *1984* and *Les Miserables*. It paints a picture of freedom against oppressive agents. As life imitates art, there have been several American examples of undercover journalism with rebellion in mind. This is shown in the widespread effect of the Pentagon
Papers or the courage of the Spotlight crew. However, there is a line between productive activism and malfeasance. This line is drawn by David Daleiden. Currently being celebrated by the far right as the example of moral journalism, Daleiden has recently become the center of a controversy. Amidst the 2014-2015 National Abortion Federation meetings, Daleiden and his other pragmatists misrepresented their identities to attend. Under the guise as the BioMax Procurement Services LLC, the alleged representatives signed a nondisclosure agreement. This NDA legally gagged the signers from sharing contents of the convention. Afterwards, Daleiden subsequently released highly edited videos. These portrayed itself to the untrained eye Planned Parenthood negotiating the price for “baby parts”. A preliminary injunction was placed on the release of any more recordings since it was in breach of the contract that Mr. Daleiden signed. The injunction called for Daleiden to cease posting anymore videos. In contrast, there were disputes on whether the Northern District of California was consistent with the First Amendment in its protection of “prior constraint”. Daleiden v. The National Abortion Federation creates a multi-faceted observation of where American society stands, including conversations about the progression of women’s autonomy, the longevity of the First Amendment, and the place the Supreme Court has in journalism. This case presents very interesting legal questions on the restraints towards private parties and how strong public interest plays a factor in the First Amendment. Whether or not public interest is a satisfactory First Amendment standard, if private parties can present preliminary injunctions. It can be seen where David Daleiden fails to create a genuine First Amendment argument. However, it speaks volumes about the history of investigative journalism, modern misogyny, current First Amendment defenses, the rights of an activist, and the future for the First Amendment.

THE HISTORY OF UNDERCOVER JOURNALISM

Undercover journalism has been a tradition in the United States. This is natural within a nation that holds free speech as such a high value. Professor Reavis of North Carolina State University, a seasoned undercover investigative journalist explains that “If you have to lie to do it, you do it. The people need the information. So, it never bothered me.”1 This is where a distinction needs to be made. Reavis was using deception to uncover potential legal issues. Essentially, he was undercover as a part of the Southern Christian Leadership Conference to determine the racial climate within Alabama in 1965. His investigation showed how African-American citizens were forced to take literacy tests to prove their

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Reavis reported his findings in totality to the public instead of using it as dialogue to his own narrative. In contrast, the District Court found that Daleiden did not uncover any criminal activity in their ruling to protect the preliminary injunction. This reality was evident to Daleiden as he had to edit the videos. There is an unspoken rule in the permissibility for breaking the law in the name of investigative journalism. If there are means to an end, something to uncover, it is permitted in certain contexts. Admittedly, there are outliers to this rule such as Jeffrey Sterling. A former CIA agent who was imprisoned for releasing classified information to a *New York Times* reporter. Daleiden does not fall within the rule or the outliers since it was determined that the videos did not hold anything criminal. In the very spirit of investigative journalism and authoritarian upheaval there are several other landmark cases to reference. Daleiden has drawn himself as a hero taking down an authoritarian power. This is common in First Amendment cases. The bottom line here is the findings of the journalism. There are instances of investigative journalism that the First Amendment has complete realm of protection. For instance, The Boston Globe Spotlight team worked undercover and discovered a trend of systemic child abuse in the Catholic Church. The abuse was hidden by backers and the clergy themselves. The Spotlight team took measures that fell into a legal gray area. However, what they overturned was indisputably earnest. The same thing can be said about the Pentagon Papers. This was during the Vietnam War when Mr. Daniel Ellsberg decided that the American public had the right to know what was happening behind closed doors. In March of 1971, Ellsberg gave these confidential papers to the *New York Times* who in turn released them. These feats are also inarguably heroic. Perhaps, Daleiden sees himself more as an Edward Snowden type. Edward Snowden was an NSA agent who revealed information on the use of domestic data collection by the government. His actions sparked a nation-wide debate on whether he was a traitor or a patriot. He was somebody who can be seen as the modern-day Benedict Arnold but who history could potentially be kind to. This is still steeped in contemplation and honesty. Snowden put himself at risk for treason to do what he believed was right. Daleiden, as stated, still used shock value tactics to attract his audience. This was not about

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2 Id.


alerting the public of the truth. This is much different than the “whistleblower with a cause” trope. Daleiden alleges Planned Parenthood’s dealings to be criminal. Therefore, his First Amendment rights have been violated, being reason to demand Certiorari. The preliminary injunction that Daleiden was served with insisted that he ceases posting videos. This was partially because of the attacks on abortion clinics they could inspire. Furthermore, the injunction allowed for the videos to be eventually posted if criminal activity was found in them. However, the videos were misleading and wrongly vilified abortion doctors.7

HATRED TOWARDS THE MODERN WOMAN

There is a strong history of violence towards abortion clinics as exhibited by the American Economic Association’s 20-year survey.8 Between the years of 1973 and 2003, there were 300 violent attacks on abortion clinics. The violence in these individual attacks had lasting economic impact as well. It greatly affected the desire of abortion clinics and abortion doctors to continue practicing. This is a blow to both safety and freedom for women. Suspended access to functioning abortion clinics limits women and promotes unsafe alternatives. More recently, Choices Women’s Medical Center in New York has had litany of issues, ranging from aggressive protests to full bloned fights.9 The New York Attorney General Eric Schneiderman dubbed the last 5-years as a “barrage of unwanted physical contact, as well as verbal abuse, threats of harm, and lies about the clinic’s hours and its services.”

This is solely a domestic issue. The United States is the one of the only secular nations that has received such widespread anti-choice violence. Europe has abortion laws that vary by country but the violence towards these clinics are significantly lower. The only country that consistently faces any backlash is Spain. Spain, relative to other European countries, has the strongest abortion policies. Consequently, these clinics have been victim to vandalism.10 In comparison, the United States has had several more examples of harassment towards pro-choice organizations and abortion clinics. This correlates to the recent District Court and Ninth Circuit’s opinion regarding the violence that Daleiden could have potentially inspired and, more accurately, the violence that

7 Danielle Kurtzleben, Planned Parenthood Investigations Find No Fetal Tissue Sales, National Public Radio, (January 28, 2016).
8 Id.
Daleiden’s actions did inspire.\textsuperscript{11} After the first few videos were released, there was a shooting in Colorado Springs. Robert Lewis Dear on the morning of November 27, 2015 walked into a Planned Parenthood with an “assault-style” rifle and began shooting people.\textsuperscript{12} Before Dear was incapacitated he injured nine and killed three. This total included two civilians and one police officer.\textsuperscript{13} Daleiden defended his stance that the videos taken at the National Abortion Federation were not responsible for this. In his petition for Writ of Certiorari it states:

“The district court’s treatment of the alleged threat to abortion providers is particularly intrusive as to how the court viewed the purpose of the non-disclosure agreement and of the preliminary injunction enforcing it. The district court admitted that all of the negative repercussions to date followed the release of videos that were not taken at NAF conventions.”\textsuperscript{14}

This assertion made by petitioner’s attorneys is fundamentally flawed. These videos that allegedly inspired the violence were still of the Center of Medical Progress’ creation. They were just released prior to the NAF meeting videos. Historically speaking, there are examples of what Daleiden’s libel is capable of. Daleiden’s work has promoted abuse of women’s rights. There is a trend between religion and the abuse of women in the secular world, that of which is displayed in \textit{Religious Violence and Abortion: The Gideon Project} by Dallas A. Blanchard\textsuperscript{15}.

There is an empirical connection of authoritarianism between the government and women. This is depicted in simple, everyday truths such as the patriarchal status of our house and senate. This authoritarian nature is broken down to simple statistics. As of 2018 women only held 20\% of congressional seats, 23\% of senatorial seats, and 19.3\% of representative seats.\textsuperscript{16} There is a natural power imbalance between men and women. This translates into the private sector. Every year, there are countless workplace sexual harassment suits coupled

\begin{itemize}
\item\textsuperscript{11} Joshua Berlinger, \textit{Documents Reveal New Details about Planned Parenthood shooting suspect}, CNN News, (April 12, 2016).
\item\textsuperscript{12} Id
\item\textsuperscript{13} Julie Turkewitz and Jack Healy, \textit{3 Are Dead in Colorado Springs Shootout at Planned Parenthood Center}, New York Times, (November 27, 2015).
\item\textsuperscript{14} Daleiden v. National Abortion Federation, 138 S. Ct. 1483, (9th Cir. 2017), cert. denied.
\item\textsuperscript{15} Terry J. Prewitt, \textit{Religious Violence and Abortion}, Religious Research Association (Mar. 1994)
\end{itemize}
with the increasing statistics of the likelihood of being raped. Current statistics show that roughly 1-in-6 American women are sexually assaulted at some point in their lives. Furthermore, it appears that only 31% of rape is reported for a myriad of reasons. Victim blaming is prevalent in American culture which shames sexual assault survivors. His culture directly feeds into the attitude towards abortion and the vilification of the women who receive them. This vilification is steeped in misconception. The usage of misleading videos, that have previously lead to deaths, should not have protections under this court. These protections would be detrimental to women’s autonomy. Prior to safe abortion practices in 1973 due to the Supreme Court’s ruling in Roe v. Wade, there was a wide array of botched abortions. Notably, Roe v. Wade’s place in Daleiden v. NAF is the question of privacy it presented. The Court held that there was precedence set in Griswold v. Connecticut that allowed women, under the 14th amendment, to receive abortions because of their right to privacy. This had constitutional standing but also played part in ending abortion related deaths.

The University of Washington’s James Gregory compiles the deaths due to these botched abortions in his article When Abortion was Illegal (and Deadly). The truth is that women’s deaths from botched abortions were often underreported by the media. This was due to the stigma against abortion alongside its current illegal nature. It was believed that there were approximately 15,000 deaths a year because of this practice. This is a terrifying truth. Essential autonomy is crucial in any society, especially in a society that constantly degrades women. Safe abortion practices are a mitigating factor towards systematic misogyny. It allows for women to legally take control of their bodies and promotes freedom. Therefore, an organization that has aired libelous material that encouraged seizure of women’s rights in the past should still have that brand in the future. This creates an issue of credibility for news stations. Libel, amongst other discrepancies, destroys future credibility for news outlets. This means the date of violence after the release of the videos is irrelevant. The content within those videos is edited to appear as inflammatory as the previously released videos.

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18 National Alliance to End Sexual Violence Staff, Where We Stand, National Alliance to End Sexual Violence, (2018).
THE MANY “FREE SPEECH” SCAPEGOATS

Intention plays an interesting role in this situation. Daleiden had to be aware with this political climate that his use of editing would cause a large splash. This gives more leeway to the court to protect a preliminary injunction of this nature. Basically, to determine if there is any criminal nature of the videos and to cease any unnecessary fallout. Conversely, the petitioner continues to claim that the harm created by these videos is alleged and only because of third-party reaction. This is flawed and merely ideological. The claim is that only reason why there was this third-party reaction was because the idea of Planned Parenthood selling “baby-parts” was naturally upsetting. This idea completely misses the mark. Especially because Daleiden pieced together this dialogue since there was no evidence of wrongdoing found.\textsuperscript{23} Daleiden’s assertions deteriorate the place abortion has in modern women’s health. Secondly, a bigger issue of the trend of tactless First Amendment claims in the status quo. There is a “spaghetti effect” of First Amendment cases. The spaghetti effect is essentially the “whatever sticks” policy. This promotes fraudulent First Amendment claims. This is due to the wide nature of the First Amendment that allows the general public to twist situations into free speech issues. Even as of 2017 the Supreme Court avoids stringent rulings on First Amendment cases due to this.\textsuperscript{24}

The First Amendment is wide in scope with somewhat confusing exceptions. Essentially, these are cases that are desperate to reach the bench for the possibility of setting precedence. This is to end this loose interpretation and create a strong standard. The First Amendment is not the only amendment built like this, but there is a large barrier of interpretation. This stretches from the protection of hate speech to libel. There has been a “throw it at the wall and see if it makes it to conference” mentality. Daleiden’s actions conform to this method. This would first look into the nature of his crimes. The second issue that Daleiden had was “whether the U.S. Court of Appeals for the 9th Circuit’s application of the “abuse of discretion” standard on appeal in a case involving restrictions on First Amendment rights merits summary reversal”\textsuperscript{25}. Abuse of discretion is a standard of review that claims the lower court was not consistent with previous precedence. The 9th Circuit’s use of discretion directly correlates with Daleiden’s crime of misrepresentation, especially since he represented himself as a genuine member of BioMax Procurement Services. This was an invitation only event and

\textsuperscript{24} Cortelyou Kenney and Amy Kapczynski, \textit{Supreme Court Avoids Broad Ruling on Free Speech in Credit Card Case}, Media, Freedom & Information Access Clinic, (April 1, 2017).
\textsuperscript{25} Daleiden \textit{v. National Abortion Federation}, supra note 14
that very decision for Daleiden and his conspirators to forge their identities was a felony. The contract contained a clause that demanded that “all written, oral, or visual information disclosed at the meetings is confidential and should not be disclosed to any other individual or third parties”. Additionally, the contract banned “disclosure of any such information to third parties without first obtaining NAF’s express written consent.” Daleiden abandoned his expectation of free speech. This is further seen, as cited in the Ninth Circuit’s opinion, that in these videos “BioMax” employees were attempting to solicit beneficial answers for their narrative. This means that they were asking leading questions to NAF meeting attendees.

These videos took place within the convention’s walls and in public areas. All of these locations were in jurisdiction of the NDA. This was a major privacy issue for multitudinous reasons. The identities of these providers were at risk as well as further confidential information. Furthermore, Daleiden did not uncover anything illegal. The videos revealed intimate details of abortion providers without their consent and still came up fruitless. This truth is what dismantles petitioners’ assertion that these videos were of great public interest. They were not; they were inflammatory and libelous. As deciphered in Gertz v. Robert Welch Inc. there is two kinds of libel. First, the standard day-to-day kind, libel that someone who is not famous can suffer. The second, against a person who is in the public eye. Planned Parenthood stands in view of the public eye as a celebrity would. This puts any libel claim under the second category. This would mean that a malicious intent would have to be proven. The very nature of the videos would prove that. The heavily edited nature of the videos demonstrates that there was not just a blatant recital of the facts. This presents malicious intent rather than just journalism. The placement of an injunction was natural reaction since Daleiden did not have a case and willingly signed the NDA.

This mirrors other fraudulent First Amendment cases. For example, James G. Gilles (better known as “Brother Jim”) is a serial lawsuit artist. Despite, his First Amendment claims having non-secular flair to them, there are still some similar traits that make these two cases analogous. James Gilles, a member of the Street Preacher Conference, has been a self-described open-air preacher since

28 Planned Parenthood Staff, Daleiden Admits to Deceptively Editing Videos, Planned Parenthood Federation of America (October 20, 2015).
29 Gilles v. Davis, 427 F.3d 197 (3rd Cir. 2005).
1982. He is known specifically for going to college campuses with antagonistic signs to speak with students. Furthermore, Gilles has made five separate lawsuits against universities. Only one was granted for Writ of Certiorari for the Supreme Court but was denied. Here we see a similar set of criteria that Daleiden also falls under, first being the place and time of free speech. Many of Brother Jim’s disputes were result of him trespassing. For instance, Gilles wanted to relocate his protest in a more public part on Vincennes University to be in front of the library. The university denied his request, since that would disrupt the learning environment for students. It is completely in a university’s right to place where protestors facilitate for both private and public universities. Similarly, it was within the National Abortion Federation’s authority to demand privacy within their own convention.

The line between “spaghetti-to-the-wall” and “legitimate complaint” falls in public interest. Public interest is a broad First Amendment standard. Petitioner contended that these videos fell within public interest. Public interest would suggest that there was an actual “upsetting” crime that took place. In this situation, there was not crime present. September 28th, 2015, the president of Planned Parenthood, Cecile Richards, fiercely defended Planned Parenthood. In this defense, which Congress found lawful, Richards broke down exactly what the viewer saw in these sting operations. The biggest claim made by Daleiden was that Planned Parenthood was negotiating prices for these, alleged, “baby-parts”. However, Richards explained that only 1% of her organization participates in fetal tissue harvesting. Secondly, the monetary sum that was being discussed was merely a 60-dollar reimbursement. This reimbursement paid Planned Parenthood for their services, including the seeking of consent from patients and harvesting the tissues. This was found to be completely legal. Daleiden’s claim of Planned Parenthood’s wrongdoing was incorrect. This would mean that there was nothing to uncover or great public interest to consider. This is what makes the last of Daleiden’s spaghetti claims fall from the wall to the floor.

THE RIGHTS OF AN ACTIVIST

There is no dispute that pro-life activists have the same First Amendment protections as anybody else. The First Amendment is wide in scope for the

31 Gilles v. Blanchard, 477 F.3d 466, (7th Cir. 2007).
32 Jennifer Haberkorn, Planned Parenthood Chief to Offer Spirited Defense, Politico (September 28, 2015).
33 Id.
34 Id.
purpose of protecting journalistic interest. This fact was of great interest to Daleiden as well. This is where the first issue that Daleiden presented is so pertinent:

“Whether the U.S. Court of Appeals for the 9th Circuit erred by its unprecedented holding, in conflict with decisions of the U.S. Courts of Appeals for the 2nd and 4th Circuits, and the consistent teachings of the Supreme Court, that the First Amendment permits issuance of an injunction restraining the release of information of undisputed and legitimate public interest”\(^{35}\)

What is notable is that a private party issuing this preliminary injunction is constitutional. Within in his petition, it draws out an Orwellian nightmare of unchecked control of private entities to be able to silence journalists and activists. It compares Daleiden’s plight to that of company whistleblowers making measures against sexual harassment.\(^{36}\) There is irony of the petitioner thinly veiling the true intention of their desired outcome by trying to relate to the women they are harming is baffling. It is the sentiment that allowed for this private party to give this preliminary injunction. The purpose of the preliminary injunction was not to stifle a journalist from uncovering the truth of an authoritarian power. This is not a public versus private entity issue that the petition is trying to ensure. It is, rather, an “intention issue”. If this was a private entity trying to use its power lessen the fallout of their actions, the Ninth Circuit and District Courts would have seen that in review of the videos. Conversely, nothing illegal was found by Congress or the courts.\(^{37}\) This is what Daleiden’s case hinges on. These videos are illegally gained material with no wrongdoing captured. However, Daleiden’s intentions must also be considered. “Activist” is defined as “a person who uses or supports strong actions in support of or opposition to one side of a controversial issue” by Merriam-Webster. Activism is seen as patriotic in nature and passionate in method. However, historically activism is fighting something cohesive. This would include a call to change or clear motive. Daleiden is being praised by the pro-life moment as a hero.\(^{38}\) It would be a natural assumption since he is the founder of Center of Medical Progress and a previous employee of Live Action.\(^{39}\) However, there is something hellacious in Daleiden’s actions. A true activist,

\(^{35}\) Daleiden v. National Abortion Federation, supra note 14

\(^{36}\) Id.

\(^{37}\) Kurtzleben, supra note 7.

\(^{38}\) Steve Ertelt, Pro-Life Hero David Daleiden Wins Again!, Walk for Life West Coast (January 11, 2017).

someone who truly believes that abortion is murder, would release the “truth” to the public immediately. This is an immense bipartisan issue in which both sides find the other to be morally corrupt. With strong political tensions it is nonsensical that Daleiden would stagger the release of the videos. There was a dramatic, slow-build provided for creating shock value. That is not consistent with past activists or journalists. These actions depict a cry for attention rather than a will to do good. This provides further call to believe the spaghetti effect. The preliminary injunction was imposed on him before he had the opportunity to release anymore videos. Truly, Daleiden would never have had faced the preliminary injunction if he released the videos immediately. This, however, would not have allowed time to edit the videos in a satisfactory light and to accrue an audience large enough for both Daleiden’s and the CMP’s increasing need for notoriety. This is not congruent with the spirit of activism or investigative journalism. This slow build allowed for the attention to pile, for the controversy to build, and allowed for the depiction of Daleiden as both a saint and a demon.

Daleiden’s sting operation was never about any genuine grievance towards Planned Parenthood. Rather, it was rooted in seeking notoriety at the expense of women’s autonomy.

**THE COURT’S VISION FOR THE FIRST AMENDMENT**

In terms of constitutional critiques, Daleiden poses an interesting claim on the lower court’s right to make an unprecedented ruling. Claiming, that the Ninth Circuit was incorrect for ruling this way since private entities have not previously allowed to issue preliminary injunctions. This could be considered “prior restraint”. Meaning, the Framers Intent of the First Amendment must be considered, the amendment is as quoted:

> “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

As a nation born out of war, there is a clear intention for the First Amendment. It was meant to protect the people, particularly the press, from government overreach. As free speech has developed, it has formed exceptions; including no protection for perjury, obscenity or fighting words. This leaves allowances for interpretations that are consistent within an evolving society. This is why the American judiciary exists. The spirit of the Constitution is to adapt to the changes in society. This is seen in such cases as *Trop v. Dulles* that set an evolving

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40 *Man behind Planned Parenthood Videos Speaks out*, CNN (July 31, 2015).
standard of decency for punishments. 41 Similarly, the First Amendment evolves in an age of technology. It is meant to define barriers and give interpretation when it is needed. The Court must make unprecedented moves occasionally in the face of new problems. This is how the snowball of precedent works. As the evolution of precedence continues throughout the years it forms essential guidelines for future court decisions. Of course, lower court decisions are not binding. If precedent is binding, that means that it must be followed regardless of the nuance of a constitutional question. Meaning, that a technical conflict with the Second and Fourth Circuits is not a constitutional violation. Often these circuits have differing interpretations. It may encourage slight inconsistencies between the U.S. Court of Appeals, but it still was well within the Ninth Circuit’s authority. This is why the Supreme Court exists. It is meant to be the all-knowing overhead that can take the inconsistencies and form a cohesive, possibly binding, precedent.

The future of First Amendment protections is a vague one. Especially since the Supreme Court denied Writ of Certiorari to even hear this case. This indicates the trend; the Ninth Circuit has depicted is lasting: that criminal behavior and the protections of people are supreme over total “free speech”. The selection process for First Amendment cases to be heard by the Court is a narrowing tunnel, one that only the truly relevant complete. The First Amendment is an important tool for the daily journalist. This directly correlates with the overarching purpose of journalism. Essentially, the purpose of journalism is how it informs the public. Is this information truly relevant? Is this information current? A journalist is a beyond honorable profession. This is a person who will put the power of the truth over their own safety. This is shown by the hundreds of journalists who go missing or are killed trying to report on human rights violations overseas. A 2016 survey shows that 115 journalists were murdered overseas that year. As the director of the News Safety Institute Hannah Storm describes that of these 115 “most were not international journalists, few had the support of major news outlets, and most died after fighting insurmountable odds, daily threats and constant pressures”. 43 The valiant efforts of these journalists are representative of the goals of journalism. This information allows a comparison to be drawn between the traditional journalist and David Daleiden. This comparison is lacking since Daleiden does not fulfil the criteria of the traditional journalist.

As mentioned, the Supreme Court recently denied Writ of Certiorari for *Daleiden v. The National Abortion Federation*. It didn’t go down without a fight, making it to the conference stage. There are many observations for what potential impact could have been made if this case went to the Court. If this went to the Court it would lead to a binding precedent. Legal reasoning is purposely left vague for nuance in future problems. However, in this case it would call for specific guidelines of what is considered prior restraint. If this went to the Supreme Court, there would have to be some type of guideline or code to determine when it is suitable for an agent to practice forms of prior restraint. This entire situation was denoted simply as a scandal. Misinformed cries demanded for Planned Parenthood to be defunded. This situation, in the eye of a bipartisan country, is not about free speech-- rather women’s autonomy. However, the Supreme Court cannot grant Writ of Certiorari just based on scandal. Even without the Writ of Certiorari present there is an impact created by David Daleiden’s actions. It has added to a darker shade of paparazzi mentality. Planned Parenthood’s view in the public eye made it susceptible to Daleiden’s operation. There are many examples of intense paparazzi doing less than ethical things, whether that be causing the car crash that killed Princess Diana or the thousands of nude photographs released of female celebrities. There is a boundary of privacy that is slowly being chipped away in the age of technology. Some of this natural regression is expected; however, the public outlook has become compliant. In a generation that is familiar with doxing and metadata, the expectation of privacy is dwindling away. This boundary is no longer generalized. David Daleiden used this truth to his advantage and gained political traction. Furthermore, he waited those 12-months and staggered the release of his videos. He understood that the reason for the contract was to protect the privacy of consenting clients and doctors. The impact Daleiden made is a statement for the social connotation behind how American privacy devolves.

**CONCLUSION**

There is beauty in the persistent fight of patriots against totalitarian governments -- the Robin Hood mentality of the people taking over. This is a dangerous train of thought when it is a scapegoat for people like David Daleiden to manipulate situations. Daleiden set his stage in a way depicting himself as a martyr. He further claimed to show the evil ways of Planned Parenthood whilst asserting a free speech violation. However, the truth is that his actions simply exacerbate the trends of sexism and delusion in the United States. Daleiden’s process is steeped in misconception. His claims do not fit within a reasonable constitutional critique. He misrepresented his identity and broke a nondisclosure agreement to create a libelous dialogue. Daleiden’s free speech claims do not fall
under the protections of the First Amendment. The trend of free speech cases will continue to be spaghetti against the wall until the Court develops a stringent standard. Daleiden was not the case to create that standard.
RATIONAL BASIS REVIEW IN LEDEZMA-COSINO V. SESSIONS

MiKayla Jones
Department of Political Science

TABLE OF CONTENTS

INTRODUCTION

I. THE REASONING
II. WHAT THE NINTH CIRCUIT MISSED
III. PROHIBITION IN THE TWENTY FIRST CENTURY

CONCLUSION

INTRODUCTION

Salomon Ledezma-Cosino is a Mexican native who has spent the past thirty-one years residing in the United States with his family. In 2008, he was placed in removal proceedings until he was denied petition for cancellation of removal but granted voluntary departure by an Immigration Judge. Ledezma then appealed his removal to the Board of Immigration Appeals who remanded the case back to the Immigration Judge. The proceedings, however, were delayed when Ledezma became hospitalized due to liver failure tied to his ten-year history of alcoholism. Both the Immigration Judge and Board of Immigration Appeals then determined that Ledezma could not be granted voluntary departure, and must be removed, because he “suffers from alcoholism [and] lacks good moral character.” Ledezma then petitioned for review the Ninth Circuit Court of Appeals claiming the “habitual drunkard” provision denies him equal protection as it is unconstitutionally vague. The Ninth Circuit first reviewed Ledezma’s case in a three
judge panel but reheard the petition en banc where they denied Ledezma’s petition in a split decision and ultimately ruled under rational basis review that the “habitual drunkard” provision is not unconstitutionally vague. Ledezma appealed to the Supreme Court of the United States but the Court denied him certiorari in January 2018.

THE REASONING

Ledezma’s appeal to the Supreme Court holds two issues. First, whether a court, under rational basis review, must consider both the ultimate effect of a statute and the statutory means by which it achieves that effect, or whether a court must look only at the ultimate effect of the statute.1 Secondly, that the habitual drunkard clause of the Good Moral Character provision of the Immigration and Nationality Act (INA) is unconstitutionally vague.2 Ledezma claims that he was denied equal protection under the Fifth Amendment by the Ninth Circuit Court of Appeals’ rational basis review of the Good Moral Character provision of the INA.

The Ninth Circuit Court of Appeals maintains that Ledezma’s history of alcoholism qualifies him as a habitual drunkard, therefore barring him from good moral character and subsequently voluntary departure as ruled by the Immigration Judge. While the panel asserted that “it is apparent from the face of the statute that Congress has created a classification dividing ‘habitual drunkards’—i.e. persons with chronic alcoholism—from persons who do not suffer from the same disease and identifying the former as necessarily lacking good moral character,” which is “not permissible under the Equal Protection Clause,” the en banc court upholds that “[t]he statute … does not classify ‘habitual drunkards’ by reference to any medical diagnosis of alcoholism, but rather focuses on the conduct of the alien during the good moral character period[.]” (Ledezma-Cosino v. Sessions). Though the court ultimately denied Ledezma’s review, there were four different opinions (three concurring and one dissenting) addressing Ledezma’s claim of unconstitutional vagueness. The majority opinion ruled that “an ‘habitual drunkard’ is a person who regularly drinks alcoholic beverages to excess,”

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2 SCOTUSblog, 2017.
separating the provision from unconstitutional vagueness and thus denying the definition provided by the panel. A plurality of four judges further denied Ledezma’s challenge of equal protection, claiming that through rational basis review the court is “limited to assessing congressional action,” identifying that “Congress’ action was the denial of cancellation of removal to habitual drunkards.”

**WHAT THE NINTH CIRCUIT MISSED**

The first issue Ledezma-Cosino petitioned to the Supreme Court is how a court must assess a statute under rational basis review. The Ninth Circuit holds that “the effect would be the same” no matter if they changed or removed the “intermediate label” (good moral character) from the INA habitual drunkard provision. However, the good moral character “label” is necessary, albeit inadequate, for establishing a legitimate government purpose and therefore necessary not only to pass, but even be given consideration in a rational basis test. Had the INA just described habitual drunkards as a non-citizen subject to removal, without classifying the provision as a category of those who lack good moral character, the statute fails to establish any rational basis. This is an important distinction that must be made when reading the good moral character and habitual drunkard provision. The statue does not disqualify habitual drunkards from naturalization because they are a habitual drunkard, rather, the statute disqualifies habitual drunkards because they are believed to lack good moral character. In the ladder, the legitimate government interest can be identified as those who lack good moral character (such as habitual drunkards) should not stay in the country because they are harmful to the community. The former, however, cannot even be rationally tested, as there is no legitimate government interest with denying habitual drunkards naturalization other than the fact that they are habitual drunkards. Without identifying habitual drunkards as those who lack good moral character, establishing some connection with a government interest, the provision would merely be an empty category of persons leaving the question “Why exactly are habitual drunkards being denied from the country?”

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3 Ledezma-Cosino v. Sessions, 857 F.3d 104 (9th Cir. 2017).
4 Ledezma-Cosino v. Sessions.
Though, the Ninth Circuit asserts that the former explanation is true, and that the habitual drunkard provision alone is what must be analyzed in a rational basis review because the end result of denying Ledezma-Cosino cancellation of removal and voluntary departure because he is a habitual drunkard would remain the same regardless if the good moral character aspect is assessed. Whether intentionally or not, the court largely misunderstood the issue and provided a neglectful ruling that establishes harmful precedent. When denying Ledezma-Cosino’s petition for review, the court claimed that “their job is to assess whether there is a rational basis for Congress to remove a habitual drunkard.” Ledezma-Cosino’s claim, however, was that he was denied equal protection as a result of being categorized as someone unable to show good moral character because he was identified as a habitual drunkard. The question is not whether Congress can remove a habitual drunkard, the question is whether Congress can remove someone identified as not having good moral character because they are a habitual drunkard. Not only did the court misinterpret the issue presented, but it also failed to adequately address the equal protection issue at hand: whether Congress can categorize immigrants as morally bad people because of alcohol consumption.

PROHIBITION IN THE TWENTY FIRST CENTURY

The habitual drunkard provision was established under the Immigration and Nationality Act of 1952, which largely reintroduced sentiments of the Prohibition era. Jayesh M. Rathod affirms that “[the legacy of Prohibition] persists today in the exercise of discretion in immigration enforcement, adjudication in immigration courts, and in recurring legislative proposals targeting immigrant alcohol use” and further explains that there is a long and deep relationship between immigrants and alcohol regulation:

“During these decades, powerful societal views about immigrants and alcohol consumption emerged and were solidified through propagation in social and political discourse. The influx of European immigrants, with their unfamiliar
cultural practices, economic strength, and growing political clout, posed a threat to established interests. Indeed, the production, sale, and consumption of alcohol by immigrants linked together these various concerns. For this reason, some historians have argued that Prohibition was driven, in part, by a ruling class of Anglo-Saxon Protestants who were struggling to retain power and privilege in the face of an influx of immigrants. Similarly, others have framed Prohibition as an attempt to codify (and impose onto others) a specific, elite lifestyle choice - and its accompanying morals and values. Throughout these years, xenophobic and nativist elements also drew attention to the dangers that flowed from immigrants and alcohol.”

Classifying “habitual drunkards” as people lacking good moral character is rooted in this fabricated narrative created by Anglo-Saxon Protestants who feared losing social or economic power. It then follows that the rational basis for the habitual drunkard provision is an institutional classification informed largely by an era of blatant nativism and xenophobia. Such a sentiment, which has not been reevaluated since its introduction in 1952, inherently violates the Equal Protection Clause.

CONCLUSION

The Ninth Circuit, with Ledezma-Cosino v. Sessions, establishes a dangerous precedent for future immigration cases. According to the majority, as long as the lasting result is the same, the language is essentially irrelevant and provides no limit to Congress’s power. This allows ample opportunity for arbitrary decisions. Had the Supreme Court granted Ledezma-Cosino certiorari, it is possible they could have established a clear standard for the future of rational basis and immigration.

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7 Rathod, *Distilling Americans*. 
Lucia v. SEC:
A Political Game That’s Just Begun

Anne M. Luquette
Department of Finance

TABLE OF CONTENTS

INTRODUCTION .................................................................................................................... 2

BACKGROUND INFORMATION .......................................................................................... 3

Securities and Exchange Commission (SEC) ................................................................. 3
Alternative Law Judges (ALJs) ...................................................................................... 4
Facts of the Case ............................................................................................................ 6
Trump Administration’s Position Change ................................................................. 8
Appointments Clause .................................................................................................. 10
Employees vs. Officers – Important Case Law ..................................................... 11

OPINIONS ....................................................................................................................... 13

Majority ....................................................................................................................... 13
Concurring ................................................................................................................... 15
Part I .......................................................................................................................... 15
Part II .......................................................................................................................... 16
Part III ....................................................................................................................... 17
Dissenting .................................................................................................................... 18

CASE SIGNIFICANCE .................................................................................................. 19

Effects .......................................................................................................................... 20
Remedy ........................................................................................................................ 20
Removal ....................................................................................................................... 23

CONCLUSION ............................................................................................................... 28

APPENDIX ..................................................................................................................... 29
INTRODUCTION

The Supreme Court hears and decides some of the most profound and influential legal issues present in today’s legal and political climate. Without the precedents set by the supreme judiciary, our country would not be able to offer equal or adequate protection to its citizens. The implications of most decisions and the effects they will have on society are typically understood. But what happens when the issued opinions, and even the very structure of the case, are so out of the ordinary that the decision itself creates more legal ambiguity than it clarifies? Lucia v. SEC, a seemingly uninteresting and tedious case, gained momentum and intrigue in several ways. The actors involved in Lucia v. SEC each make blatant, calculated moves in a power struggle for control over the administrative state. The line between administrative independence from the President, and accountability to the American people is hotly debated. For better or for worse, the ruling in this case no doubt shifted that line regardless of the courts hesitance to rule on it outright.

Due to the nature of the case, the first section of this essay will offer background information on the SEC, ALJs, facts of the case, and the Appointments Clause. Once all of the necessary background is out of the way, I will examine the unique treatment of this case by the current administration. From there, I will delve into the meanings and implications of the three decisions as well as the distinct legal issues presented by the ruling. The bulk of the essay comes in section three, in which I will discuss the effects of the case and subsequent administrative actions. I will end the discussion by issuing my final thoughts on the importance of the ruling, and the role I believe this decision will play in the broader political landscape.

The question “Are SEC ALJs employees or officers of the United States?” was presented to the court. From the outside looking in, Lucia v. SEC is a fairly simple case. But, digging a little deeper, it is apparent that the issues involved are not so black and white. From statute complications to judicial independence, the issues of Lucia v. SEC will be debated for years to come.
BACKGROUND INFORMATION

To adequately analyze and understand a Supreme Court case regarding the SEC, it is imperative to first understand its function and its significance. In this section I will begin by explaining the structure and role of the SEC, as well as the duties and powers of ALJs. I will present the facts of the case, as well as context and precedent surrounding the Employee v. Officer debate. I will end the section by discussing the position change of the current administration and the requirements contained in the Appointments Clause.

Securities and Exchange Commission (SEC)

The SEC is comprised of five commissioners that are each appointed by the President. In an effort to create a more bipartisan board, a single political party can have a maximum of three representatives. Each term is limited to 5 years, and one commissioner’s term expires each June. The President dictates which Commissioner will be the Chairman. Currently, there are only 4 sitting Commissioners, three appointed by Donald Trump and one appointed by Barack Obama.1 According the organization’s own website, their mission is “to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”2 Essentially, the purpose of the SEC is to ensure that inexperienced investors cannot be manipulated or taken advantage of by securities fraud, overly complicated or misleading financial statements, and brokers or investors looking to make a profit from unsuspecting novice investors. It is important to recognize the original aims of the SEC and its founders to understand why they are often aggressive in their investigations and prosecution of offenders.

The SEC can prosecute offenders in two different ways: civil or administrative action. Civil action is taken when the SEC files a claim with the U.S. District Court. The case is tried in the federal court system as any regular civil case. Administrative action is essentially the same as a regular court proceeding, except it is handled internally within the SEC and overheard by ALJs, or Administrative Law Judges. In some cases, they pursue both options simultaneously. The Division of Enforcement within the SEC will decide to take civil action when they are looking for a stronger remedy, such as barring a

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corporate director or officer from continuing in their role, specific injunctions, and imprisonment. For less severe punishments, they may decide to take administrative action. The process of administrative action is the object of controversy in this case, due to the SECs use of Administrative Law Judges (ALJs) in deciding the outcomes of administrative action cases.

An important distinction to note between the rules of civil law and SEC proceedings is the burden placed on the prosecutor. In most civil cases, it is necessary for the petitioner to provide proof of damages in order to be awarded recovery: if there is no damage done, there is nothing to recover. However, while it may seem unintuitive, in administrative action proceedings the SEC does not need to prove that any party suffered damages at all. They are only responsible for proving the defendant had the intent to defraud or the potential to cause hypothetical damages. This standard of proof is known as the Substantial Evidence Standard, and only requires the plaintiff to “provide enough evidence that a reasonable mind could accept as adequate to support a particular conclusion.” This burden of proof is much lower than expected in federal courts and lead some to speculate that the SEC brings its weaker cases in front of ALJs for that reason.

Alternative Law Judges (ALJs)

Although the penalties may be less severe than those imposed by the civil action cases, ALJs can make significantly powerful and life changing decisions. Administrative action cases can end in “cease and desist orders, suspension or revocation of broker-dealer and investment advisor registrations, censures, bars from association with the securities industry, civil monetary penalties, and disgorgement.” But, ALJs do not have the power to make these decisions alone. Each decision issued by an ALJ is merely a recommendation to the Commissioners. The Commissioners have the final say on accepting, denying, or reevaluating the recommendation of the ALJ.

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3 “What We Do.”, supra.
5 Richardson v. Perales, 402 U.S. 389 (1971)
8 “What We Do.”, supra.
between the Commissioners and the ALJs presents the fundamental question of law that is raised in Lucia v. SEC.

In order to adequately analyze this case, it is important to understand the role that ALJs play in the actual course of the trial, as their roles become important factors in the opinions issued by the court. ALJs have the authority to “oversee hearings and discovery, rule on motions (including summary disposition)\(^9\), enter default judgments\(^{10}\), and impose or modify sanctions\(^{11}\)…rule on the admissibility of evidence\(^{12}\), take testimony, and make credibility findings… [as well as] the authority to do all things necessary and appropriate”\(^{13}\) to adjudicate cases brought for administrative action by the SEC. This becomes important when discussing one of the key elements of Lucia. A prominent question throughout the case is whether or not these duties constitute “significant authority,” discussed at length in section two.

Throughout my research, I came across many sources that posit that instead of allowing administrative action, the SEC should adjudicate through the federal courts, thus eliminating the concept of the SEC gaining a “home-field” advantage.\(^{14}\) \(^{15}\) \(^{16}\) Even the ALJ that ruled in Lucia’s original case “is viewed as being sympathetic to the agency’s enforcement division.” Judge Elliot “has issued more than 50 ‘initial decisions’ at the SEC… [and] has yet to rule against the agency.”\(^{17}\) Although it is not a point of contention for this essay or this case, it will be interesting to see moving forward how the closer look into the constitutionality of ALJs effects their power and their scope.

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\(^9\) 17 C.F.R. § 201.250
\(^{10}\) See id. § 201.155
\(^{11}\) See id. § 201.180
\(^{12}\) See id. § 201.320-.326
\(^{13}\) See id. § 201.111
\(^{14}\) Eaglesham (2014), supra.
Facts of the Case

This case begins back in 2012.18 Almost 6 years ago, Raymond J. Lucia and his investment company, Raymond J. Lucia Companies, Inc., were accused of violating the Investment Advisers Act of 1940 as well as SEC rules meant for anti-fraud protection. Mr. Lucia used the term “backtests” in a presentation to potential clients to describe hypothetical investment scenarios. The information used in these scenarios was based partially on historical facts, but also included other factors “such as inflation and real-estate rates of return.”19 The main issue in the original case was the definition of “backtests.” The SEC argued that backtests must be only supported by historical facts and utilizing this definition for scenarios calculated using other variables, even though those variables were disclosed, is considered misleading and fraudulent information disseminated to the public. It is stated in the petitioner’s writ of certiorari that “[before] Mr. Lucia publicly distributed the slideshow, supervising broker-dealers repeatedly approved the slides, and Commission staff had reviewed a similar version – and none had raised any concern that the slides were misleading.”20 The Securities and Exchange Commission (SEC) decided to pursue administrative action rather than try the case in federal court, and Lucia’s case was heard by SEC Alternative Law Judge Cameron Elliot.

Lucia and his company were determined guilty of fraudulent investment practices by Judge Elliot and his recommendation was given to the Commission. The Commission reviewed the case and requested that Judge Elliot obtain more evidence and information in order to determine the outcome of the case.21 Judge Elliot once again determined, on the basis of the definition of “backtest” that Lucia was guilty and offered his recommendation to the Commission. Lucia and his company were banned from doing business in the financial industry and charged with a $300,000 fine.22

Lucia then asked the Commission to review his case, and also the eligibility of Judge Elliot to even rule on the case. Lucia argued that because Judge Elliot was an

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19 See id. at 5
20 See id. at 5
21 See id. at 7
Officer of the United States, subject to the Appointments Clause, and was not appointed, his rulings were invalid. SEC ALJs are selected through a hiring process conducted by other staff of the SEC rather than appointed by the President or the Commission itself. The Commission affirmed Judge Elliot’s decision and said that the issue of the Appointments Clause should be heard by an Article III court (a federal court). Lucia then petitioned the D.C. Circuit to hear his case and it was denied based on the ruling of a similar case (Landry v. FDIC). They then petitioned to be granted an en blanc hearing (heard by all judges of the court) in front of the D.C. Circuit. Meanwhile, a completely separate case, Bandimere v. SEC, was being conducted in the 10th Circuit court. In the majority opinion issued by Judge Matheson of the 10th Circuit court, the ruling sustained that the SEC ALJs were indeed Officers of the United States and even went so far as to say that the D.C. Circuit based its ruling “erroneously” and that its decision in Lucia “compounded that error.” The D.C. Circuit granted the petition for an en blanc hearing to determine the officer status (or lack thereof) of SEC ALJs, but later was unable to decide the case as the court was deadlocked in an even 5-5 split.

Due to the conflicting understandings of the correct interpretation of the law, Lucia petitioned the Supreme Court of the United States in order to solve the discrepancies created by previous precedent. The central question of law which Lucia petitioned the court to answer is: “Whether administrative law judges of the Securities and Exchange Commission are Officers of the United States within the meaning of the Appointments Clause.” Writ of Certiori was granted by the Supreme Court on January 12, 2018 and arguments were heard April 23, 2018. The opinions were issued June 21, 2018, reversing and remanding the D.C. Circuits decision, declaring SEC ALJs Officers of the United States and thus subject to the Appointments Clause.

23 Raymond J. Lucia, supra generally.
24 Raymond J. Lucia, supra at 295a-297a.
26 204 F.3d 1125 (D.C. Cir. 2000)
29 Raymond J. Lucia, supra at i.
30 581 US _ (2017)
So that’s exciting. We know the end of the story before it even begins. But what really does this mean for Lucia, the SEC, or the law? What are the factors that determine an officer vs. an employee? And, as much as I would like to give it all away in the beginning, there were a few more bumps in the road that twist this case into a political game with potential rewards for each of its players.

*Trump Administration’s Position Change*

One of the interesting factors that makes this case unique is the dissonance between the stances of the previous and current administrations. While the Obama administration supported the SEC’s claim that their ALJ’s are employees, the Trump administration retracted that position and asked the court to rule in favor of Lucia, and even take the ruling further than Lucia requested.31 As odd and backwards as this may seem, there is reason to believe that this approach to the case by the Trump administration was both calculated and purposeful.

If ALJ’s are considered officers, then they can be appointed by the President, and at the very least must be appointed by “the President alone, [the] Courts of Law, or [the] Heads of Departments.”32 This gives the President more power, reach, and influence over governmental agencies. The SEC, while often charged with overreaching their bounds, is specifically designed to maintain the interests of investor protection over those of business and government.33 As a former celebrity and outspoken corporate investor, Trump’s election poses many concerns about possible conflicts of interest between his duties as an elected leader, and his personal investments in business. These issues bring to light the potential for abuse of the system and corruption of its original intent.

Although the law must be interpreted objectively, I believe this is an unforeseen consequence of the Supreme Court ruling. It is also important to note that none of the top lawyers at the SEC signed the petition filed by the Solicitor General.34 This implies to me, and is speculated by other sources, that the SEC values its autonomy from political

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31 Lucia V. Sec, 2018 U.S. S. Ct. Briefs LEXIS 1548
32 U.S. Const. art. II, § 2, cl. 2
33 “What We Do”, *supra.*
agendas and even their legal team did not find the case law compelling enough to relinquish their longstanding position on the case.

The courts appointed Anton Metlitsky to argue the case on behalf of the SEC. The Trump administration has switched sides in multiple cases, all including primarily political advancements and agendas. These cases involve workers’ rights, voting rights, and political appointments, with the administration “abandoning the positions of the previous administration for ones favored by conservatives.” In February of 2018, Justice Sotomayor asked the Solicitor General Noel Francisco “How many times this term already have you flipped positions from prior administrations?”, expressing her frustrations with the administration’s frequent position changes. This is an uncharacteristic, aggressive tactic and seems a concerning attempt to gain more power and influence over the SEC and other government agencies.

One issue brought up frequently by various scholars is the issue of judiciary independence. One of the main rights and benefits of a federal Article III court is the presence of an impartial and unbiased adjudicator. When judges, even special administrative judges, are subject to removal based on their rulings or political affiliations, it leaves room for extreme bias; robbing citizens that go before the court of their basic right to a fair trial. Already, the SEC wins upwards of 90% of the cases tried before it. The idea that a 90% conviction rate can then be coupled with a political agenda, and an adjudicative role can be subject to the president’s discretion is a concerning possibility. Since the first mention of the issue of ALJs being officers, the Trump administration is the first to go after the power to appoint them. I posit that it is

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37 581 US _ (2017)
41 Eaglesham, supra.
because other presidents and attorney generals have respected the distance and independence which SEC ALJs once had. This radical change in position by the Trump administration has without a doubt altered the proceedings of the case in favor of the increasing presidential power over one of the American people's most fundamental institutions, the main role of which is the oversight of fraudulent and abusive activity perpetuated by large corporations and investors. This change of heart by the administration flags this case as monumentally important. Although the ALJ approval procedure in place allows Congress some oversight, the big issue at hand can be seen in the removal process, which is much less restrictive if ALJs are determined to be Officers. I will go further in depth into the removal issues in Part II: Case Significance, but I found this piece of the case specifically intriguing and, dare I say it, a bit frightening. Now that we have established the significance of the case with sufficient context, it is time to delve into the actual case law.

_Appointments Clause_

In this section, I will break down the most relevant case law decided up until Lucia’s opinion was issued. In the appendix, there is also a timeline of case law that depicts which cases express that ALJ’s are officers and which say they are employees. I have also included a few relevant cases that do not make either distinction, but rather offer different influential insights on the issue.

The Framers could never have predicted the bureaucratic behemoth that governs our country today. With this foresight in mind, many of the phrases and instructions within the constitution leave room for speculation, but also ensure that we are able to shape an evolving definition of many important distinctions within the ambiguous wording. As early as 1823, the definition of an “Officer” of the United States has been speculated and debated. Case law has conflicted throughout the circuits, and even the Justices of the Supreme Court that came to the same conclusion about the definition of an Officer went about it in various ways.

The Appointments clause states: “[the President] shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States,… but the Congress may by law vest the appointment of such inferior officers, as they think
proper, in the President alone, in the courts of law, or in the heads of departments."42

The wording of the Appointments clause states the word “officer” but refuses to give any indication of a way to define the term. Another issue brought up by this case is the latter part of the quote. For the purposes of this case, ALJs are considered to be inferior officers.43

Employees vs. Officers – Important Case Law

Although the details and decisions in each of these cases are both riveting and of great legal significance, for brevity’s sake, I will only be describing the significant implications to be gained from each of these cases in reference to Lucia v. SEC.

United States v. Maurice.44 Tried in 1823, Maurice offered the very first definition of “officer.” Justice Marshall established in this case the criteria that in order to be an officer of the United States, the position must be a “continuing” one and the duties must be on behalf of the United States.

United States v. Germaine.45 The main significance of this case is that it reiterated and affirmed the requirement of an Officer’s position to be continuous. This case, along with Buckley and Freytag, is cited by Justice Kagan’s majority opinion as the main foundation for the ruling.

United States v. L.A. Tucker Truck Lines.46 The ruling in this case set the precedent for the remedy given Lucia. Based on the remedy given in this case, Lucia was guaranteed a new trial. Kagan added her own specification to Lucia’s remedy that it must be heard by a new ALJ that was not in the remedy of U.S. v. Tucker.

Buckley v. Valeo.47 This case determined the importance of specifying the type of authority wielded by the position holder. This is where the term “significant authority” makes its first appearance. Justice Kagan determines the ALJs in Lucia to have significant authority and thus this case helped influence their ruling in Lucia.

42 U.S. Const., art. II, § 2, cl. 2
43 581 US _ (2017)
44 United States v. Maurice, 26 F. Cas. 1211, 1213 (C.C.D. Va. 1823) (No. 15,747)
45 99 U. S. 508 (1878)
46 344 U.S. 33 (1952)
47 424 US 1 (1976)
Freytag v. Commissioner.⁴⁸ Although there were no ALJs involved in this case at all, the principle question of law was very similar to that in Lucia. This case was meant to determine the status of Special Trial Judges (STJs) within the context of the Appointments Clause. The duties and powers of STJs were all but identical to those of ALJs, and thus this was a major foundation of the ruling in Lucia. The STJs in this case were determined to be Officers of the United States and set compelling precedent for SEC ALJs to be determined the same. Justice Sotomayor posits in her dissent that the majority applied the ruling of this case incorrectly as the STJs were determined to have some finality in their ability to rule and Sotomayor believes ALJs do not have any final decision-making power. Kagan acknowledges these concerns in her opinion.

Edmond v. United States.⁴⁹ This case clarified the importance of the distinction between a principle and inferior officer. ALJs were determined inferior officers, and thus, did not have to meet the requirement of reaching final decisions. They only had to exercise “significant authority.”⁵⁰ Also, as inferior officers, the Commission is able to appoint them rather than just the President.

Landry v. Federal Deposit Insurance Corporation (FDIC). ⁵¹ The ALJs of the FDIC were in question during this case. The court found that the ALJs were not Officers of the United States (principle or inferior), but merely employees due to their inability to make final decisions. The decisions were determined not to be final because they had superiors that reviewed their rulings. The court believed that the main reason the STJs in Freytag were found to be Officers was their capacity to at times make final decisions. Because the FDIC always had the opportunity to review the decisions of its ALJs, the court found that the ALJs were employees. This case is the main precedent used in the SEC’s argument of the case as well as the dissenting opinion.

Free Enterprise Fund v. Public Company Oversight Board.⁵² The decision in this case is where it gets more complicated for Lucia. The court found in this case that “for cause” removal constituted a violation of the requirement for Officers of the United

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⁴⁹ 520 US 651 (1997)  
⁵⁰ 424 US 1 (1976)  
⁵¹ 204 F.3d 1125 (D.C. Cir. 2000)  
⁵² 561 US 477 (2010)
States not to be under multiple layers of protection from removal. Basically, the ruling of this case meant that if ALJs were to be determined Officers of the United States, they would lose their ability to be given reasonable cause to be removed: they could be taken off the bench for any reason or even none at all. This creates a myriad of issues discussed further in the rest of the analysis. The existence of this precedent opened up the opportunity for political motivations to enter the scene.

**Bandimere v. U.S. SEC.** The opinion of the judge in Bandimere called out the D.C. Circuit for originally denying Lucia’s case. The decision held in a case extremely similar to Lucia’s that ALJs were Officers. The conflicting decisions between this case and Landry as well as the split in the D.C. Circuit court gave Lucia the ability to petition the Supreme Court for a resolution.

All this essentially leads to two separate schools of thought, of which the majority and dissenting opinions are each a member. Proponents of Freytag believe that the requirements for an officer consist of 1) continuing official duties on behalf of the government, and 2) the ability to exercise significant authority pursuant to the laws of the United States. Subscribers to the foundations laid in Landry place heavy weight on the concept of finality. Advocates from this point of view believe that a position cannot be considered that of an Officer if it does not have the ability to make final binding decision beyond review. Both are discussed in depth in the section below.

**OPINIONS**

In this section I will describe the important aspects of the opinions issued by the court in the case of Lucia v. SEC. Although the majority decision is important, the issues raised by the concurring and dissenting opinions are important for agencies and future cases to consider.

**Majority**

On June 21, 2018, Supreme Court Justice Elena Kagan released the Majority opinion on Lucia v. SEC, in which Justices Roberts, Kennedy, Thomas, Alito, and Gorsuch, joined. The court decided based on initial criteria set forth in US. v. Germaine and Buckley v. Valeo, and the framework established by Freytag v. Commissioner that

\[53 \text{ 855 F.3d 1128 (10th Cir. 2017).}\]

\[54 \text{ 501 U.S. 868 (1991).}\]
the SEC ALJs are Officers of the United States. In the opinion, Kagan was explicitly narrow in her discussion of the topic. She states that the decision is only to apply to the ALJs of the SEC and that the court refuses to decide on the issue of removal. The only time she even mentions removal is in the footnotes of the opinion stating:

“the Government asked us to add a second question presented: whether the statutory restrictions on removing the Commission’s ALJs are constitutional. See Brief in Response 21. When we granted certiorari, we chose not to take that step. See 583 U. S. ___ (2018). The Government’s merits brief now asks us again to address the removal issue. See Brief for United States 39–55. We once more decline. No court has addressed that question, and we ordinarily await “thorough lower court opinions to guide our analysis of the merits.” Zivotofsky v. Clinton, 566 U. S. 189, 201 (2012).”

Although the opinion was indeed narrow, it does leave room for future cases to be tried for other agencies on the basis of the ruling issued. It also calls for the issue of removal to be resolved by way of another case. The majority opinion sites the extreme similarities between the STJs in Freytag and the ALJs in Lucia. Kagan states that the court need not offer any further tests or distinctions in this case because it follows the test and decision issued in Freytag so closely. The remedy offered by the court to Lucia is the ability to be tried in front of a different, correctly appointed ALJ. Kagan makes it clear that Judge Elliot is not to be allowed to hear the case, even if he is correctly appointed.

Although Kagan’s seemingly conservative leanings in this case may seem out of the ordinary, in Mark Sterns article “Elena Kagan Is Up to Something”, he posits that Kagan may have joined the majority in order to ensure the limited scope of the opinions. He states that: “Kagan’s opinion, however, curtly declines to address the removal issue. Her ruling stays tightly focused on the appointments question, handing conservatives a small but satisfying win against the ‘administrative state.’” He goes on the say that if “she dissented instead, the opinion might’ve gone to an avowed opponent of the civil service like Gorsuch, who may well have reached out and grabbed the broader question, allowing

56 Lucia v. SEC, supra.
57 See id.
Trump to reshape the federal bureaucracy in his image. By joining the majority and penning the opinion, Kagan put off that potential calamity for another day.\(^5^8\)

This case is not only about a simple, limited decision. The value of this case comes from direct observation of the political actors involved. It is profoundly astonishing to see blatant political moves from both sides of the bench: Justice Kagan and the Solicitor General. I believe this political dynamic warrants close attention in the cases to come, especially with Justice Kennedy’s recent retirement,\(^5^9\) and Trump’s appointment of a new justice to the bench.

Concurring

There were two concurring opinions in this case: one by Justice Thomas and one by Justice Breyer. I believe Justice Breyer’s opinion to be more encompassing of the relevant issues for this analysis. Justice Thomas essentially agrees with the court’s ruling but believes the opinion should have given more guidance for cases in the future.\(^6^0\) Although Justice Breyer issued a concurring opinion (in which Justice Gorsuch and Sotomayor join as to Part III) his agreement with the majority that SEC ALJs are Officers is heavily qualified. He divides his opinion into three parts, each dissecting his reasoning for coming to the same conclusion as the majority, but by different means.

Part I

He admits that based on the precedent set by Freytag the ALJs should be considered officers but disagrees with the courts unwillingness to be more direct in its ruling. He states that “[while] precedents like Freytag discuss what is sufficient to make someone an officer of the United States, our precedents have never clearly defined what is necessary.”\(^6^1\) He believes that the court should have determined a test for deciding the debate of Officer vs. Employee in most or all cases. He also states that the majority reached its decision on the incorrect form of law, positing that the language for determining officer status is present in the Administrative Procedure Act. This act


\(^{60}\) See Lucia v. SEC, 585 U. S. ____ (2018), Thomas concurring at 1: “Moving forward, however, this Court will not be able to decide every Appointments Clause case by comparing it to Freytag. And, as the Court acknowledges, our precedents in this area do not provide much guidance.”

\(^{61}\) Lucia v. SEC, 585 U. S. ____ (2018), Breyer concurring at 1.
outlines that agencies are entitled to appointing administrative law judges in order to hear cases. It specifies that the Commission itself is the agency. Breyer suggests that because the Administrative Procedure Act requires the agency to appoint the judges and members of the Commission are the only ones that fulfill that definition, ALJs must be appointed. He interprets the APA to disallow any delegation of appointment duties to staff and thus, on the basis of statute rather than constitutional compliance, Judge Elliot was in violation of the Appointments clause. If the court would have decided for these reasons, the precedent may not have any bearing on future cases brought before the court: “The analysis may differ for other agencies that employ administrative law judges. Each agency’s governing statute is different, and some, unlike the Commission’s, may allow the delegation of duties without a published order or rule. See, e.g., 42 U. S. C. §902(a)(7) (applicable to the Social Security Administration).” He states that following this statutory logic makes this case simple to decide and that the court should go no further than to say the SEC violated a statute.

Part II

Breyer begins Part II of his opinion by addressing the main conflict analyzed in this essay: removal, or the ability of ALJs to be taken from the bench sans good cause. Based on the case law created by Free Enterprise, members appointed by the President could not be afforded “multilevel protection from removal.” For purposes of the SEC, this means that the ALJs would need to be subject to removal without cause by the President. This directly conflicts with the statue that created and outlines the policies of the SEC, which states that ALJs must be protected from removal without cause in order to maintain their independence. Under the APA, to remove an ALJ, the President must first provide just cause to the Merit Systems Protection Board. In order to remove a member of the Merit Systems Protection Board, he must prove that they neglected their duties. You can see how this would constitute the exact definition of multilevel protection from removal. And therein lies the problem with finding the ALJs as Officers

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64 Lucia v. SEC, 585 U. S. ____ (2018), Breyer concurring at 3.
65 561 US at 484 (2010)
66 5 U. S. C. §7521(a)
on the basis of precedent and constitutionality. Breyer states that to maintain the fairness
and autonomy of administrative proceedings, ALJs must be free from the fear of being
removed for political motives. He concludes Part II (A) of his opinion by stating:

“If the holding is to the contrary, and more particularly if a holding that
administrative law judges are “inferior Officers” brings with it application of
Free Enterprise Fund’s limitation on “for cause” protections from removal, then
a determination that administrative law judges are, constitutionally speaking,
“inferior Officers” would directly conflict with Congress’ intent, as revealed in
the statute. In that case, it would be clear to me that Congress did not intend that
consequence, and that it therefore did not intend to make administrative law
judges ‘inferior Officers’ at all.”

Although the court may not have addressed these issues in its extremely restricted
majority opinion, I believe this to be the central issue with the decision that ALJs are
officers.

Part II (B) mostly focuses on the importance of taking congress’s intentions into
account when ruling on a supreme court case. It is his view that congress intended ALJs
to be inferior Officers and thus again justifies his joining the majority opinion.

Part III

In the third part of his opinion, he explains some reasons that may have motivated
him to dissent. Justices Gorsuch and Sotomayor have joined only on this part of his
opinion. In this section, he steadfastly opposes the remedy outlined by the majority. He
does not believe there is any basis to conclude that Judge Elliot does not have the ability
to fairly hear the case. Although it does not make too much of a difference in this case,
Breyer fears that setting this remedy as precedent may be dangerous and inefficient for
any agencies that are required to comply: “in other cases—say, a case adjudicated by an
improperly appointed (but since reappointed) Commission itself—the “Officer” in
question may be the only such “Officer,” so that no substitute will be available.” He
sums up his opinion on the matter by expressing that if there is no requirement
demanding a new judge hear the case, the court should assume Justice Elliot’s ability to
remain impartial endures.

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Throughout the concurring opinion, it seems that Breyer takes the most issue with the courts limited scope and emphasis on the constitution rather than the statues that created and govern the administrative law judges and SEC in general. He even goes so far as to say that “[by] considering each question in isolation, the Court risks… unraveling, step-by-step, the foundations of the Federal Government’s administrative adjudication system as it has existed for decades…. And the Court risks doing so without considering that potential consequence.”70 It is essential for the adjudicators in our country to be able to rule on issues of law without outside fears or influence. Breyers concurring opinion brings up several conflicting principles of law that are involved in this case that make this ruling and its implications more convoluted than ever. The takeaway from this opinion should be that, although in a vacuum, it may seem simple to declare ALJs officers, and move on, the courts still have several questions left to answer. It brings to light many of the issues I believe the court will be forced to decide in the future, however hesitant the majority opinion on this case.

Dissenting

The dissenting opinion, written by Justice Sotomayor and joined by Justice Ginsburg, subscribes to the second school of thought described in Part I of this essay.71 They agree with the court’s definition that an officer of the court must hold a continuous office, and that they must have significant authority. They depart however on the meaning of significant authority and believe the court should outline a more technical and explicit definition. Sotomayor argues that the term “significant authority” should require the ability to “make final binding decisions on behalf of the Government.”72 This is the principle concept present in the Landry case discussed above. Sotomayor believes that the ALJs of the SEC do not have the ability to issue final decisions or bind the government in any way, they merely “assist others in exercising sovereign functions but [they] do not have the authority to exercise sovereign power themselves [and therefore] do not wield significant authority.”73

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71 They apply the logic from Landry [204 F.3d 1125 (D.C. Cir. 2000)] with an emphasis on the ALJs ability to make final decisions.
Justice Sotomayor also disagrees with the application and interpretation of Freytag by the majority in this case, on the basis that Freytag also implies the requirement of an ability to issue a final decision.\footnote{501 U. S., at 882.} In Freytag, the STJs were determined to be officers in some respects but declared officers overall as it is impractical to consider a position that of an officer on some occasions and an employee in others. These respects included cases in which the STJs could issue final decisions. Sotomayor believes this is grounds to conclude that issuing a final decision is an inherent requirement of being an officer in both Freytag and Landry.\footnote{Lucia v. SEC, 585 U. S. ____ (2018), dissenting at 5.} She ends her dissent by acknowledging the troubling issues that are presented in Breyers concurring opinion and saying that there are still “concerns regarding the Court’s choice of remedy.”\footnote{Lucia v. SEC, 585 U. S. ____ (2018), dissenting at 5.}

Although a 7-2 decision may seem like a slam dunk for Lucia, the concerns in the concurring and dissenting opinions were shared by four Justices. However straightforward this case may seem, I believe that Justice Sotomayor’s interpretation of the decision in Freytag shows that the lines between Officer and Employee are convoluted and indistinct. Both the concurring and dissenting opinions seem to call for Kagan to provide stronger and more precise applications of the law in this case, a call that Kagan is hesitant to answer. It seems that all the questions raised in each of these opinions, and more, are being debated and will be seen by the courts before long. Even though Kagan may have tried to make as little a splash in the water as possible, the ripples will still take effect. Regardless of her emphasis that this case only applies to SEC ALJs, the consequences of this decision will be seen in the SEC as well as other agencies. These consequences are examined in the following section.

**CASE SIGNIFICANCE**

This section of the essay addresses the potential effects of the case on the SEC as well as other bureaucracies. I will discuss the significance and issues surrounding the remedy provided to Lucia by the court, as well as the statutory conflicts that arise with
this decision. Finally, the analysis ends by looking at the Trump administration’s proposed solution to these statutory conflicts and what it means for the SEC and similar institutions. The following contains the majority of my analysis of the case and surrounding discourse, rather than simply the needed facts and context of the case outlined above.

**Effects**

Although the concurring and dissenting opinions raise many valid questions for future cases to solve, the ruling does have some immediate and important consequences. Specifically, the remedy prescribed for Lucia sets a precedent for cases within and outside the SEC. This issue of removing an ALJ also creates a conflict with the very statute that gives ALJs their powers.78 There is interesting and passionate discourse surrounding actions being taken to correct that complication, as well as the debate of ALJs independence v. accountability.

**Remedy**

Kagan stated that “the ‘appropriate’ remedy for an adjudication tainted with an appointments violation is a new ‘hearing before a properly appointed’ official.”79 She stated that Judge Elliot would not be allowed to conduct the new hearing even though his appointment has been made constitutional because “he cannot be expected to consider the matter as though he had not adjudicated it before.”80 The case will be reheard by another ALJ that has received a proper appointment from the President or the Commission. The effects of this prescribed remedy could be seen as soon as the day after the decision was issued and will continue to play out in the years to come.

**Within the SEC.**

The day after the Lucia decision was issued, the SEC responded by issuing an order to halt all adjudication proceedings before ALJs, effective for 30 days.81 This will affect 100 cases that are currently being tried at the SEC and 12 cases that are currently

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78 Lucia v. SEC, 585 U. S. ____ (2018), Breyer concurring Part II generally.
80 See id.
81 Hazel Bradford, SEC puts in-house cases on hold after Supreme Court ruling Pensions & Investments (2018), http://www.pionline.com/article/20180625
on appeal.\textsuperscript{82} This significantly affects the ability of the SEC to conduct their cases and essentially pauses all administrative efficiency. In November of 2017, before the court heard the case or writ was granted, the SEC issued a ratification of its current ALJs.\textsuperscript{83} The opinion by the court did not address whether or not such a ratification would validate the appointments, but the SEC’s actions since the ruling seems to implicate it does not. It is still to be seen how many cases within the Commission will be affected. There have been several cases in the past that have attempted to get their cases overturned on the basis of the ALJs method of selection. After this ruling, it is likely that many of these cases will petition to be allowed a new trial in front of a new judge, as Lucia was given. Taking on these new cases will inevitably lead to some efficiency issues for the SEC.

Another outcome I believe the SEC faces is increased scrutiny on their ALJ proceedings: “This is fertile ground for potential future litigation and is likely to lead to a variety of legal challenges to agency actions.”\textsuperscript{84} Many of the articles I have read regarding this case end by taking issue with the process of ALJ proceedings in general.\textsuperscript{85} \textsuperscript{86}\textsuperscript{87} I believe the increased pressure on the Commission to appoint and be responsible for the ALJs will lead to more transparency within the Commission. There has definitely been an increase in discourse surrounding the fairness of trials conducted by ALJs with most people coming to the conclusion that the SEC should try most of their cases in Article III federal courts.\textsuperscript{88} \textsuperscript{89} Whether or not this discourse will lead to any change in venue for SEC cases is yet to be seen, but I do believe the SEC will be under more pressure and inspection than they have been in the past.

\textsuperscript{85} Anello, \textit{supra}.
\textsuperscript{86} Eaglesham (2014), \textit{supra}.
\textsuperscript{87} Eaglesham (2015), \textit{supra}.
\textsuperscript{88} \textit{See id}.
Outside the SEC.

The more interesting and controversial effects of the ruling can be seen outside the SEC. The New York Times quotes David Zornow, saying “the decision permits any litigant with a pending administrative case who has challenged the constitutionality of an administrative law judge to demand a new hearing.”\(^90\) The ruling has the potential to guide cases that have nothing to do with the SEC. There are at least 1,931\(^91\) ALJs that are in various agencies throughout the administrative system. Each agency has its own individual procedure for selecting ALJs, but all of them have the potential to be challenged after this ruling. As shown in the table in the Appendix\(^92\), most of the ALJs (1,655) preside over cases at the Social Security Administration (SSA), to rule on benefit cases and other matters. Due to the ambiguity of the decision issued, even the SSA does not know how their ALJs stand in regard to the Appointments Clause. The SSA issued an emergency message to its ALJs on June 25, 2018, stating that the ALJs must acknowledge that the Appointments Clause issue has been raised in a case, but must “not otherwise discuss or make any findings related to the Appointments Clause issue.”\(^93\) It is yet to be seen how the ruling will affect the ALJs at the SSA, but the number of judges and cases that could potentially be called into question is alarming.

In the weeks proceeding the ruling, agencies were at a stand-still, looking to legal counsel to shed light on what the ruling may mean for them. In the article titled, Assessing Lucia’s Impact Beyond the SEC, the authors detailed an example of what the effects of the ruling would look like for just one agency: the EPA, which only has 3 of the 1,931 ALJs. Following on the test developed by Kagan, the ALJs at the EPA have continuing offices, and have very similar duties to the SEC ALJs that qualified them as having significant authority. They said that under the Lucia analysis “it is possible a court would find that EPA ALJs constitute Officers of the United States,” and go on to say that, if so determined, “any decision challenged within the 45-day appeal window could

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\(^92\) See id.

\(^93\) This emergency message has since been taken down. Link, last visited July 30, 2018: [https://secure.ssa.gov/apps10/reference.nsf/links/06252018113417AM](https://secure.ssa.gov/apps10/reference.nsf/links/06252018113417AM)
arguably be subject to a new hearing before a different and appropriately appointed ALJ.”94 Not only would this create an administrative headache, but “it could [also] delay enforcement proceedings and provide parties an opportunity to consider settlement or other options prior to undertaking the adjudicatory process.”95

The effects of this ruling will be seen rippling out in litigation in thousands of potential suits.96 Each case, while seemingly minute, has the ability to create massive roadblocks and halt efficiency for the administrative activities and regulation. This comes from the remedy available to appellants because such a large surge of cases that require new hearings will demand an extension of resources and will obstruct the efficiency of the system. Legal counsel of all types of cases will see this as an advantageous way to get their cases retried and their clients a different outcome. This decision also has the potential to reach beyond even ALJs. There are many different adjudicators and administrators within governmental agencies that also maintain continuous offices and have the ability to make significant decisions by the definition developed by the Lucia ruling.

Removal

The Removal of ALJs became a point of contention the moment the ruling was issued. As previously described, the statute that created the position of ALJs only allows them to be removed for cause based on the findings of the Merit Systems Protection Board. The Appointments Clause does not allow for multiple layers of protection, i.e. for cause specification, between the Officer and the President or Heads of Departments. This creates a battle between laws, but also ideologies. Some people believe that the independence of the judiciary is more important than the ability to tie a judge to a political party. Others propose a judge’s accountability to the public can guide their decisions justly and make them more receptive and vulnerable to review by their superiors. These issues have been debated wildly, and the Trump administration recently made an executive order that not only extends the breadth of the ruling itself, but also changes the balance between the regulatory systems and the political powers they serve.

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94 Barry Hartman, supra at 2.
95 See id.
96 See id.
**Independence v. Accountability.**

Administrative Law Judges, although not members of the federal judiciary, have significant power over everything from individual fines and penalties to massive regulation and oversight of large corporations. There is a balance to be struck between ALJs having autonomy to decide cases independent of their agencies and being accountable to the public for which they are creating and enforcing the policies. The justices seem to have been mindful of this during the oral arguments. Justice Kagan, addressing the petitioner’s attorney Mark Perry, said:

“[You] want to keep decisional independence as something that you’re not interfering with. There are different ways to interfere with decisional independence. One is by docking somebody’s pay. One is by having a removal power that you hang over your head. And another is by being the person who gets to decide who gets the job or not. And so all of these things in some manner tie the adjudicator more closely to the political system.”97

It is clear that Kagan viewed the power of removal as an attack on the independence of the ALJs from the political party in power. Likewise, The American Constitution Society, a progressive legal organization, said the change “could have a stunning impact on how myriad administrative claims are handled. Political appointment could, for example, lead to more administrative law judges with pro-corporate anti-worker biases,” its President, Caroline Fredrickson, said in a statement.98

Justice Roberts, and those of a more traditionalist and Framers view of the Constitution, focused on the ability of the power of removal to create reciprocal accountability between the ALJs and those that appoint them:

“One of the principles that caused the drafters to give the authority to appoint officers to the President was the important one of accountability99 .... if the individual were an officer, he would have to be appointed by the Commission, and people would know who was responsible for whatever conduct or misconduct or decisions he would take. But in this case, you don’t have that accountability. The Commission can say: Don’t blame us. We didn’t do it. The President can say: Don’t blame me. I didn’t appoint them. And, instead, it’s something in the

99 Oral Argument at 51: 8-11, supra.
administrative bureaucracy which operates as insulation from the political accountability that the drafters of the Constitution intended.”

These quotes represent the two main ideas behind many debates about administrative independence. Declaring ALJs as Officers of the United States does allow for the Commission to gain more attention for its decisions and hold the selection process to a higher standard, but it also allows for the power of removal without cause to apply pressure to the judges to make judicial decisions that benefit their appointer.

Executive Order.

On July 10, 2018, President Trump issued an executive order titled “Executive Order Excepting Administrative Law Judges from the Competitive Service.” In the order, the President declares, based on the decision issued in Lucia and the presumption that more Appointments Clause issues will be raised regarding ALJs, that all ALJs within the federal government that are “[responsible] for important agency adjudications” are Officers of the United States. The order exempts ALJs in federal agencies from competitive service and competitive examination requirements. According to the United States Office of Personnel, competitive service requires that “individuals [go] through a competitive hiring process (i.e., competitive examining) before being appointed.” The appointment and removal of ALJs will now be considerably different. They will now be Schedule E excepted service officers, that may be appointed without competitive review of their skills and removed without cause. The order does contain the provision however that “[i]ncumbents of this position who are, on July 10, 2018, in the competitive service shall remain… as long as they remain in their current positions.”

Because of this provision, we may not start seeing the results of this order for a few years, but it does seem like a drastic overreach of the ruling issued by the courts. The court specifically did not address the issue of removal due to a lack of court proceedings on the matter, and it seems baseless to issue an order changing the process of removal.

100 Oral Argument at 51-52: 13-25, supra.
101 83 FR 32755 §1
102 See id.
104 83 FR 32755 §3(iv)
just from the decision issued in Lucia. The order states that “there are sound policy reasons to take steps to eliminate doubt regarding the constitutionality of the method of appointing officials,” and that this policy will “mitigate concerns about undue limitations on the selection of ALJs, reduce the likelihood of successful Appointments Clause challenges, and forestall litigation in which such concerns have been or might be raised.” Even further, “[t]his action will also give agencies greater ability and discretion to assess critical qualities in ALJ candidates, such as work ethic, judgment, and ability to meet the particular needs of the agency.”

Although the order may clear up some confusion regarding the statutory conflicts created by the ruling, it reaches far beyond the scope of the decision issued and makes policy based on case law that intentionally denies setting the precedent on which it relies. The President of the Association of Administrative Law Judges believes that:

“[the order] is an assault on the due process for the American people who have a right to a neutral arbiter... [it] calls for replacing the current merit system used to hire judges with a court packing plan that will allow agency heads to hand pick judges who hear cases at the Social Security Administration and dozens of other federal agencies. This change will politicize our courts, lead to cronyism and replace independent and impartial adjudicators with those who do the bidding of political appointees. This is a decision that should be reversed. If allowed to go forward, it would be the equivalent of placing a thumb on the scale of justice.”

In his article discussing the order, Brian Casey even goes so far as to say “perhaps the administration had this one in the can already,” suggesting that the Administration had planned to issue this order if ALJs were determined to be officers of the court, “mak[ing] them like any other political appointee—entirely beholden to the head of the agency or the President for their jobs…. ALJ adjudicative independence may quickly become a thing of the past.”

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105 See id at §1
106 See id.
bound to the executive branch has been an on-going trend with the Trump administration: “The White House also moved recently, in three executive orders to reduce the power of the civil service by limited federal unions’ ability to process whistleblower and other worker complaints; by ordering previous federal union agreements to be renegotiated and by making it easier to fire federal employees.”

There is likely to be backlash and challenges to the executive order, as some believe it is in direct conflict with the APA of 1946. The SSA, the most affected by this order, still has the contents of the order as well as the ruling of Lucia “under review” so they may determine the impact of both and how best to comply with laws and regulations without leaving themselves vulnerable to liability or further litigation and appeals. Most other agencies have accepted the order and will begin implementing it. It is still to be determined how the order or subsequent challenges of the order will affect the current administrative state. In the current chaos surrounding both the ruling and the order, effectiveness and efficiency have already taken a hit, with new regulations and current enforcement actions being put on hold until this is all sorted out. Although the order may have seemingly solved the statutory conflicts regarding removal, its speed following the ruling and broad nature outside the scope of the case demands review and close attention to the administration’s moves ahead.

111 Administrative Procedure Act, supra.
112 On August 17, 2018, President Trump requested that the SEC eliminate required quarterly reporting for public companies. Companies would only be required to issue financial reports twice a year. This creates more flexibility for businesses, but also more ambiguity and volatility for investors. Financial analysts often use quarterly financial reporting to find major issues in company finances and forecast projected earnings. Marcy Gordon, Trump asks SEC to consider ending required quarterly reports The Olympian (2018), https://www.theolympian.com/news/business/article216875770.html
CONCLUSION

It is easy to perceive a case involving the SEC, Appointments Clause, and Alternative Law Judges to be of little importance. Admittedly, the minutia needed for context and understanding often makes for a pretty dry read, but through their actions, both the executive and the judicial branch function to create a political gameboard of which the American people are only spectators. Kagan refused to create precedent for a question clearly needing resolution, and in response the administration expanded the application of the ruling to fit its political agenda. Lucia v. SEC has called into question not only the definition of Officers, but also the constitutionality of court proceedings outside of the federal judiciary. ALJs are meant to be pointedly impartial and unpolitical, but in practice this ideal may be unrealistic. The balance between independence and accountability is delicate, and the consequences of the administration shifting this balance will be interesting to see. Unfortunately, it is not easy to wrap up this case as it is still being fleshed out - it is a political game that’s just begun.
**APPENDIX**

List of ALJs and their agencies

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Timeline of Important Case Law
INTRODUCTION

The phrase “no trespassing” conveys a simple message: one may not enter someone else’s property without an invitation or the legal authority to do so.\(^1\) Homeowners often use no trespassing signs to signal that visitors are unwelcome on their property. In circumstances involving police, however, most courts have held that no trespassing signs alone are ineffective in revoking the customary license police are presumed to have. Instead, the most important consideration for most courts is the

existence of a barrier physically preventing police from entering the premises. The courts have created a physical requirement that a barrier exist between the homeowner and the police to maintain the homeowner’s Fourth Amendment rights. This requirement leads courts to apply a stricter standard than is constitutionally required for homeowners. Consequently, courts have made it more difficult for homeowners to keep police away from their homes.

On August 3rd, 2013, James Robert Christensen Jr. was arrested for harboring an active methamphetamine lab and multiple firearms. The investigators received a tip that Mr. Christensen was selling pseudoephedrine, an ingredient needed to create methamphetamine. As investigators interviewed the person who notified the police, a man appeared at window view of the person's property. The man told the investigators that he had just dropped off pseudoephedrine at Christensen's property. After hearing that Mr. Christensen was in the process of making methamphetamine, the officers walked to Mr. Christensen's residence. As they began to step on Mr. Christensen's property, the investigators encountered tall grass along his driveway that extended to a seventy-yard distance to his two trailer homes. Although there were no physical obstructions that prohibited the investigators' entrance, there were two "No Trespassing" signs posted on the residence. The investigators arrived at Mr. Christensen's front door, where he proceeded to open the door, exit his home, and promptly shut the door behind him. When the officers asked him to search his residence, he refused. The investigators, having smelled the odor commonly associated with the production of methamphetamine, concluded that they need to enter the home and locate the active narcotics lab. They entered his home and proceeded to detain him. At trial, Christensen filed a motion to suppress the evidence gathered from his home, claiming that the presence of a “No Trespassing” sign exuded a reasonable expectation of privacy. His motion was denied and he was convicted of five separate criminal charges.

2 State v. Christensen, 517 S.W.3d. 60 (2017)
3 Id.
4 Id.
5 Id.
6 Id.
I. THE COURTS DECISIONS ON "NO TRESPASSING SIGNS"

“No trespassing” signs on homes signal visitors that they are unwelcome on a residence. However, through the analysis of state and federal courts, physical signs such as gates, fences, and "no trespassing" posters have not created a de facto barrier between the implied license of officers who conduct “knock and talks”. Alongside Mr. Christensen's petition stand four other state and federal rulings that further support the notion that the courts have made it more difficult for homeowners to keep police away from their homes. In United States v. Schultz the defendant, in that case, claimed that a "No Trespassing" sign meant that "officers had no legal right to be on his property, and therefore did not have the legal right to seize any evidence." No different to Mr. Christensen's scenario, the United States District Court for the Eastern District of Michigan instated the reasoning that the officers had a lawful right to enter onto the defendant’s property, despite the presence of no trespassing signs, to “engage in investigation-related conversation.”

Then in United States v. Jones, the same physical barrier of "no trespassing" signs was the element of contention by the petitioner who brought this case to the United States District Court for the Western District of Virginia. The facts presented to this district court showed that the petitioner's home had eight "no trespassing" signs covering the outer area of his residence. The number of signs had no impact on the ruling since the court ruled that “the existence and volume of 'No Trespassing' signs neither revoked the officer's implied license to approach the house nor expanded the defendant’s rights under the Fourth Amendment”. In 2015 United States v. Holmes the defendant barred his home with an electronic gate that encompassed his home and was covered with a "No Trespassing, Keep Out." sign. It was the United States District Court for the Middle District of Florida that later reasoned the "In the absence of another barrier, such as a fence and gate, ‘No Trespassing’ signs do not, in and of themselves, withdraw the

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7 See Id. 546
8 See Id.
10 United States v. Jones, No. 4:13cr00011-003, 2013 WL 4678229
11 Id.
12 United States v. Holmes, 143 F. Supp. 3d 1252
implied consent to conduct a knock and talk." These examples—as favorable they are to law enforcement—show the deterioration of civil liberties and the useless application of real and effective bars that civilians propose on their homes to avoid intrusion. The United States Court of Appeals for the Eighth Circuit contributed in a concoction ruling and upheld a "knock and talk" despite a "no trespassing" sign on the driveway gate. Through the same probable cause standard that derived from the mentioned cases, the investigators, in this case, were able to clarify exigent circumstances and impose their implied license to an unwarranted search. The Tenth circuit joined the Eighth circuit in the most recent example of this ignoring physical barriers pattern in 2016. The facts of this case are the quintessential illustration of the scenario in which a sign alone was found to be ineffective in revoking a law enforcement officer’s license to be on an individual’s property.

In United States v. Carloss, six agents were investigating Ralph Carloss for violations of weapons and drug laws. In order to talk to Carloss, the agents approached his residence and knocked on the door. As they approached the home, the agents bypassed multiple "no trespassing" signs that lined the property. Additionally, there was a "no trespassing sign" posted on the front door of the house. Carloss came out of the house, briefly talked to the agents, and started to return to the house. The agents then asked if they could accompany him inside, to which Carloss agreed. In the house, the officers saw drug paraphernalia and drug residue in plain view. After leaving the house without searching, the officers used their observations to obtain a search warrant and search the house. They found multiple meth labs and a loaded shotgun, among other items, leading to the prosecution of Carloss for weapons and drug offenses. The customary license that police have been afforded have skewed the path of these physical barrier cases. Contradictory to Supreme court ruling that imposes that "law enforcement

13 Id.
14 United States v. Bearden, 780 F.3d 887, 893–94 (8th Cir. 2015)
15 Id.
16 United States v. Carloss, 818 F.3d
17 Id.
18 Id.
19 Id.
20 Id.
officers who are not armed with a warrant and knock on a door” can do no more than any private citizen might do.21

II. THE TRESPASS STANDARD

The Supreme Court ruling of Florida v. Jardines has strengthened the license and drawn further back these liberties. Through Jardines, the "traditional property-based understanding of the Fourth Amendment" added to that which was established in Katz v. United States.22 In Jardines, the Supreme Court recognized the limits of an implied license. In that case, officers without a warrant approached a home with a drug-sniffing dog to investigate an unverified tip that marijuana was being grown in the home. While on the front porch, the dog indicated that there were drugs in the house, which the officers then used as the basis for obtaining a search warrant.23 Jardines never manifested an intent to revoke the implied license, but the issue of signage or barriers was never addressed. Instead, the case turned on the scope of the implied license and what is customary. Justice Scalia, stating for the majority, held that use of the drug-sniffing dog on the homeowner’s front porch constituted a warrantless search under the Fourth Amendment.24 Using the trespass analysis, that he had articulated in United States v. Jardines, Justice Scalia reasoned that the employment of a specialized dog exceeded the scope of a visitor’s customary invitation to enter the premises.25 Revisiting the facts in Jones illustrate the different ways in which physical trespassing can occur. Without a warrant, law enforcement officers installed a GPS tracking device on the undercarriage of Mr. Jones’s vehicle, which was parked in a public parking lot. Found in violation of the fourth amendment by the majority. 26 Justice Scalia said that “by attaching the device to the vehicle, officers encroached on a protected area.”27 This trespass upon a

21 Kentucky v. King, 563 U.S. 452, 469 (2011)
22 Florida v. Jardines, 133 S. Ct. 1409

23 Id.
24 Id.
25 Id.
26 Jones, 565 U.S.
27 Id.
constitutionally protected “effect” constituted a warrantless search. What many believe Jones added to the Katz analysis was that of a trespass test.

When triggered, the trespass test takes precedence over the Katz test. In Jones, an inquiry into the reasonableness of Jones’s expectations of privacy was considered unnecessary because a physical intrusion of a constitutionally protected space occurred. Since the facts in implied license cases involve physical intrusions, the trespass analysis is the relevant inquiry. Before the 1960’s the Supreme Court equated searches with trespasses. With Jones it was revived.

III. THE RESURGENCE OF THE TRESPASS STANDARD UNDER IMPLIED LICENSES

The shift made in Jones is pivotal to understand these implied licenses cases because in cases such as Christensen’s, Bearden's and Carliss' their protections maybe have been offered as soon as those investigators stepped in the curtilage of their home. The implied license to enter a homeowner’s curtilage applies to all visitors to a residence. When Girl Scouts are selling cookies or salesmen are knocking on your door they are using an implied license. This practice is the knock and talk and is known widely and relatively. A knock and talk is a pertinent tool for law enforcement to use, and warrants information needed for their job. It requires no warrant and no judicial oversight. However, knock and talks can have significant negative ramifications for homeowners, even if they are not engaged in criminal conduct. Scholars have noted that the practice often leads to a full-fledged search, either through obtaining probable cause, the presence of exigent circumstances, or express consent to move beyond the scope of the implied license. This dynamic is not innately corrupt, as police officers can obtain evidence that prevents crimes and harm to civilians. However, it is the inherent pressure of police interactions with homeowners—especially in the consent context—that may lead to

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28 Id.
30 See Id.
31 See Id.
32 See Id.
abuses of civil liberties. It then becomes the concerns of citizens and targeted groups who consent searches based on their communications with the police. Evidence leads the public to believe that police often conduct ‘knock and talks’ for the main goal of getting consent to a search.33 These consent searches are hard to challenge, as courts are reluctant to invalidate these searches, even when coercion is involved.34 Recognizing this dynamic, police have increasingly relied upon consent to conduct searches when the officers do not have probable cause. This is worrying, as citizens may underestimate the invasiveness and consequences of a consent search, perhaps agreeing to the search to seem cooperative. Further, many citizens do not understand that they can refuse when an officer asks for consent.35 In this context, knock, and talks can be particularly troubling. Though officers are “encouraged” to identify themselves as police, they are not required to inform homeowners about the limits of a knock and talk visit. Many residents may be unaware that the police, without a warrant, are merely visitors to the home and only rely upon the same implied license as the public. Thus, police may conduct knock and talks in a targeted manner in the hope that the interactions may lead to full-fledged searches. Though courts do not designate it as an explicit requirement Courts generally required a barrier to create a legitimate expectation of privacy.36 The de facto barrier requirement is not faithful to the historical conception of revocation of an implied license. As noted above, the historical key to revoking an implied license is notice. The real barrier requirement distracts from this principle and artificially raises the burden to revoke a license. Recently, then-Judge Gorsuch noted that the common law suggested that “posted notice can suffice to warn off ‘reasonable’ visitors. “not, knock and talks have been invalidated only when a barrier is present.37

33 Craig M. Bradley, “Knock and Talk” and the Fourth Amendment, 84 IND. L.J. 1099, 1111 (2009).
34 See Id.
37 United States v. Carloss,
The present acceptance of both Katz and Jones and how they shape knock and talks leaves police officers and citizens in a difficult position, as neither possesses a true bright-line rule by which to evaluate their rights. This ambiguity in the law must be resolved to promote both civil liberties and effective policing. Any changes to the circumstances in which a license can be revoked will have a major impact on police practice. In that vein, it is important to note that numerous appellate court decisions upholding the practice post Jardines demonstrate that it is still a relevant and valid tool.\textsuperscript{38} A large spectrum exists in which the scope of an officer’s license is limited and cannot be reconciled within Fourth Amendment view.\textsuperscript{39} Still Christensen’s case is a reminder that as a homeowner, your continuation and expectation of privacy with signs is not enough to revoke this license.

\textbf{III. Conclusion}

The present acceptance of both Katz and Jones in the context of knock and talks leaves police officers and citizens in a difficult position, as neither possess a true bright-line rule by which to evaluate their rights. This ambiguity in the law must be resolved to promote both civil liberties and effective policing. Any changes to the circumstances in which a license can be revoked will have a major impact on police practice, with the practice of knock and talks being most affected. In that vein, it is important to note that numerous appellate court decisions upholding the practice post-Jardines demonstrate that it is still a relevant and valid tool. Jardines, with its recognition that the scope of an implied license is limited, should provide a deterrent for unscrupulous officers who use knock and talks as a front to conduct a search. Banning the practice altogether, though, may hamstring investigators who would be unable to approach the homes of witnesses or neighbors without prior express consent, a warrant based on probable cause, or an exigent circumstance. On the other end of the spectrum, it has been suggested that police officers should “enjoy an irrevocable right to enter a home’s curtilage to conduct a knock and talk.”\textsuperscript{40} This argument, though, opens potential constitutional issues. Revoking an

\textsuperscript{38} See Id.
\textsuperscript{39} See id.
\textsuperscript{40} See Id.
implied license has become very difficult. Homeowners are often forced to deal with police approaching their home as part of a knock and talk. This practice, while an effective tool for law enforcement, can have serious ramifications for homeowners. Often, knock and talks can result in invasive searches, either by homeowner consent or by probable cause because of the interaction. Citizens wishing to avoid a knock and talk can attempt to revoke the basis on which the practice is based—the implied license.

Courts, however, essentially require a homeowner to construct a physical barrier that keeps police and visitors off the premises. Christensen’s petition and case were denied because a physical barrier was found to be a non-dispositive reason under the trespass test. No signage has been found enough to revoke the implied license. For citizens to revoke this license the courts must move towards a true totality of circumstances test. While the barrier should remain an important consideration in the standard, it would still be one of the factors that brings forwards a dispositive fourth amendment hearing.
THE CYCLE OF MASSACRE:
A Historical Inquiry of 2nd Amendment Constitutionality from Generation to Generation.

Angela L. Whistler
Departments of International Studies and History

TABLE OF CONTENTS

INTRODUCTION

I. THE HISTORY OF REGULATIONS FROM COLONIAL ERA TO EARLY RECONSTRUCTION (EST. 1607-1865)
II. THE SHIFTING MINDSET BETWEEN THE RECONSTRUCTION ERA TO MILLER
III. HISTORICAL DEVELOPMENTS OF THE 2ND AMENDMENT POST-MILLER TO MODERN DAY

CONCLUSION

INTRODUCTION

Freedom underlines the principles of the United States of America. Humans of every walks of life embedded themselves into the essence of this land, searching for a hope they could not have forged anywhere else. From generation to generation, each one strived to live, to love, to be happy, but most of all, they fought. Generation after generation fought in hopes to create a better nation for their prosperity, for the right to be themselves without fear, and to continue to fight today. From the founding of our government to our current political atmosphere, it became our constitutional right to
survive, thrive, and protect what we hold dear.\(^1\) This belief of self-preservation and defense manifested into our constitutional right to bear arms,\(^2\) but its definition and role in American society evolved with each new generation and new fear that followed, evolving from a protection towards a paranoia.

During early, foundational era legislation, gun regulations and gun rights created a symbiotic relationship, understood by the American populous as a freedom within itself: a freedom of safety and of protection from the fears surrounding their generation. The second amendment and Bill of Rights was designed with the same intent: to protect and guarantee certain unalienable rights for the people of the United States.\(^3\) They took shape during a time in which fear of tyrannical rulers, standing armies, and repressive legislation ran rampant throughout all parts of the country, and cries for governmental prevention of these possibilities were echoed in federalist doctrine.\(^4\) In the second amendment, this was personified through its rhetoric, hoping to prevent these possibilities and protect the people through its militia clause and right to bear arms,\(^5\) as seen below:

“A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”.

But somewhere along the way, the protection of freedom and the protection of firearms\(^6\) became synonymous with one another, each equating and validating the extremes of the one another instead of protecting citizens as both were individually designed to do. The toxic rapport formed in political platforms between the second amendment and governmental regulations transformed the ideals of this nation’s courts and citizens alike,

\(^2\) U.S. Const. amend. I- XXVII, §.
\(^3\) U.S. Const. Amend. II, § 1.
\(^4\) U.S. Const. amend. I- XXVII, §.
\(^5\) Id.
\(^6\) Firearms are defined as “a weapon from which a shot is discharged by gunpowder —usually used of small arms” by Firearm, Merriam-Webster, https://www.merriam-webster.com/dictionary/firearm (last visited May 23, 2018).
disfiguring a constitutional right into debatable political ideal. When did the functionality of firearms become the foundation for modern freedom? When did guns stop being tools and start symbolizing the barrier between democracy and anarchy?

For the majority of American history, firearms and freedom flourished as separate entities. Each one defined their own individual ideals instead of one another, as explained in Part II, but increased tension and fear from generations wounded by overly-destructive wars, advancing technology, and political corruption at the highest levels of government disassembled the origin of what each once stood for. The world was different; we were different. The people expected to be protected by the government, not from it, but that is not the case anymore. Somewhere along the way, the deaths and violence attributed to an array of unforeseen changes did not matter anymore. The numbers seemed to simply pile on one another, instead of penetrating the remaining ethics left in legislation. Somehow, somewhere, political gain became more important than the freedom it threatened, and only one side of the firearm debate was told at a time. Our current constitutional debate regarding the second amendment stems from this blind spot, as elaborated by Part III, but it was not always the way the story went.

For most of history, a debate between gun control and gun rights had no reason to even exist. From the House of Burgess of Virginia in 1619, to landmark cases such as United States v. Miller (1939), to modern supreme court petitions such as Silvester v. Becerra (2017), firearms progressed from a tool of independence to a last-resort protection for an idealized way of life. For the majority of our nation’s life, gun control meant anything but the thwarting of freedom: that regulations are a protection of freedom within itself, giving ease of mind and safety without impeding on anyone’s constitutional rights because protection from dangerous and preventable events was the government's

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9 United States v. Miller, 307 U.S. 174, 178 (1939)

job, not an individual's. That police should be able to prevent a school shooting, not a teacher. Regulations are not constructs or functions of a post-industrial era set against nationalism and freedom but tried and practiced legal precedence that protected the United States for generations prior that saw greater dangers than current day, without endangering the people or their rights.11

Regulations meant protection. Whether it was from governments, citizens, or the dangers that lurk with both, regulations were protection against the preventable dangers seen in each generation. They diverted the looming existential unknowns and laid the groundwork, so regulations can be protection for this generation once more, as illustrated in Part IV and concluded in Part V of this essay. By going back through time, the steps forward become clearer, and the inconsistency of current protocols and rhetoric becomes obvious, underscoring the reality that gun laws are not a modern concept, nor is the fear that their existence creates.12

Fear and freedom’s supposed symbiotic relationship within the firearm debate has little constitutional or historical precedence, yet it dictates it. It undermines the parallel goals that created each one: protection and liberty. For freedom’s sake and for safety’s sake, the totality of our nation’s history must enter the gun regulations debate to make clear the inconsistencies and distorted rhetoric used in the current gun right debates. What’s revealed is not the bipartisan standpoint of gun control versus gun rights, but the legitimate symbiotic relationship between the two. Gun control can be an affirmation of gun rights. History will speak for the generations who can no longer, for the generation whose lives depend on this debate’s outcome, and for the generation who have yet to have their shot.


THE HISTORY OF REGULATIONS FROM COLONIAL ERA TO EARLY RECONSTRUCTION
(EST. 1607-1865)

Gun regulations are not a modern concept. Cries for a return to a once great American society echo across the country, especially when the mere whisper of government interference within the firearm/freedom relationship comes about. However, the truth of the matter is that the historical framework does not coincide with the belief that regulations only came about once the federal government began to get more involved in American lives. The opposite, however, does. This principle, as illustrated by Robert J. Spitzer in his review Gun Law History in the United States and Second Amendment Rights, that American gun control regulations come from the ultra-liberal ideals of the late 1960’s collides with legal precedence and history. In reality, it was the hardened “rum-guzzling pioneers [of] the 1600s.”

Firearm regulations dawned with the rising of our nation in the early colonial era. Weapon regulations and restrictions existed in the founding settlements, such as Maine and New York. During the first legislative session recorded within the colonies, the House of Burgesses in Jamestown, Virginia, a law restricting and regulating the commerce of firearms and weapons to the Native Americans, as well as other outsiders within the community was established, practiced, and tried. This set in motion a precedence for individual level restriction in colonial and foundational eras of American legislation that continued on for well over a century.

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14 Id. at 56

15 Id. at 55


17 1642 N.Y. Laws 33, Ordinance of The Director and Council of New Netherland Against Drawing A Knife and Inflicting A Wound Therewith:


19 Id. at 56-57
Prior to Reconstruction especially, the ideals and understanding surrounding firearm legislation painted a reality that is stark in contrast to the current mindset. Saul Cornell and Eric Ruben illustrate this in their article for the Yale Law Journal, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Caselaw in Context.* Ruben and Cornell indicate that the majority of foundational era legislation continued English common law practices in regard to the regulation of firearms, specifically the tradition surrounding the inability to carry weapons in public established in the Statute of Northampton in 1328. Mark Anthony Frassetto further elaborates on Cornell and Ruben's argument in his paper *The First Congressional Debate on Public Carry and What It Tells Us About Firearm Regionalism* by establishing that “[...] no credible scholar, from either side of the debate, disputes that the Northampton formulation governed public carry during [the founding] period.”

Up until the civil war, two regional beliefs for gun regulations regarding public carry were the most pronounced throughout the United States, according to Cornell and Ruben: the “Massachusetts model”, which outlawed public carry of firearms in general and the “Deep South” tradition allowed for open carry in public but not concealed carry. Despite these differences, both illustrate an understanding by the American people at the time that variations of gun control allowed for the right to bear arms to be upheld while also maintaining the protection of the public. Aside from these carry policies, regulations on gunpowder, storage, and ability to sell firearms were heavily used

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22 Senior Counsel, Everytown for Gun Safety, B.A. Marquette University, J.D. Georgetown University Law Center.


24 This model allowed for public carry for those with specific, justifiable reason for fear of their safety. See *Id. 41*

in both the North and South, creating a sense of uniformity among the American populous in a wide array of aspects for gun control. Through this lens, the reality remains clear that gun rights and gun control did coincide in these eras.

Frassetto continues to illuminate on the indiscretions and contradictions told by deregulation lobbyist in his paper *Firearms and Weapons Legislation Up to The Early Twentieth Century* by complying a comprehensive dataset of regulatory and reformatory firearm practices seen, state by state, throughout several eras of American politics. It assembles them into discretionary categories, detailing the expansive, wideset reach of firearm control prior to 1934 in a majority of regulatory subsets of modern debate, along with historical subsets that elevate the fact that gun control and gun rights were equals in legislation for a large portion of our history. Robert Spitzer compressed this data into a table that isolated each category of gun law by era and frequency of the number of states in which the legislation was present, depicting the precedence for modern regulatory practice on the right to bear arms.

From storage laws to outright bans, Table 1 illustrates the respect for regulations and gun control, presenting an accounted 760 laws. Even so, Frassetto and Spitzer discounted numerous hunting and military-based regulations due to the sheer overabundance of their occurrence throughout the United States. Thousands of restrictions and regulations encompassed every aspect of firearms from the founding of the United States to 1934. State to state, north to south, coast to coast, restrictions and regulations on all aspects of firearm culture such as modifications and storage is long standing and

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26 Id.


28 Robert J. Spitzer (Ph.D., Cornell University, 1980) is Distinguished Service Professor and Chair of the Political Science Department at SUNY Cortland. He is the author of fifteen books, including five on gun policy, most recently GUNS ACROSS AMERICA (Oxford University Press 2015).

29 Kevin M. Sweeney, Firearms, Militias, and the Second Amendment, in THE SECOND AMENDMENT ON TRIAL, supra note 8, at 310–11

30 Spitzer surpa note 13
supported within federal and state establishments, even if their enforcement is viewed as heinous and superficial.31

Table 132: Gun Law Frequency and State Gun Law Numbers between 1607-1934.33

For 157 years prior to the establishment of our government and for over a century afterwards, the legislative body that set the precedence and procedure for the current congressional body made clear that the protection of the people surpassed the protection

31 Peterson v. Martines 707 F.3d 1197, 1211 (10th Cir. 2013). The court ruled against a right to concealed carry due to precedence of concealed carry bans in numerous states throughout the 19th century.

32 Source: Spitzer cera Frassetto, supra note 13. Though the table is labeled “State” gun laws, it also includes laws enacted when the states were colonies, and some local/municipal laws. The full category of gun laws from Frassetto’s paper were: “Bans on Handguns/Total Bans on Firearms; Brandishing; Carrying Weapons; Dangerous or Unusual Weapons; Dueling; Felons, Foreigners and Others Deemed Dangerous By the State; Firing Weapons; Hunting; Manufacturing, Inspection and Sale of Gunpowder and Firearms; Militia Regulation; Possession by, Use of, and Sales to Minors and Others Deemed Irresponsible; Registration and Taxation; Race and Slavery Based Firearms Restrictions; Sensitive Areas and Sensitive Times; Sentence Enhancement for Use of Weapons; Storage.”

33 Spitzer supra note 13: states that “the small number of laws pertaining to slaves or race-based restrictions pertaining to guns is not meant to suggest that the legal regime in the pre–Civil War South was somehow not uniformly harsh, but rather reflects the fact that express statutory restrictions were not necessary in all places, given the South’s uniformly oppressive system of slavery.”
of an object. The ideal of regulation sustained into the establishment of the Constitutional era of the United States, onto the industrial and reconstruction era, and into Depression Era reforms.

**THE SHIFTING MINDSET BETWEEN THE RECONSTRUCTION ERA TO MILLER**

Reflected in these numbers, seen in Table 1, are generations who viewed the foundation of safety and security for the Amendment populous origination not from an object, but from the ideal and people who wield it. Between Reconstruction and 1934, changing technology and viewpoints towards the role of firearms with communities brought forth a new wave of legality for the Second, changing the scope and spectrum for firearms, along with their role and definition in America.  

The Civil War brought unprecedented change to virtually all aspects of American life. Industrialization brought the ability to mass produce weapons on a scale unparalleled by any other prior generation that led the way for the widespread expansion of firearms within the hands of the American populous. Replaceable parts created guns that could be easily and cheaply repaired, as well as modified past their initial sale and by any owner to be faster, more durable, and deadlier. Now, guns could contain more than a single shot at a time, and fire at rates up to 400 rounds a minute. However, the most drastic change came in regard to firearms occurred in how they were handled in the public mindset both in how they were used and who was supposed to wield them.

In one way, firearms transition from a household utensil towards equipment for exhibition sports through the popularity of tricks otters such as Annie Oakley and the other performers with Buffalo Bill’s Wild West traveling circus. This romanticized version of the “Wild West” circulated around the United States throughout the

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34 Frassetto surpa note 11

35 Frassetto surpa note 20

Reconstruction era, displaying the utility and versatility firearms now possessed, as well as their accuracy that allowed almost anyone to learn how to not only shoot, but do so with speed and elegance. This parading of marksmanship combined with the existing hunting traditions and frontier personification kindled a new identity for firearms as a source of entertainment and recreation.

But with every ounce of entertainment brought, violence coincided. The grievances and animosity left after the conclusion of the Civil War impacted relations and legislation throughout every corner of the reunited country. Racial tension and outright alienation of communities created a surge of violence throughout the reconstructed South and divided the government in its approach towards the new reality of the United States. Spitzer highlights the gun policy that came from this crisis:

“After the Civil War, the ravaged South again witnessed violence at rates greater than the rest of the country. Thus, states with greater violence, in the form of greater gun violence, turned in part to stronger gun laws as a remedy.”

The repression of constitutional rights and violence towards the newly freed African American community was personified heavily in second amendment legislation. The continuation of already repressive codes and mandates from “slave laws” suppressed both commerce and carry of firearms that inhibited on their inherent right of self-defense and right to bear arms. Even with the introduction of the 14th amendment which prohibited these codes and mandates that infringed on these new citizens’ privileges, the violence and repression did not dissipate. This negative coalition between racism and gun control created a schism that separates this immoral abuse of regulation from that created with the intent to protect the health and life of all citizens purely due to each one’s constitutionality alone and must be acknowledged. Yet, despite the obvious abuse of

37 Spitzer supra note 57, at 65-66
38 Id. at 65
40 Frasetto supra note 20
statute, these laws are unjustly used as examples for the need of deregulation. What separates this injustice from the just use of regulation in regard to gun regulations is the hatred and prejudice that fueled this era’s redefinition of gun control. Modern gun control attempts to protect the populous and their freedoms all at once instead of selecting only one type of person who freedom applies too.

The early 20th century brought similar technological advances for the firearm industry. Weapons, such as Tommy guns and other variations of automatic style weapons, once again transformed into unforeseen forces of destruction and violence. “Dangerous and unusual” took on new meanings in realm of gun control. In the early stages of their invention, both the government and people alike saw the practical side of their use, especially when their use in World War I progressed the conclusion of the war. Afterwards, however, their abilities fueled a new wave of violence in America: organized crime and mobs.41 Spitzer writes:

“The lesson here is significant both for its historical context and for the contemporary debate over the regulation of new or exotic gun technologies. In these instances, new laws were enacted not when these weapons were invented, but when they began to circulate widely in society. [...] But it was only when ownership spread in the civilian population in the mid-to-late 1920s, and the [Tommy] gun became a preferred weapon for gangsters, that states moved to restrict them. The lesson of gun regulation history here is that new technologies bred new laws when circumstances warranted.”42

In 1934, in light of these new fears and dangers, President Franklin Roosevelt and Congress enacted a New Deal legislation of gun commerce legislation that implemented the taxation of certain firearms to restrict interstate distribution and transportation known as the National Firearm Act of 1934.43 The federal government, through legislation such as this and newly established bureaucratic institutions such as the Civil Works

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41 Spitzer supra note 13
42 Id. at 68
Administration (CWA) and the Farm Security Administration (FSA), reorganized the structure and power of our government reformed Americans belief on the role of government in their lives.\textsuperscript{44}

Government was no longer a simple protection for foundational right, but an upholder of the American way of life and of its people. Citizens began to see the federal government’s job as an entity that protected citizens in times of need, an entity that sought to prevent these disasters from even occurring and then insuring that if it did, there was still some form of safety net provided.\textsuperscript{45} They began to view the government as both the protector of the good and the preventer of the bad, whatever their definition for each was.

The National Firearm Act of 1934\textsuperscript{46} personified this new perspective by attempting to control the surge of violence and protect the general public from advancing dangerous associated with gun violence throughout the 1920’s and 1930’s. However, it also led way to one of the earliest major supreme court decisions regarding the classification and interpretation of the Second Amendment in \textit{United States v. Miller} (1939).\textsuperscript{47} \textit{Miller} would define decades of legislative interpretation and precedence in the reasonability of certain classifications of firearms, as well as the government’s reach within the firearm market.

\textit{Miller} challenged the foundation of which the second amendment bequeathed the people their right to bear arms. At hand was the debate between inalienable inherency and militia causation, an individual right to self-defense versus a collective right to the common defense, as well as the reach of the government when it comes to their involvement in the everyday lives of citizens.\textsuperscript{48} Their ruling relied on the basis of

\begin{itemize}
  \item \textsuperscript{44} \textit{Id.}
  \item \textsuperscript{45} \textit{Id.}
  \item \textsuperscript{46} \textit{Id.}
  \item \textsuperscript{47} United States v. Miller, 307 U.S 174, 178 (1939)
  \item \textsuperscript{48} Miller, 307 U.S 174, 178
\end{itemize}
dissidence from the founders against the idea of standing armies and interpreted the second amendment in favor of collective over individual.

Because of the prominence of the word “militia” within the second amendment, the Court drew a separation and difference between it and the word “people” that established the basis of an individual rights in other amendments.49 The government’s new devotion towards public safety eclipsed the former hindrance towards government involvement, but also began the covetous movement of individualism that established the foundational parallel between freedom and firearms in that the government's new “overreaching” presence in citizens life was believed to only be checked by the people’s second amendment right to arm themselves and defend themselves in the possibility of another revolution.

The government’s, technology’s, and fear’s role in gun control and gun rights would only continue to develop and changing throughout the 20th and 21st century. Gun control would begin to take on new connotations. Instead of “public safety,” “prevention,” or “guarantee for equal protection,” the rhetoric shifted towards “gun-grabbing,” “restriction of constitutional rights,” and “impeding on the personal freedoms.”50 Politics would begin to intervene in perspectives and precedence, pushing out the history involved and creating a conflict between gun control and gun rights.

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49 Miller, 307 U.S 174, 178
50 Shaw surpa note 12
**HISTORICAL DEVELOPMENTS OF THE 2ND AMENDMENT POST-MILLER TO MODERN DAY**

Through an era of reformation with Gun Control Act of 1968,\(^5\) to the re-establishment of family protection values with the Firearms Owners’ Act of 1986,\(^6\) to the Supreme court decision of *District of Columbia v. Heller* (2008),\(^7\) public safety and personal freedom permeated political principles for generations through gun control and gun rights. However, this era also saw the beginning of the modern trend of governmental distrust and bipartisanship that isolated gun control on one side and gun rights on the other.

The linchpin of governmental distrust is often credited to President Richard Nixon’s scandal regarding the attempted burglary, and subsequent cover-up, of the Democratic National Committee headquarters in the Watergate office, often referred to as the “Watergate scandal.” Beginning in this era, the general populous became weary of government’s involvement and regulation regarding personal freedoms, such as the right to bear arms.\(^8\) The level of deceit and corruption that was discovered during the “Watergate” scandal caused citizens to wonder whether the people’s rights were really the top priority for the government’s involvement in so many aspects of their life, or whether something more sinister was the root of their involvement.\(^9\)

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With scandals destroying the faith of the public in government, politicians began to rely on more polarized ideals to attract voters by criticizing the very government they mistrusted. The Pew research center notes on this continual trend that has separated Congress and Legislation since the 1970’s in their research by Drew Desilver:

“Americans are more ideologically polarized today than they’ve been in at least two decades. Their representatives in Congress are divided too and have been pulling apart since the days of M*A*S*H and Billy Beer. [...]What is notable today, however, is the degree of such partisanship and the accelerating pace of this polarization on key international policy issues.”

Gun control and gun rights became staples in political platforms. Conservative politicians took gun rights and the growing distrust in government regulations and combined the two while liberal politicians fought to gain back the public's faith in the government through their agenda of public safety with gun control.

Between United States v. Miller (1939) and District of Columbia v. Heller (2008), the Supreme Court insured and protected people’s individual and collective right to own a firearm for the purpose of defense and sport. The Supreme Court of the United States throughout numerous eras and generations upheld the second amendment, defining the spectrum of influence to an individual's right to bear arms with strict limitation on the government's ability to impede the freedom guaranteed. By defining the second amendment as such, any outright or plausible widespread ban on all firearms, or even select types of firearms, is constitutionally impossible and immoral. However, with every Supreme Court ruling came the clear indication and implication that

56 Id.
57 United States v. Miller, 307 U.S 174, 178 (1939)
59 Heller, 76 U.S.L.W. 463
60 Joseph Blocher, Hunting and the Second Amendment, 91 Notre Dame L. Rev. 133 ()
61 See Heller, 76 U.S.L.W. 463
regulation and reformation was constitutional.\textsuperscript{62} Even the late Justice Antonin Scalia, a prominent Supreme Court conservative judicial figure, states in his majority opinion for \textit{Heller} that:

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Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”\textsuperscript{63}
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He later went on to clarify that “We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive,”\textsuperscript{64} outlining that as long as the purpose of government involvement in the sphere of firearms did not unjustly infringe on the right to possess and bear arms or the subsequent inherent right of self-defense within the home. Regulatory practices fell into government's right to insure public safety and protection of the general populous. Just as seen with the First and Fourth Amendment,\textsuperscript{65} the basis for restrictions on individual rights stems from the belief that the good of the public can infringe on the good of a single individual within “sensitive areas” such as time, place and manner.\textsuperscript{66} This ideal allowed for regulation of speech through the Patriot Act of 2001,\textsuperscript{67} the regulation of behavior through the New

\textsuperscript{62}See Heller, 76 U.S.L.W. 463, Miller, 307 U.S 174, 178

\textsuperscript{63} Heller, 76 U.S.L.W. 463

\textsuperscript{64} Heller, 76 U.S.L.W. 463

\textsuperscript{65} U.S. Const. Amend. I-IV, § 1-4

\textsuperscript{66} Cox v. New Hampshire, 312 U.S. 569 (1941)

\textsuperscript{67} See UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM (USA PATRIOT ACT) OF 2001 PUBLIC LAW 107–56—OCT. 26, 2001
Deal regulations, and most of all, the regulatory practices of firearms throughout history and modern day.

But in *Heller*, a disregard for historical precedence changed the nature of the second amendment and its understanding into its modern identity. The “militia” basis, a precedent used for two centuries of American judicial decisions, was no longer a set standard. The right of self-defense entered American’s lives, changing firearm regulations and the second amendment operative clause towards an unbridled margin of error between district and appellate courts. Coupled with the decision in *McDonald v. City of Chicago (2010)* that incorporated the second amendment under the protection of the fourteenth amendment, the Supreme Court opened the door for decades of deliberation regarding the placement of the second amendment in the lives and liberty of the American people.

Since this decision, hundreds of gun laws restricting and regulating firearm possession and carry in dozens of states have been rolled back, allowing “gun right” advocates to push forward legislation that deregulated the firearm sector and firearm policy with unprecedented ease and impact. Following this, a 17% increase in firearm-related deaths was seen between 2009 and 2016 and continues on its upward trend today.

Gun-related violence since the second amendment’s transformation in *Heller* has created a wave of uncertainty surround the logistics and legality of firearm control and rights in this country. The inability to define where rights end and obstruction begins is causing havoc and uncertainty across the nation, and its being left untreated. Like any

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68 National Firearms Act, (1934).


70 McDonald v. City of Chicago 130 S.Ct. 3020 (2010)

71 Rebecca Shabad, Why more than 100 gun control proposals in Congress since 2011 have failed CBS News (2016), http://www.cbsnews.com/news/how-many-gun-control-proposals-have-been-offered-since-2011/ (last visited Mar 19, 2018)

other public health concern that is left unchecked, gun violence will continue to run rampant and evolve.

CONCLUSION

The result of this phenomenon created and spurred on an all-encompassing debate regarding the second amendment’s unique role in the development and continuation of this epidemic. America is exclusive in the developed world for both its constitutional right to bear arms and in its dilemma with mass shootings. The second amendment was designed and defined to protect the people of the United States of America. That remains undeniable. Whether the protection intended was designed in mind with or against a centralized government’s involvement, its intentions stay the same. It exists to protect the people. But when a law is abused and puts in jeopardy the safety of a nation, or generation, then its foundation is becoming corrupted and misguided. No right, of any kind, can be absolute. If a law is used to give the people a seemingly unrestrained ability to murder and massacre without inhibition or restrictions regarding the opportunity available, can its intentions remain pure?

The seemingly dismissive handling of second amendment concerns calls into question the consequences seen from this dismissal of history and public safety. Since 1982, the United States has seen at least 2,13273 victims of mass shootings. Dismissal after decisive decision dug the graves for thousands of Americans from ages only weeks old to decades old, allowing for the seizure of mass killing machines by the insane, the spiteful, and the malicious, with 79% of mass shooters obtaining the weapon used for the shooting legally between 1982-2012.74

73 This estimate is used using the victim count of Mother Jones mass shooting data set. However, multiple shootings where listed with an estimated count and the total victim count could have been higher due to other circumstances. For example, the Las Vegas shooting of 2017, hundreds were hurt in both the shoot and the panic that ensued, and therefore an exact count could not be confirmed. This was last accessed on August 24, 2018.

Weapons, both dangerous and unusual for civilian use, were designed with the intent outside recreation or even self-defense, but bloodshed and fear were harnessed and used unabashedly against thousands of innocent people. Firearms, such as the AK-47 and AR-15, that use military grade large capacity magazines (LCM’s) and stocks were often legally used for, in all reality, there intent. Their intended purpose is not protected by the right to bear arms. The fact they’re not designed or reasonable for sport or hunting due to their noise and damage, as well as their un-reasonability for the intent of defense due to the unneeded brute force and killing mechanisms embedded in their designs dismisses its protection in the same way machine guns were dismissed after their use for violence in the 1920’s-30’s, for their unusual use.76

Even without touching the firearm itself, the modifications and modules seen on numerous weapons of mass shooters77 such as bump stocks and increased ammunition caches can and should be restricted for civilian use. The primary purpose of these

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77 See Pan surpa note 75
modules is not reasonable for the right of self-defense established in *Heller*\textsuperscript{78} due to its inherent danger to the public and individuals, as well as its unusual role in exhibition sports and recreation. Therefore, by Justice Scalia’s rationale of regulation due to “the historical tradition of prohibiting the carrying of dangerous and unusual weapons,”\textsuperscript{79} they are not constitutionally protected under the second amendment.

Yet, despite this precedence, deregulation of both firearms and modification as well as mass shooting are on the rise since 2011.\textsuperscript{80} Between January 2012 and July 2018, 45 identified mass shootings occurred.\textsuperscript{81} Compared to 1982-2011, where 55 mass shootings occurred in 29 years, the rate of occurrence of mass shooting almost doubles in a little over 6 years.

**Table 4.3: Cato Institute’s Timeline of Mass Shooting Incidents between 1982- February 2018**\textsuperscript{82}
The issue of whether or not a serious change should be made can no longer apart of the debate. A decade of death counts and countless massacres in places once thought to be safe-havens urges a change in gun control and gun right ideals and its precedence. The exhaustion of seeing flags at half mass followed by passive repeats of thoughts and prayers illustrates that constituents are at their limits. That enough is finally enough. Change isn’t going to bring back all the innocent lives lost to gun violence but going back and learning from our mistakes could ensure that the innocent can once again seize their freedom back from the fear encompassing today’s generation and a compromise could be reached.

The right to bear arms will always be a part of America’s identity and character. But, as history shows, no right is absolute in its formulation or reach. Gun control ensures that those who are using the second amendment for its given purpose, self-defense and sport, can continue to do so without fear from the outside world. However, it also ensures that the right is not misused.
CHALLENGES TO THE MODERN AMERICAN DEATH PENALTY

Cassidy Wray  
Departments of Political Science and Economics

TABLE OF CONTENTS

INTRODUCTION

I. CAPITAL PUNISHMENT FACES A VARIETY OF ISSUES OUTSIDE OF THE COURTS  
   A. The Anesthetic Chemicals Used in Lethal Injection Procedures Are In Short Supply  
   B. The Cost of Trying, Convicting, and Executing a Prisoner Is Skyrocketing  
   C. Many Retentionist States are Not Executing Prisoners

II. THE COURT’S PREVIOUS ANALYSIS OF THE DEATH PENALTY APPLIES TO ITS USE IN MODERN DAY  
   A. There is Inconclusive Evidence to Suggest Fulfillment of one of Four Penological Purposes  
      1. The death penalty may be ineffective in accomplishing the goal of deterrence  
      2. Capital punishment’s use as bargaining tactic in trial erodes its penological purpose  
   B. Retentionist States Demonstrate a Movement Away from the Practice  
      1. Nineteen states have abolished the death penalty  
      2. The use of the death penalty is shrinking in retentionist states  
   C. There Is a General Global Consensus Against Capital Punishment

CONCLUSION
INTRODUCTION


Abel Hidalgo, a hired killer convicted of first degree murder in Arizona, petitioned for two Eighth Amendment claims to be heard before the Supreme Court. His first claim addressed Arizona’s failure to “constitutionally narrow” those eligible to be put to death under Arizona’s eligibility requirements. This claim took root in the argument that, under Arizona’s sentencing laws, almost any individual convicted of first degree murder in Arizona could be sentenced to death. 

Hidalgo’s second claim, however, elicited a degree of national attention surrounding the case. This was due to the controversial nature of the practice he was challenging; his second claim posed a facial challenge to the constitutionality of the death penalty. Despite interests in the case expressed by an assortment of pro- and anti-capital-punishment amici, the case was ultimately denied for review, due to a record that was “limited and largely unexamined by experts and the courts below.” While Hidalgo may have run out of momentum, another, larger movement is gaining traction: a call for the end of the death penalty. The death penalty is plagued with logistical, economic, and implementation-related problems while also facing a variety of challenges questioning the constitutional justification for the practice. Amid burdensome issues surrounding capital punishment, the very purpose and constitutionality of the practice has been called into question. With the now-muddied

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2 Id. at 550.
3 Id. at 550.
justification of the practice and the logic presented in recent landmark death penalty cases such as *Atkins v. Virginia*, 536 U.S. 304, 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005) taken into consideration, it is a practice that may soon be abolished within the United States.\(^5\)

I. CAPITAL PUNISHMENT FACES A VARIETY OF ISSUES OUTSIDE OF THE COURTS

The death penalty holds an established presence in the American penological system, and it has been in use continuously since a brief moratorium in 1972.\(^6\) Despite this, the death penalty is plagued with an assortment of challenges from outside of the courtroom which hinder it from its intended use. Supply issues surrounding the typical three-chemical lethal injection method, skyrocketing costs, and a sluggish system of actually carrying out an execution have debilitated the American capital punishment system from functioning effectively or, in some cases, at all.

A. The Anesthetic Chemicals Used In Lethal Injection Procedures Are In Short Supply

The first of these issues is a drought in the supply of the drugs used to administer a lethal injection. The typical procedure involves a “sequential administration of [sodium] thiopental, pancuronium [bromide], and potassium chloride”.\(^7\) Thiopental is used for anesthetization, pancuronium bromide induces paralysis, and potassium chloride ceases heart function.\(^8\) This combination is critical to the process established and practiced by many states. Most important to a “relatively humane” process of lethal injection is the


\(^8\) Id.
presence of thiopental, without which a condemned inmate would experience the acute pain of “asphyxiation, a severe burning sensation, massive muscle cramping, and (...) cardiac arrest.”\(^9\) Lethal injection is touted by many as a humane form of execution due to the presence of thiopental to block the pain an individual might feel without anesthetic. In theory, the use of sodium thiopental makes lethal injection far less painful than other forms of execution. The implementation of anesthetic allows lethal injection to be publicly perceived as a more “humane” process in comparison to other methods of execution because of the pain-blocking effect of anesthetic. The pain-free aspect of capital punishment makes the death penalty far more tolerable to a public with interests in humane treatment of condemned inmates. For this reason, sodium thiopental is vital to the most-used capital punishment procedure of many states.

In response to the lethal injection industry’s reliance on the use of sodium thiopental, opponents of the death penalty began to target thiopental suppliers.\(^10\) In 2011, in response to global pressures from anti-capital-punishment forces targeting Hospira, the sole U.S. producer of thiopental, the drug supplier ceased production of the drug.\(^11\) This closure led to a capital punishment industry in chaos, with many states “facing execution delays and dwindling supplies scheduled to expire”.\(^12\)

Because of the sudden drought of supply, states looked to Europe for a new source of the drug. In response, anti-death-penalty groups like Britain’s Reprieve group began organizing massive “shaming campaigns” for any company willing to sell a drug intended for use in American executions.\(^13\) Such campaigns targeted suppliers willing to sell sodium thiopental to the capital punishment industry, and flouted this information (including the supplier’s physical location) to the public.\(^14\) As one supplier after another

\(^9\) Id.
\(^11\) Id. at 439.
\(^12\) Id. at 439.
\(^13\) Id. at 439-440.
\(^14\) Id. at 439-440.
began to refuse to sell drugs intended for executions, prison officials became increasingly desperate to find a new supply.\textsuperscript{15} Thus ensued a game of cat-and-mouse, with prison officials resorting to new lengths to find the necessary drugs to carry out scheduled executions. Some states looked to far-flung countries outside of Europe, while others obtained what little drugs they could by borrowing from fast-dwindling the stockpiles of other states.\textsuperscript{16}

When no new solution presented itself and willing suppliers continued to disappear, states began to turn to different lethal cocktails, including barbiturate, pentobarbital, and midazolam.\textsuperscript{17} Concurrently, states scrambled to implement execution secrecy laws, concealing the identity of their suppliers.\textsuperscript{18} As a result, the lethal injection industry became fraught with delays, filled with confusion, and veiled with secrecy. Amid this confusion and secrecy, stories of botched executions have received considerable media attention. In 2015, three prolonged executions in Oklahoma, Arizona, and Ohio drew media ire.\textsuperscript{19} Each of these instances involved the use of the drug midazolam and were thought to have caused considerable suffering to those executed.\textsuperscript{20} These incidents, along with an assortment of other challenges, began to make their way to the courts. Growing concern for lethal injection procedure secrecy gave rise to cases contesting the secrecy laws. In a dramatic and controversial series of events, Joseph Wood sued Arizona just one month before his scheduled execution due to the state’s refusal to release the information of the drugs meant to kill him.\textsuperscript{21} After a decision from the 9th Circuit Court granting a stay of execution, the Supreme Court reversed the

\textsuperscript{15} \textit{Id.} at 439-440.
\textsuperscript{16} \textit{Id.} at 440.
\textsuperscript{17} \textit{Id.} at 442.
\textsuperscript{18} \textit{Id.} at 446.
\textsuperscript{19} \textit{Id.} at 431.
decision, and Joseph Wood was executed the following day. On July 23, 2014, Joseph Wood was injected with the state’s chosen cocktail of chemicals, taking a full two hours to die.

The Supreme Court has already begun to hear cases regarding varying states’ specific lethal injection protocols. In one such case, 2008’s *Baze v. Rees*, 128 S.Ct. 1520 (2008), two Kentucky inmates challenged the three-drug protocol implemented by the state. The *Baze* Court found that the procedure (which included the anesthetic sodium thiopental) did not pose an “unnecessary risk” of harm to a condemned inmate. They reasoned that a procedure did not need to minimize risk to avoid posing an unnecessary risk. Therefore, the procedure implemented by Kentucky did not violate the protections of the Eighth Amendment. While that decision was something of a win for lethal injection, it has done little to soothe the chaos and confusion currently plaguing the practice. Indeed, in addition to *Baze*, a swarm of cases have arisen in recent years challenging the drug confidentiality and complications in the capital punishment industry, such as the case of Joseph Wood. Altogether, lethal injection has won some small victories in the courts (especially with *Baze v. Rees*), but the industry still faces shortages, increased legal challenges, vicious targeting from outside anti-capital-punishment activism groups, and growing public concern for the botched executions that may be exacerbated by drug secrecy laws and protocols.

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22 *Id.*


25 *Id.* at 1526.

26 *Id.* at 1550.

27 *Id.* at at 1526.
B. The Cost of Trying, Convicting, and Executing a Prisoner is Skyrocketing

In concurrence with the rising logistic problems surrounding the execution of a prisoner, the cost of a capital case, from trial to execution, is skyrocketing. As of 2013, the average cost of one death penalty case, from “arrest to execution,” was between one and three million dollars.28 Pursuing a death sentence has consistently proven to be much costlier than a life-without-parole sentence. A study conducted in Kansas found that capital cases cost 70% more than non-capital cases.29 In North Carolina, capital sentences are estimated to cost $2.16 million more than a life imprisonment sentence.30 In states such as Texas and Maryland, the death penalty is estimated to cost three times more than a case without a death penalty sentence.31 In response to this rising cost, many officials have pondered the “wisdom of spending such exorbitant sums on (...) unpredictable and isolated [capital] cases.”32 Such concern is no surprise; as costs continue to rise, states that retain the “unmanageably expensive” punishment are using it less and less.33

C. Many Retentionist States Are Not Executing Prisoners

States that retain the ability to use the death penalty are commonly referred to as “retentionist” states.34 As a result of supply-side and cost barriers and a lengthy trial-to-execution process, many of these retentionist states are increasingly not exercising that ability. Indeed, “most of the thirty-five states with the death penalty rarely carry out their

29 Is the Death Penalty Dying? at 265
30 Id. at 265.
31 Stuart Banner, The Death Penalty, 67 (2002)
33 Id. at 409.
threat to put capital murderers to death”. Roughly one third of retentionist states very seldom use the death penalty, with small death row populations and few or no executions. One third of retentionist states employ capital sentences at the trial level but rarely carry out an execution, and, lastly, only one third of the thirty five retentionist states regularly imposes and carries out capital sentences.

The result of the dwindling supply and skyrocketing cost of putting convicted individuals to death is the gradual erosion of the American capital punishment system. This is demonstrated by the decreasing use of the practice, even in states that retain the ability to do so. Increasingly, states are abandoning the death penalty “de facto”; the legislative ability to execute a prisoner may exist within a state, but they are not exercising that ability. Within states that do regularly execute prisoners, the high cost and shortage of supply have created massive complications and delays, and have increased the burden placed upon taxpayers within a capital punishment state. The problems surrounding capital punishment and “the arrangements through which American capital punishment is currently enacted undermine the death penalty’s objectives” and impede upon the very purpose for its existence. Instead of serving its intended purpose, many argue that the continued existence of the modern death penalty has become “merely symbolic.”

35 Id. at 11.
36 Id. at 42.
37 Id. at 42.
38 Id. at 43.
40 Id. at 19.
II. THE COURT’S PREVIOUS ANALYSIS OF THE DEATH PENALTY APPLIES TO ITS USE IN MODERN DAY

A. There is inconclusive evidence to suggest fulfillment of one of four penological purposes

Two of the most recent landmark Supreme Court cases regarding the continued use of the death penalty were Atkins v. Virginia, 536 U.S. 304, 304 (2002) and Roper v. Simmons, 543 U.S. 551 (2005).\(^{41}\) Atkins questioned whether the execution of a mildly mentally disabled man, Daryl Renard Atkins, was a “cruel and unusual punishment” and therefore protected against by the Eighth Amendment.\(^{42}\) The Court in Roper decided whether the execution of an individual who committed his or her crimes before the age of eighteen could be sentenced to death.\(^{43}\) In both cases, the Court found that execution of minors and the mentally disabled was no longer acceptable under the protections of the Eighth Amendment. Within the decisions of these two cases, a key component of the Court’s analysis was the question of whether or not capital punishment fulfilled a penological purpose. The Court considered “objective indicia” to determine whether the practice was acceptable by society’s standards. These objective indicia included the specific behaviors of states with regard to enforcement of the death penalty. In addition to this, the Court analyzed whether it fulfilled one of four penological purposes laid out by the Court in Harmelin v. Michigan: retribution, deterrence, incapacitation, or rehabilitation.\(^{44}\) Proponents of the continued use of the death penalty cite two “distinct social purposes served by the capital punishment: retribution and

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deterrence of capital crimes” as justification for continued use of the practice.\textsuperscript{45} There exists an argument for some of these purposes (execution is hardly rehabilitative). However, the central argument of many, deterrence, is surrounded by inconclusive evidence. In addition, the very purpose of execution as a punishment is being eroded by the behavior of many trial courts, as the punishment is increasingly used as a bargaining tool in plea deals.

1. The death penalty may be ineffective in accomplishing the goal of deterrence

Proponents of the death penalty cite the punishment’s effect as a deterrent to other potential killers. In seeing one murderer executed for their crimes, some argue, another potential killer may reconsider his or her crime. Professor Erik Lillquist of Seton Hall University School of Law found that there is insufficient data to prove a deterrent effect.\textsuperscript{46} Instead, contrary to capital punishment’s intended effect, it may actually have a “brutalization effect”; in such a scenario, when executions increase so, too, does the murder rate.\textsuperscript{47} While conclusive evidence either for or against this logic does not yet exist, there does exist tenuous data reflecting the opposite of the intended deterrent effect. Evidence presented by Richard Dieter before the Subcommittee on the Constitution, Civil Rights and [Human] Rights of the United States Senate Judiciary Committee in 2006 reflected that “states without a death penalty statute [had] significantly lower murder rates than their counterparts with the death penalty.”\textsuperscript{48} He also noted that the South, with the highest execution rate of the four geographic regions of the country, also has the highest murder rate.\textsuperscript{49} Conversely, the Northeast has the lowest execution and murder


\textsuperscript{46} Stuart Banner, \textit{The Death Penalty}, 30 (2002)

\textsuperscript{47} \textit{Id.} at 30.

\textsuperscript{48} \textit{Id.} at 29.

\textsuperscript{49} \textit{Id.} at 29.
rate of the nation. This effect may be geographical or caused by an unknown outside factor, but it still lends support to the idea that execution and murder rates bear a positive relationship. However, the evidence to support either theory remains inconclusive. While there is no proof of the existence of a brutalization effect, there is also no substantive evidence to support the opposite. The result is a considerable blow to the popular deterrence argument in favor of execution.

2. Capital punishment’s use as bargaining tactic in trial erodes its penological purpose

Before Hidalgo was denied for review, an amici brief was filed by The Promise Of Justice Initiative, The Arizona Capital Representation Project & The Atlantic Center For Capital Representation in support of the petitioner, Abel Hidalgo. Instead of looking to the deterrent effect of the death penalty or discussing the behavior of the rest of the world regarding the death penalty, the brief focused on the fact that, at the trial level, the death penalty “in large part, is imposed on defendants who refuse to offer, or accept, a life plea.” The brief discusses a breakdown in the penological purpose of the death penalty in the 35 retentionist states. Instead of being used for its intended purpose as a punishment, the death penalty is used as a bargaining chip pursuant to a plea-resolution in a potentially expensive and lengthy capital case. Recent years have seen a decrease in capital sentences, because “[t]he decline in capital trials results mostly from prosecutors' increasing willingness to trade capital charges for guilty pleas.” This behavior can be found in a variety of retentionist states: between 2011 and 2016 in Pennsylvania, 60% of capital-eligible cases resulted in a guilty plea in exchange for a sentence less than the

50 Id. at 29.
52 Id. at 11.
53 Id. at 14.
death penalty.\textsuperscript{54} Similar numbers are found in Arizona, North Carolina, and Louisiana, with a plea-rate of 55\%, 70\%, and approximately 90\%, respectively.\textsuperscript{55} This usage of the death penalty as a bargaining chip (rather than a punishment) has three major ramifications upon the constitutionality of the practice.

The first effect of using capital punishment as a threat rather than a punishment is a breakdown of the penological purpose of the death penalty. Instead of fulfilling the penological purposes of rehabilitation, deterrence, retribution, or incapacitation, the purpose of the death penalty is as a bargaining chip. The goal is “not to deter crime” but instead to “deter trials.”\textsuperscript{56} When working a capital case, many prosecutors have begun dangling the threat of a sentence to death over a defendant. Facing the threat of death, a defendant is more likely to accept a plea deal and forgo trial, thus saving time and money by avoiding a trial. To many defendants in capital cases, the death penalty is no longer a punishment. Instead, it is an incentive to waive the right to trial and bring a quicker end to his or her case.

The second major impact of this new usage of the death penalty is the threat of a “double negative” result\textsuperscript{57} There is heightened risk that an innocent individual will be sentenced to death, “having refused to accept a life plea.”\textsuperscript{58} Concurrently, “it increases the possibility that innocent defendants will plead guilty to avoid execution.”\textsuperscript{59} The former of these two effects is the most cause for concern. An innocent person may choose to stand trial, having refused to accept a plea on account of his or her innocence. The innocent defendant is then subject to the decision of a jury, which may err in their judgement and wrongly sentence an innocent person to death.\textsuperscript{60} Conversely, there are “documented instances of innocent persons have pled guilty to avoid the death penalty”

\textsuperscript{54} Id. at 15.
\textsuperscript{55} Id. at 15.
\textsuperscript{56} Id. at 5.
\textsuperscript{57} Id. at 23.
\textsuperscript{58} Id. at 23.
\textsuperscript{59} Id. at 24.
\textsuperscript{60} Id. at 25.
and the “risks of trial by jury.” The use of capital punishment as a bargaining tactic increases the likelihood that an innocent person will plea to life while also increasing the chances that such a person will be sentenced to death.

Lastly, the third effect of the plea-bargain approach to capital sentences is the increased risk that “individuals with mental illness or intellectual disability, or the immaturity of youth” will be more likely to be sentenced to death than those with more mental acuity. These defendants are seen by the Court to be “less culpable” by nature. They may also be “unable to assist in making cogent decisions” regarding his or her case. These defendants, while still legally culpable for their crimes, are considered less culpable than others who are better equipped to consider the details of his or her case. Many such defendants lack sophisticated decision-making skills, and may be more likely to proceed to trial than a more sophisticated criminal. The result of this is a less culpable class of defendants who are disproportionately more likely to proceed to trial. Without the ability of a more sophisticated defendant, they are unable to thoroughly weigh the risk of proceeding to trial and risk being (potentially wrongfully) sentenced to death. Meanwhile, because of the choice created by the plea-bargain scenario, more sophisticated defendants are able to consider the benefits of accepting a plea. Therefore, the class of defendants considered to be more “culpable” in the eyes of the law are more likely to escape execution than “less culpable” defendants.

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65 *Id.* at 27.

creates a situation in which less culpable offenders are likely to be sentenced more harshly than more culpable offenders. This disproportionate distribution of punishment demonstrates the erosion of the penological purpose of the death penalty. When capital punishment is used as a bargaining chip rather than an outright punishment, the innocent and the less-culpable are more likely to die.

B. The behavior of retentionist states demonstrates a movement away from the practice

Another brief of Amicus Curiae in Hidalgo’s case was filed by the Fair Punishment Project. In that brief, the Fair Punishment Project presents an analysis of the modern-day trends regarding state use of the death penalty, arguing that there is a clear and consistent movement away from the practice. This “movement away” is a guideline used by the Court in Roper, stating that a measurable “movement away” from a practice could be enough to constitute that a punishment had become no longer acceptable to society. This is part of the assessment of punishment that the Court has used since Trop v. Dulles, 356 U.S. 86 (U.S. 1958). Trop established that a punishment may be in violation of the Eighth Amendment if it exceeds “the evolving standards of decency that mark the progress of a maturing society.” The Roper Court determined that such evolving standards could be measured by observing the behavior of the states. In looking toward the behavior of states regarding the death penalty, “over the past 25 years, there has been a consistent decline in the frequency of executions and death sentences imposed.” On a macro level, a consistent (if sluggish) trend away from the

70 Id. at 101.
use of the death penalty in the legislative decisions of the states is present. This is an example of the objective indicia that the Court looks to in determining how a practice is being used.

1. Nineteen states have abolished the death penalty

Currently, there are nineteen states that have made the policy decision to abolish the death penalty state-wide. In addition to these nineteen states, four more states have imposed a moratorium against the practice, effectively abolishing capital punishment until further notice. This is part of the overall trend away from the use of capital punishment, but this trend is not just limited to absolute abolishment. Not only should the presence or absence of abolishment be considered, but so, too, should the rate at which death sentences are actually imposed and carried out within the remaining retentionist states.

2. The use of the practice is shrinking in retentionist states

Since a high of ninety-eight executions in 1999, the total number of executions carried out within a year in the United States shrank to just fifty-two in 2009. States that retain the death penalty are increasingly not exercising their ability to put an inmate to death. Whether death sentences are not being carried out or they are never even being imposed, with the exception of a few high-practice states, retentionist usage of the practice is shrinking. Ten jurisdictions “have essentially rejected the punishment, performing five or fewer executions over the past fifty years” while “three additional jurisdictions have had zero executions in the past decade, and two more have had just

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73 Id. at 2.
74 Id. at 2.
With only one third of retentionist states regularly using the death penalty, capital punishment is shrinking. While more than three fifths of the nation’s states have the ability to execute a prisoner, just more than one fifth of states actually use that ability. The death penalty is measurably shrinking in name and in practice.

C. There Is a General Global Consensus Against Capital Punishment

In addition to the behavior of states across the nation, the Court in *Roper* took note of the behaviors of other western nations in regard to the death penalty, while being sure to make clear that the actions of foreign nations were not determinants of the Court’s decision. The Court stated that “foreign and international law have no place in (...) Eighth Amendment jurisprudence.” The global consensus was, however, acknowledged with regard to the problem in *Roper*. Likewise, in regarding the modern death penalty, the global consensus should be noted. Since 1976, “eighty-nine countries have either abolished capital punishment or were founded without any provision for the death penalty in their laws.” In recent years, the voices of these abolitionist countries around the globe have increased in volume protesting America’s continued use of the death penalty. Global voices have launched an affront on the practice from all sides. From attacking and publicly shaming drug suppliers to creating social media movements against the practice, the outside voices have managed to cause a stir within the capital punishment industry.

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Should a case like that of Hidalgo ever be granted for Writ of Certiorari, these factors will almost certainly be taken into consideration.

CONCLUSION

The capital punishment industry is fraught, and the justifications for the practice are becoming increasingly frail by constitutional standards. While Hidalgo v. Arizona was not the ‘right’ case for review, eventually the ‘right’ case will come along. When it does, the future of the death penalty is uncertain: the death penalty is too expensive, too complicated, and its purpose as a punishment is eroding with the decreased levels of implementation and the use as a pre-trial bargaining chip.

The debate around the death penalty remains incredibly political, and, by its nature, the Court should not be subject to political sway. When an Eighth Amendment challenge to capital punishment is next heard before the Supreme Court, the Court may (and, by many standards, should) rule to abolish American capital punishment. Conversely, despite the problems plaguing the death penalty, the Court may rule in its favor on constitutional grounds, partially to avoid overturning several decades of precedent. This would entail throwing out landmark cases such as Gregg v. Georgia, 428 U.S. 153 (1976) which has been held as legal precedent in the United States since its decision in 1976.82 Only time will tell, and in the meantime, the capital punishment industry will continue to exist in the United States.

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