

# VERMONT LAW REVIEW

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VOLUME 50 NUMBER 1

FALL 2025

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**“REASONABLE DISTANCE”: THE MAJOR QUESTION OF  
THE BORDER PATROL’S 100-MILE BORDER REGION**

**Alexander Arroyo\***

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## INTRODUCTION

In 2008, Vermont Senator Patrick Leahy was driving through New York on his way back to Vermont when he was confronted with a temporary immigration checkpoint on the highway.<sup>1</sup> This was odd, because he was at least 125 miles from any international border.<sup>2</sup> At the temporary immigration checkpoint, Border Patrol agents ordered Senator Leahy from his vehicle and asked him to prove that he was a U.S. citizen.<sup>3</sup> Senator Leahy asked what authority the Border Patrol had to stop and seize him in this way, this far from the border. Reportedly, the agent then pointed to his firearm and said, “[t]hat’s all the authority I need.”<sup>4</sup>

In truth, a Border Patrol agent has more authority than just his weapon. The Immigration and Nationality Act, passed in 1952, authorizes immigration officers to perform warrantless searches within a “reasonable distance” of the border.<sup>5</sup> A subsequent regulation promulgated in 1957 by the Justice Department, which housed the Border Patrol at the time, interpreted the phrase “reasonable distance” to be “100 air miles from any external boundary.”<sup>6</sup> The Justice Department’s interpretation expanded the Border Patrol’s geographic jurisdiction, thus granting itself broad authority over a majority of the country’s population. Despite its enormous implications, the agency promulgated this provision with little discussion or proper administrative procedure.<sup>7</sup>

Since 1957, Border Patrol activities have steadily encroached into the interior of the country and now impact millions of people every year.<sup>8</sup> In the early 1950s, there were about 1,100 border agents<sup>9</sup>—today, there are nearly 20,000.<sup>10</sup> This dramatic expansion of the Border Patrol force, combined with the broad authority granted to agents by the regulation, has reshaped life in the border zone. In this region, legal residents and citizens have diminished privacy rights and are subject to extensive government monitoring, even

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1. Melissa del Bosque, *Checkpoint Nation*, HARPER’S MAG., Oct. 2018, at 35, 40.

2. *Id.*

3. *Id.*

4. *Id.*

5. 8 U.S.C. § 1357(a)(3).

6. 8 C.F.R. § 287.1(a)(2) (2025).

7. WASH. LEGIS. OFF., ACLU, Customs and Border Protection’s (CBP’s) 100-Mile Rule 3 n.10 (2014).

8. Deborah Anthony, *The U.S. Border Patrol’s Constitutional Erosion in the 100-Mile Zone*, 124 PENN. ST. L. REV. 391, 431 (2020).

9. *Border Patrol History*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/border-security/along-us-borders/history> (last updated Sep. 25, 2025) [hereinafter *Border Patrol History*].

10. *Border Facts*, SBCC, <https://www.southernborder.org/border-facts#> (last visited Dec. 14, 2025).

though they live far from the actual border.<sup>11</sup> Two-thirds of the U.S. population lives within this zone, which covers most of the country’s ten largest cities and the entirety of several states.<sup>12</sup> Despite this extraordinary imposition, evidence suggests that interior operations of the Border Patrol fail to serve their intended purpose: only 2% of Customs and Border Protection’s total arrests of deportable non-citizens occurred at temporary checkpoints far from the border.<sup>13</sup> At the same time, individuals in this region face constant circumscription of their constitutional rights.<sup>14</sup>

Actions taken by executive agencies—such as the border regulation promulgated by the Justice Department—rely on delegated authority from Congress. Congress frequently delegates authority and does so with explicit language, or in broader, more general terms.<sup>15</sup> However, the Constitution requires clear congressional intent that does not offend the separation of powers for an agency to issue a *major* rule. The Major Questions Doctrine addresses this “particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.”<sup>16</sup> This doctrine states that if an agency attempts to use ambiguously supplied authority to make a rule on a subject of extreme “economic and political significance,” the rule is unlawful absent explicit congressional authorization.<sup>17</sup>

The Justice Department’s expansive interpretation of “reasonable distance” in the Immigration and Nationality Act is an example of such agency overreach. The Department’s 100-mile border zone implicates enormous social, economic, political, and constitutional issues and is a major question that Congress must speak to directly.

Part I of this Article outlines the history of the reasonable distance provision of the Immigration and Nationality Act and the subsequent regulation defining that distance as 100 miles. Then, it provides an overview

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11. Anthony, *supra* note 8, at 401.

12. WASH. LEGIS. OFF., ACLU, *supra* note 7, at 1.

13. Tanvi Misra, *Inside the Massive U.S. ‘Border Zone’*, BLOOMBERG (May 14, 2018), <https://www.bloomberg.com/news/articles/2018-05-14/mapping-who-lives-in-border-patrol-s-100-mile-zone>.

14. *See generally* JAMES LYALL ET AL., AM. C.L. UNION, RECORD OF ABUSE: LAWLESSNESS AND IMPUNITY IN BORDER PATROL’S INTERIOR ENFORCEMENT OPERATIONS 5 (2015) (detailing Border Patrol operations throughout the border region and revealing repeated violations of border residents’ civil and constitutional rights).

15. KATE R. BOWERS, CONG. RSCH. SERV., IF10277, THE MAJOR QUESTIONS DOCTRINE (2022).

16. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

17. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147 (2000); *see* U.S. Telecom Ass’n v. Fed. Comm’n Comm’n, 855 F.3d 381, 419 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting) (outlining the “overlapping and reinforcing presumptions” against agency authority to issue “a major rule” with ambiguous delegation).

of the Supreme Court’s Major Questions Doctrine and how it serves to preserve constitutional separation of powers by requiring clear congressional authorization for issues of extraordinary significance. Part II utilizes the Court’s Major Questions framework to analyze the law and regulation underlying the 100-mile border zone. The analysis shows how this definition goes beyond an appropriate delegation and instead must be determined by Congress. This Article concludes by arguing that, if presented, the Supreme Court should vacate the regulation defining “reasonable distance” from the Immigration and Nationality Act as “100 air miles” because it exceeds the proper constitutional authority of an agency.

## I. BACKGROUND

### A. *The Immigration and Nationality Act of 1952*

The Immigration and Nationality Act of 1952 (INA)<sup>18</sup> consolidated several existing laws related to immigration. Congress has amended the INA many times, but it remains a landmark piece of legislation and contains many important provisions governing immigration law.<sup>19</sup>

One provision of the INA authorizes immigration officers to perform warrantless searches within a “reasonable distance” of the border.<sup>20</sup> Five years later, in 1957, the Justice Department promulgated a regulation interpreting the phrase “reasonable distance” to mean “100 air miles” from any external boundary.<sup>21</sup> In doing so, the Justice Department created a border region that rings the country. This ring extends 100 miles into the interior, where the Border Patrol has broad authority and operates with little oversight.

Over the first half of the twentieth century, the Border Patrol developed into the primary agency tasked with securing the borders.<sup>22</sup> The Border Patrol began as a loose collection of mounted watchmen patrolling borderlands on horseback and officers assigned to inspection stations.<sup>23</sup> Prohibition and increased immigration related to global wars brought renewed attention to border enforcement, and the Border Patrol grew to fulfill an expanded

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18. 8 U.S.C. §§ 1101–1503.

19. *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act> (last updated July 10, 2019).

20. 8 U.S.C. § 1357(a)(3).

21. 8 C.F.R. § 287.1(a)(2) (2025).

22. See *Border Patrol History*, *supra* note 9 (describing the Border Patrol’s rapid expansion following its establishment in 1924 and focusing particularly on the increasing enrollment of Border Patrol agents during the WWII years).

23. *Id.*

mission.<sup>24</sup> During this same period, national policies created a patchwork of laws, executive orders, and proclamations related to immigration and illicit goods.<sup>25</sup>

The INA revised and recodified that patchwork of laws, creating a comprehensive U.S. immigration policy.<sup>26</sup> Congress enacted the bill over President Truman’s veto.<sup>27</sup> The President acknowledged that a revision to the nation’s immigration laws was “long overdue,” but he had fundamental concerns with various provisions of the bill.<sup>28</sup> In particular, he noted that “changes made by the bill . . . would result in empowering minor immigration . . . officials to act as prosecutor, judge, and jury.”<sup>29</sup> He cautioned against granting of such authority, finding it to pose a “serious risk of unreasonable invasions of privacy.”<sup>30</sup>

A significant provision of the INA granted “any officer or employee” of the Border Patrol power to perform warrantless searches and seizures “within a reasonable distance of any external boundary of the United States.”<sup>31</sup> During deliberations of what would become this provision of the INA, Senator Revercomb of West Virginia expressed concern over granting a “blanket right of search without warrant” to any law enforcement official.<sup>32</sup> However, his concerns were overcome by claims of the necessity for unbridled authority in order to effectively enforce immigration laws.<sup>33</sup>

In 1957, the Justice Department promulgated a regulation interpreting the “reasonable distance” language from Section 1357.<sup>34</sup> The agency defined the term to be “100 air miles from any external boundary.”<sup>35</sup> There is no record of how the Justice Department came to this determination.<sup>36</sup> Some have speculated that the 100-mile distance was the standard distance that the Justice Department “considered to be reasonable regarding the availability of witnesses for examination, responses to subpoenas, and numerous other

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24. *Id.*

25. JOYCE C. VIALET, CONG. RSCH. SERV., 91–141 EPW, A BRIEF HISTORY OF U.S. IMMIGRATION POLICY I (1991).

26. *Id.* at 14.

27. *Id.*

28. Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, 1 PUB. PAPERS 441, 441 (June 25, 1952).

29. *Id.* at 444.

30. *Id.*

31. 8 U.S.C. § 1357(a)(3).

32. 79 CONG. REC. 10334 (1946) (quoting Sen. Chapman Revercomb of West Virginia).

33. *Id.* (quoting Sen. Richard Russell of Georgia).

34. 8 U.S.C. § 1357(a)(3).

35. 8 C.F.R. § 287.1(a)(2) (2025).

36. WASH. LEGIS. OFF., ACLU, *supra* note 7, at 3.

discovery issues under other federal laws.”<sup>37</sup> However, if true, that standard distance was not tailored to the context of immigration.

With this new and expanded authorization, the Border Patrol began conducting enforcement activities deeper into the interior of the country. These activities take the form of “extended border searches,” fixed immigration checkpoints, and roving patrols.<sup>38</sup>

The Supreme Court authorized much of what the Border Patrol does in the border zone. Consistently, the Court has held that the governmental interest in deterring the “illegal entry of aliens”<sup>39</sup> and securing the border outweighs the “modest” intrusion<sup>40</sup> that a “brief questioning” imposes.<sup>41</sup> The Court thus determined that such questioning in the context of border enforcement is “consistent with the Fourth Amendment.”<sup>42</sup> The Court identified that a “brief detention[s] of travelers,” made for the “sole purpose of conducting a routine and limited inquiry into residence status,” presents a “minimal” intrusion.<sup>43</sup> With this perspective, the Court has sanctioned diminished Fourth Amendment protections based on the exigencies of the border context.<sup>44</sup>

### *B. The Major Questions Doctrine*

The Supreme Court’s Major Questions Doctrine is a clear statement rule that requires Congress to speak directly—or unambiguously articulate its intent—on matters of significant economic, political, and social importance.<sup>45</sup> Delegation of lawmaking authority to executive agencies is a fundamental aspect of administrative function. However, the Constitution establishes separate powers among branches and creates a system of checks and balances to prevent any one branch from overreach.<sup>46</sup> The durability and

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37. *Id.* at 3 n.10.

38. HILLEL R. SMITH, CONG. RSCH. SERV., LSB10559, U.S. CUSTOMS AND BORDER PROTECTION’S POWERS AND LIMITATIONS: A PRIMER 4 (2021).

39. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *United States v. Martinez-Fuerte*, 428 U.S. 543, 549 (1976).

40. *See Brignoni-Ponce*, 422 U.S. at 878–79.

41. *See Martinez-Fuerte*, 428 U.S. at 566 (holding that a vehicle stop at a fixed checkpoint for brief questioning of its occupants, even though there is no reason to believe the particular vehicle contains illegal aliens, is consistent with the Fourth Amendment).

42. *Id.*

43. *Id.* at 558–60.

44. Hannah Robbins, *Holding the Line: Customs and Border Protection’s Expansion of the Border Search Exception and the Ensuing Destruction of Interior Fourth Amendment Rights*, 36 CARDOZO L. REV. 2247, 2249 (2015).

45. Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1009–12 (2023).

46. U.S. CONST. art. I, § 1; *id.* art. II, § 2, cl. 2; *id.* art. III, § 1.

resilience of our system of government rests squarely on this balanced separation of authority. Courts serve a vital function in maintaining the separation of powers by exercising judicial review to preserve that balance.<sup>47</sup>

The Court first applied the Major Questions Doctrine with force in *Food & Drug Administration v. Brown & Williamson Tobacco Corporation*.<sup>48</sup> In that case, the Food and Drug Administration (FDA) attempted to regulate tobacco products with the agency’s existing statutory authority under the Food, Drug, and Cosmetics Act.<sup>49</sup> In seeking to regulate tobacco in this way, the FDA would have regulated a substance that did not fit easily into the statutory definition of “drug or device.”<sup>50</sup> Moreover, the FDA’s actions pushed the agency outside of its traditional purview and into an area where Congress had already passed comprehensive legislation.<sup>51</sup> Reviewing this, the Supreme Court held that the agency exceeded its appropriate regulatory authority.<sup>52</sup> The Court found it “extremely unlikely” that Congress intended to authorize the agency to regulate tobacco given the “economic and political significance” of the issue.<sup>53</sup>

Building on this logic, the Court focused on the significant implications of the EPA’s attempt to regulate vehicle emissions in *Utility Air Regulatory Group v. EPA*, holding that the agency went beyond its delegated authority.<sup>54</sup> Under the Clean Air Act, Congress granted the EPA authority to regulate emissions from stationary sources through setting attainment standards and issuing permits.<sup>55</sup> The agency attempted to use this authority to regulate greenhouse gas emissions from motor vehicles by designating vehicles as “stationary sources.”<sup>56</sup> The Court concluded that the agency’s interpretation was “unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority.”<sup>57</sup> Additionally, the EPA could have significant influence on the national economy without “clear congressional authorization.”<sup>58</sup>

Beginning in 2021, the Court further crystallized the Major Questions Doctrine and identified factors that it looks to when finding an agency action exceeds a reasonable delegation. In *Alabama Association of Realtors v.*

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47. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

48. 529 U.S. 120, 159 (2000).

49. *Id.* at 125.

50. *Id.* at 142.

51. *Id.*

52. *Id.* at 143.

53. *Id.* at 147.

54. 573 U.S. 302, 310, 325 (2014).

55. *Id.* at 308–10.

56. *Id.* at 310.

57. *Id.* at 324.

58. *Id.*

*Department of Health & Human Services*, the Court reviewed a nationwide moratorium on evictions imposed by the Centers for Disease Control (CDC) as part of its response to the COVID-19 pandemic.<sup>59</sup> The Court determined that the CDC's interpretation of "necessary" from its enabling statute, which it relied on for the moratorium, provided no limiting principle and would give the agency "a breathtaking amount of authority."<sup>60</sup> The Court also noted that preventing landlords from evicting tenants implicated values of federalism and intruded on States' traditional authority as the primary regulator of the landlord-tenant relationship.<sup>61</sup> In striking down the eviction moratorium, the Court explained that its "precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power."<sup>62</sup>

Similarly, in 2022, the Court struck down a rule enacted by the Occupational Safety and Health Administration (OSHA) that mandated vaccines for "much of the nation's workforce" as part of the Government's response to the COVID-19 pandemic.<sup>63</sup> The Court declared that OSHA's rule was "no 'everyday exercise of federal power,' but rather a significant encroachment into the lives . . . of a vast number of employees."<sup>64</sup> An action with such significant implications, the Court reiterated, requires "Congress to speak clearly."<sup>65</sup>

During the same term, the Court reviewed EPA's nationwide effort to regulate coal-fired power plants in *West Virginia v. EPA*.<sup>66</sup> In striking down EPA's rule, the Court articulated the Major Questions Doctrine in its clearest terms. The Court again explained that in "'extraordinary cases' . . . the 'history and breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."<sup>67</sup> The Court cited both separation of powers principles and "a practical

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59. 141 S. Ct. 2485, 2486 (2021).

60. *Id.* at 2489.

61. *Id.*

62. *Id.* (quoting *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849–50 (2020)).

63. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab. & OSHA Admin*, 142 S. Ct. 661, 662 (2022).

64. *Id.* at 665 (quoting *In re MCP No. 165*, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C.J., dissenting)).

65. *Id.* (quoting *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021)).

66. 142 S. Ct. 2587, 2599–2600 (2022).

67. *Id.* at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–160 (2000)).

understanding of legislative intent” for its reluctance to read an expansive delegation into ambiguous statutory text.<sup>68</sup>

Through this line of cases, the Court exercised a targeted application of nondelegation, requiring explicit congressional authorization for “transformative” expansions in agency authority.<sup>69</sup> When an agency attempts to exercise “expansive regulatory authority over some major social or economic activity . . . an *ambiguous* grant of statutory authority is not enough.”<sup>70</sup>

## II. THE MAJOR SOCIAL, ECONOMIC, AND POLITICAL SIGNIFICANCE OF THE 100-MILE BORDER REGION

The Border Patrol’s interpretation of “reasonable distance” has vast economic, social, political, and constitutional implications. Defining the border region as “100 air miles” results in many of the country’s largest cities, and even entire states, falling within the Border Patrol’s jurisdiction.<sup>71</sup> This means nearly two-thirds of Americans live within an area where constitutional exceptions exist because of the governmental interest in securing the border.<sup>72</sup> The vastness of this region, in turn, requires extraordinary levels of funding and resource allocation. The Border Patrol’s long history of abusing its power and colluding with other law enforcement agencies to circumvent constitutional protections ultimately displays the dangers of allowing an overly broad definition of “reasonable distance.”<sup>73</sup> It is highly unlikely that Congress would authorize an agency to decide something of such economic, social, and political importance. The definition of the “reasonable distance” within which the Border Patrol can exercise its

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68. *West Virginia*, 142 S. Ct. at 2609 (2022) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

69. Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475, 483 (2021).

70. *U.S. Telecom Ass’n v. Fed. Comm’n Comm’n*, 855 F.3d 381, 421 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting).

71. WASH. LEGIS. OFF., ACLU, *supra* note 7, at 1.

72. *Id.*

73. See *100 Year Anniversary of Border Patrol Violence and Impunity: Fighting for Our Dignity*, SBCC, [https://www.southernborder.org/100\\_years\\_of\\_fighting\\_for\\_our\\_dignity](https://www.southernborder.org/100_years_of_fighting_for_our_dignity) (last visited Dec. 14, 2025); see also *Abuse of Power and Its Consequences*, SBCC, [https://www.southernborder.org/border\\_lens\\_abuse\\_of\\_power\\_and\\_its\\_consequences](https://www.southernborder.org/border_lens_abuse_of_power_and_its_consequences) (last visited Dec. 14, 2025); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) (involving a Border Patrol agent’s unconstitutional, warrantless search of vehicle); *Bond v. United States*, 529 U.S. 334, 335 (2000) (involving a Border Patrol agent’s illegal search of bus passenger’s belongings); *Hernandez v. Mesa*, 140 S. Ct. 735, 740 (2020) (involving a Border Patrol agent’s cross-border shooting and killing of a 15-year-old Mexican national); *Vermont v. Walker-Brazie*, 2021 Vt. 75, ¶ 43, 215 Vt. 492, 512, 280A.3d 24, 37 (2020) (involving a Border Patrol agents’ obtaining evidence in violation of Vermont Constitution).

broad authority is a major question that the agency cannot appropriately define itself. Rather, Congress must clearly and specifically define it.

### A. Social Significance

The social significance of a border region that encompasses many of the country's largest cities, and hundreds of millions of Americans, is hard to overstate. Exceptions to constitutional rights that pertain to border enforcement authorities heighten this significance. This geographic coverage and breadth of authority create conditions for arbitrary and abusive application of governmental power. The distance within which the Border Patrol can exercise its expansive authority under its "100 air mile" definition is an extraordinary encroachment into the lives—and rights—of a vast number of Americans.

The 100-mile border region encompasses the entire eastern seaboard (including Washington, D.C., New York City, Philadelphia, and Boston); most of California (including San Diego, Los Angeles, San Francisco, and Sacramento); almost the entirety of the states surrounding the Great Lakes; and the entirety of several states (Florida, Hawaii, Michigan, Maine, New Hampshire, Rhode Island, Vermont).<sup>74</sup> Thus, hundreds of millions of Americans are potentially subject to "investigatory detention and warrantless search" by Border Patrol agents.<sup>75</sup>

Residents of some parts of the border region refer to it as a "band of isolation"—a "no man's land"—where "local residents perpetually live with diminished rights and constant government intrusion and suspicion in their lives."<sup>76</sup> In Vermont, Border Patrol agents operating far from the northern border and enforcing drug laws rather than immigration laws caused Vermont residents to complain "that driving in their state feels like 'being in Eastern Europe under communism.'"<sup>77</sup> The Border Patrol asserts that interior checkpoints are necessary to "effectively secure the border against 'illegal aliens' and 'illegal narcotics.'"<sup>78</sup> However, these checkpoints result in the arrest of U.S. citizens at a "significantly higher" rate than non-citizens.<sup>79</sup> The

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74. Anthony, *supra* note 8, at 399.

75. WASH. LEGIS. OFF., ACLU, *supra* note 7, at 1.

76. Anthony, *supra* note 8, at 401; see David Branham, Sr., *The Influence of Seclusion: Immigration and Border Security Attitudes of Registered Voters Living Behind the Interior Border Patrol Checkpoints in the State of Texas*, 16 MIDSOUTH POL. SCI. REV. 1, 1 (2015) (detailing the daily impacts of living within the 100-mile border region and the constant state of suspicion and surveillance experienced by those attempting to lead normal lives in the region).

77. Robbins, *supra* note 44, at 2267.

78. Anthony, *supra* note 8, at 401.

79. Anthony, *supra* note 8, at 402.

Tenth Circuit determined that a search that occurred over 200 miles from the border was too far removed and exceeded the agency’s authority.<sup>80</sup> The Court noted that the “further one gets from the border . . . the greater the likelihood the volume of legitimate travelers will increase.”<sup>81</sup>

Racial profiling and constitutional violations in the form of unreasonable searches and detentions are rampant within the 100-mile border region.<sup>82</sup> Nearly 75% of the U.S. Hispanic population live within this region and face increased suspicion simply because of their race.<sup>83</sup> Countless citizens that have been the subject of interior enforcement activities complain of agents’ “violent, reckless, and threatening conduct.”<sup>84</sup> Reports reveal Border Patrol agents “assaulting non-threatening motorists; driving aggressively and tailgating at high speeds; wielding weapons . . . in routine traffic encounters; threatening to shoot motorists or their pets; and mocking and insulting motorists with profane and derogatory language.”<sup>85</sup>

The authority to perform warrantless searches is extremely significant and should not be granted without careful deliberation and imposition of clearly defined limits. The framers of the Constitution were concerned with granting broad authority to state agents.<sup>86</sup> In 1761, James Otis gave a speech that highlighted the need to prioritize protection of an individual’s right to be free from arbitrary governmental intrusion.<sup>87</sup> His speech decried how “writs of assistance” were an affront to civil liberties.<sup>88</sup> These “general” writs granted broad authority to officers of the British Crown to search homes and vessels, in contrast to “special writs” directing specific officers and specifying specific locations to be searched.<sup>89</sup> Otis claimed that “[e]veryone with this [general] writ may be a tyrant,” able to “search special places” without restriction.<sup>90</sup>

The Supreme Court echoed this perspective during the Prohibition Era, when alcohol prohibition injected a new rationale for extensive border enforcement. In *Carroll v. United States*, the Court stated that it would be “intolerable and unreasonable” if a border enforcement agent “were

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80. *United States v. Venzor-Castillo*, 991 F.2d 634, 640 (10th Cir. 1993).

81. *Id.* at 639.

82. Anthony, *supra* note 8, at 402.

83. Anthony, *supra* note 8, at 399.

84. LYALL ET AL., *supra* note 14, at 6.

85. *Id.* (citations omitted).

86. Thomas K. Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 *Ind. L.J.* 979, 991–92 (2011).

87. James Otis, *Speech Against Writs of Assistance* (February 24, 1761) (transcript available at <https://teachingamericanhistory.org/document/speech-against-writs-of-assistance/>).

88. *Id.*

89. *Id.*

90. *Id.*

authorized to stop every automobile on the chance of finding liquor.”<sup>91</sup> Such authority would “subject all persons lawfully using the highways to the inconvenience and indignity of such a search.”<sup>92</sup> However, the Border Patrol today views itself as a “paramilitary border security force,” operating outside “constitutional constraints” and rejecting outside scrutiny or oversight.<sup>93</sup>

By stretching the conception of the border region and its authority within it, the Border Patrol’s interior operations create the conditions for arbitrary and abusive application of governmental authority over an enormous area. The agency’s interior efforts are attenuated from the physical border yet impact the daily lives of millions of Americans. The Border Patrol’s legal authority to operate throughout this area rests solely on its own, unchallenged regulation, which interpreted the vague delegation in the INA. The 100-mile border region represents a “significant encroachment into the lives” of a vast number of citizens.<sup>94</sup> There is nothing reasonable about it. Such an “extraordinary” imposition provides significant “reason to hesitate before concluding that Congress” intended such a delegation.<sup>95</sup>

### B. Economic Significance

The vast area encompassed by the 100-mile border region, in turn, requires the use of a vast force of law enforcement personnel and equipment. Customs and Border Protection (CBP), the agency that now houses the Border Patrol, is the federal government’s largest law-enforcement agency.<sup>96</sup> From 2003 to 2022, the number of Border Patrol agents almost doubled, growing from a little over 10,000 to nearly 20,000 agents.<sup>97</sup> The allocation of federal funds associated with such an extensive Border Patrol force is immense. From 2003 to 2024, the federal government allocated an estimated \$409 billion to agencies that carry out immigration enforcement.<sup>98</sup>

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91. *Carroll v. United States*, 267 U.S. 132, 153–54 (1925).

92. *Id.*

93. LYALL ET AL., *supra* note 14, at 18. *See e.g.*, Byron Tau & Garance Burke, *Border Patrol Is Monitoring US Drivers and Detaining Those with ‘Suspicious’ Patterns*, AP (Nov. 20, 2025), <https://abcnews.go.com/Technology/wireStory/border-patrol-monitoring-us-drivers-detaining-suspicious-travel-127699704> (uncovering Border Patrol’s latest abuse of its extensive self-defined authority and revealing the agency’s conception that “it is legally allowed ‘to operate anywhere in the United States’”).

94. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab. & OSHA Admin.*, 142 S. Ct. 661, 665 (2022).

95. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

96. *Stats and Summaries*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats#> (last updated Sept. 17, 2025).

97. AM. IMMIGR. COUNCIL, *THE COST OF IMMIGRATION ENFORCEMENT AND BORDER SECURITY* 2 (2024).

98. *Id.*

What has this massive spending bought? The U.S. has hundreds of miles of fencing along the Southern border, “record levels of staff for ICE and CBP, as well as a fleet of drones—among other resources.”<sup>99</sup> The border region “has become a war zone.”<sup>100</sup> Now, it is “a transfer station for sophisticated American military technology and weapons,” where defense contractors look to border areas and border enforcement agencies “to make money.”<sup>101</sup> It is “entirely normal to look up into the Arizona sky and to see Blackhawk helicopters and fixed-wing jets flying by.”<sup>102</sup> On a clear day, you can sometimes hear Predator drones buzzing overhead.<sup>103</sup> These drones are equipped with the same kind of “man-hunting” radar technology used in Afghanistan.<sup>104</sup> By virtue of its activities throughout the 100-mile border region, the Border Patrol is commonly referred to as “part police force, part occupying army, part frontier cavalry.”<sup>105</sup>

The 100-mile border region both necessitates and enables this massive outlay of funding. The economic significance of ongoing and ever-expanding spending reveals a disconnect between Congressional intent when it delegated “reasonable distance” authority to the Border Patrol and the reality today. The budget for today’s Border Patrol is “staggering by any measure.”<sup>106</sup> Under the Supreme Court’s Major Questions Doctrine, when Congress authorizes “an agency to exercise powers of ‘vast “economic and political significance,”” it must speak clearly.<sup>107</sup> The Justice Department seized upon the vague delegation of “reasonable distance” in the INA to create this massive border region. This “100 air mile”<sup>108</sup> interpretation of “reasonable distance from any external boundary”<sup>109</sup> has enormous economic significance and must be determined by Congress.

### C. Political Significance

The 100-mile border region created by the agency’s regulation also results in federal authority encroaching on the power of states to protect their

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99. *Id.*

100. Todd Miller, *War on the Border*, N.Y. TIMES (Aug. 17, 2013), <https://www.nytimes.com/2013/08/18/opinion/sunday/war-on-the-border.html>.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. Anthony, *supra* note 8, at 401.

106. *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023).

107. *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

108. 8 C.F.R. § 287.1(a)(2) (2025).

109. 8 U.S.C. § 1357(a)(3).

citizens and enforce their laws. While border enforcement is the purview of the federal government, there is significant potential for improper overreach of federal authority on state sovereignty when entire states are subsumed into an arbitrarily defined jurisdictional zone.<sup>110</sup>

As CBP interior checkpoints become further removed from the border boundary, there is increased risk that these checkpoints could evolve from an immigration focus into “general crime control and drug interdiction.”<sup>111</sup> For example, in Woodstock, New Hampshire—6 miles from the Canadian border, Border Patrol agents erected a temporary checkpoint that did just that.<sup>112</sup> At this checkpoint, federal Border Patrol agents and State law enforcement “worked in concert” to “circumvent the independent protections provided by the New Hampshire Constitution against dog-sniff searches in the absence of a warrant or reasonable suspicion.”<sup>113</sup> A federal district court in Maine expressed concern with interior operations in effect “pushing the border in,” along with the agency’s extensive border enforcement powers.<sup>114</sup> In New York State, the N.Y. Civil Liberties Union documented “a disturbing picture” of the Border Patrol “resorting to aggressive policing tactics in order to increase arrest rates, without regard for the costs and consequences of its practices on New Yorkers’ rights and freedoms.”<sup>115</sup> In Arizona, “systemic oversight failures” of Border Patrol activities result in near impunity for agents’ “racial profiling,” conducting “unwarranted stops and searches,” employing “false canine alerts,” and inflicting other abuses far into the interior of the state.<sup>116</sup> Additionally, in his dissent to the 1993 Ninth Circuit case of *United States v. Soyland*, Judge Kozinski noted that the evidence in the case suggested that “the Constitution is being routinely violated” at interior checkpoints used for “general law enforcement” activities such as searching for contraband.<sup>117</sup>

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110. *United States v. Gabriel*, 405 F. Supp. 2d 50, 57 n.10 (D. Me. 2005) (“For some states, the 100-mile limitation has an unusually broad reach. . . . Under 8 C.F.R. § 287.1(a)(2), the entire state of Maine might be subject to Border Patrol checkpoints. What would not be covered by the limitation of 100 miles from the border would likely be included within 100 miles of the territorial sea. The same may be true of other states, like Florida.”).

111. KATHERINE HAWKINS, *THE BORDER ZONE NEXT DOOR, AND ITS OUT-OF-CONTROL POLICE FORCE* 17 (Julia Delacroix et al. eds., 2023).

112. *State v. McCarthy et al. (Woodstock Border Patrol Checkpoint Cases)*, ACLU N.H., <https://www.aclu-nh.org/en/cases/state-v-mccarthy-et-al-woodstock-border-patrol-checkpoint-cases> (last updated Dec. 12, 2017).

113. *Id.*

114. *Gabriel*, 405 F. Supp. 2d at 59.

115. N.Y.C.L. UNION, *JUSTICE DERAILED: WHAT RAIDS ON NEW YORK’S TRAINS AND BUSES REVEAL ABOUT BORDER PATROL’S INTERIOR ENFORCEMENT PRACTICES* 1 (2011).

116. LYALL ET AL., *supra* note 14, at 7, 13.

117. 3 F.3d 1312, 1319–20 (9th Cir. 1993) (Kozinski, J., dissenting).

The Major Questions Doctrine applies in situations where an agency seeks to “intrud[e] into an area that is the particular domain of state law.”<sup>118</sup> The 100-mile border region creates a dramatic imposition of federal jurisdiction on state sovereignty. This overlap cultivates the potential for constitutional abuses and improper law enforcement collusion between state and federal authorities. Additionally, the Major Questions Doctrine requires clear congressional intent where federal and state powers conflict, thus preserving the “proper balance between the States and the Federal Government.”<sup>119</sup> When an agency “claims the power to regulate vast swaths of American life, it not only risks intruding on Congress’s power, it also risks intruding on powers reserved to the States.”<sup>120</sup> Here, the 100-mile “reasonable distance” regulation claims power over a massive land area that, in turn, places millions of state citizens under the potential for warrantless search and seizure within the place they call home.<sup>121</sup>

The reasonable distance of the border region is a Major Question that Congress must speak to directly. A vast number of Americans fall within the Border Patrol’s defined jurisdiction. Those Americans are then subject to extensive surveillance and aggressive enforcement, reminiscent of a warzone in some places. This extraordinary imposition from the vague words of “reasonable distance” surely must cause one to “raise an eyebrow.”<sup>122</sup> The hundreds of billions of dollars in federal funding claimed necessary to secure this massive border region is major by any understanding.

### III. THE 100-MILE “REASONABLE DISTANCE” REGULATION SHOULD BE VACATED UNDER THE MAJOR QUESTIONS DOCTRINE

Since the promulgation of the reasonable distance regulation, the Border Patrol’s enforcement activities have steadily moved further into the interior of the country.<sup>123</sup> What began as a vague delegation from Congress is now the core jurisdictional rule for the country’s largest federal law enforcement agency. The impact of the Border Patrol’s interior operations is felt “not only by those individuals arrested but by all citizens and non-citizens who live in the areas where these operations take place.”<sup>124</sup>

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118. *West Virginia v. EPA*, 142 S. Ct. 2587, 2621 (2022) (Gorsuch, J., concurring).

119. *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991)).

120. *Id.*

121. *100 Mile Border Zone*, ACLU, <https://www.aclu.org/know-your-rights/border-zone> (last updated Sep. 5, 2025).

122. *West Virginia v. EPA*, 142 S. Ct. 2587, 2613 (2022).

123. Anthony, *supra* note 8, at 431.

124. N.Y.C.L. UNION, *supra* note 115, at 27.

Despite the increasing militarization of the border region, the 100-mile regulation “has remained static.”<sup>125</sup> Simultaneously, case law and U.S. border policies have failed to provide workable limits, or oversight, to the use and abuse of the Border Patrol’s authority.<sup>126</sup> However, the Constitution places limits on what executive agencies can properly address. Agencies cannot create “regulations as substitutes for laws passed by the people’s representatives.”<sup>127</sup> It is a fundamental principle of our democracy that “[i]t is the peculiar province of the legislature to prescribe general rules for the government of society.”<sup>128</sup> When an agency interprets a vague delegation and the result is a rule that impacts the vast majority of citizens, there is a problem.

The Border Patrol describes its interior checkpoints as “effective and valuable” tools for securing the border.<sup>129</sup> However, data obtained through investigations by the American Civil Liberties Union “suggests the claimed benefits of those activities have been exaggerated.”<sup>130</sup> Further, even with the breadth of their self-defined authority, the Border Patrol consistently ignores it, conducting activities beyond the 100-mile limit and refusing “to acknowledge the regulation as a limitation on its operations.”<sup>131</sup> While border enforcement is necessary and important, there are immense dangers to the rights of Americans when the exigencies of the border creep further and further into the interior. The reasonable distance regulation creates this exact reality.

The Court’s decisions rely on the governmental interest in securing the international border and “preventing the entry of unwanted persons and effects.”<sup>132</sup> The Court asserts that warrantless searches and seizures “are reasonable simply by virtue of the fact that they occur at the border.”<sup>133</sup> However, the Court’s presumption concerning the limited nature of exceptions to the Fourth Amendment in the border region contrasts sharply with the documented conduct of the Border Patrol in the 100-mile border region.<sup>134</sup> Mere acceptance of this presumption fails to take account of the

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125. Yessenia Renee Medrano-Vossler, *Sniff and Search Border Militarization*, 14 SEATTLE J. SOC. JUST. 915, 926 (2016).

126. *Id.*

127. *West Virginia v. EPA*, 142 S. Ct. 2587, 2626 (2022) (Gorsuch, J., concurring).

128. *Id.* (quoting *Fletcher v. Peck*, 6 U.S. (1 Cranch) 87, 136 (1810)).

129. *Border Patrol Checkpoints Demonstrate Effectiveness and Valuable Tool*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/local-media-release/border-patrol-checkpoints-demonstrate-effectiveness-and-valuable-tool> (Feb. 3, 2021).

130. LYALL ET AL., *supra* note 14, at 14.

131. Anthony, *supra* note 8, at 423.

132. *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004).

133. *Id.* at 152–53 (quoting *United States v. Ramsey*, 431 U.S. 606, 616 (1977)).

134. Anthony, *supra* note 8, at 423; *see, e.g.*, LYALL ET AL., *supra* note 14.

disconnect between the goals of immigration enforcement and how the Border Patrol actually uses its authority in the border region.

If presented, the Supreme Court should vacate the regulation interpreting the INA’s “reasonable distance”<sup>135</sup> language as “100 air miles.”<sup>136</sup> The definition of this distance has implications far too great for Congress to allow the agency tasked with enforcement to define it for itself. We must reconceive what a “reasonable distance” is for border enforcement. For if we do not, we must acknowledge that we already “live in a country where armed officers approach Americans engaged in no wrongdoing and ask them to produce papers to prove that they are indeed Americans.”<sup>137</sup> An “extraordinary grant of regulatory authority”—such as defining the “reasonable distance” for warrantless border enforcement as 100 air miles from any external boundary—cannot be valid through “modest words,” “vague terms,” or “subtle device[s].”<sup>138</sup> The constitutional requirements asserted by the Major Questions Doctrine protects fundamental democratic principles. The “100 air mile” regulation is an extraordinary imposition on Americans’ liberties and American values and must be invalidated.

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135. 8 U.S.C. § 1357(a)(3).

136. 8 C.F.R. § 287.1(a)(2) (2025).

137. N.Y.C.L. UNION, *supra* note 115, at 21.

138. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (quoting *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001)).

# HOW COURTS DIE

David Sobreira\*

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## INTRODUCTION

“[A] death by a thousand cuts” is how some scholars who study democratic backsliding describe the process that leads to the end of a democracy.<sup>1</sup> Academic literature has repeatedly shown that democratic regimes no longer end abruptly, but rather gradually, although the speed of transition may vary.<sup>2</sup> This phenomenon manifests itself through a series of small attacks (cuts) on democratic institutions that, individually, may seem insignificant but collectively erode the fundamental structure of the rule of law.

However, not all cuts are equal. Some are deeper and cause more serious damage than others, especially when the integrity of apex courts is violated. These institutions play a crucial role in maintaining constitutional order, acting as guardians of the constitution and protectors of fundamental rights. When attacked, the capacity of a democratic system to self-correct is severely compromised.

Political science has shown that a new wave of autocratization is upon us.<sup>3</sup> Academics have been studying this problem incessantly, especially in the last decade and a half when the phenomenon seems to have gained more traction worldwide. Despite the different research approaches, one conclusion about the autocratization process seems unanimous: the importance of apex courts in its fulfillment. Often seen as obstacles by authoritarian leaders, these courts fall victim to attacks that seek to undermine their independence and turn them into tools to legitimize their agendas.

The importance of apex courts in protecting democratic values cannot be underestimated. It is due to the power they wield that these institutions can act as a bulwark against authoritarian projects. By protecting fundamental rights and ensuring that the legislative and executive branches operate within constitutional limits, they play a vital role in preserving democracy. However, this same role makes them prime targets for

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1. See generally Luca Cianetti & Seán Hanley, *The End of the Backsliding Paradigm*, 32 J. DEMOCRACY 66 (2021); R. H. Rohlffing & Marlene Wind, *Death by a Thousand Cuts: Measuring Autocratic Legalism in the European Union’s Rule of Law Conundrum*, 30 DEMOCRATIZATION 1 (2023); Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, 14 L. & ETHICS HUM. RTS. 49 (2020).

2. See generally sources cited *supra* note 1; STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018) [hereinafter *HOW DEMOCRACIES DIE*]; Aziz Z. Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018) [hereinafter *How to Lose a Constitutional Democracy*].

3. Anna Lührmann & Staffan I. Lindberg, *A Third Wave of Autocratization Is Here: What Is New About It?*, 26 DEMOCRATIZATION 1095, 1095–96 (2019).

authoritarian agents who seek to consolidate power and eliminate mechanisms that can hinder their illiberal plans.

In recent decades, supreme and constitutional courts have been the targets of systematic attacks in different parts of the world. In countries like Venezuela, Turkey, Hungary, Poland, El Salvador, and Israel, political leaders and parties have employed strategies to weaken or control these institutions.<sup>4</sup> In the repertoire of these illiberal figures are maneuvers such as judicial structure reforms, reducing the number of judges, increasing executive control over judicial appointments, and limiting the authority of the courts. Such schemes compromise judicial independence but also ease the implementation of policies that may be contrary to democratic principles. It is due to these issues that this work aims to analyze how political agents have subverted courts and weaponized them for their purposes.

Thus, Part I takes a historical approach by exposing the reasons that led to the concentration of powers in supreme and constitutional courts. From *Marbury v. Madison* in 1803, through the creation of the basic structure doctrine in India in the 1970s, to the invalidation of Amendment No. 3 by the Israeli Supreme Court in 2024, this explanation helps to understand the authority of the courts and the interest they arouse in authoritarian agents. This art explores how these courts acquired their role as guardians of the constitution and how this authority made them targets in times of democratic crisis.

Next, I present the concept of what I call “court taming,” a term I find more appropriate than the alternatives used in the specialized literature, because it more accurately captures the dynamic between judiciary and legislative processes. This concept is complemented by a typology created from the analysis of the experiences of six countries. Starting from the presented concept and using a deductive argument, I provide arguments for why taming of a court should be seen as illegitimate.

In Part II, I employ a comparative approach to explain the methodology used for selecting the countries analyzed. I also explain issues such as temporal scope, concepts of democracy, and regime transition. Subsequently, I present the political context and erosion process of six countries (Venezuela, Turkey, Hungary, Poland, El Salvador, and Israel), with an emphasis on the attacks directed at their supreme and constitutional courts.

The case studies in this Part follow a uniform structure to facilitate the analysis. Initially, I delineate the situation prior to the attacks on the judiciary. Then, I present the different strategies employed to tame the courts. Finally,

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4. *See infra* Part II.

I attempt to evaluate the consequences of the taming process, assessing—when possible—the implications of judicial independence.

Building on the lessons learned from the study of each of these countries, Part III presents sociological and institutional proposals to address the problem of court taming. In a non-exhaustive list, I present ideas related to sociological legitimacy and how a court can build it, how constitutional designers can establish rules to hinder taming attempts, and ways in which the courts can defend themselves against attacks.

### I. COURT TAMING

Rather than rejecting the language of constitutionalism and democracy in the name of a grand ideology as their authoritarian forebears did, the new legalistic autocrats embrace constitutional and democratic language while skipping any commitment to the liberal values that gave meaning to those words.<sup>5</sup>

In the past two decades, legal academic literature has seen an increasing production of studies on the process of democratic decay—a regime that seems to be facing yet another crisis in many countries around the world.<sup>6</sup> Quantitatively, the world is divided between 88 democracies and 91 autocracies—as pointed out in the 2025 report of the Varieties of Democracy Institute (V-Dem).<sup>7</sup> For the first time in the past 20 years, there are more autocracies than democracies in the world. This means that today, 71% of the world’s population (approximately six billion people) live in autocracies—nearly a 50% increase in the last decade.<sup>8</sup>

It is difficult to assess whether this is a trend that will persist or if this is part of a cycle of crises in democratic regimes. Whatever the answer, academics have produced warnings, analyses, and responses in attempts to overcome this moment. The result has been a vast collection of works that have brought relevant insights for understanding this period. Without exhausting the topic—and probably doing the injustice of failing to mention

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5. Kim Lane Scheppelle, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 562 (2018) [hereinafter *Autocratic Legalism*].

6. See Hanspeter Kriesi, *Is There a Crisis of Democracy in Europe?*, 61 POLITISCHE VIERTELJAHRESSCHRIFT [GERMAN POL. SCI. Q.] 237, 239 (2020) (disagreeing that there is a democratic crisis in Europe).

7. MARINA NORD ET AL., V-DEM INSTITUTE, DEMOCRACY REPORT 2025: 25 YEARS OF AUTOCRATIZATION – DEMOCRACY TRUMPED? 6 (2025) [hereinafter DEMOCRACY REPORT 2025].

8. *Id.* at 6.

some—the works of Jack Balkin (Constitutional Rot),<sup>9</sup> David Landau (Abusive Constitutionalism),<sup>10</sup> Nancy Bermeo (Democratic Backsliding),<sup>11</sup> as well as Steven Levitsky and Daniel Ziblatt (How Democracies Die)<sup>12</sup> can be mentioned.

As Levitsky and Ziblatt point out, the authoritarian challenges launched against contemporary democracy have a common hallmark: they are a reaction to the progressive strengthening of multiracial democracy.<sup>13</sup> Levitsky and Ziblatt define multiracial democracy as “a political system with regular, free, and fair elections in which adult citizens of all ethnic groups possess the right to vote and basic civil liberties such as freedom of speech, the press, assembly, and association.”<sup>14</sup>

In this context, the strengthening of an increasingly cosmopolitan and globalized world has contributed to the advancement of multiracial democracy. As a consequence, formerly dominant social groups now find themselves forced to share their positions of power with groups once marginalized. For Levitsky and Ziblatt, this loss of political space leads old dominant groups to question the changes in the social status quo, causing them to fear for their positions in society.<sup>15</sup>

This fear, compounded by resentment over losing social status, makes such groups susceptible to being captivated by demagogic populist discourses. Some of these populists, often charismatic, have little or no commitment to democracy and are capable of channeling people’s worst feelings. This is because, “[i]n spite of the reliance on rhetoric and irrational appeals, populism does respond to real problems,”<sup>16</sup> such as the democratic deficit currently growing due to factors like:

[T]he general growth of executive power at the expense of legislatures, political corruption and the role of money in the electoral process, the weakening of political parties, the rise

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9. See Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147 (2017) (explaining how states become less democratic and less republican).

10. See David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013) [hereinafter *Abusive Constitutionalism*] (addressing the weaponization of constitutionalism against itself).

11. See Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5 (2016) (exploring the transformation of the strategies to end the democratic rule).

12. See HOW DEMOCRACIES DIE, *supra* note 2 (analyzing how autocrats rise to power).

13. STEVEN LEVITSKY & DANIEL ZIBLATT, TYRANNY OF THE MINORITY 5 (2023). [hereinafter TYRANNY OF THE MINORITY].

14. *Id.* at 4.

15. *Id.* at 10.

16. Andrew Arato, *How We Got Here? Transition Failures, Their Causes, and the Populist Interest in the Constitution*, 45 PHIL. & SOC. CRITICISM 1106, 1108 (2019) [hereinafter *How We Got Here?*].

of ‘media democracy’, the instrumentalization and commercialization of the public sphere, the transformation of civil society into a network of formal organizations, the reduction of direct democratic practices into plebiscitary ones and the growth of powerful regional or international organizations less democratic in form and operation than were many nation states.<sup>17</sup>

Populism, however, has many definitions. According to Bojan Bugarcic, populism is “chameleon-like,” capable of adapting to its environment while maintaining a narrowly defined ideology.<sup>18</sup> As a result, populism can take various forms, including “agrarian, socio-economic, xenophobic, reactionary, authoritarian,” and even “progressive.”<sup>19</sup> Nevertheless, certain elements frequently recur in populist movements, such as the division of society into antagonistic groups, the claim to speak on behalf of “the people,” and an emphasis on popular sovereignty and direct democracy.<sup>20</sup>

Similarly, though with a more systematic approach, Andrew Arato argues that “today’s main challenge to democracy comes from projects (movements and regimes) that very well fit the six criteria” derived from the theories of various political scientists.<sup>21</sup>

(1) Appeal to ‘the people’ and ‘popular sovereignty’ as empty signifiers, uniting in a rhetorical form heterogeneous demands and grievances (=the fiction of E. Morgan; the myth of M. Canovan).

(2) A part (of the population) standing for the whole (‘the people’).

(3) The construction of frontier of antagonism (=the friend–enemy couplet of Carl Schmitt).

(4) Unification through strong identification with a leader, or rarely unified leadership group (=embodiment model of Lefort, Habermas; the general will of C. Mudde).

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17. *Id.*

18. Bojan Bugarcic, *The Two Faces of Populism: Between Authoritarian and Democratic Populism*, 20 GERMAN L.J. 390, 392 (2019).

19. *Id.*

20. *Id.*

21. *How We Got Here?*, *supra* note 16, at 1106.

(5) Insistence on a strong notion of politics, or ‘the political’ and a disinterest in mere ‘ordinary’ politics or policy.

(6) Nevertheless, attachment to at least partially competitive elections (until a populist regime with mere ritualized elections can be constituted).<sup>22</sup>

The conclusion is that the populist project, in its authoritarian form,<sup>23</sup> contains elements fundamentally incompatible with democracy, such as dividing society into allies and enemies—rather than allies and opponents. This notion aligns with ideas such as Levitsky and Ziblatt’s principle of mutual tolerance. According to them, as long as opponents abide by the rules of the democratic process, those who claim to uphold democracy must respect their opponents’ right to exist and compete for power.<sup>24</sup>

Respect for political opponents—and their right to participate—is also defended by more radical theories that emphasize the inherently conflictual nature of democracy, such as Chantal Mouffe’s. In her agonistic model of democracy, Mouffe uses the term “enemy” in a qualified sense: “[a]n adversary is an enemy, but a legitimate enemy—one with whom we have some common ground because we share an adherence to the ethico-political principles of liberal democracy: liberty and equality.”<sup>25</sup>

Despite such democratic ideals, authoritarianism has been gaining ground worldwide.<sup>26</sup> The rhetoric of authoritarian actors and their illiberal practices have found receptive audiences in various countries facing crises of different kinds. Much like in the last century, when democracy was not yet a consolidated value, today’s autocrats have become the new “sexy”—at least for a segment of the population.

A well-functioning constitutional democracy relies on several key factors, including (1) the effective operation of institutions that serve as

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22. *Id.* at 1107 (formatting altered).

23. Bojan Bugarcic differentiates between two types of populism: one authoritarian in nature and, therefore, contrary to liberal values; and the other emancipatory, which can be compatible with liberal democracy. Bugarcic, *supra* note 18, at 393. The concept of populism is essentially disputed, despite having some common characteristics. However, not all authors agree with the existence of a populism with liberal characteristics as Bugarcic does. CARINA BARBOSA GOUVEA & PEDRO H. VILLAS BÔAS CASTELO BRANCO, POPULIST GOVERNANCE IN BRAZIL: BOLSONARO IN THEORETICAL AND COMPARATIVE PERSPECTIVE 43 (2022).

24. HOW DEMOCRACIES DIE, *supra* note 2, at 8–9.

25. CHANTEL MOUFFE, THE DEMOCRATIC PARADOX 120 (2000).

26. ECONOMIST INTEL. UNIT, DEMOCRACY INDEX 2024, at 29 (2025); *see generally* DEMOCRACY REPORT 2025, *supra* note 7; FREEDOM HOUSE, FREEDOM IN THE WORLD 2025: THE UPHILL BATTLE TO SAFEGUARD RIGHTS (2025).

checks on power, (2) public trust in elected representatives, and (3) the patience and adherence of public officials to the rules of the political system.<sup>27</sup> However, authoritarian figures have no qualms about undermining the mechanisms that uphold these democratic safeguards in pursuit of their political objectives.

Among the essential components of a strong democracy, the proper functioning of institutions that limit power—particularly the independence of apex courts—is the central focus of this Article. Given the significant authority these courts wield, they have become frequent targets of attack by those seeking to advance illiberal agendas.<sup>28</sup>

### A. *The Rise of Apex Courts*

When Alexander Hamilton began publishing his essays in New York to advocate for the ratification of the U.S. Constitution, he described the U.S. Supreme Court as the “least dangerous” branch.<sup>29</sup> Without access to the purse (budget), which was the competence of the Legislature, or the sword (military), which was the competence of the Executive, the Judiciary represented, for the founding fathers, a reduced risk to liberty.

However, just over a decade after the Constitution’s ratification, the U.S. Supreme Court demonstrated that Hamilton’s prediction was far from accurate. In *Marbury v. Madison*,<sup>30</sup> the Court asserted its authority to invalidate laws that conflicted with the Constitution. Far from being a purely legal matter, *Marbury* was the product of a political struggle between the two dominant factions of the time: the Democratic-Republicans, led by then-President Thomas Jefferson, and the Federalists, led by former President John Adams.

The concept of judicial review was not entirely new. In Virginia, two decades before *Marbury*, the state’s Court of Appeals had already claimed the power to refuse enforcement of laws it deemed unconstitutional.<sup>31</sup> A similar precedent occurred in Rhode Island in 1786 with *Trevett v. Weeden*.<sup>32</sup> Still, no such mechanism had yet been established at the federal level, making *Marbury* a landmark case in constitutional history.

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27. Balkin, *supra* note 9, at 151.

28. See ANDRÁS SAJÓ, RULING BY CHEATING: GOVERNANCE IN ILLIBERAL DEMOCRACY 66, 74 (2021); Von Dieter Grimm, *Neue Radikalkritik an der Verfassungsgerichtsbarkeit* [*New Radical Critique of Constitutional Adjudication*], 59 DER STAAT 321, 321–22, 334 (2020).

29. THE FEDERALIST NO. 78 (Alexander Hamilton).

30. *Marbury v. Madison*, 5 U.S. (1 CRANCH) 137 (1803).

31. WILLIAM MEIGS, THE RELATION OF THE JUDICIARY TO THE CONSTITUTION 63 (1971).

32. *Id.* at 70.

Over time, the field of law—particularly constitutional law—has evolved, and supreme and constitutional courts have become increasingly influential. Established by the Philadelphia Constitution of 1787, the U.S. Supreme Court was the first institution of its kind—later serving as a model for numerous countries across the Americas in the 19th and 20th centuries.<sup>33</sup> Meanwhile, in 1920, Austria introduced the first formal Constitutional Court.<sup>34</sup> The American model follows a diffuse system, in which judicial review can be exercised by any court in specific cases, with the U.S. Supreme Court serving as the ultimate authority.<sup>35</sup> In contrast, the concentrated system, rooted in continental European legal traditions, restricts constitutional review to a specialized constitutional court, which assesses laws in the abstract.<sup>36</sup>

From studies on these institutions, one of the most significant academic debates in history emerged, centered on a fundamental question: Who should guard the Constitution? Hans Kelsen and Carl Schmitt offered contrasting answers. Forged in the Weimar-era crises, this clash prefigured today's divide between court-centered constitutionalism and plebiscitary- or executive-centered claims to constitutional guardianship.

Following a more democratic tradition, Kelsen argued that an independent body, outside the traditional structure of government powers, should be entrusted with constitutional interpretation.<sup>37</sup> In his view, the existence of a constitutional court was essential to ensuring constitutional supremacy and preventing the arbitrariness of political power—creating a closed system in which morality and politics remained impenetrable.<sup>38</sup>

Carl Schmitt, a critic of liberalism, also maintained that the Constitution's guardian should be a separate institution rather than one of the established powers. Entrusting this responsibility to them could elevate them above the others and allow them to evade oversight—resulting in a master of the Constitution.<sup>39</sup> However, unlike Kelsen, Schmitt argued that constitutional guardianship should rest with the President of the Reich, an

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33. Virgílio Alfonso da Silva, *Constitutional Courts / Supreme Courts, General*, MAX PLANCK ENCYC. COMPAR. CONST. L., <https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e518#> (last updated Sept. 2018).

34. *Id.*

35. *Id.*

36. *Id.*

37. HANS KELSEN, JURISDIÇÃO CONSTITUCIONAL 239–40 (2003).

38. *Id.*

39. Cláudio L. Oliveira, *Judicialização da Política, Auto-restrição judicial e a Defesa da Constituição: algumas lições de Carl Schmitt em Der Hüter der Verfassung* [Judicialization of Politics, Judicial Self-Restraint, and the Defense of the Constitution: Some Lessons from Carl Schmitt in the Guardian of the Constitution], 17 DOISPONTOS: 63, 65 (2020) (Braz.).

agent sufficiently neutral to handle inherently political and sovereign conflicts.<sup>40</sup>

A second defining moment in constitutional history—particularly for the proliferation and consolidation of constitutional courts—occurred in the aftermath of World War II, when the focus of constitutions shifted. Whereas constitutions had previously been concerned primarily with state structure and the distribution of powers, they now centered on fundamental rights.<sup>41</sup> This transformation led to the emergence of a distinct form of constitutional interpretation, aimed at realizing and enforcing fundamental rights.<sup>42</sup> A landmark example of this shift was the *Lüth* case, decided by the German Federal Constitutional Court.<sup>43</sup> This ruling introduced the notion of the objective dimension of fundamental rights into constitutional discourse, signifying that the constitution permeates all aspects of society—protecting citizens not only in their relationship with the state but also in their interactions with one another.<sup>44</sup>

As a result, constitutional courts have become central to the project of constitutionalism. Tasked with ensuring the fulfillment of constitutional promises made by many states, some courts have asserted powers not explicitly granted by their constitutions.<sup>45</sup> As Andrew Arato observes, before these powers were formally delegated, it was the courts themselves that first assumed the role of distinguishing between constituent and constituted powers.<sup>46</sup>

A notable example of this judicial expansion occurred in India.<sup>47</sup> In 1967, the Supreme Court of India—going beyond even the boldness of the U.S. Supreme Court in *Marbury*—recognized its authority to invalidate constitutional amendments that violated fundamental rights.<sup>48</sup> This principle was reaffirmed in 1973 in *Kesavananda Bharati v. State of Kerala*, when the Court articulated what became known as the *basic structure doctrine*, establishing minimum parameters for constitutional amendments.<sup>49</sup> From

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40. LARS VINX, *THE GUARDIAN OF THE CONSTITUTION: HANS KELSEN AND CARL SCHMITT ON THE LIMITS OF CONSTITUTIONAL LAW* 150–51, 158 (Lars Vinx trans., 2015).

41. PAULO BONAVIDES, *CURSO DE DIREITO CONSTITUCIONAL* 616–17 (35th ed. 2020).

42. *Id.* at 611.

43. BVERFG, 1 BvR 400/51, Jan. 15, 1958 (Ger.).

44. *Id.*

45. ANDREW ARATO, *Populism, Constitutional Courts, and Civil Society*, in *JUDICIAL POWER: HOW COURTS AFFECT POLITICAL TRANSFORMATIONS* 318, 331 (Christine Landfried ed., 2019) [hereinafter *Populism, Constitutional Courts, and Civil Society*].

46. *Id.*

47. BRUCE ACKERMAN, *REVOLUTIONARY CONSTITUTIONS* 67 (2019).

48. *Id.*

49. *Kesavananda Bharati Sripadagalvaru v. State of Kerala*, (1973) 4 SCC 225 (India).

that point forward, the essential elements of the Indian Constitution—its basic structure—received an added layer of protection.<sup>50</sup>

More recently, in early 2024, the Supreme Court of Israel invalidated an amendment to the Basic Law.<sup>51</sup> This provision was part of a broader initiative by Benjamin Netanyahu’s government to consolidate power and curtail the fundamental rights and protections of certain Israeli citizens.<sup>52</sup> Lacking an explicit constitutional provision granting it the authority, the Court nonetheless asserted its power by drawing upon the Indian basic structure doctrine, the theory of unconstitutional constitutional amendments—further developed by Professor Yaniv Roznai—and other insights from the broader literature on constitutional erosion.<sup>53</sup>

Against this backdrop, legal scholars and political scientists have increasingly studied the causes, mechanisms, and consequences of courts’ (self) empowerment. Tom Ginsburg notes that in “recent decades, new democracies around the world have adopted constitutional courts to oversee the operation of democratic politics.”<sup>54</sup> In politically uncertain environments, states turn to judicial review as a mechanism to safeguard “constitutional bargains.”<sup>55</sup>

Offering a different perspective, Ran Hirschl argues that judicial empowerment is best understood as the result of interrelated actions by three groups. First, threatened political elites seeking to insulate their political preferences from democratic shifts. Second, economic elites leveraging the constitutionalization of rights to secure protections for their financial interests against government intervention. Third, judicial elites aiming to expand their power and enhance their international standing.<sup>56</sup>

Whether through Ginsburg’s or Hirschl’s framework, the outcome is invariably the same: judicialization.<sup>57</sup> As a result, issues of significant political relevance—and the authority to rule on them—are increasingly

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50. *Id.*

51. H CJ 5658/23 Movement for Quality Government v. Knesset (2024) (Isr.) [English Translation].

52. *Id.*

53. *Id.* at 48, 53, 65.

54. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES, at i (2003).

55. *Id.* at 25.

56. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 12 (2004).

57. Luís Roberto Barroso, *Contramajoritário, Representativo e Iluminista: Os papéis dos tribunais constitucionais nas democracias contemporâneas* [Counter-majoritarian, Representative, and Enlightenment: The Roles of Constitutional Courts in Contemporary Democracies], 9 REVISTA DIREITO & PRÁXIS [REV. DIREITO PRÁXIS] 2171, 2178 (2018) (Braz.).

transferred to the judiciary “to the detriment of traditional political bodies, namely the Legislature and the Executive.”<sup>58</sup>

This judicial strengthening, in turn, incentivizes political actors to exploit courts as a means of entrenching their power. Not without reason—apex courts offer various mechanisms, not all of them republican, for ambitious politicians to solidify their authority.<sup>59</sup>

While courts can serve legitimate functions in promoting democracy, upholding the rule of law, and safeguarding fundamental rights, they can also be weaponized to dismantle these very principles.<sup>60</sup> In recent decades, successful attempts to pursue this illiberal agenda have become increasingly common.<sup>61</sup> Venezuela, Hungary, and Turkey provide striking examples of constitutional courts that no longer fulfill their intended role.<sup>62</sup> However, resistance to authoritarian encroachments have also been observed, as in the cases of Israel and Poland.<sup>63</sup>

As András Sajó and Dieter Grimm note, apex courts are often the first to go: they are among the first victims of authoritarian attacks on constitutionalism.<sup>64</sup> This happens not only because they are central to the system of checks and balances in democratic regimes, but also because they are institutionally bound to apply the constitution—even when that constitution has already been rendered illiberal.<sup>65</sup> In their more sophisticated forms, these attacks have become known as autocratic legalism<sup>66</sup> and abusive constitutionalism,<sup>67</sup> depending on the path the potential autocrat wishes to follow.

This phenomenon is further exacerbated by the so-called *demonstration effect*. Originally coined by economist James Duesenberry<sup>68</sup> and later adopted by political scientists, this concept describes how events and innovations in one context influence actors in other societies to attempt to replicate them. As explained by Jørgen Møller, Svend-Erik Skaaning, and

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58. *Id.*

59. HIRSCHL, *supra* note 56, at 50; see *Abusive Constitutionalism*, *supra* note 10, at 191; Grimm, *supra* note 28, at 321; cf. SAJÓ, *supra* note 28, at 66–74.

60. *Populism, Constitutional Courts, and Civil Society*, *supra* note 45, at 333.

61. *Id.* at 333–34.

62. *Id.* at 334.

63. *Id.* at 324–25.

64. See SAJÓ, *supra* note 28, at 66, 74; Grimm, *supra* note 28, at 321–22, 334.

65. SAJÓ, *supra* note 28, at 66.

66. *Autocratic Legalism*, *supra* note 5, at 548.

67. *Abusive Constitutionalism*, *supra* note 10, at 191.

68. JAMES STEMBLE DUSENBERRY, INCOME, SAVING AND THE THEORY OF CONSUMER BEHAVIOR 27 (1949).

Jakob Tolstrup,<sup>69</sup> “when democratic powers predominate, pro-democratic demonstration effects proliferate and democratization flourishes; when autocratic powers preponderate, anti-democratic demonstration effects abound and democratic regressions dominate.”<sup>70</sup>

Whether through ordinary legislation or constitutional means, scholars have documented how authoritarian actors orchestrate changes that weaken the foundations of democratic systems—particularly by targeting the judiciary, which often lacks effective means to defend itself.<sup>71</sup>

Thus, studying the process by which constitutional courts are subverted provides a deeper understanding of the risks associated with such strategies and offers insight into effective countermeasures.

### B. Concept and Typology

One of the definitions of *taming*, according to the Cambridge Dictionary, is “to control something dangerous or powerful.”<sup>72</sup> While the term is typically used in reference to animals, it has been borrowed from biology in this context because it aptly describes what occurs when a court loses its autonomy under illiberal attacks.<sup>73</sup>

Furthermore, the option seems more appropriate than *capture*, which is widely used in specialized literature.<sup>74</sup> This is because a capture does not necessarily result in the direct use of the captured object or person. In contrast, the act of taming—although equally instrumental—seeks to directly use what has been tamed, “imposing alignment between the intended conduct and the will”<sup>75</sup> of the taming agent.<sup>76</sup>

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69. Jørgen Møller et al., *International Influences and Democratic Regression in Interwar Europe: Disentangling the Impact of Power Politics and Demonstration Effects*, 52 GOV'T & OPPOSITION 559, 561 (2017).

70. *Id.*

71. See generally *Autocratic Legalism*, *supra* note 5; *Abusive Constitutionalism*, *supra* note 10.

72. *Taming*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/taming> (last visited Dec. 14, 2025).

73. David Sobreira & Carlos Marden Cabral Coutinho, *Domesticando a Justiça [Domesticating Justice]*, REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS [REV. INVESTIG. CONST.], May/Aug. 2023, at 1, 4 [hereinafter *Domesticando a Justiça*].

74. See *Abusive Constitutionalism*, *supra* note 10, at 202, 216; *Autocratic Legalism*, *supra* note 5, at 570; ROSALIND DIXON & DAVID LANDAU, ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY 114 (2021) [hereinafter ABUSIVE CONSTITUTIONAL BORROWING]; Yaniv Roznai & Amichai Cohen, *Populist Constitutionalism and the Judicial Overhaul in Israel*, 56 ISR. L. REV. 502, 519 (2023).

75. *Domesticando a Justiça*, *supra* note 73, at 4.

76. Andrew Arato uses the expression “domestication of the apex courts” in passing. Although commonly used as synonyms, “taming” refers to the process of habituating animals to the presence—and eventually the commands—of a human; whereas “domestication” is the product obtained from the crossbreeding of species of animals or plants. See *Populism, Constitutional Courts, and Civil Society*,

In this context, “tamed courts present a valuable asset for any government,”<sup>77</sup> particularly given that, as of 2011, more than 80% of the world’s constitutions included some form of judicial review.<sup>78</sup> Once a court has been tamed, it can: (1) provide preferential treatment to laws and amendments of questionable constitutionality; (2) facilitate constitutional changes that would be unfeasible through the political process; (3) obstruct future governments—if democracy persists—in their attempts to reverse illiberal reforms; and (4) assist in entrenching the taming government in power indefinitely.<sup>79</sup>

The power and prestige of apex courts are such that even in consolidated autocratic regimes, these institutions are often preserved. According to Andrew Arato, this occurs for reasons of legitimacy and political strategy.<sup>80</sup> Tamed courts retain symbolic significance both domestically and internationally.<sup>81</sup> Furthermore, a tamed court can serve an autocrat even in the event of electoral defeat, complicating efforts to restore democracy or implement transitional justice.

By court taming—a term I adopted in *Domesticando a Justiça*,<sup>82</sup> co-authored with Carlos Marden—I refer to modifications in a court’s composition or powers, or both, aimed at subordinating it to the interests of a political actor or group.<sup>83</sup> By restricting a court’s autonomy, the taming process disrupts the balance of powers and contributes to the erosion of a country’s democratic standing—an effect documented by institutions such as V-Dem.<sup>84</sup>

The taming process can affect the court in two dimensions, one subjective and the other objective. When it comes to the subjective dimension, taming seeks to interfere with a court’s composition.<sup>85</sup> When

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*supra* note 45 at 320. András Sajó uses both “domesticate” and “tame” as synonyms. *See* SAJÓ, *supra* note 28, at 70, 75.

77. *Domesticando a Justiça*, *supra* note 73, at 4.

78. Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J. L. ECON. & ORG. 587, 587 (2014).

79. Richard J. Sweeney, *Constitutional Conflicts in the European Union: Court Packing in Poland Versus the United States*, 4 ECON. & BUS. REV. 3, 5 (2018).

80. *Populism, Constitutional Courts, and Civil Society*, *supra* note 45, at 332–33.

81. Raul A. Sanchez Urribarri, *Courts Between Democracy and Hybrid Authoritarianism: Evidence from the Venezuelan Supreme Court*, 36 L. & SOC. INQUIRY 854, 857 (2011) [hereinafter *Courts Between Democracy and Hybrid Authoritarianism*].

82. *Domesticando a Justiça*, *supra* note 73, at 4.

83. *Id.*

84. *Judicial Constraints on the Executive Index*, OUR WORLD IN DATA [hereinafter *Judicial Constraints on the Executive Index*], <https://ourworldindata.org/grapher/judicial-constraints-on-the-executive-index?country=~VEN> (last updated Mar. 17, 2025).

85. *See infra* Part I.B.1.

directed at the objective dimension, taming aims to cripple the court in its institutional capacities.<sup>86</sup>

An analysis of court taming worldwide reveals a few primary (though not exclusive) strategies, which may be employed individually or in combination. Taming can occur through: (1) expansion of seats, (2) removal of judges, (3) jurisdiction stripping, or (4) defunding.<sup>87</sup>

However, not every change to a court's composition or powers constitutes an act of taming. A contextual evaluation, one that "transcends a purely formal assessment of compliance with legal requirements,"<sup>88</sup> is essential to determine whether such modifications are legitimate.

Beyond the philosophical foundations of constitutional democracy—which extend beyond mere proceduralism—this scrutiny is necessary because legal systems are designed to function as integrated structures. As Lon Fuller's concept of *polycentric problems* suggests, changes to courts can have far-reaching, interconnected effects, much like a spider web:

A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centered"—each crossing of strands is a distinct center for distributing tensions.<sup>89</sup>

Thus, interference with the structure and composition of courts can produce unforeseen consequences. In this context, the literature cautions that judicial reforms should be assessed both individually and collectively. Only a holistic approach can reveal their full impact.<sup>90</sup>

However, such precautions alone are insufficient to safeguard judicial independence. This is because incrementalism—"a central element in the process of democratic erosion"<sup>91</sup>—is not always immediately noticeable, and

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86. See *infra* Part I.B.2.

87. Stephan Haggard & Lydia Tiede, *Judicial Backsliding: A Guide to Collapsing the Separation of Powers*, 32 DEMOCRATIZATION 513, 515 (2025).

88. *Domesticando a Justiça*, *supra* note 73, at 5.

89. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395 (1978).

90. WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN 5–6 (2019) [hereinafter POLAND'S CONSTITUTIONAL BREAKDOWN]; Yaniv Roznai et al., *Judicial Reform or Abusive Constitutionalism in Israel*, 56 ISR. L. REV. 292, 294 (2023) [hereinafter *Judicial Reform or Abusive Constitutionalism*].

91. *Judicial Reform or Abusive Constitutionalism*, *supra* note 90, at 298.

even when it is, it can be difficult to counter. As Roznai, Dixon, and Landau explain, democratic erosion often unfolds through a series of small steps that, despite their incremental nature, do not necessarily amount to a slow process.<sup>92</sup> As a result, incrementalism is not always perceived as “a frontal assault on the basic principles of liberal democracy.”<sup>93</sup>

In this context, “[l]ike the apocryphal frog placed in slowly boiling water, a democratic society in the midst of retrogression may not realize its predicament until matters are already beyond redress.”<sup>94</sup> In such situations, the efforts of the democratic opposition become particularly challenging. First, no single event is significant enough to mobilize widespread societal resistance. Second, early warnings are often dismissed as “hysterical or paranoid.”<sup>95</sup>

Another way to identify non-republican intentions regarding the judiciary is to analyze the rhetoric of political actors seeking to modify the courts. Some leaders reveal their objectives only after consolidating power—such as Viktor Orbán. In July 2014, four years after returning as Hungary’s Prime Minister, Orbán delivered his infamous “illiberal democracy” speech in Romania.<sup>96</sup> On that occasion, Orbán celebrated his party’s second consecutive electoral victory.<sup>97</sup> During his speech, he emphasized themes common in illiberal populist discourse, such as prioritizing the collective over the individual.<sup>98</sup> In his words, “[the] Hungarian nation is not a simple sum of individuals, but a community that needs to be organized, strengthened and developed, and in this sense, the new state that we are building is an illiberal state . . . .”<sup>99</sup>

Curiously, some politicians are more explicit about their intentions from the outset. One example is Jarosław Kaczyński, the leader of Poland’s Law and Justice Party (*Prawo i Sprawiedliwość*, PiS) and the country’s de facto ruler. As early as 2011—four years before PiS came to power—Kaczyński

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92. *Id.* at 298–99; POLAND’S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 5–6.

93. *Judicial Reform or Abusive Constitutionalism*, *supra* note 90, at 298.

94. *How to Lose a Constitutional Democracy*, *supra* note 2, at 119 (2018).

95. POLAND’S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 6.

96. Csaba Tóth, *Full Text of Viktor Orbán’s Speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014*, BUDAPEST BEACON (July 29, 2014), <https://web.archive.org/web/20240428021934/https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>.

97. *Id.*

98. *Id.*

99. *Id.*

openly referenced Orbán’s illiberal project in Hungary by declaring: “the day will come when there will be Budapest in Warsaw.”<sup>100</sup>

A third category consists of politicians who attempt to disguise their intentions. Benjamin Netanyahu exemplifies this approach. When announcing his proposed judicial reforms in Israel, he framed them as necessary corrections to the constitutional revolution of the 1990s. He claimed it had created “a crack in Israeli democracy, which must be corrected.”<sup>101</sup>

However, the political context—omitted by Netanyahu but well understood by Israeli society—clarifies the true motives behind his attacks on the judiciary.<sup>102</sup> The Prime Minister is currently facing corruption and fraud charges in the Jerusalem District Court. His governing coalition includes religious parties intent on implementing illiberal and discriminatory policies.<sup>103</sup>

Given these considerations, analysts can assess whether proposed—or ongoing—changes to a court’s structure constitute a taming process. However, such an evaluation requires proper methodological tools, which this Article seeks to refine. Unlike the typology proposed in *Domesticando a Justiça*,<sup>104</sup> this Article proposes two broader models of taming, as opposed to the original four narrower ones.

Following this approach, my model differs from the one proposed by Stephan Haggard and Lydia Tiede,<sup>105</sup> who argue that the process of taming—a phenomenon they call *judicial backsliding*—occurs in three ways: (1) attacks on the court’s powers; (2) attacks on its members; and (3) defunding.<sup>106</sup> By structuring my typology around the court’s subjective and objective dimensions, my framework covers the same situations identified by Haggard and Tiede. This Article avoids conceptual duplication by grouping both defunding and competence (jurisdictional) restrictions under the objective dimension. Moreover, it expressly accommodates judicial overstay (a phenomenon that does not fit neatly within “attacks on

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100. “Przyjdzie dzień, że w Warszawie będzie Budapeszt” [“The Day Will Come When Warsaw Will Be Budapest”], TVN24 (Oct. 9, 2011), <https://tvn24.pl/polska/przyjdzie-dzien-ze-w-warszawie-bedzie-budapeszt-ra186922-ls3535336>.

101. Yaniv Roznai, *Israel – A Crisis of Liberal Democracy?*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 355, 370 (Mark A. Graber et al. eds., 2018) [hereinafter *A Crisis of Liberal Democracy?*].

102. *Id.* at 373.

103. David Sobreira, *Como os Tribunais morrem: o caso de Israel* [How Courts Die: The Case of Israel], JOTA (Nov. 21, 2023) (Braz.) [hereinafter *o caso de Israel*], <https://www.jota.info/opiniao-e-analise/artigos/como-os-tribunais-morrem-o-caso-de-israel-24032023> (interview with Professor Yaniv Roznai).

104. *Domesticando a Justiça*, *supra* note 73, at 4–5.

105. Haggard & Tiede, *supra* note 87, at 515.

106. *Id.*

members”) since it preserves—or even prolongs—judicial tenures rather than removing them.

### 1. The Subjective Dimension

Taming processes targeting the subjective dimension can take a variety of forms, from the most well-known, such as court-packing, to more discreet ones, like reducing the retirement age.<sup>107</sup> In addition to these, however, there are other less well-known strategies, such as court-hoarding.<sup>108</sup> Below, I attempt to list some of the strategies used to undermine the courts’ subjective dimension.

#### a. Packing Courts

One of the best-known ways a court can be tamed is through court-packing. Coined in the 1930s in the United States, the expression court-packing was used to refer to an attempt to expand the American Supreme Court by then-President Franklin Delano Roosevelt.<sup>109</sup> Roosevelt attempted this when trying to address the effects of the Great Depression of 1929. He presented the nation with the New Deal, a bold economic plan that placed the government at the center of the country’s recovery process.<sup>110</sup>

However, the U.S. Supreme Court’s precedents at that time were guided by what can be called *laissez-faire constitutionalism*, marked by decisions that imposed strict limits on the States’ attempts to implement labor guarantees and rights.<sup>111</sup> Known as the Lochner Era, this 40-year period began with the judgment of *Allgeyer v. Louisiana*<sup>112</sup> in 1897 and ended in 1937 with the judgment of *West Coast Hotel Co. v. Parrish*.<sup>113</sup>

In this context, the Court adopted a broad interpretation of due process. Consequently, the Due Process Clause of the 14th Amendment to the U.S. Constitution, which states that no state shall deprive any person of life,

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107. *Id.*

108. Patrick Leisure & David Kosař, *Court-Hoarding: Another Method of Gaming Judicial Turnover*, 46 L. & POL’Y 328, 329 (2024).

109. KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO BROWN 61–75 (2004).

110. *Id.*

111. Matthew J. Lindsay, *In Search of “Laissez-Faire Constitutionalism”*, 123 HARV. L. REV. F. 55, 55 (2010).

112. *See* 165 U.S. 578, 593 (1897).

113. *See* 300 U.S. 379, 408 (1937).

liberty, or property without due process of law,<sup>114</sup> was interpreted by the Court to also encompass economic freedom.<sup>115</sup>

As a result, the Court struck down more than 100 state laws.<sup>116</sup> As Mary Dudziak notes, the Court “had played a judicially activist but politically conservative role,” preventing Congress from exercising its legislative function.<sup>117</sup>

Frustrated by repeated clashes with the Court, Roosevelt—who had been re-elected by a landslide in 1936—introduced his court-packing plan in 1937, despite never mentioning it during the campaign.<sup>118</sup> With a strong congressional majority, he proposed a judicial reform that would allow him “to appoint a new justice for every justice over the age of seventy-five.”<sup>119</sup> At the time, this would have resulted in six new appointments, expanding the Court from nine to fifteen members.

The last modification to the Supreme Court’s composition occurred in 1869—“long enough for many people to regard it as set by the Framers.”<sup>120</sup> Combined with rising concerns over fascism in Italy and Germany, this reinforced public support for judicial independence.<sup>121</sup> As a result, Roosevelt’s proposal was met with widespread hostility, including from the Court itself.<sup>122</sup>

The court-packing plan was effectively derailed in July 1937 following the unexpected death of Senator Joseph Robinson, who had been orchestrating the political negotiations necessary for its passage.<sup>123</sup> However, months earlier, in March of that year, the Court had already shifted its stance. In *West Coast Hotel*, the Court upheld a Washington state law establishing a minimum wage for women.<sup>124</sup> This abrupt reversal—popularly known as the

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114. U.S. CONST. amend. XIV, § 1, cl. 2.

115. See Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1502–03 (1999).

116. See generally Barry Cushman, *Teaching the Lochner Era*, 62 *ST. LOUIS U. L.J.* 537, 568 (2018).

117. Mary L. Dudziak, *The Politics of “The Least Dangerous Branch”: The Court, the Constitution, and Constitutional Politics Since 1945*, in *A COMPANION TO POST-1945 AMERICA* 385, 386 (Jean-Christophe Agnew & Roy Rosenzweig eds., 2006).

118. Michael Nelson, *The President and the Court: Reinterpreting the Court-Packing Episode of 1937*, 103 *POL. SCI. Q.* 267, 276–77 (1988).

119. MARK TUSHNET, *I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES* 103 (2008) [hereinafter *I DISSENT*].

120. Nelson, *supra* note 118, at 276.

121. *Id.*

122. *Id.* at 276, 282.

123. *I DISSENT*, *supra* note 119, at 103.

124. Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 *J.L. ANALYSIS* 69, 70 (2010).

“switch in time that saved nine”<sup>125</sup>—was attributed to Justice Owen Roberts, who had typically aligned with the Court’s conservative majority but unexpectedly began siding with its liberal wing.<sup>126</sup>

Following this episode, both the term and the practice of court-packing spread worldwide. In the 21st century alone, court-packing has been implemented in countries such as Venezuela,<sup>127</sup> Hungary,<sup>128</sup> and Turkey.<sup>129</sup> Additionally, debates over its potential use have emerged in the United States<sup>130</sup> and Brazil,<sup>131</sup> among others.

Despite its historical association with democratic erosion, some scholars argue that court-packing can serve democratic purposes. Rivka Weill,<sup>132</sup> Thomas Keck,<sup>133</sup> and Tom Gerald Daly<sup>134</sup> have defended this perspective. However, contemporary practice suggests that court-packing has become nearly synonymous with illegitimate maneuvers aimed at taming courts.<sup>135</sup>

Contrary to the arguments put forth by Weill, Keck, and Daly, I contend that court-packing is an illegitimate measure. In Part III, I propose a framework for legitimate judicial reforms—one that allows for modifications to the composition or functioning of apex courts without leading to their taming.

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125. *Id.*

126. *Id.*

127. Matthew M. Taylor, *The Limits of Judicial Independence: A Model with Illustration from Venezuela Under Chávez*, 46 J. LATIN AM. STUD. 229, 253 (2014) [hereinafter *The Limits of Judicial Independence*].

128. BOJAN BUGARIČ, PROTECTING DEMOCRACY AND THE RULE OF LAW IN THE EUROPEAN UNION: THE HUNGARIAN CHALLENGE 9 (Europe in Question, LEQS Paper No. 79, 2014) [hereinafter PROTECTING DEMOCRACY AND THE RULE OF LAW].

129. Tom Gerald Daly, “Good” Court-Packing? *The Paradoxes of Democratic Restoration in Contexts of Democratic Decay*, 23 GER. L.J. 1071, 1083 (2022).

130. Rivka Weill, *Court Packing as an Antidote*, 42 CARDOZO L. REV. 2705, 2709 (2021); Thomas M. Keck, *Court-Packing and Democratic Erosion*, in DEMOCRATIC RESILIENCE: CAN THE UNITED STATES WITHSTAND RISING POLARIZATION? 143 (Robert C. Lieberman et al. eds., 2022).

131. Cássio Casagrande, *Bolsonaro e o ‘plano de empacotamento’ do STF [Bolsonaro and the Supreme Court’s ‘Packing Plan’]*, JOTA (Oct. 10, 2022), <https://www.jota.info/opiniao-e-analise/colunas/o-mundo-fora-dos-autos/bolsonaro-e-o-plano-de-empacotamento-do-stf>; *Bolsonaro cogita ampliar número de ministros no Supremo caso seja reeleito [Bolsonaro Is Considering Expanding the Number of Justices on the Supreme Court if He Is Re-Elected]*, CORREIO BRAZILIENSE (Oct. 8, 2022), <https://www.correiobraziliense.com.br/politica/2022/10/5042935-bolsonaro-cogita-ampliar-numero-de-ministros-no-supremo-caso-seja-reeleito.html>.

132. Weill, *supra* note 130, at 2709.

133. Keck, *supra* note 130, at 143.

134. Daly, *supra* note 129.

135. See generally David Kosař & Katarína Šípulová, *Comparative Court-Packing*, 21 INT’L J. CONST. L. 80 (2023); *Autocratic Legalism*, *supra* note 5, at 547; Javier Corrales, *The Authoritarian Resurgence: Autocratic Legalism in Venezuela*, 26 J. DEMOCRACY 38, 38 (2015); POLAND’S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 26; *How to Lose a Constitutional Democracy*, *supra* note 2, at 126.

### b. Removing Judges

In contrast to the strategy employed in court-packing, which involves expanding the court, another court-taming method is to remove judges from a court.<sup>136</sup> The primary motivation for such measures is that certain judges may represent the last line of defense against the implementation of illiberal projects by authoritarian rulers.

These removal strategies manifest in various ways. One common method is the reduction of the retirement age for public servants in general or judges in particular. This tactic was employed in Hungary when Viktor Orbán's government lowered the retirement age for judges from 70 to 62—a measure later invalidated by the Constitutional Court.<sup>137</sup> A similar strategy was observed in Poland<sup>138</sup> under the PiS government and was debated in Brazil during the Bolsonaro administration.<sup>139</sup>

Another means of reducing a court's composition is through political persecution, fraudulent impeachments, or abusive removals. In Argentina, for instance, the impeachment of Supreme Court justices has been a recurring political tool since Juan Perón's era in the late 1940s and into the early 21st century.<sup>140</sup> In such cases, impeachment serves not only as an effective mechanism for removing judges but also as a tool of political pressure, coercing court members into resignation. Similar instances occurred in Venezuela under Hugo Chávez<sup>141</sup> and in El Salvador under Nayib Bukele's government,<sup>142</sup> though the latter employed a different approach.

Given the increasing sophistication of autocrats and authoritarian populists in advancing their political agendas, it is difficult to identify all the

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136. My understanding of the situation involving the removal of judges differs from that of David Kosař and Katarína Šipulová, who advocate for a broader definition of court-packing—one that encompasses not merely the expansion of a court, but any intentional and irregular change, whether quantitative or qualitative, that adds, substitutes, or removes members of the court. *See* Kosař & Šipulová, *supra* note 135, at 84–85.

137. Kim Lane Scheppelle, *Constitutional Revenge*, VERFASSUNGSBLOG (Mar. 4, 2013), [hereinafter *Constitutional Revenge*], <https://verfassungsblog.de/constitutional-revenge/>.

138. Wojciech Sadurski, *Constitutional Crisis in Poland*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 157–58 (Mark A. Graber et al. eds., 2018).

139. Rick Daniel Pianaro, *É preciso estar atento e forte: Supremo e a 'PEC do Pijama'* [*We Need to Be Vigilant and Strong: The Supreme Court and the 'Pajama Amendment'*], JOTA (June 10, 2020), [https://www.jota.info/opiniao-e-analise/artigos/e-preciso-estar-atento-e-forte-supremo-e-a-pec-do-pijama-10062020#\\_ednref5](https://www.jota.info/opiniao-e-analise/artigos/e-preciso-estar-atento-e-forte-supremo-e-a-pec-do-pijama-10062020#_ednref5).

140. GRETCHEN HELMKE, COURTS UNDER CONSTRAINTS: JUDGES, GENERAL, AND PRESIDENTS IN ARGENTINA 15 (Margaret Levi et al. eds., 2005).

141. *The Limits of Judicial Independence*, *supra* note 127, at 254; *Courts Between Democracy and Hybrid Authoritarianism*, *supra* note 81, at 872.

142. Lukas Graute, *A Second Term for "the World's Coolest Dictator"?*, VERFASSUNGSBLOG (Nov. 13, 2023), <https://verfassungsblog.de/a-second-term-for-the-worlds-coolest-dictator/>.

possible methods by which a court's membership can be reduced. However, the framework proposed here provides objective criteria for assessing each case. Whether through a permanent reduction in the number of seats or through strategic vacancies followed by politically motivated appointments, the shadow of taming remains ever-present.

### c. Hoarding Courts

Patrick Leisure and David Kosař identified “[a]nother method of gaming judicial turnover”.<sup>143</sup> They called it *court-hoarding*, a strategy that involves illegitimately extending the time in office of loyal judges.<sup>144</sup> As the authors further explain, for court-hoarding to take place, four criteria must be met: (1) an extension of the time in office, (2) this extension must be abusive, (3) it must affect judges who are loyal to a court-hoarder, and (4) it must be done by political branches.<sup>145</sup> By setting these standards, Leisure and Kosař avoid a framework that would hinder legitimate changes related to a court's terms, but also leave out potential disputes between political branches that project themselves onto the courts.

Take the Hungarian case, for example. After implementing ostensive changes that brought the Hungarian Constitutional Court to its knees,<sup>146</sup> Viktor Orbán sought to ensure that the new composition—now mostly loyal to him—would remain in office longer than initially planned.<sup>147</sup> To achieve this, he had Parliament amend the Act on the Constitutional Court to remove the mandatory retirement age for constitutional justices.<sup>148</sup> In this case, it is possible to see that all of Leisure and Kosař's criteria were met.

In contrast, the Brazilian case illustrates how potentially abusive term extensions do not necessarily constitute court-hoarding. In 2015, shortly after a narrow victory that secured Dilma Rousseff a second term, the National Congress moved to approve Constitutional Amendment 88, which would extend the mandatory retirement age of Supreme Federal Tribunal justices from 70 to 75 years.<sup>149</sup>

Unlike the Hungarian case, the Brazilian case fails to meet one of the criteria—the loyalty to the court-hoarder. The National Congress in Brazil did not intend to control the Supreme Federal Court, but rather to curb the

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143. Leisure & Kosař, *supra* note 108, at 328.

144. *Id.* at 330.

145. *Id.*

146. *See infra* Part II.C.

147. Renáta Uitz, *Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary*, 13 INT'L J. CONST. L. 279, 292–93 (2015).

148. *Id.*

149. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 40 (Braz.).

president's power since she had already made three appointments to the Court. When added to the appointments previously made by Lula da Silva—both from the Workers' Party—this would have resulted in their party being responsible for 10 out of the 11 seats on the Court.<sup>150</sup>

This distinction is important because, although the public and scholars may debate the potential abusiveness of the measure taken by Congress at that time—which could easily be classified as a case of constitutional hardball<sup>151</sup>—it did not subject the court to the will of another political branch.<sup>152</sup>

## 2. The Objective Dimension

When the changes affect the objective dimension of a court, they impact the court's ability to fulfill its constitutional role. Although these changes may indirectly influence the subjective dimension—such as by altering judicial appointment rules—its primary effect is on the court's powers and functions. A defining characteristic of the attacks on the objective dimension is the wide range of methods through which they can be implemented.

A court's budget, judicial appointment process, and even the scope of its authority are all fundamental to its ability to perform its constitutional duties. This does not mean that these elements cannot be adjusted. Societies may legitimately reform their constitutional courts, including modifying their jurisdiction or limiting access to them. However, such reforms must not undermine the court's role as a check on the other branches of government—what Rosalind Dixon and David Landau call the democratic *minimum core*.<sup>153</sup>

Several historical cases illustrate how transformation has been carried out. In India in 1971—four years after the Supreme Court asserted its authority to invalidate constitutional amendments that violated fundamental rights—Prime Minister Indira Gandhi, backed by a parliamentary supermajority (352 of 518 seats), introduced constitutional changes to curtail the Court's ability to exercise judicial review in certain matters.<sup>154</sup> The Court

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150. *Domesticando a Justiça*, *supra* note 73, at 17–18.

151. Constitutional hardball refers to political maneuvers—usually legislative or executive—that clearly fall within the formal bounds of existing constitutional doctrine and practice, yet nonetheless strain the unwritten norms that have traditionally guided political actors. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004) [hereinafter *Constitutional Hardball*].

152. *Id.*

153. Rosalind Dixon & David Landau, *Competitive Democracy and the Constitutional Minimum Core*, in *ASSESSING CONSTITUTIONAL PERFORMANCE* 268, 277–78 (Tom Ginsburg & Aziz Huq eds., 2016).

154. ACKERMAN, *supra* note 47.

responded by developing the basic structure doctrine, reaffirming its authority and establishing a broad framework for applying judicial review.<sup>155</sup>

In Venezuela, Hugo Chávez employed a highly questionable constituent assembly to revoke judicial tenure and stability protections.<sup>156</sup> Even before assessing the effects of this measure, it is widely recognized that such guarantees are essential to ensuring judicial independence.<sup>157</sup> The guarantees' suspension alone constituted a serious threat to the judiciary's ability to function.

Similarly, in Poland, under Jarosław Kaczyński's PiS government, legislation was passed—later invalidated by the Constitutional Court—that restricted the Court's ability to exercise abstract review.<sup>158</sup> The law increased the minimum quorum of judges required to deliberate on the constitutionality of provisions.<sup>159</sup> In practice, given the Court's already diminished composition, this measure would have effectively rendered it inoperative.<sup>160</sup>

More recently, in Israel, Prime Minister Benjamin Netanyahu's government approved an amendment to the Basic Law—which functions as the country's constitution—that curtailed the Supreme Court's authority.<sup>161</sup> However, in early 2024, the Supreme Court struck down the amendment because its provisions would bar the Court from assessing the reasonableness of government actions. This granted the administration significant leeway to manipulate institutions and pursue an illiberal agenda.<sup>162</sup>

The experiences of these countries highlight the dangers posed by transformative reforms. Democratic actors must therefore remain vigilant against such changes and subject them to rigorous scrutiny.

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155. *Id.*

156. ABUSIVE CONSTITUTIONAL BORROWING, *supra* note 74, at 123.

157. *See generally* Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Independence of the Judiciary*, annex, at 59, U.N. Doc. A/CONF.121/22/Rev.1 (Aug. 26–Sept. 6, 1985); ELLIOT BULMER, JUDICIAL TENURE, REMOVAL, IMMUNITY AND ACCOUNTABILITY (2d ed. 2017).

158. Lech Garlicki, *Constitutional Courts and Politics: The Polish Crisis*, in JUDICIAL POWER: HOW CONSTITUTIONAL COURTS AFFECT POLITICAL TRANSFORMATIONS 141, 147–48 (Christine Landfried ed., 2019).

159. *Id.*

160. *Id.*

161. Mordechai Kremnitzer, *Releasing the Government from Acting Reasonably; or, the Government Says Goodbye to Reasonableness*, 56 ISR. L. REV. 343, 344 (2023).

162. *Id.*; HCJ 5658/23 Movement for Quality Government v. Knesset (2024) (Isr.) 52 [English Translation].

*C. What Lies Ahead*

As democracies have expanded globally, so too have autocracies. These cases of judicial attacks not only reveal the blueprint for subverting democracies but also serve as a warning for societies to mobilize in defense of their institutions. As Timothy Snyder notes, institutions require active support to function effectively, so “[d]o not speak of ‘our institutions’ unless you make them yours by acting on their behalf. Institutions do not protect themselves. They fall one after the other unless each is defended from the beginning.”<sup>163</sup>

This insight raises a crucial question: What is the most effective way to safeguard a court? Modern history offers numerous examples of democracies that have collapsed, endured, or ultimately recovered after their courts came under attack. Therefore, the first step in addressing this question is to examine how these events have unfolded—and continue to unfold—around the world.

## II. HOW COURTS DIE: A COMPARATIVE ANALYSIS

Today the constitutional world looks different. The constitutionalism project is under populist pressure in many countries that only recently aspired to achieve it. The Constitutional Courts are among the first victims of this turnaround.<sup>164</sup>

One of the key uses of comparative constitutional analysis is to examine how different legal systems address specific challenges. Today, attacks on apex courts represent a phenomenon that occurs across various countries in different forms. However, for a meaningful comparison, the analyzed systems must share common characteristics. Comparative analysis requires the application of uniform parameters rather than *ad hoc* criteria. In this regard, despite undergoing processes of judicial taming in the 21st century, countries such as Venezuela, Turkey, Hungary, Poland, El Salvador, and Israel<sup>165</sup> share fundamental liberal democratic values—albeit to varying degrees. These systems have sought to uphold ideals such as the rule of law,

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163. TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 22 (2017).

164. Grimm, *supra* note 28, at 321.

165. Despite the ongoing risk of autocratization, Israel is still within the democratic spectrum. *See* discussion *infra* Part II.F.

political rights, and checks and balances.<sup>166</sup> However, democratic erosion has led them to shift from more democratic to less democratic regimes.

To assess and classify these countries, I will rely on the typology, methodology, and indices developed by the Varieties of Democracy Institute (V-Dem).<sup>167</sup> According to its researchers, the world's regimes currently fall into four categories: closed autocracies, electoral autocracies, electoral democracies, and liberal democracies.<sup>168</sup> As Anna Lührmann, Marcus Tannenberg, and Staffan I. Lindberg explain, in closed autocracies the executive leader is not subject to elections. If elections do occur, they lack real competition.<sup>169</sup> In electoral autocracies, multiparty elections persist as a means of legitimizing the system, but they fail to meet democratic standards due to frequent irregularities and institutional violations.<sup>170</sup> On the democratic spectrum, electoral democracies hold free and fair multiparty elections and safeguard fundamental rights such as suffrage, association, and expression.<sup>171</sup> Finally, liberal democracies go further, ensuring not only electoral democracy but also effective legislative and judicial constraints on the executive, along with the protection of individual liberties and the rule of law.<sup>172</sup>

The Regimes of the World (RoW) project, part of V-Dem, has conducted a study evaluating global political regimes from 1900 onward, with dynamic data visualization tools available on *Our World in Data*.<sup>173</sup> The V-Dem index assigns regimes a score between zero (closed autocracies) and one (liberal democracies).<sup>174</sup> For instance, prior to the rise of the Chavismo movement, Venezuela had experienced democratic strengthening from the late 1950s to the 1990s, reaching an index of 0.62 as an electoral democracy since the 1970s.<sup>175</sup> Similarly, Turkey saw democratic progress between the 1990s and the early 2000s, maintaining the status of an electoral democracy from 1999

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166. See *infra* Parts II.A, II.B, II.C, II.D, II.E, II.F.

167. The V-Dem Institute is just one of the large organizations that globally evaluate the world's democracies, along with Freedom House and The Economist, among others. Despite the seriousness and breadth of the work carried out by these organizations, the assessment of the quality of democracies in the world faces factual and methodological issues. Therefore, despite being some of the most respected parameters in specialized literature, their data cannot be taken as an absolute reading of reality.

168. Anna Lührmann et al., *Regimes of the World (RoW): Opening New Avenues for the Comparative Study of Political Regimes*, 6 POL. & GOVERNANCE 60, 62 (2018).

169. *Id.* at 63.

170. *Id.*

171. *Id.* at 62.

172. *Id.* at 63.

173. V-Dem, *Liberal Democracy Index, 2024*, OUR WORLD IN DATA (Sept. 22, 2024) [hereinafter *Liberal Democracy Index, 2024*], <https://ourworldindata.org/grapher/liberal-democracy-index>.

174. DEMOCRACY REPORT 2025, *supra* note 7, at 9 n.2.

175. *Liberal Democracy Index, 2024*, *supra* note 173.

to 2008 before transitioning into an electoral autocracy.<sup>176</sup> Shortly after, Hungary underwent democratic backsliding: once a liberal democracy with an index of 0.77, it later became an electoral autocracy.<sup>177</sup> Poland followed a similar trajectory, with its index dropping from 0.82 (liberal democracy) to 0.42, followed by a recovery to 0.62.<sup>178</sup> El Salvador also experienced democratic regression with its modest index falling from 0.44 to 0.09.<sup>179</sup> Lastly, the 2024 V-Dem report noted a significant shift in Israel, which lost its status as a liberal democracy for the first time in 50 years.<sup>180</sup>

A common trend among these cases of democratic decline is the taming of apex courts. In at least four of these countries—Hungary, Poland, El Salvador, and Israel—court taming served as a mechanism for undermining democracy.<sup>181</sup> In the remaining two—Venezuela and Turkey—it appears to have been instrumental in consolidating a new regime.<sup>182</sup> This leads to a crucial observation: despite their fundamental role in constitutional systems, apex courts do not always succeed in preventing authoritarian projects.

These conclusions emerge from an analysis of two indices developed by the V-Dem Institute. The first, the *Liberal Democracy Index*, assesses the overall quality of democratic governance in each country.<sup>183</sup> The second, the *Judicial Constraints on the Executive Index*, measures the extent to which the executive is subject to independent judicial decisions.<sup>184</sup> Across all six countries, a clear causal relationship can be observed: a decline in judicial constraints on the executive correlates with a subsequent drop in liberal democracy scores. While this is unsurprising—since judicial constraints are a component of the broader liberal democracy index—a closer examination of each case reveals important nuances. In Venezuela and Turkey, for example, while court taming played a major role in democratic erosion, it was not necessarily the decisive factor in establishing a new regime; rather, it may have been more crucial in consolidating one.

The selection of these countries for analysis is justified by their shared—though varying—commitment to cosmopolitan liberal democratic values, positioning within the democratic spectrum, experience of constitutional erosion, and the presence of court taming in one or more forms.

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176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Judicial Constraints on the Executive Index*, *supra* note 84.

This comparative analysis has two objectives. First, to assess the coherence and applicability of the conceptual framework and typology developed in this Article. Second, to build on prior research by expanding the number of cases examined and refining theoretical and methodological approaches.

Finally, following the line of reasoning I established in *Domesticando a Justiça*,<sup>185</sup> I begin with the hypothesis—one that also aligns with Raul Urribarri’s perspective<sup>186</sup>—that court taming emerges as a strategy when autocrats or would-be autocrats find their ambitions obstructed by the constitutional exercise of checks and balances by apex courts.

*A. Supreme, pero no mucho: Venezuela’s Highest Court under Chávez*

In 1988, Carlos Andrés Pérez won the presidential election on an anti-neoliberal platform.<sup>187</sup> However, once in office, he deviated from his campaign promises and implemented austere and unpopular economic measures.<sup>188</sup> This unexpected shift sparked mass protests across the country, leading Pérez to declare a state of emergency and deploy the military.<sup>189</sup> The ensuing confrontation between civilians and the armed forces, known as El Caracazo, resulted in the deaths of over 250 people.<sup>190</sup>

The crackdown on protesters profoundly influenced Hugo Chávez, then a career military officer and founder of the Bolivarian Revolutionary Movement 200.<sup>191</sup> In response, he began planning a coup against Pérez’s government.<sup>192</sup> The coup launched in February 1992 but failed.<sup>193</sup> Chávez surrendered,<sup>194</sup> and in an effort to contain the insurgents, the Pérez administration placed him on national television to call on his comrades to lay down their arms.<sup>195</sup> Once in front of the cameras, Chávez took full responsibility for what he called a “military movement,” and signaled his

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185. *Domesticando a Justiça*, *supra* note 73, at 3.

186. *Courts Between Democracy and Hybrid Authoritarianism*, *supra* note 81, at 871–73.

187. Terry Gibbs, *Business as Unusual: What the Chávez Era Tells Us About Democracy Under Globalisation*, 27 *THIRD WORLD Q.* 265, 270 (2006).

188. *Id.*

189. *Id.*

190. *Id.*

191. CHRISTINA MARCANO & ALBERTO BARRERA TYSZKA, *HUGO CHÁVEZ: THE DEFINITIVE BIOGRAPHY OF VENEZUELA’S CONTROVERSIAL PRESIDENT* 48–49, 55–56 (Kristina Cordero trans., 2007).

192. *Id.* at 55–56.

193. *Id.* at 62–63, 73.

194. *Id.* at 72–73.

195. *Id.*

disregard for democratic norms by declaring: “[U]nfortunately, for now, the objectives we established in the capital were not achieved.”<sup>196</sup>

A year later, Pérez—his government weakened by the coup attempt and widespread public discontent—faced impeachment.<sup>197</sup> Following Pérez’s removal, two interim politicians briefly held the presidency.<sup>198</sup> Rafael Caldera, who previously served as President (1969–1974), was then elected for a second term in 1993.<sup>199</sup> Caldera capitalized on Chávez’s failed coup to re-enter the presidential race.<sup>200</sup> As a result, Chávez, then in prison, gained further legitimacy—not only from Caldera’s implicit endorsement<sup>201</sup> but also from the national exposure he had received during the TV broadcast.<sup>202</sup>

Rafael Caldera, one of the architects of Venezuelan democracy, ultimately embraced a figure who had sought to dismantle Latin America’s oldest democratic system.<sup>203</sup> This “fateful alliance”<sup>204</sup> forged by Caldera exemplifies what Juan Linz describes as a semi-loyal democrat.<sup>205</sup> According to Linz, semi-loyal democrats are those whose commitment to democracy is secondary to their pursuit of power.<sup>206</sup> They tolerate authoritarian figures within their parties, collaborate or form alliances with them, refrain from condemning acts of political violence committed by their allies, and show little willingness to cooperate with rivals in the face of anti-democratic threats.<sup>207</sup> As Levitsky and Ziblatt remind us, “when democracies die, their [semi-loyal democrats’] fingerprints are rarely found on the murder weapon.”<sup>208</sup>

Caldera’s decision to dismiss the legal case against Chávez further confirmed his lack of democratic commitment.<sup>209</sup> As a result, Chávez spent only two years in prison for his coup attempt.<sup>210</sup> Justifying his decision, Caldera stated: “Dismissal does not imply a value judgment. When you

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196. *Id.* at 74–75.

197. H. MICHEAL TARVER & JULIA C. FREDERICK, *THE HISTORY OF VENEZUELA* 144 (2005).

198. *Id.* at xxii, 146, 163.

199. *Id.*

200. *HOW DEMOCRACIES DIE*, *supra* note 2, at 16–17.

201. *Id.*

202. MARCANO & TYSZKA, *supra* note 191, at 75.

203. *HOW DEMOCRACIES DIE*, *supra* note 2, at 17.

204. *Id.* at 15.

205. *See* JUAN J. LINZ, *THE BREAKDOWN OF DEMOCRATIC REGIMES: CRISIS, BREAKDOWN, AND REEQUILIBRATION* 33 (1978).

206. *See id.* at 32.

207. *See id.* at 32–33.

208. TYRANNY OF THE MINORITY, *supra* note 13, at 41.

209. LINZ, *supra* note 205, at 33.

210. TARVER & FREDERICK, *supra* note 197, at xxii.

dismiss a legal proceeding, you are not saying that the proceeding is relevant or irrelevant, nor are you pardoning anyone.”<sup>211</sup>

Now free and with his popularity surging among the Venezuelan people, Chávez needed only to wait for the 1998 presidential election to formally enter the race. This time, he did not resort to violence; his charisma and widespread public support were enough to secure a decisive victory.<sup>212</sup>

However, despite winning the presidency, Chávez lacked a parliamentary majority, which posed a significant obstacle to advancing his revolutionary project.<sup>213</sup> Confronted with this challenge, he moved quickly. Early in his term in 1999, he called for a referendum to establish a constituent assembly.<sup>214</sup> Chávez justified the move by invoking the doctrine of constituent power.<sup>215</sup> The proposal, however, had no clear constitutional basis. The Venezuelan Constitution provided a mechanism for total reform, but Chávez deliberately avoided this route, as it would have required negotiations with an opposition-controlled Congress.<sup>216</sup>

His attempt to circumvent the constitutional reform process faced legal challenges, requiring intervention from the Supreme Court of Justice (*Supremo Tribunal de Justicia*), then Venezuela’s highest judicial authority.<sup>217</sup> At the time, the Court was not yet under Chávez’s control but was already operating under significant political pressure.<sup>218</sup> The ruling that followed was ambiguous: the Court offered general reflections on the theory of original constituent power, recognizing that the people possessed a right prior and superior to the established legal regime.<sup>219</sup>

In response to this decision—soon followed by another ruling affirming the 1999 Constituent Assembly’s authority to intervene in all state institutions—Cecilia Sosa Gómez, then president of the Supreme Court,

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211. MARCANO & TYSZKA, *supra* note 191, at 108.

212. ABUSIVE CONSTITUTIONAL BORROWING, *supra* note 74, at 123.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. David Landau, *Constitution-Making and Authoritarianism in Venezuela*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 161, 163–64 (Mark A. Graber et al. eds., 2018) [hereinafter *Constitution-Making and Authoritarianism in Venezuela*].

218. *Id.* at 164.

219. Allan R. Brewer-Carias, *La Configuración Judicial del Proceso Constituyente en Venezuela de 1999 o de Cómo el Guardián de la Constitución Abrió el Camino para su Violación y para su Propia Extinción* [The Judicial Configuration of the Constituent Process in Venezuela in 1999 or How the Guardian of the Constitution Opened the Way for Its violation and for Its Own Extinction], REVISTA DE DERECHO PUBLICO [REV. DERECHO PÚBLICO] 453, 453, 461, 468 (1999) (Venez.); ABUSIVE CONSTITUTIONAL BORROWING, *supra* note 74, at 123.

resigned in protest.<sup>220</sup> Declaring the demise of the rule of law, she remarked that the Court had committed suicide to avoid being murdered.<sup>221</sup>

Although the Court had validated the Assembly's original constituent power, it attempted to impose some limitations on Chávez's authority. One such condition required that the rules governing the Assembly be established alongside the referendum itself, preventing *ex post facto* modifications.<sup>222</sup> However, as Dixon and Landau observe, these constraints had little practical effect.<sup>223</sup> Many voters were either unaware of or did not fully understand the procedural rules,<sup>224</sup> and an opposition boycott further tilted the process in Chávez's favor. With opposition parties largely refusing to participate,<sup>225</sup> Chavismo secured an overwhelming victory, winning 123 of the 131 available seats—over 90% of the Assembly.<sup>226</sup>

With the Constituent Assembly firmly under his control, Chávez seized the opportunity to draft a new constitution that would pave the way for his revolutionary project. In doing so, he systematically employed nearly all the tactics outlined by Aziz Huq and Tom Ginsburg as part of the manual of democratic erosion:

i. *The use of constitutional amendments to modify basic governance arrangements*: in this case, Chávez went beyond the amendment process and completely redesigned the Constitution;<sup>227</sup>

ii. *Elimination of checks between powers*: the new Constitution transformed the old bicameral system into a unicameral one;<sup>228</sup>

iii. *Centralization of Executive Power*: presidential terms were extended from five to six years, with the provision that a president could run for two consecutive terms. Additionally, presidential powers were strengthened;<sup>229</sup>

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220. *The Limits of Judicial Independence*, *supra* note 127, at 250.

221. *Id.*

222. ABUSIVE CONSTITUTIONAL BORROWING, *supra* note 74, at 123.

223. *Id.*

224. *Id.*

225. *Constitution-Making and Authoritarianism in Venezuela*, *supra* note 217, at 164.

226. *The Limits of Judicial Independence*, *supra* note 127, at 249.

227. *How to Lose a Constitutional Democracy*, *supra* note 2, at 124.

228. *Constitution-Making and Authoritarianism in Venezuela*, *supra* note 217, at 164; *see* Corrales, *supra* note 135, at 38.

229. *Constitution-Making and Authoritarianism in Venezuela*, *supra* note 217, at 164–65.

iv. *Elimination or suppression of effective political-party competition and the related prospect of rotation out of office*: early in the Assembly’s deliberations, a commission was formed that “replaced many members of the judiciary and sharply limited the powers and composition of the Congress”;<sup>230</sup>

v. *Contraction of the shared public sphere, where rights such as freedom of expression and association are exercised*: unlike the previous points, the new constitution established mechanisms for popular participation such as presidential recall and a civil society commission to participate in the selection of magistrates.<sup>231</sup>

Between 1998 and 2000, Venezuela’s democracy index plummeted from 0.59—qualifying as an electoral democracy—to 0.31, marking its transition into an electoral autocracy.<sup>232</sup> Judicial independence deteriorated significantly during the same period, dropping from 0.64 to 0.32 and reaching a low of 0.16 by 2004, shortly after the taming of the Supreme Court of Justice.<sup>233</sup> This institution, created by the Constituent Assembly as the successor to the Supreme Court of Justice,<sup>234</sup> became a key target of institutional restructuring under Chávez.

The taming process began within the Constituent Assembly itself, which, under the pretext of exercising original constituent power, rejected any limitations imposed by the existing legal order. In doing so, it fundamentally reshaped institutions, altering both their functions and compositions.<sup>235</sup> Beyond redesigning the political landscape to minimize the chances of opposition forces reclaiming power, Chávez and his Constituent Assembly launched a decade-long judicial restructuring effort. A key component of this strategy was the elimination of judicial guarantees of irremovability and stability, leaving 80% of the country’s judges classified as “provisional” by 2005.<sup>236</sup> This effectively made them dependent on the government for their continued tenure. The Assembly also appointed a new

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230. *Id.* at 165.

231. *Id.*

232. *Liberal Democracy Index, 2024*, *supra* note 175.

233. *Judicial Constraints on the Executive Index*, *supra* note 84.

234. *Courts Between Democracy and Hybrid Authoritarianism*, *supra* note 81, at 866.

235. ABUSIVE CONSTITUTIONAL BORROWING, *supra* note 74, at 124.

236. Roberto Dias & Thomaz Fiterman Tedesco, *Erosão Democrática e a Corte Interamericana de Direitos Humanos: O Caso Venezuelano* [*Democratic Erosion and the Inter-American Court of Human Rights: The Venezuelan Case*], 11 REVISTA BRASILEIRA DE POLÍTICAS PÚBLICAS [REV. BRAS. POLÍTICAS PÚBLICAS] 195, 211 (2021).

Supreme Court, a new National Electoral Council, and new heads for the offices of the Attorney General, Comptroller General, and Ombudsman.<sup>237</sup> As a result, rather than challenging the government's ambitions, the Court was primarily concerned with consolidating its own authority.<sup>238</sup>

Despite this, the Court occasionally demonstrated a degree of independence. Some of its rulings ran counter to the government's interests, a situation that took on new significance following the attempted coup against Chávez in 2002.<sup>239</sup>

Amid rising political polarization and the opposition's inability to counter a highly popular government that had systematically undermined institutional checks, some factions turned to extralegal means. The coup ultimately failed, and high-ranking military officers involved in the attempt were brought before the Supreme Court.<sup>240</sup> However, in three separate rulings, the Court found insufficient evidence to convict two generals and two admirals.<sup>241</sup> As Matthew Taylor notes, "this adherence to jurisprudential norms above political preferences came as a shock to the government"—particularly given that the Court had been entirely appointed by Chávez's allies in the Assembly.<sup>242</sup>

Before the final ruling, Chávez issued a public threat, warning that justices could be replaced if they failed to "behave."<sup>243</sup> The threat, however, did not achieve its intended effect. In August 2002, while announcing the final decision, Supreme Court President Iván Rincón defended the Tribunal's commitment to jurisprudential stability, declaring: "The constitution is not only to be used when it is beneficial to me. It has to be respected all the time."<sup>244</sup>

The ruling triggered immediate retaliation. A special committee of the National Assembly recommended removing one Supreme Court justice and the investigation of another.<sup>245</sup> Franklin Arrieché, the author of the Court's decision, was accused of falsifying credentials during his confirmation process—an allegation that led to the annulment of his appointment.<sup>246</sup> A

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237. *The Limits of Judicial Independence*, *supra* note 127, at 250.

238. David Sobreira, *Como os Tribunais morrem: o caso da Venezuela* [*How Courts Die: The Case of Venezuela*], JOTA (Feb. 4, 2024) (Braz.), <https://www.jota.info/opiniao-e-analise/artigos/como-os-tribunais-morrem-o-caso-da-venezuela> (interview with Raul Sanchez Urribarri).

239. *The Limits of Judicial Independence*, *supra* note 127, at 251.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 251–52.

246. *Id.* at 252.

temporary injunction delayed the enforcement of this decision, but the political pressure remained.<sup>247</sup>

Between 2002 and 2004, the Court remained internally divided, issuing rulings that at times favored the government and at other times did not—reflecting, at least to some extent, the functioning of an independent institution.<sup>248</sup> One such decision came from the Electoral Chamber of the Supreme Court; it overturned a National Electoral Council ruling, invalidating 876,000 of the 3,000,000 signatures collected by the opposition in support of a recall referendum against Chávez.<sup>249</sup> The government promptly appealed the decision to the Constitutional Chamber, where a Chávez-aligned majority overruled the Electoral Chamber’s judgment, effectively crushing the opposition’s hopes.<sup>250</sup>

The Electoral Chamber’s defiance came at a cost. Once the matter was settled in Chávez’s favor, the government announced that the Attorney General would investigate three of the Chamber’s judges for unethical behavior—a clear attempt to further entrench government control over the judiciary.<sup>251</sup>

The Supreme Court’s subjugation gained momentum in 2004 when the government amended the Court’s statute through an unconstitutional relative majority.<sup>252</sup> The government aimed to restructure the Court and expand its composition, thus the measure was justified with ostensibly noble intentions. The amendment expanded standing, allowing all citizens to petition to the Supreme Court, and strengthened the Court’s oversight of judicial administration and lower courts.<sup>253</sup>

However, these changes concealed the government’s true intentions: they were not limited to mere structural reforms. Citing excessive caseloads, Chávez increased the number of judges from 20 to 32, strategically allocating seats to secure a government majority in the Electoral Chamber.<sup>254</sup> The government also altered the process for appointing Supreme Court justices, reducing the required two-thirds qualified majority to a simple majority.<sup>255</sup>

Judicial removals were similarly made easier. As Raúl Urribarri explains, in an effort to make the Court more “accountable” to the government, the government introduced an expedited procedure “to

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247. *Id.*

248. *Id.* at 251–52.

249. *Id.* at 252.

250. *Id.* at 253.

251. *Id.* at 252.

252. *Courts Between Democracy and Hybrid Authoritarianism*, *supra* note 81, at 871–72.

253. *Id.* at 872.

254. *The Limits of Judicial Independence*, *supra* note 127, at 253.

255. *Id.* at 253–54.

circumvent the restrictions in place for dismissals of the Court's justices, allowing for a post hoc annulment of the justice's designation on the basis of several broad criteria, carried out and decided by a relative majority of the legislature."<sup>256</sup> Under this new framework, the impeachment process for Supreme Court justices could be initiated by a majority of the Citizen Power, which included the Attorney General, Comptroller General, and Ombudsman.<sup>257</sup> Furthermore, the mere initiation of proceedings led to the immediate suspension of the justice until the National Assembly reached a final decision by a two-thirds vote.<sup>258</sup>

With these mechanisms in place, the National Assembly quickly concluded its political purge. Franklin Arrieche, who had remained in office due to an injunction, was removed by a simple majority vote.<sup>259</sup> In his appeal, he argued that his removal violated the Constitution, but the Constitutional Chamber dismissed his claim by a three-to-two vote.<sup>260</sup> Additionally, two other judges, Alberto Martini Urdaneta and Rafael Hernández Uzcátegui—members of the Supreme Court's Electoral Chamber known for consistently ruling in favor of the opposition—were pressured into early retirement to avoid Arrieche's fate.<sup>261</sup>

A year later, in March 2005, with the Court now stacked with twelve Chávez loyalists, it reversed its prior rulings on the 2002 coup attempt, allowing the retrial of those allegedly involved.<sup>262</sup> This was followed by Chávez's victory in a referendum and his re-election for a third term, beginning in January 2007.<sup>263</sup> That same month, the National Assembly granted Chávez the power to rule by decree for eighteen months—his second time wielding such authority, having done so previously in 2001.<sup>264</sup> With these tools at his disposal, Chávez consolidated power, issuing decrees that expanded his control while the Court ensured opposition candidates were barred from running.<sup>265</sup>

The Venezuelan case exemplifies the full spectrum of court taming—both in its objective and subjective dimensions. As Javier Corrales observed,

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256. *Courts Between Democracy and Hybrid Authoritarianism*, *supra* note 81, at 872.

257. *Id.*

258. *Id.*

259. *The Limits of Judicial Independence*, *supra* note 127, at 254.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 254–55.

264. *Id.*

265. *Id.*

after 2005, the Supreme Tribunal of Justice issued more than 45,000 rulings, not a single one against the government.<sup>266</sup>

### B. Democratization Gone Wrong in Turkey

As a career politician, Recep Tayyip Erdoğan served as mayor of Istanbul from 1994 to 1998 and co-founded the Justice and Development Party (*Adalet ve Kalkınma Partisi*, AKP) in 2001.<sup>267</sup> The AKP was formed by members of the dissolved Welfare Party (*Refah Partisi*) and Virtue Party (*Fazilet Partisi*), both of which had been banned by the Constitutional Court (*Anayasa Mahkemesi*) for advocating the replacement of secularism with a state rooted in Islamic values.<sup>268</sup>

Established under the 1961 Constitution, which was drafted following a military coup, the Turkish Constitutional Court emerged during the same period as its counterparts in Austria (1945), Germany (1951), and Italy (1956).<sup>269</sup> However, as Daly points out, Turkey's historical, political, and constitutional context shaped the Court's primary role not as a defender of fundamental rights, but as a guardian of the Republic's core values—most notably, secularism.<sup>270</sup> This view is reinforced by Bertil Emrah Oder<sup>271</sup> and Esin Örucü,<sup>272</sup> who argue that the Court functioned as a mechanism for preserving both secularism and elite hegemony in a predominantly Muslim society.

With its rebranding, the AKP championed liberal values such as secularism, a market economy, and Turkey's accession to the European Union (EU).<sup>273</sup> The party soon had an opportunity to demonstrate its commitment to these principles. Just one year after its founding, the AKP secured a two-thirds majority in the parliamentary elections,<sup>274</sup> paving the way for Erdoğan to assume the role of prime minister. This period coincided with significant economic growth, further boosting the AKP's popularity.<sup>275</sup>

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266. Corrales, *supra* note 135, at 44.

267. Ozan O. Varol, *Stealth Authoritarianism in Turkey*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 339, 342 (Mark A. Graber et al. eds., 2018) [hereinafter *Stealth Authoritarianism in Turkey*].

268. *Id.*

269. Daly, *supra* note 129, at 1082.

270. *Id.*

271. Bertil Emrah Oder, *The Turkish Constitutional Court and Turkey's Democratic Breakdown: Judicial Politics Under Pressure*, 18 ICL J. 127, 129 (2024).

272. Esin Örucü, *The Constitutional Court of Turkey: The Anayasa Mahkemesi as the Protector of the System*, 3 J. COMP. L. 254, 257 (2008).

273. Ozan O. Varol et al., *An Empirical Analysis of Judicial Transformation in Turkey*, 65 AM. J. COMP. L. 187, 195 (2017) [hereinafter *Empirical Analysis*].

274. *Id.* at 195.

275. *Stealth Authoritarianism in Turkey*, *supra* note 267, at 342.

Additionally, the party's political agenda—which emphasized expanded political participation, enhanced ethnic and religious minority rights, and restrictions on military influence—resonated with Turkey's progressive segments.<sup>276</sup>

Turkey's constitutional system, historically shaped by military coups, had long been characterized by substantial military involvement in governance. However, the AKP's rise to power marked the implementation of a belated transitional justice initiative.<sup>277</sup> The party enacted reforms that curtailed the military's institutional and decision-making authority, reducing its influence over the country's democracy.<sup>278</sup> Moreover, high-ranking military officials were criminally investigated and imprisoned for allegedly conspiring to overthrow the government.<sup>279</sup>

According to Ozan Varol, despite these various initiatives, it became evident that then-Prime Minister Recep Tayyip Erdoğan's true objective was not to dismantle or reform undemocratic institutions, but rather to bring them under his control.<sup>280</sup> Under his leadership, the AKP enacted legislative and constitutional reforms that curtailed dissent, restricted individual rights, and weakened the opposition's institutional capacity to challenge the government.<sup>281</sup>

Intolerant of criticism, Erdoğan filed hundreds of libel lawsuits against his critics.<sup>282</sup> These lawsuits targeted a wide range of individuals, from those making satirical remarks to others who created images depicting Erdoğan's head on a dog's body.<sup>283</sup> However, his efforts to silence dissent extended beyond private citizens. Journalists and media outlets faced legal action—and in some cases, financial penalties—for alleged insults or simply for reporting facts.<sup>284</sup> For instance, Erdoğan prosecuted one journalist merely for announcing an investigation into corruption involving senior government officials.<sup>285</sup> The cumulative effect of these legal actions had a chilling impact on public debate.<sup>286</sup>

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276. *Id.* at 342.

277. Anja Mihr, *Regime Consolidation Through Transitional Justice: The Cases of Germany, Spain, and Turkey*, 11 INT'L J. TRANSITIONAL JUST. 113, 125 (2017).

278. Berk Esen & Sebnem Gumuscu, *Rising Competitive Authoritarianism in Turkey*, 37 THIRD WORLD Q. 1581, 1584 (2016).

279. *Stealth Authoritarianism in Turkey*, *supra* note 267, at 347–48.

280. *Id.* at 342.

281. *Id.*

282. *Id.*

283. *Id.* at 343.

284. *Id.*

285. *Id.*

286. *Id.*

This suppression of opposition was further reinforced by the selective prosecution of political adversaries. As Varol notes, many of these cases were backed by evidence, as the charges involved fraud, tax evasion, and money laundering.<sup>287</sup> This gave the government plausible deniability, allowing it to present the prosecutions as legitimate law enforcement rather than political persecution. However, the legal actions were systematically directed at government critics.<sup>288</sup>

Thus, without resorting to overt violence, Erdoğan employed legal and institutional mechanisms to obstruct his opponents and solidify his grip on power. These tactics are particularly insidious because they exploit democratic institutions to undermine the very values they are meant to uphold. Scholars such as Kim Lane Scheppele and Ozan Varol describe these strategies as “autocratic legalism”<sup>289</sup> or “stealth authoritarianism”<sup>290</sup>—terms that, despite some nuances, refer to closely related concepts.

Throughout the first decade of the 21st century, further reforms continued to consolidate Erdoğan’s authority. One key development was a 2007 referendum that expanded presidential powers and introduced direct presidential elections.<sup>291</sup> This change conferred greater legitimacy on the officeholder and the political vision they embodied.<sup>292</sup>

During this period, the Constitutional Court twice ruled against the AKP.<sup>293</sup> The first instance, in 2007, occurred before the referendum and effectively blocked the AKP’s preferred presidential candidate, despite the party holding 60% of parliamentary seats.<sup>294</sup> The second ruling reflected the Court’s staunch commitment to a rigid interpretation of secularism.<sup>295</sup> In reviewing a constitutional amendment that permitted the use of headscarves

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287. *Id.* at 344.

288. *Id.*

289. *Autocratic Legalism*, *supra* note 5, at 547.

290. Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1678 (2015).

291. *Stealth Authoritarianism in Turkey*, *supra* note 267, at 339, 348. In Turkey, referendums are used when proposed constitutional amendments reach three-fifths of the votes (330) in parliament. However, if the proposal achieves two-thirds (367) and the president’s approval, the amendment can be approved immediately. See *Empirical Analysis*, *supra* note 274, at 197.

292. See Aslı Bâli, *Turkey’s Constitutional Coup*, MIDDLE E. RSCH. & INFO. PROJECT (Dec. 15, 2018), <https://merip.org/2018/12/turkeys-constitutional-coup/>; *Stealth Authoritarianism in Turkey*, *supra* note 267, at 348.

293. Onur Bakiner, *How Did We Get Here? Turkey’s Slow Shift to Authoritarianism*, in *AUTHORITARIAN POLITICS IN TURKEY: ELECTIONS, RESISTANCE AND THE AKP* 21, 33 (Bakar Baser & Ahmet Erdi Öztürk eds., 2017).

294. *Id.*

295. *Id.*

in higher education institutions, the Court declared the provision unconstitutional.<sup>296</sup>

The headscarf amendment was intended to resolve an issue that had persisted for decades, as previous legislative attempts to lift the ban had been struck down by the Court.<sup>297</sup> Despite meeting all formal requirements for a constitutional amendment, the Court invalidated it, even though judicial review of constitutional amendments was only permissible on procedural grounds.<sup>298</sup> To justify its ruling, the Court argued that the amendment violated secularism—one of the Republic’s fundamental, and constitutionally unamendable, principles.<sup>299</sup>

The constitutional showdown<sup>300</sup> between the government and the Constitutional Court escalated in 2008 when the Court considered dissolving the AKP for allegedly violating the state’s secular foundations. The case was narrowly decided—six justices voted in favor of the party’s dissolution, falling one vote short of the qualified majority required to ban a political party.<sup>301</sup> Nevertheless, the Court issued a formal warning to the AKP and withdrew half of its public funding.<sup>302</sup>

The power to ban political parties was exercised at least 25 times over 26 years.<sup>303</sup> According to Tom Daly, the Constitutional Court’s active role in dissolving parties, coupled with its failure “to provide sufficient protection to individual rights” and its obstruction of liberalizing reforms, drew significant criticism.<sup>304</sup>

It was within this context that, in September 2010, the AKP proposed a referendum introducing a series of constitutional reforms.<sup>305</sup> The government framed the initiative as an effort to democratize the 1982 Constitution, which had been drafted following a military coup.<sup>306</sup> Among the proposed changes were measures to reduce the influence of the Constitutional Court, which was

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296. Asli Bâli, *The Perils of Judicial Independence: Constitutional Transition and the Turkish Example*, 52 VA. J. INT’L L. 235, 252–56 (2012) [hereinafter *The Perils of Judicial Independence*].

297. Mehmet Cengiz Uzun, *The Protection of Laicism in Turkey and the Turkish Constitutional Court: The Example of the Prohibition on the Use of the Islamic Veil in Higher Education*, 28 PA. ST. INT’L L. REV. 383, 408–11 (2010).

298. *The Perils of Judicial Independence*, *supra* note 296, at 253–54.

299. *Empirical Analysis*, *supra* note 273, at 196.

300. See Eric Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 992 (2008) [hereinafter *Constitutional Showdowns*].

301. *The Perils of Judicial Independence*, *supra* note 296, at 252 n.54.

302. *Stealth Authoritarianism in Turkey*, *supra* note 267, at 348–49.

303. Daly, *supra* note 129, at 1082.

304. *Id.*

305. *Stealth Authoritarianism in Turkey*, *supra* note 267, at 349.

306. *Id.*

widely viewed as an activist institution committed to upholding the values of Turkey's old secular elite.<sup>307</sup>

However, the referendum package consisted of 26 provisions that were voted on collectively rather than individually.<sup>308</sup> Consequently, when 58% of voters approved the package, all its provisions were enacted.<sup>309</sup> As a result, the composition of the Constitutional Court changed from 11 permanent judges and 4 substitutes to 17 permanent members.<sup>310</sup> Additionally, judicial terms were limited to 12 years—complementing the existing age cap of 65—and the appointment process became more politically influenced by other branches of government.<sup>311</sup> Standing was also expanded, and its rights-protection framework was strengthened in response to cases brought against Turkey at the European Court of Human Rights.<sup>312</sup>

Following these changes, studies indicate an initial expansion of the Court's role in protecting fundamental rights.<sup>313</sup> For example, Daly highlights how, in the years immediately after the reform, the Court appeared to exercise independence by issuing landmark rulings in defense of freedom of expression and the right to a fair trial.<sup>314</sup> In June 2014, the Court overturned the convictions of 230 defendants accused of plotting a coup against the AKP, citing procedural and substantive violations during their trials.<sup>315</sup>

For Aslı Bâli, these reforms were necessary for consolidating democracy, as the Constitutional Court had long functioned as a mechanism for preserving the establishment responsible for the undemocratic 1982 Constitution.<sup>316</sup> She argues that judicial independence must be assessed in the broader context of democratic transition.<sup>317</sup>

Yet, contrary to expectations for a government promoting liberalizing reforms, the new judicial framework shifted the Court's ideological orientation in a conservative direction. An empirical analysis by Varol, Pellegrina, and Garoupa found that 2010 marked a turning point, after which

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307. *Id.*

308. *The Perils of Judicial Independence*, *supra* note 296, at 297.

309. Karabekir Akkoyunlu, *Electoral Integrity in Turkey: From Tutelary Democracy to Competitive Authoritarianism*, in *AUTHORITARIAN POLITICS IN TURKEY: ELECTIONS, RESISTANCE AND THE AKP* 47, 53 (Bakar Başer & Ahmet Erdi Öztürk eds., 2017).

310. *The Perils of Judicial Independence*, *supra* note 296, at 300.

311. *Empirical Analysis*, *supra* note 273, at 198.

312. Daly, *supra* note 129, at 1083.

313. *Id.*

314. *Id.* at 1085.

315. *Id.* at 1085–86.

316. *The Perils of Judicial Independence*, *supra* note 296, at 291.

317. *Id.* at 239–40.

the Court consistently moved rightward.<sup>318</sup> Following this shift, the Court revised its established positions, particularly on issues related to executive power expansion.<sup>319</sup> As Bertil Emrah Oder observes, “[t]hese interpretative shifts of the Court are instances of an absolute deference that empower the executive in the institutional balance at the expense of democratic oversight and rule of law guarantees.”<sup>320</sup>

With these reforms in place, Erdoğan pursued an even more ambitious goal: transforming Turkey into a presidential system.<sup>321</sup> However, the 2011 elections left the AKP four seats short of the 330 needed to submit constitutional amendments to a national referendum.<sup>322</sup> As a result, the AKP sought a coalition with other parties to draft a new constitution.<sup>323</sup> The proposal, which envisioned a strengthened presidency, led to a political deadlock.<sup>324</sup> The initiative ultimately failed, but Erdoğan continued expanding presidential powers through informal means, effectively preparing the office he would assume in 2014.<sup>325</sup>

By 2013, corruption allegations involving government ministers began eroding the AKP’s popularity.<sup>326</sup> Compounding this was the collapse of the ceasefire with Kurdish militants in 2015, which triggered a wave of lawsuits related to civil rights violations and extrajudicial killings.<sup>327</sup> Demonstrating some degree of autonomy, the Constitutional Court issued several rulings that displeased the government, prompting Erdoğan—now president—to push for further restrictions on the Court’s jurisdiction.<sup>328</sup>

The situation reached a critical turning point in 2016, when lower-ranking military officers attempted a coup.<sup>329</sup> While on vacation, Erdoğan appeared on television via FaceTime, urging his supporters to take to the

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318. *Empirical Analysis*, *supra* note 273, at 213.

319. Oder, *supra* note 271, at 135.

320. *Id.*

321. *The Perils of Judicial Independence*, *supra* note 296, at 309.

322. *Stealth Authoritarianism in Turkey*, *supra* note 267, at 350.

323. *Id.*

324. See Felix Petersen & Zeynep Yanaşmayan, *Explaining the Failure of Popular Constitution Making in Turkey (2011–2013)*, in *THE FAILURE OF POPULAR CONSTITUTION MAKING IN TURKEY: REGRESSING TOWARDS CONSTITUTIONAL AUTOCRACY* 21, 44, 52–53 (Felix Petersen & Zeynep Yanaşmayan eds., 2020).

325. Oder, *supra* note 271, at 131–32. After the 2010 constitutional amendments, the AK Party became the dominant force in judicial appointments, and by 2017 the shift toward presidentialism and autocratization was fully institutionalized. *See id.*

326. Daly, *supra* note 129, at 1086.

327. *Id.*

328. *Id.*

329. *Stealth Authoritarianism in Turkey*, *supra* note 267, at 352.

streets in defense of the regime—a call that many heeded.<sup>330</sup> The coup was crushed in less than 24 hours.<sup>331</sup>

The aftermath was marked by severe repression. The death toll surpassed 200, and a massive purge followed: 6,823 soldiers, 2,777 judges and prosecutors (including two Constitutional Court judges), and dozens of governors were detained.<sup>332</sup> Additionally, over 49,000 civil servants were dismissed, and 21,000 private school teachers had their licenses revoked.<sup>333</sup> Nearly 1,600 university deans were forced to resign, while academics were placed on leave and barred from traveling abroad.<sup>334</sup>

In 2017, strengthened by the victory over the coup attempt, Erdoğan finally succeeded in pushing through a constitutional referendum—approved by 52% of voters—that formally replaced Turkey’s parliamentary system with a presidential one, thereby transforming his *de facto* concentration of power into *de jure* authority.<sup>335</sup> Under the new system, the President was now empowered to appoint judges, initiate disciplinary investigations against any of Turkey’s 3.5 million public servants, and govern with broad executive discretion.<sup>336</sup>

According to V-Dem data, Turkish democracy reached its peak in 2003 with a score of 0.53, maintaining relative stability until 2007, when the process of constitutional erosion accelerated.<sup>337</sup> From that point, Turkey’s democracy rating steadily declined, reaching 0.30 in 2013.<sup>338</sup> It continued to drop, eventually placing the country outside the ranks of global democracies.<sup>339</sup>

Judicial oversight of the executive, however, deteriorated at a slower pace than democracy itself. While judicial independence also declined, it remained relatively high until 2016, when it fell to 0.39.<sup>340</sup> By the following year, the judiciary had nearly lost all autonomy, with the “judicial constraints on the executive” index dropping to 0.14 in 2017—and showing only slight improvement to 0.22 in 2024.<sup>341</sup>

Turkey’s recent history, much like Venezuela’s, illustrates that court taming was not the primary driver of democratic erosion but rather a crucial

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330. *Id.*

331. *Id.*

332. *Id.* at 351–52.

333. *Id.* at 352.

334. *Id.* at 352.

335. Daly, *supra* note 129, at 1087.

336. *Stealth Authoritarianism in Turkey*, *supra* note 267, at 353.

337. *Liberal Democracy Index, 2024*, *supra* note 173.

338. *Id.*

339. DEMOCRACY REPORT 2025, *supra* note 7, at 19 n.3, 53.

340. *Judicial Constraints on the Executive Index*, *supra* note 84.

341. *Id.*

component of a broader strategy for consolidating power. In 2024, Erdoğan completed 21 uninterrupted years in office—with no clear indication that this would change.

### *C. Hungary's Illiberal Democracy Laboratory*

With the end of World War II, Hungary, along with other Eastern European countries, found itself behind the Iron Curtain under Soviet influence.<sup>342</sup> Despite this, Hungary retained a certain degree of independence compared to countries such as Czechoslovakia, Romania, Bulgaria, Latvia, Lithuania, and Estonia.<sup>343</sup> However, despite this relative autonomy, the period of Soviet rule left deep scars on both the Hungarian people<sup>344</sup> and their constitutional framework. Previously governed by a historical, unwritten constitution, Hungary adopted its first written constitution during this period of Soviet tutelage: the Communist Constitution of 1949.<sup>345</sup>

After the fall of the Soviet Union, the West initiated a democratization project for the countries that had been behind the Iron Curtain.<sup>346</sup> This initiative introduced Hungary to ideals such as the rule of law, liberal constitutionalism, and human rights after more than 40 years under Soviet control.<sup>347</sup> This led to a “peaceful and gradual”<sup>348</sup> transition beginning in the late 1980s, making Hungary a success story<sup>349</sup> and a promising model for the western-led democratization process.

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342. See Norman Naimark, *The Sovietization of Eastern Europe, 1944–1953*, in *THE CAMBRIDGE HISTORY OF THE COLD WAR* 175, 180–81 (Melvyn P. Leffler & Odd Arne Westad eds., 2010).

343. David Sobreira, *Como os Tribunais morrem: o caso da Hungria* [*How Courts Die: The Case of Hungary*], *JOTA* (Apr. 14, 2023) (Braz.) [hereinafter *o caso da Hungria*], <https://www.jota.info/opiniao-e-analise/artigos/como-os-tribunais-morrem-o-caso-da-hungria-14042023> (interview with Tímea Drinóczi).

344. See generally TIMEA DRINÓCZI & AGNIESZKA BIEN-KAÇALA, *ILLIBERAL CONSTITUTIONALISM IN POLAND AND HUNGARY: THE DETERIORATION OF DEMOCRACY, MISUSE OF HUMAN RIGHTS AND ABUSE OF THE RULE OF LAW* (2022) (providing a more detailed analysis of the impacts of constitutional transitions on Hungary's national identity).

345. *Id.* at 51.

346. MILADA ANNA VACHUDOVA, *EUROPE UNDIVIDED: DEMOCRACY, LEVERAGE, AND INTEGRATION AFTER COMMUNISM* 3 (2005); STEVEN LEVITSKY & LUCAN A. WAY, *COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR* 17–18 (2010); see generally *THE EUROPEANIZATION OF CENTRAL AND EASTERN EUROPE* (Frank Schimmelfennig & Ulrich Sedelmeier eds., 2005).

347. DRINÓCZI & BIEN-KAÇALA, *supra* note 344, at 60.

348. Paul Lewis et al., *The Emergence of Multi-Party Systems in East-Central Europe: A Comparative Analysis*, in *DEMOCRATIZATION IN EASTERN EUROPE: DOMESTIC AND INTERNATIONAL PERSPECTIVES* 151, 157–58 (Geoffrey Pridham & Tatu Vanhanen eds., 1994).

349. *PROTECTING DEMOCRACY AND THE RULE OF LAW*, *supra* note 128, at 6–7.

As Gábor Halmai explains, this transformation was not achieved through the creation of a new constitution.<sup>350</sup> Instead, Hungary chose to retain its existing Constitution while implementing a model of liberal constitutionalism through a series of amendments that significantly altered its content.<sup>351</sup> One key reform during this period was the strengthening of the Constitutional Court, which was granted broad judicial review powers as part of the structural framework of the new democracy.<sup>352</sup>

During this transition, a young politician named Viktor Orbán began to gain prominence.<sup>353</sup> Supported by military colleagues and members of the political establishment, Orbán founded the Alliance of Young Democrats—the original name of what is now known as Fidesz.<sup>354</sup> Initially adopting a liberal-nationalist ideology, Fidesz positioned itself as an opposition party to the conservative government.<sup>355</sup> However, in the early 1990s, the party underwent an internal ideological shift, moving further to the right.<sup>356</sup> In 1998, after forming a coalition with two other parties, Orbán became Hungary's Prime Minister for the first time at the age of 35.<sup>357</sup> His government lasted until 2002, when he was defeated by a liberal-socialist coalition that remained in power until 2010.<sup>358</sup>

For a time, the transfer of power between parties appeared to function smoothly. However, in 2010, Fidesz secured a landslide victory,<sup>359</sup> gaining a parliamentary majority large enough to amend—or even replace—the country's Constitution. Several factors contributed to this outcome. First, the alliance between Fidesz and the Christian Democratic People's Party (KDNP). Second, widespread dissatisfaction across Central and Eastern Europe with the transition process.<sup>360</sup> Third, Hungary's electoral system, designed during the democratic transition to address concerns such as parliamentary fragmentation.<sup>361</sup> Lastly, the leak of confidential speeches in

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350. Gábor Halmai, *A Coup Against Constitutional Democracy: The Case of Hungary*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 243, 244 (Mark A. Graber et al. eds., 2018) [hereinafter *A Coup Against Constitutional Democracy*].

351. PROTECTING DEMOCRACY AND THE RULE OF LAW, *supra* note 128, at 8–9.

352. *A Coup Against Constitutional Democracy*, *supra* note 350, at 243–44.

353. SIMEON DJANKOV, HUNGARY UNDER ORBÁN: CAN CENTRAL PLANNING REVIVE ITS ECONOMY? 3 (Peterson Inst. for Int'l Econ., Policy Brief No. PB15-11, 2015).

354. *Id.*

355. *Id.* at 4.

356. *Id.* at 3.

357. *Id.*

358. *Id.*

359. *A Coup Against Constitutional Democracy*, *supra* note 350, at 245.

360. *Id.* at 245.

361. Miklós Bánkuti et al., *Hungary's Illiberal Turn: Disabling the Constitution*, 23 J. DEMOCRACY 138, 139 (2012).

which government leaders admitted to having blatantly lied to the public—an event that nearly became a political rallying point for Orbán.<sup>362</sup>

Halmai explains that Fidesz’s decisive victory—winning more than 50% of the vote—was amplified by Hungary’s proportional electoral system, granting the Fidesz-KDNP coalition two-thirds of the parliamentary seats (263 out of 386).<sup>363</sup> This supermajority allowed the new government to implement sweeping changes without having to negotiate with the opposition—and that is precisely what it did.<sup>364</sup>

Early in his new term, in 2010, Orbán and Fidesz launched their illiberal offensive by repealing Article 24(5) of the Constitution.<sup>365</sup> A product of the redemocratization process, Article 24(5) had been introduced in 1995 to foster consensus among political actors and safeguard the interests of minority parties.<sup>366</sup> This provision required a four-fifths parliamentary majority to determine the “concept” of the Constitution—a vague term that, as Drinóczi argues, did not necessarily imply the drafting of a new constitution.<sup>367</sup>

Understanding the significance of this repeal requires deeper contextual analysis. According to Drinóczi, Hungary does not distinguish between original and derived constituent power in substantive terms.<sup>368</sup> One key reason for this is the absence of entrenched clauses or mechanisms to safeguard the Constitution’s identity.<sup>369</sup> As a result, those holding a two-thirds legislative majority effectively wield an almost unlimited power to amend the Constitution.<sup>370</sup>

Thus, in a process comparable to what Brazilian constitutional doctrine would call a “double revision”<sup>371</sup>—first removing constraints on

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362. *o caso da Hungria*, *supra* note 343.

363. *A Coup Against Constitutional Democracy*, *supra* note 350, at 245.

364. *Id.*

365. PROTECTING DEMOCRACY AND THE RULE OF LAW, *supra* note 128, at 8.

366. *Id.* at 9.

367. *o caso da Hungria*, *supra* note 343.

368. Tímea Drinóczi, *Constitutional Politics in Contemporary Hungary*, 10 INT’L J. CONST. L. 63, 66 (2016).

369. *Id.*

370. *Id.* at 66.

371. In Brazilian academic literature, double revision is understood as the process of circumventing constitutional limitations on the power of amendment, specifically those established by the entrenched clauses of Article 60, Section 4, of the Brazilian Constitution. Initially, the rules with limits established by the original constituent power are revoked, and then the Constitution is amended without any disrespect to the modified text. The Brazilian Supreme Federal Court has already addressed—and rejected—this thesis on different occasions. S.T.F., Ação Direta de Inconstitucionalidade No. 981 MC/PR, Relator: Min. Néri da Silveira, 17.12.1993, Diário da Justiça [D.J.], 05.08.1994, 30, 54–55 (Braz.); S.T.F., Ação Direta de Inconstitucionalidade No. ADI 1722 MC/TO, Relator: Min. Marco Aurélio, 10.12.1997, 2124-2, Diário da Justiça [D.J.], 19.09.2003, 401, 417 (Braz.). For further reading on the topic, *see*

constitutional amendments, then altering previously protected content—Orbán’s government amended the Constitution to eliminate Article 24(5).<sup>372</sup> Shortly thereafter, it introduced an entirely new constitutional framework.<sup>373</sup>

Despite its abusive nature, Orbán’s government executed this maneuver within a constitutional design that posed few obstacles beyond the requirement of a qualified quorum. Richard Albert argues that for a constitutional change to be properly understood as an amendment it must remain consistent with the existing constitution.<sup>374</sup> However, applying this principle to Hungary at the time presents two challenges. First, the Hungarian system inherently blurred this requirement by failing to differentiate between original and derived constituent power. Second, as Drinóczi notes, by that time constitutional scholarship had not yet extensively debated concepts such as unconstitutional constitutional amendments,<sup>375</sup> making retrospective analyses susceptible to accusations of anachronism.

Later in 2010, Fidesz continued its constitutional transformation with no viable opposition to counter its dominance, passing a series of amendments and legislative changes that reshaped multiple areas of the state.<sup>376</sup> Among these was a restructuring of representative bodies: the number of parliamentary seats was reduced from 386 to 200, and the number of local government representatives also decreased<sup>377</sup>—centralization measures reminiscent of Vladimir Putin’s governance style.<sup>378</sup>

Significant reforms also targeted the media sector. Constitutional provisions against monopolies were weakened, and a new regulatory authority was established, consolidating control over the press.<sup>379</sup>

The judiciary was not spared from Fidesz’s assault. Constitutional amendments reshaped the appointment process for judges to the Constitutional Court (*Alkotmánybíróság*).<sup>380</sup> Kriszta Kovács and

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Virgílio Afonso da Silva, *ULISSES, AS SERELAS E O PODER CONSTITUINTE DERIVADO: sobre a Inconstitucionalidade da dupla revisão e da alteração no quorum de 3/5 para aprovação de emendas constitucionais* [*Ulysses, the Sirens, and the Derived Constituent Power: Regarding the Unconstitutionality of Double Revision and the Change in the 3/5 Quorum for Approval of Constitutional Amendments*], 226 *REVISTA DE DIREITO ADMINISTRATIVO* [R. DIR. ADM.] 11 (2001).

372. PROTECTING DEMOCRACY AND THE RULE OF LAW, *supra* note 128, at 8–9.

373. *Id.*

374. RICHARD ALBERT, *CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS* 15 (2019).

375. DRINÓCZI & BIEN-KAÇALA, *supra* note 344, at 158.

376. Kriszta Kovács & Gábor A. Tóth, *Hungary’s Constitutional Transformation*, 7 *EUR. CONST. L. REV.* 183, 187–88 (2011) [hereinafter *Hungary’s Constitutional Transformation*].

377. *Id.* at 188.

378. *Autocratic Legalism*, *supra* note 5, at 551.

379. *Hungary’s Constitutional Transformation*, *supra* note 376, at 189–90.

380. The Hungarian jurisdiction system resembles the German one, meaning that Hungary has a Constitutional Court (*Alkotmánybíróság*), which is not part of the Judiciary, and a Supreme Court (*Curia*),

Gábor A. Tóth explain that under the previous system, a special committee with representatives from each parliamentary faction decided appointments. Candidates then required approval by a two-thirds majority in the legislature.<sup>381</sup> Under the new rules, however, a parliamentary committee would make appointments, whose composition directly reflected the distribution of seats in parliament.<sup>382</sup> As Bugaric argues, this change ensured that Fidesz, with its two-thirds supermajority, could appoint justices without opposition.<sup>383</sup>

A second major shift occurred after the Court struck down a government attempt to impose a retroactive tax of up to 98% on public funds deemed contrary to “good morals.”<sup>384</sup> High-ranking public officials—the primary targets of the measure—successfully challenged the tax before the Court, which was widely accessible at the time.<sup>385</sup> In response, that same day the government reintroduced the law with identical content—this time accompanied by a constitutional amendment restricting the Court’s jurisdiction over fiscal matters.<sup>386</sup>

Shortly after implementing these changes, in 2011, Orbán and Fidesz delivered on their earlier promise by introducing a new constitution.<sup>387</sup> The new Fundamental Law (*Alaptörvény*) came into effect in 2012, incorporating “several provisions which radically undermine basic checks and balances from the old constitution.”<sup>388</sup> Among the most consequential changes, access to the Constitutional Court—previously almost unrestricted—was now severely curtailed.

Additionally, the retirement age for ordinary judges was lowered from 70 to 62, a transitional measure approved by Parliament in late 2011, just days before the Fundamental Law took effect.<sup>389</sup> This change forced approximately 274 judges into early retirement, including “six of the twenty county-level court presidents, four of the five appeals court presidents, and twenty of the eighty Supreme Court judges.”<sup>390</sup>

To consolidate control over judicial appointments, the government established a new National Judicial Office and granted it sweeping powers to

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which occupies the top of the hierarchy of this branch. *Hungary’s Constitutional Transformation*, *supra* note 376, at 184–85.

381. *Id.* at 193.

382. *Id.*

383. PROTECTING DEMOCRACY AND THE RULE OF LAW, *supra* note 128, at 9.

384. *Hungary’s Constitutional Transformation*, *supra* note 376, at 192.

385. *Id.*

386. *Id.* at 192–93.

387. PROTECTING DEMOCRACY AND THE RULE OF LAW, *supra* note 128, at 1.

388. *Id.* at 10.

389. *A Coup Against Constitutional Democracy*, *supra* note 350, at 246.

390. *Id.*

replace the retiring judges with new appointees.<sup>391</sup> Unsurprisingly, as Bugarcic notes, Fidesz appointed a close ally of Orbán to head the institution—namely, the wife of József Szájer, the principal architect of the new Fundamental Law.<sup>392</sup> The president of the National Judicial Office, serving a nine-year term, was also granted the authority to reassign cases between courts and even determine which judge would preside over specific cases<sup>393</sup>—a power that was later invalidated by the Constitutional Court.<sup>394</sup>

Despite the numerous measures taken to undermine the Constitutional Court's authority, its president, Paczolay Péter, managed to build alliances with his colleagues and deliver setbacks to Orbán's illiberal project. Among the government measures overturned were (1) the reduction of the judicial retirement age from 70 to 62; (2) a law criminalizing homelessness; and (3) a provision revoking the official status of more than 300 churches.<sup>395</sup>

However, in March 2013, Fidesz passed the Fourth Amendment, introducing a package of constitutional provisions that added 15 pages to the 45-page Fundamental Law.<sup>396</sup> According to Gábor Halmai, it reinstated several measures previously struck down by the Constitutional Court.<sup>397</sup> Yet, in his view, the most significant of these changes was the annulment of all Constitutional Court precedents established before the adoption of the Fundamental Law.<sup>398</sup> As Halmai explains, “practically speaking, the Fourth Amendment annuls primarily the cases that defined and protected constitutional rights and harmonized domestic rights protection to comply with European human rights law.”<sup>399</sup>

Since Fidesz's return to power in 2010, Hungary has steadily moved toward autocratization. The country's democracy rating declined from 0.77 in 2009 (which classified Hungary as an electoral democracy) to 0.32 in 2024, designating Hungary as an electoral autocracy.<sup>400</sup> Interestingly, even though Orbán appointed all current Constitutional Court judges, the Judicial Constraints Index remains relatively high, having declined from 0.9 to 0.62.<sup>401</sup> This suggests that the process of fully subjugating the Hungarian Constitutional Court has not yet been completed or that the institutional

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391. PROTECTING DEMOCRACY AND THE RULE OF LAW, *supra* note 128, at 10.

392. *Id.*

393. *Id.*

394. *Constitutional Revenge*, *supra* note 137.

395. *Id.*

396. *A Coup Against Constitutional Democracy*, *supra* note 350, at 247.

397. *Id.*

398. *Id.*

399. *Id.*

400. *Liberal Democracy Index, 2024*, *supra* note 173.

401. *Judicial Constraints on the Executive Index*, *supra* note 84.

changes enacted so far have been sufficient to prevent the Court from significantly interfering with Orbán's agenda.

Regardless of the Court's role, Orbán's *illiberal constitutionalism*<sup>402</sup> has proven remarkably effective. Initially borrowing tactics from previous autocrats, he has since transformed Hungary into a laboratory for illiberal democracy, exporting his model to others seeking to replicate his approach—as seen in Poland.<sup>403</sup>

#### *D. Budapest in Warsaw: The Polish Blitzkrieg on Judicial Independence*

The Polish Constitution, which was established in 1952 and personally approved by Stalin,<sup>404</sup> remained in force until 1992 when it was replaced by a transitional document.<sup>405</sup> In turn, this document was superseded by the current Constitution of the Republic of Poland in 1997.<sup>406</sup> While the previous constitution functioned primarily as an ideological symbol with little real-world application, the new Polish Constitution embraced liberal democracy and its core principles.<sup>407</sup>

However, even before the collapse of the Soviet regime, Poland experienced significant constitutional transformations. Throughout the 1980s, the country established a supreme administrative court, an official ombudsman's office, and even a constitutional tribunal (the Constitutional Court).<sup>408</sup>

As expected under such circumstances, the Constitutional Court initially wielded limited powers.<sup>409</sup> Its rulings on the constitutionality of legislative provisions were subject to parliamentary review, with the Parliament (*Sejm*) holding the authority to overturn them by a two-thirds majority vote.<sup>410</sup>

Amid the waning influence of Soviet power, the Constitutional Court strategically expanded its role in the late 1980s, striking down certain laws while maintaining institutional balance.<sup>411</sup> This approach earned it a degree of legitimacy, “an asset necessary to survive the future process of

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402. The term illiberal constitutionalism is controversial, considered coherent by some, such as Tímea Drinóczi and Agnieszka Bień-Kacała, and an oxymoron by others, such as Gábor Halmái, Kim Lane Scheppelle, and Gábor Attila Tóth. See DRINÓCZI & BIEN-KAČALA, *supra* note 344, at 22.

403. *Autocratic Legalism*, *supra* note 5, at 552–53.

404. POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 35.

405. *Id.* at 41.

406. *Id.*

407. *Id.* at 35 (“It was less a legal document, more an ideological signpost.”).

408. *Id.* at 35, 42.

409. Garlicki, *supra* note 158, at 142.

410. *Id.*

411. *Id.*

transformation,” a process that began in 1989 and culminated in 1997 with the adoption of the current Constitution.<sup>412</sup>

Following the implementation of the new Constitution, the Court gradually strengthened its authority, adjudicating cases concerning fundamental rights and judicial independence while avoiding direct confrontation with other branches of government.<sup>413</sup> However, this institutional dynamic shifted in 2005, when the Law and Justice Party (Prawo i Sprawiedliwość, PiS) first came to power. As Lech Garlicki explains:

The situation became less comfortable after the 2005 parliamentary elections when the new majority of the Law and Justice Party (LaJ) launched a new project that drastically differed from the hitherto established patterns. The political conflict soon expanded into the area of constitutional interpretation and, as neither the Constitutional Courts nor other supreme courts were ready to yield, it culminated in attacks on the judicial branch.<sup>414</sup>

The PiS government, led by Prime Minister Jarosław Kaczyński, was defeated in the 2007 elections, with opposition leader Donald Tusk assuming the role of prime minister and restoring the status quo.<sup>415</sup> Having demonstrated its ability to resist government-backed pressures, the Constitutional Court “emerged from the crisis with a strengthened authority.”<sup>416</sup> However, this apparent victory also served as a learning experience for the politically inexperienced PiS, teaching the party important lessons on how to implement radical changes more effectively in the future.<sup>417</sup>

Several years later, during the Polish presidential election in May 2015, Kaczyński, as PiS president, expected an easy victory for the incumbent, Bronisław Komorowski.<sup>418</sup> Unwilling to risk personal defeat, Kaczyński chose to nominate a relatively unknown candidate to run against Komorowski. That candidate was Andrzej Duda, a young politician with limited political experience.<sup>419</sup> Surprisingly though, Komorowski’s chaotic campaign led to an unexpected victory for Duda.<sup>420</sup> This was followed by a

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412. *Id.*

413. *Id.* at 144.

414. *Id.*

415. *Id.*

416. *Id.*

417. POLAND’S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 2.

418. *Id.* at 3.

419. *Id.* at 1.

420. *Id.*

second triumph for PiS in the parliamentary elections in October of the same year.<sup>421</sup> With voter turnout at just 50.9%, PiS secured an absolute majority in Parliament with just 37.5% of the vote—equivalent to just 18% of the total electorate.<sup>422</sup>

These back-to-back electoral victories ended the centrist-liberal coalition's eight years of dominance. However, unlike Hungary, where Orbán's party secured a two-thirds parliamentary majority, PiS held only a slim five-seat advantage over the opposition.<sup>423</sup>

The Polish case also differs from its Hungarian counterpart in another key aspect: the absence of a catalytic crisis. Since the fall of the Soviet Union, Poland's economy had expanded sixfold and was the only EU country to avoid a recession during the 2008 financial crisis.<sup>424</sup> This challenged the notion, as suggested by Levitsky and Ziblatt, that old and wealthy democracies are inherently resilient to democratic erosion.<sup>425</sup>

Despite these differences, both Hungary and Poland experienced similar processes of democratic backsliding. Sadurski describes Poland's transformation as an "constitutional coup."<sup>426</sup> By late 2015, following the October elections, the country "witnessed the beginning of a fundamental authoritarian transformation: the abandonment of the dogmas of liberal democracy, constitutionalism, and the rule of law that had previously been taken for granted."<sup>427</sup> Under Kaczyński's leadership as the government's de facto ruler, PiS adopted a playbook directly inspired by Orbán's playbook.<sup>428</sup> This included (1) attacks on the media; (2) the weakening of the Constitutional Court; (3) changes to electoral commission rules; and (4) portraying the European Union as a hostile entity.<sup>429</sup>

At first glance, the political conditions in Poland seemed unfavorable for revolutionary institutional changes. PiS lacked the supermajority required for constitutional amendments. Additionally, the existing constitutional framework granted Parliament the authority to appoint judges to the Constitutional Court. Finally, given that Constitutional Court judges serve nine-year terms, the existing bench was expected to remain in office

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421. *Id.*

422. *Id.*

423. PiS secured 235 of 460 seats in the lower house (*Sejm*) and 61 of 100 in the upper house (*Senat*). Sweeney, *supra* note 79, at 7.

424. POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 2.

425. TYRANNY OF THE MINORITY, *supra* note 13, at 197, 215.

426. POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 14.

427. *Id.* at 3.

428. *Autocratic Legalism*, *supra* note 5, at 562.

429. POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 3–4.

throughout the new legislative period despite PiS's parliamentary dominance.<sup>430</sup>

However, these institutional safeguards proved insufficient against PiS's determination. PiS attacked the Constitutional Court in both its composition and functional authority.<sup>431</sup> As Sadurski explains, PiS's so-called "reforms" were introduced under the disingenuous justification of eliminating legal obstacles to create a fairer economic system.<sup>432</sup>

By the beginning of the new legislative term in late 2015, the Polish Constitutional Court had established itself as a key institution in protecting the democratic process, effectively checking the powers of the executive and legislative branches in various matters.<sup>433</sup> This does not mean, however, that the Constitutional Court's decisions were beyond criticism. As Sadurski explains, in areas such as the separation of church and state, freedom of expression and the press, and the protection of linguistic minorities, the Court's rulings were sometimes weak or lacked a firm commitment to enforcing constitutional provisions.<sup>434</sup>

Nevertheless, PiS had unfavorable memories of the Constitutional Court from its previous time in government (2005–2007), when the Court had blocked many of its initiatives.<sup>435</sup> This led to the first major crisis at the end of 2015, when the terms of five of the Court's fifteen judges were set to expire—three in November and two in December.<sup>436</sup>

Anticipating a likely PiS victory, the outgoing legislature amended the law governing the Constitutional Court in June 2015, just months before the October parliamentary elections.<sup>437</sup> In an act of constitutional hardball,<sup>438</sup> the centrist-liberal coalition manipulated the judicial appointment process, bringing forward the selection dates for five judges.<sup>439</sup> Three judges were set to leave the Court before the legislative term ended, but the remaining two would have vacated their seats in December after the new PiS-controlled

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430. Garlicki, *supra* note 158, at 146.

431. Tomasz Tadeusz Konciewicz, *The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux*, 43 REV. CENT. & E. EUR. L. 116, 120–21 (2018).

432. POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 58.

433. *Id.* at 58–59.

434. *Id.* at 59.

435. *Id.* at 61.

436. Garlicki, *supra* note 158, at 146.

437. *Id.*

438. *Constitutional Hardball*, *supra* note 151, at 523.

439. Garlicki, *supra* note 158, at 146.

legislature had taken office.<sup>440</sup> Despite this, the parliamentary majority proceeded with appointing all five judges.<sup>441</sup>

Starting in August 2015, President Andrzej Duda refused to administer the oath of office to the centrist-liberal coalition's appointed judges.<sup>442</sup> After PiS gained control of Parliament, the new legislature took an unprecedented step: it declared the previous appointments invalid and instead appointed five new judges. The President immediately swore in these judges.<sup>443</sup>

In response, the opposition challenged these actions before the Constitutional Court. The Constitutional Court ruled that the incumbent legislature had the authority to fill vacancies only when the outgoing judge's term ended during that same legislative session.<sup>444</sup> As a result, three of the five original appointments remained valid. However, in a separate decision, the Court declined to rule on these individual appointments, concluding that such matters fell outside its jurisdiction.<sup>445</sup>

Despite the ruling, Duda—backed by the PiS-dominated Parliament—refused to comply, insisting on the validity of the new appointments.<sup>446</sup> In defiance, the President of the Constitutional Court declared that only two of the judges appointed by the new Parliament—those whose positions had been improperly filled by the previous legislature—could rightfully take their seats.<sup>447</sup> This resulted in a standoff, with two rival groups of three judges each claiming the same vacancies—one appointed by the previous legislature and the other by PiS.<sup>448</sup> The government used this dispute to undermine the legitimacy of the Court and its rulings.<sup>449</sup>

The attacks did not stop there. After failing to pack the Constitutional Court, PiS took an unprecedented step in European legal history: it refused to publish the Constitutional Court's judgments.<sup>450</sup> Citing procedural errors and a lack of legal justification, the government simply ignored its constitutional duty to publish and enforce the Constitutional Court's decisions.<sup>451</sup> In *Case K 47/15*, the Venice Commission—an advisory body of the Council of Europe on constitutional matters—ruled that this omission

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440. POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 62.

441. Garlicki, *supra* note 158, at 146.

442. *Id.*

443. *Id.*

444. *Id.* at 147.

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.*

449. *Id.*

450. Konciewicz, *supra* note 431, at 121–22.

451. *Id.* at 121.

violated the rule of law.<sup>452</sup> Domestically, the Constitutional Court reaffirmed the government's obligation to publish its rulings, explicitly rejecting any claim of executive discretion in the matter.<sup>453</sup>

On another front, judicial independence came under attack through the government's efforts to subjugate the National Judicial Council (*Krajowa Rada Sądownictwa*, KRS). Alongside the executive, court presidents, and judicial self-governance bodies, the KRS plays a central role in Poland's judicial governance system. Originally established under the communist regime but restructured during the democratic transition to ensure independence, the KRS was "designed as a guardian of the separation of powers and judicial independence, and indirectly as a safeguard for the effective realization of the right to a fair trial enshrined in Article 45(1) of the Constitution."<sup>454</sup> Its key responsibilities include (1) selecting judges for the Supreme Court; (2) overseeing judicial transfers and appointments; and (3) establishing and enforcing judicial ethics rules.<sup>455</sup>

With a hybrid composition, the KRS consists of 25 members serving four-year terms.<sup>456</sup> As Anna Śledzińska-Simon explains, a Constitutional Court ruling requiring the physical presence of KRS members for deliberations made it difficult for certain key officials to participate regularly.<sup>457</sup> These officials—including the Minister of Justice, First President of the Supreme Court, and President of the Supreme Administrative Court—often could not attend lengthy sessions on judicial evaluation and selection.<sup>458</sup> As a result, judicial representatives came to dominate the KRS.<sup>459</sup>

Until 2017, judges held 15 of the 25 seats on the KRS.<sup>460</sup> However, the Polish Constitution did not explicitly stipulate that judicial members should have equal voting power in the judge selection process. Exploiting what appeared to be a representational imbalance in the judiciary's seat

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452. *Id.* at 121–22.

453. *Id.*

454. Anna Śledzińska-Simon, *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition*, 19 *GER. L.J.* 1839, 1843, 1847–48 (2018).

455. *Id.* at 1848.

456. KRS's composition is as follows: "According to the Constitution, the KRS consists of fifteen judges. The remaining members are the chief justices of the SC and Supreme Administrative Court, the MJ, a representative of the president, four MPs 'elected by the Sejm,' and two senators 'elected by the Senate.'" See *POLAND'S CONSTITUTIONAL BREAKDOWN*, *supra* note 90, at 100 (discussing KRS's composition under the Polish Constitution).

457. Śledzińska-Simon, *supra* note 454, at 1849–50.

458. *Id.* at 1850.

459. *Id.* at 1849.

460. *Id.*

distribution,<sup>461</sup> PiS launched a propaganda campaign against this aspect of the KRS.<sup>462</sup>

Following widespread protests against legislative initiatives aimed at restructuring the KRS, President Duda—politically cautious of the growing unrest—vetoed a PiS-drafted bill.<sup>463</sup> However, it was not long before Duda and PiS reached an agreement to revive efforts to bring the KRS under government control.<sup>464</sup>

Although the Polish Constitution did not explicitly define the process for electing judicial members to the KRS, the widely accepted practice had been that judges themselves were responsible for making these appointments.<sup>465</sup> Accordingly, the governing law of the KRS established different election models for various sectors of the judiciary.<sup>466</sup> This provision was subsequently challenged before the Constitutional Court—then dominated by a PiS-aligned majority—which ruled it unconstitutional.<sup>467</sup>

Notably, the Constitutional Court did not reject the principle that judges should be elected by their peers. Instead, the Constitutional Court ruled only that “different methods of inter-judiciary elections at different levels of the courts” were impermissible.<sup>468</sup> According to Śledzińska-Simon, this “gave the government a ‘legitimate’ reason to reform the election process and move the authority to select judicial members away from the bodies representing the judiciary and into the hands of the Parliament.”<sup>469</sup> Under the new system, judges would be consulted only during the pre-selection phase.

The outcome of this broader process of constitutional erosion—encompassing not only the subjugation of the Constitutional Court but also the centralization of power in positions controlled by PiS<sup>470</sup>—was a dramatic decline in Poland’s democracy rating, which fell from 0.81 in 2014 to 0.42

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461. According to Anna Śledzińska-Simon:

2 members were judges of the Supreme Court; 2 members – the judges of administrative courts; 2 members – the judges of appellate courts; 8 members – the judges of regional and district courts; and, 1 member – a judge of a military court. As a result, judges of higher courts were overrepresented, while the district court judges did not have an adequate number of representatives (for example, in the last term of the NCJ there was only one judge from the district court).

*Id.* at 1850.

462. POLAND’S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 98.

463. *Id.* at 101.

464. *Id.*

465. *Id.*

466. *Id.*

467. *Id.* at 100.

468. *Id.*

469. Śledzińska-Simon, *supra* note 454, at 1851.

470. For example: the Ministry of Justice has incorporated the functions of the Prosecutor General. See Śledzińska-Simon, *supra* note 454, at 1840, 1857–51, 1857.

in 2022.<sup>471</sup> These numbers have improved after the victory of the opposition coalition in 2023. The democracy index reached 0.62<sup>472</sup> and the judicial constraints index reached 0.77.<sup>473</sup>

Yet the political environment became more volatile after the 2025 presidential election delivered a PiS-backed president, creating new veto points that have the potential to stall restoration of the rule-of-law.<sup>474</sup> Scholars and watchdogs therefore have reason to monitor the aftermath closely, as institutional gridlock could facilitate a PiS comeback.<sup>475</sup>

### *E. In the Shadow of El Salvador's Millennial Autocrat*

Unfamiliar with democratic governance until the 1990s, El Salvador endured 50 years of military rule and 12 years of civil war against the guerrilla forces of the Farabundo Martí National Liberation Front (*Frente Farabundo Martí para la Liberación Nacional*, FMLN).<sup>476</sup> This changed in the early 1990s when the Republican Nationalist Alliance (*Alianza Republicana Nacionalista*, ARENA) and the FMLN agreed to end the conflict.<sup>477</sup> Through the Chapultepec Peace Accords, signed in Mexico in 1992, both parties sought to democratize El Salvador, ensure respect for human rights, and reunify Salvadoran society.<sup>478</sup>

Previously excluded from the electoral process, the FMLN was incorporated as an official political party, allowing former guerrilla members to actively participate in the country's political system.<sup>479</sup> To safeguard the interests of the elites involved, electoral laws were designed to accommodate both ARENA and the FMLN, creating legislative barriers that hindered the

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471. *Liberal Democracy Index, 2024*, *supra* note 173.

472. *Liberal Democracy Index, 2024*, *supra* note 173.

473. *Judicial Constraints on the Executive Index*, *supra* note 84.

474. Donatienne Ruy, *The Implications of Poland's Presidential Election*, CTR. FOR STRATEGIC & INT'L STUD. (June 3, 2025), <https://www.csis.org/analysis/implications-polands-presidential-election>.

475. See Stanley Bill & Ben Stanley, *Democracy After Illiberalism: A Warning from Poland*, 36 J. DEMOCRACY 16, 29–30 (2025).

476. Cynthia J. Arnson, *Introduction* to RICARDO GUILLERMO CASTANEDA ET AL., *EL SALVADOR'S DEMOCRATIC TRANSITION TEN YEARS AFTER THE PEACE ACCORD* vii, vii (Cynthia J. Arnson ed., 2003).

477. Rubén Zamora, *The Nature of the Political Transition: Advances and Setbacks in Democratic Consolidation*, in *EL SALVADOR'S DEMOCRATIC TRANSITION TEN YEARS AFTER THE PEACE ACCORD* 6, 6 (Cynthia J. Arnson ed., 2003).

478. José Miguel Cruz, *The Nature of the Political Transition: Advances and Setbacks in Democratic Consolidation*, in *EL SALVADOR'S DEMOCRATIC TRANSITION TEN YEARS AFTER THE PEACE ACCORD* 13, 13 (Cynthia J. Arnson ed., 2003).

479. Manuel Meléndez-Sánchez, *Latin America Erupts: Millennial Authoritarianism in El Salvador*, 32 J. DEMOCRACY 19, 24–25 (2021).

emergence of new parties.<sup>480</sup> This institutional framework resulted in a bipartisan political system with ARENA representing the right and the FMLN the left.<sup>481</sup>

Amnesty laws, absolving war crimes committed by both sides, followed the peace accords.<sup>482</sup> While Manuel Meléndez-Sánchez acknowledges that this measure constituted a setback in the application of transitional justice,<sup>483</sup> he also notes that it facilitated the democratization process by allowing “wartime leaders on both sides of the conflict to participate in the new democratic regime.”<sup>484</sup> As a result, El Salvador defied the well-known lesson of Von Clausewitz—who argued that war is merely the continuation of politics by other means—by enabling former combatants to assume key positions in subsequent governments.<sup>485</sup>

This transition led to a steady improvement in El Salvador’s democratic rankings. According to V-Dem metrics, El Salvador progressed from an electoral autocracy in 1993 to an electoral democracy by 2007.<sup>486</sup> The judiciary, previously subordinate to the executive,<sup>487</sup> experienced a gradual and sustained increase in its independence during this period.<sup>488</sup>

In the decade following the peace accords, El Salvador made notable advances in human rights protections, political participation, and institutional accountability.<sup>489</sup> However, as a resource-poor country without access to the Caribbean coast, El Salvador became increasingly reliant on remittances sent by emigrants seeking better economic opportunities abroad.<sup>490</sup> In the face of these structural challenges, neither ARENA nor the FMLN was able to propose effective policies to stimulate economic growth.<sup>491</sup> Rising corruption and violent crime further exacerbated these difficulties. A surge in criminal activity placed El Salvador among the most dangerous countries in the

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480. *Id.* at 25.

481. *Id.*

482. *Id.*

483. Which is not necessarily correct, as amnesties are included among the mechanisms of transitional justice. *Cf.* Geoff Dancy et al., *Behind Bars and Bargains: New Findings on Transitional Justice in Emerging Democracies*, 63 INT’L STUD. Q. 1, 7–8 (2019).

484. Meléndez-Sánchez, *supra* note 479, at 25.

485. *Id.*

486. DEMOCRACY REPORT 2025, *supra* note 7, at 52.

487. Laura Nuzzi O’Shaughnessy & Michael Dodson, *Political Bargaining and Democratic Transitions: A Comparison of Nicaragua and El Salvador*, 31 J. LAT. AM. STUD. 99, 107 (1999).

488. *Judicial Constraints on the Executive Index*, *supra* note 84.

489. Ricardo Guillermo Castaneda, *The Nature of the Political Transition: Advances and Setbacks in Democratic Consolidation*, in *EL SALVADOR’S DEMOCRATIC TRANSITION TEN YEARS AFTER THE PEACE ACCORD I*, 1 (Cynthia J. Arnson ed., 2003).

490. Forrest D. Colburn & Arturo Cruz, *El Salvador’s Beleaguered Democracy*, 25 J. DEMOCRACY 149, 152 (2014).

491. *Id.* at 156.

world.<sup>492</sup> As Forrest Colburn and Arturo Cruz observe, “[e]ven everyday activities such as riding a public bus can be dangerous” in a nation plagued by unchecked gang violence.<sup>493</sup>

The growing institutional independence of prosecutors and courts in El Salvador’s young democracy further exposed the severity of the situation. Beginning in 2014, high-ranking government officials faced corruption investigations for the first time. Former President Francisco Flores (1999–2004) and his chief of staff, both from the ARENA party, were arrested. Flores died two years later while under house arrest.<sup>494</sup> On the FMLN’s side, former President Mauricio Funes (2009–2014) sought asylum in Nicaragua to evade prosecution.<sup>495</sup>

Amid this context, trapped between the same old choices of ARENA and the FMLN—and constrained by the 1992 Electoral Code, which made the formation of new parties difficult—the Salvadoran population grew increasingly frustrated with the country’s political and social stagnation. This decline in party representativeness fueled broader dissatisfaction with the democratic system itself,<sup>496</sup> creating a political environment ripe for populist appeal.

Enter Nayib Bukele. Bukele launched his political career at the age of 30 when he was elected mayor of Nuevo Cuscatlán under the FMLN banner in 2012.<sup>497</sup> He held the position until 2015, when he was elected mayor of the capital, San Salvador.<sup>498</sup> From the outset of his political career, Bukele leveraged social media—especially Twitter (now X)—to cultivate his public image; a strategy that eventually earned him the nickname “millennial president.”<sup>499</sup>

Expelled from the FMLN in 2017 for his criticisms of the party leadership, Nayib Bukele quickly leveraged his popularity to form a new political party, New Ideas (*Nuevas Ideas*).<sup>500</sup> However, electoral laws prevented the party from fielding a candidate in the 2018 presidential election, prompting Bukele to run under the banner of the Grand Alliance for National Unity (*Gran Alianza por la Unidad Nacional*, GANA).<sup>501</sup>

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492. *Id.* at 154–55.

493. *Id.*

494. Meléndez-Sánchez, *supra* note 479, at 28.

495. *Id.*

496. *Id.* at 26–27.

497. Noelia Ruiz-Alba & Rosalba Mancinas-Chávez, *The Communications Strategy via Twitter of Nayib Bukele: The Millennial President of El Salvador*, 33 COMM’N & SOC’Y 259, 261 (2020).

498. *Id.*

499. *Id.* at 260.

500. Martin Nilsson, *Nayib Bukele: Populism and Autocratization, or a Very Popular Democratically Elected President?*, 12 J. GEOGRAPHY, POL. & SOC’Y 19, 19 (2022).

501. *Id.*

According to Martin Nilsson, Bukele's campaign already exhibited clear signs of his populist tendencies.<sup>502</sup> His rhetoric was characterized by an anti-pluralist discourse, frequent denunciations of the political establishment, and claims to represent the true will of the people.<sup>503</sup> Bukele's victory in the 2019 election, with a 21-percentage-point lead over his closest rival, made him "the only candidate not from ARENA or the FMLN to win the Salvadoran presidency since 1984."<sup>504</sup>

However, signs of Bukele's authoritarian tendencies were evident even before his 2019 election. As Meléndez-Sánchez notes, in 2016, Bukele mobilized supporters outside the Attorney General's Office to pressure him into stepping down.<sup>505</sup> In 2018, ahead of the presidential election, Bukele emulated Donald Trump's rhetoric by alleging—without evidence—that electoral authorities were planning to rig the vote against him.<sup>506</sup>

Beyond these incidents, Meléndez-Sánchez identified several other behaviors that align with Levitsky and Ziblatt's criteria for detecting authoritarianism, including: (1) rejection of or weak commitment to democratic norms; (2) delegitimization of political opponents; (3) tolerance or encouragement of violence; and (4) willingness to curtail civil liberties, including freedom of the press.<sup>507</sup> Among Bukele's actions curtailing freedom of the press were reductions in tax incentives for print media, verbal attacks on news outlets, and investigations into critical news websites. More generally, he also encouraged supporters to storm electoral authorities' offices and refused to recognize court rulings that limited executive power.<sup>508</sup>

One of the most striking demonstrations of Bukele's authoritarianism occurred in February 2020, ahead of the 2021 election that would later grant him an unprecedented supermajority in the Legislative Assembly. On that occasion, Bukele deployed military and security forces to occupy the Assembly.<sup>509</sup> Once inside, he sat in the chair reserved for the president of the legislature and demanded that lawmakers approve an international loan to fund his proposed socioeconomic reforms.<sup>510</sup> Before leaving, he issued a veiled ultimatum: "A week, gentlemen. In a week, we'll meet here."<sup>511</sup>

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502. *Id.*

503. *Id.* at 23; Meléndez-Sánchez, *supra* note 479, at 21.

504. Meléndez-Sánchez, *supra* note 479, at 20–21.

505. *Id.* at 22.

506. *Id.*

507. HOW DEMOCRACIES DIE, *supra* note 2, at 65–67.

508. Meléndez-Sánchez, *supra* note 479, at 22.

509. *Id.*

510. *Id.* at 21.

511. Carlos Martínez, *Ahora creo que está muy claro quién tiene el control de la situación* [Now I Think It's Very Clear Who Has Control of the Situation], EL FARO (Feb. 10, 2020),

At the time, the Supreme Court—still independent—declared Bukele’s actions unconstitutional and ordered him to refrain from using the military for political purposes.<sup>512</sup> However, Bukele continued to defy democratic norms. On another occasion, he openly challenged the authority of the Supreme Court, declaring that he would not comply with rulings from its Constitutional Chamber that opposed his pandemic-related policies.<sup>513</sup> Under Jack Balkin’s framework, such actions are hallmarks of constitutional crises.<sup>514</sup>

Despite these authoritarian moves, Bukele has maintained an approval rating above 75% since taking office in 2019.<sup>515</sup> The same, however, cannot be said for El Salvador’s democratic standing. The country’s democracy index, which peaked at 0.47 in 2017, has since plunged, reaching just 0.11 in 2023.<sup>516</sup>

By 2020, as he entered the second year of his five-year term, Bukele had already begun laying the groundwork for his reelection bid, despite the fact that El Salvador’s Constitution contains an eternity clause explicitly preventing the president from succeeding himself.<sup>517</sup> Seeking to obscure his true intentions, Bukele announced the creation of a commission tasked with studying, discussing, and potentially proposing constitutional reforms “according to the current needs of the society.”<sup>518</sup> This maneuver was met with criticism from both civil society and academia.<sup>519</sup>

The political landscape shifted dramatically after the February 2021 elections. With Bukele’s popularity still soaring, his party, New Ideas,

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[https://elfaro.net/es/202002/el\\_salvador/24006/"Ahora-creo-que-está-muy-claro-quién-tiene-el-control-de-la-situación".htm](https://elfaro.net/es/202002/el_salvador/24006/).

512. David Agren, *Nayib Bukele’s Military Stunt Raises Alarming Memories in El Salvador*, GUARDIAN (Feb. 16, 2020), <https://www.theguardian.com/world/2020/feb/16/el-salvador-nayib-bukele-military-alarming-memories>.

513. Sergio Arauz, *Nayib Bukele anuncia que no acatará órdenes de la Sala de lo Constitucional [Nayib Bukele Announces That He Will Not Comply With Orders From the Constitutional Chamber]*, EL FARO (Apr. 16, 2020), [https://elfaro.net/es/202004/el\\_salvador/24296/Nayib-Bukele-anuncia-que-no-acatará-órdenes-de-la-Sala-de-lo-Constitucional.htm](https://elfaro.net/es/202004/el_salvador/24296/Nayib-Bukele-anuncia-que-no-acatará-órdenes-de-la-Sala-de-lo-Constitucional.htm).

514. Balkin, *supra* note 9, at 148.

515. Eddie Galdamez, *Nayib Bukele’s Approval Rating: The President Achieves an 87% Approval in the Latest Survey*, EL SAL. INFO, <https://elsalvadorinfo.net/nayib-bukele-approval-rate/> (last updated Oct. 9, 2025).

516. *Liberal Democracy Index, 2024*, *supra* note 173. El Salvador’s scores during the interim were as follows: 0.43 (2018), 0.39 (2019), 0.31 (2020), 0.16 (2021), 0.12 (2022). *Id.*

517. Article 248 states: “Under no circumstances, may the articles of this Constitution, which refer to the form and system of government, to the territory of the Republic, and to the principle that a President cannot succeed himself (*alternabilidad*), be amended.” CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR June 28, 2014, art. 248 (El Sal.).

518. Manuel Merino, *El Salvador*, in THE 2020 INTERNATIONAL REVIEW OF CONSTITUTIONAL REFORM 105, 106 (Luis Roberto Barroso & Richard Albert eds., 2021).

519. Meléndez-Sánchez, *supra* note 479, at 19.

secured 56 of the 84 legislative seats, giving it a 66% majority.<sup>520</sup> In contrast, ARENA and the FMLN—parties that had governed El Salvador for nearly three decades—won only 19 seats combined, marking a disastrous defeat.<sup>521</sup>

Now fully in control of the legislature, Bukele's allies wasted no time. On the very day the newly elected Assembly was sworn in, lawmakers invoked a dubious constitutional prerogative to deliver a major blow to El Salvador's institutional independence; the removal of all five judges from the Supreme Court's Constitutional Chamber,<sup>522</sup> along with the Attorney General.<sup>523</sup>

The Supreme Court of El Salvador is composed of 15 judges divided into four chambers: (1) the Constitutional Chamber (five judges); (2) the Civil Chamber (three judges); (3) the Criminal Chamber (three judges); and (4) the Contentious-Administrative Chamber (four judges).<sup>524</sup> Bukele and his allies quickly appointed five new judges to the Constitutional Chamber.<sup>525</sup> Furthermore, in August 2021, the legislature passed laws mandating the removal of lower court judges over the age of 60.<sup>526</sup> These actions severely undermined judicial independence, causing El Salvador's judicial independence index to plummet from 0.5 in 2020 to 0.11 in 2021 and to 0.02 in 2024.<sup>527</sup>

Although these sweeping changes may appear unlawful, Nilsson argues that they were technically carried out within El Salvador's constitutional framework.<sup>528</sup> The real problem, he suggests, lies in the country's institutional design, which failed to anticipate the possibility of a single party or coalition simultaneously controlling the presidency and a two-thirds legislative majority.<sup>529</sup>

Now firmly under Bukele's control, the Constitutional Chamber became a tool for consolidating his hold on power. In September 2021, the Chamber ruled that Bukele could run for reelection.<sup>530</sup> This is where the legal interpretation becomes contentious. According to Nilsson, while El

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520. *Id.*

521. *Id.*

522. Merino, *supra* note 518, at 106.

523. Meléndez-Sánchez, *supra* note 479, at 19.

524. MNEESHA GELLMAN, THE DEMOCRACY CRISIS IN EL SALVADOR: AN OVERVIEW (2019–2022) 9 (Ctr. For Mex. & Cent. America, Reg'l Expert Paper Series No. 4, 2022).

525. *Id.*

526. *Id.*

527. *Judicial Constraints on the Executive Index*, *supra* note 84.

528. Nilsson, *supra* note 500, at 20.

529. *Id.* at 20–21.

530. *Id.* at 19.

Salvador's Constitution was designed to ensure the alternation of power, certain loopholes exist in its text.<sup>531</sup>

Specifically, Article 154 states: "The presidential period shall be five years, and shall begin and end on the first of June, without the person who has exercised the Presidency being able to continue in his functions one day more."<sup>532</sup> When Article 154 is read in conjunction with Article 152, it becomes possible to interpret that a president could resign a few months before an election and thus become eligible to run again. Article 152 stipulates:

[The following] shall not be candidates for the President of the Republic: 1st. He who has held the Presidency of the Republic for more than six months, consecutive or not, during the period immediately prior to or within the last six months prior to the beginning of the presidential term . . . .<sup>533</sup>

Despite acknowledging this loophole, Nilsson argues that Bukele's maneuver remains unacceptable because the Constitution's original intent was to establish single-term presidencies.<sup>534</sup> Moreover, the Supreme Court previously upheld a precedent requiring a ten-year interval before a former president could seek reelection.<sup>535</sup> In light of this, a lenient interpretation of the Court's ruling might classify it as an instance of constitutional hardball.<sup>536</sup> However, considering the fundamental principles of the Salvadoran Constitution, it is more accurately described as what Richard Albert terms a "constitutional dismemberment."<sup>537</sup>

El Salvador's autocratization deepened in the following years. Popular protests against Bukele's government were suppressed, journalists were targeted through Pegasus spyware surveillance,<sup>538</sup> and a mass incarceration campaign led to the imprisonment of more than 70,000 people, allegedly for gang affiliations or even for having certain tattoos.<sup>539</sup> In March 2022, Bukele declared a state of emergency to address the country's high crime rates—an

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531. *Id.* at 21.

532. CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR June 28, 2014, art. 154 (El Sal.).

533. Nilsson, *supra* note 500, at 21.

534. *Id.*

535. *Id.*

536. *Constitutional Hardball*, *supra* note 151, at 523.

537. ALBERT, *supra* note 374, at 31.

538. GELLMAN, *supra* note 524, at 8.

539. Graute, *supra* note 142.

action that, according to Graute, is highly questionable given its stated purpose.<sup>540</sup>

In 2024, Justice and Security Minister Gustavo Villatoro claimed that homicides had dropped by more than 70% in 2023, bringing the murder rate down from 8 per 100,000 inhabitants in 2022 to just 2.4 in 2023.<sup>541</sup> However, such claims, especially in an autocratic regime, should be approached with skepticism. More importantly, this assertion encapsulates the essence of illiberalism: the belief that national security can be achieved through the widespread erosion of fundamental rights.

At the end of 2022, Bukele began advocating for two structural reforms aimed at reducing both the number of municipalities in the country and the number of seats in the Legislative Assembly.<sup>542</sup> After some resistance from the opposition, both proposals were approved in June 2023.<sup>543</sup> As a result, the number of legislative seats was reduced from 84 to 60, while the number of municipalities was slashed from 262 to 44.<sup>544</sup> This measure represents a clear case of electoral manipulation, designed to further entrench Bukele's dominance.

By 2024, with no remaining institutional barriers to his candidacy, Bukele was reelected with more than 70% of the country's votes<sup>545</sup>—though under such conditions, one might question whether this can even be considered a real election.

#### *F. Israel's Constitutional Showdown*

In March 2024, when V-Dem's annual report classified Israel as an electoral democracy for the first time in 50 years,<sup>546</sup> the announcement was accompanied by contrasting news: the Israeli Supreme Court's (*Beit*

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540. *Id.*

541. See *El Salvador Says Murders Fell 70% in 2023 as It Cracked Down on Gangs*, REUTERS (Jan. 3, 2024), <https://www.reuters.com/world/americas/el-salvador-says-murders-fell-70-2023-it-cracked-down-gangs-2024-01-03/>.

542. *El Salvador President Wants to Cut the Number of Municipalities from 262 to 44*, AP (June 2, 2023), <https://apnews.com/article/el-salvador-nayib-bukele-municipalities-fcae596ca92455394df3decd0a8a0597>.

543. Nelson Renteria, *El Salvador Slashes Size of Congress Ahead of Elections*, REUTERS (June 7, 2023), <https://www.reuters.com/world/americas/el-salvador-slashes-size-congress-ahead-elections-2023-06-07/>.

544. *Freedom in the World 2024: El Salvador*, FREEDOM HOUSE, <https://freedomhouse.org/country/el-salvador/freedom-world/2024/> (last visited Dec. 14, 2025).

545. Mary Beth Sheridan & Carmen Valeria Escobar, *'World's Coolest Dictator' Reelected in El Salvador: What to Know*, WASH. POST, <https://www.washingtonpost.com/world/2024/02/03/el-salvador-election-nayib-bukele/> (last updated Feb. 5, 2024).

546. MARINA NORD ET AL., DEMOCRACY REPORT 2024: DEMOCRACY WINNING AND LOSING AT THE BALLOT 6 (2024); see DEMOCRACY REPORT 2025, *supra* note 7, at 16.

*haMishpat haElyon*) decision on January 1 to strike down Benjamin Netanyahu's government's judicial reform.<sup>547</sup> Understanding this clash, however, requires an examination of Israel's constitutional structure.

Established as a Jewish state, Israel was founded in 1948.<sup>548</sup> Its Declaration of Independence proclaimed that the country would be governed under a constitution. However, such a document was never formally drafted. According to Hanna Lerner, political disagreements over both its content and the process of its creation led to a deadlock.<sup>549</sup> The secular and religious factions were divided, unable to reach a consensus on various issues, so the Knesset (Parliament) adopted an incrementalist approach.<sup>550</sup> It opted to develop the constitutional framework gradually through Basic Laws.<sup>551</sup>

By the early 1990s, the Knesset had enacted nine Basic Laws, primarily addressing institutional and state organization matters; topics that, according to Lerner, provoked little controversy.<sup>552</sup> This dynamic shifted in 1992 when two Basic Laws on human rights were finally passed: one concerning dignity and liberty, and the other addressing freedom of occupation.<sup>553</sup> These provisions imposed limits on the Knesset's authority and guaranteed their enforcement through strong judicial review powers, marking the beginning of what became known as Israel's "constitutional revolution."<sup>554</sup>

Three years later, in *United Mizrahi Bank v. Migdal Cooperative Village*, the Supreme Court—under the presidency of Aharon Barak, a key architect of Israel's judicial expansion—further deepened this constitutional transformation.<sup>555</sup> According to Gideon Sapir, the Court leveraged these provisions to "create a full-fledged Bill of Rights,"<sup>556</sup> asserting that (1) the Basic Laws held a constitutional status superior to ordinary legislation and (2) the Court had the authority to strike down laws that conflicted with them.<sup>557</sup> As Roznai explains, this "extensive interpretation of the rights protected in the basic law together with a broad right of standing before the court and minimal justiciability restrictions," placed the Court on elevated footing compared to the political branches—an unprecedented

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547. HCJ 5658/23 Movement for Quality Government v. Knesset (2024) (Isr.) [English Translation].

548. HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 51 (2011).

549. *Id.* at 51–52.

550. *Id.*

551. *A Crisis of Liberal Democracy?*, *supra* note 101, at 358.

552. LERNER, *supra* note 548, at 71.

553. *A Crisis of Liberal Democracy?*, *supra* note 101, at 358.

554. *Id.*

555. *Id.*

556. Gideon Sapir, *Constitutional Revolutions: Israel as a Case-Study*, 5 INT'L J.L. CONTEXT 355, 355 (2009).

557. *Id.*

development.<sup>558</sup> This shift marked Israel's transition from a system of legislative supremacy—where Parliament had the final say on constitutional matters—to an era of constitutional dialogue, in which the Supreme Court now held the power to issue the final provisional ruling on such issues.

Following *United Mizrahi Bank*, the Israeli Supreme Court continued expanding its powers.<sup>559</sup> Through broad interpretation, it recognized aspects of equality and freedom of expression as inherent to human dignity, thereby granting constitutional status to rights that had been deliberately excluded from the 1992 Basic Laws.<sup>560</sup> Additionally, the Court developed the *reasonableness doctrine*, a standard of review enabling it to assess the substantive merits of government decisions.<sup>561</sup>

As a result, the Israeli Supreme Court came to be regarded as one of the most activist courts in the world.<sup>562</sup> According to Roznai, criticism of the Court's enlightened approach—prioritizing universal values over the will of the electorate—was further fueled by concerns over the homogeneity of its judicial composition.<sup>563</sup> Explaining this issue, Ran Hirschl stated:

[J]urists who are Opera-goers and Ha'aretz subscribers, whose mothers knew Yiddish, and who own an apartment or two in an upscale neighborhood are much more likely to get appointed to the Supreme Court than those who celebrate the Mimooona (a Northern-African Jewish feast), wear Tefillin (phylacteries) every weekday morning, speak fluent Arabic, were born in the former Soviet Union, or have a close family relative under the poverty line. As it happens, over two-thirds of the Israeli electorate falls into at least one of these categories.<sup>564</sup>

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558. *A Crisis of Liberal Democracy?*, *supra* note 101, at 358.

559. *Id.*

560. *Id.*

561. *Id.* at 4.

562. See MENACHEM MAUTNER, *LAW AND THE CULTURE OF ISRAEL*, at ix (2011) (beginning the foreword as follows: "This book tells the story of the Supreme Court widely regarded as the most activist in the world"). Richard Posner compared the expansions of judicial powers done by Aharon Barak to that of John Marshall. See generally Richard A. Posner, *Enlightened Despot*, *THE NEW REPUBLIC* (Apr. 23, 2007), <https://newrepublic.com/article/60919/enlightened-despot>. Barak was the president of the Israeli Supreme Court from 1995 to 2006 and was responsible for much of the constitutional revolution, similar to John Marshall. *Id.* Robert Bork referred to Barak's work in the following way: "In a word, Barak's court can turn ordinary legislation into a constitution, force it on the nation, and then announce that it can prevent any democratic amendment. In this, Barak surely establishes a world record for judicial hubris." Robert H. Bork, *Barak's Rule*, 27 *AZURE* 125, 131 (2007).

563. *A Crisis of Liberal Democracy?*, *supra* note 101, at 359–60.

564. Ran Hirschl, *The Socio-Political Origins of Israel's Juristocracy*, 16 *CONSTELLATIONS* 476, 487 (2009).

As a result, efforts to curb the Supreme Court's powers began to emerge. Doron Navot and Yoav Peled note that the first significant attempt occurred in 2007–2008, a few years after Aharon Barak's mandatory retirement. At the time, then-Justice Minister Daniel Friedman initiated reforms aimed at limiting judicial authority.<sup>565</sup> This marked the beginning of a broader trend that gained momentum from 2015 onward, during Netanyahu's second government.<sup>566</sup>

Netanyahu has served as Israel's prime minister for more than 15 years across three separate periods (1996–1999, 2009–2021, and 2022–present).<sup>567</sup> According to Roznai, unlike his first term, by 2015 Netanyahu was leading “the most right-wing government in the nation's history, pushing for national, traditional, and religious values, as well as the territorial integrity of Israel.”<sup>568</sup> Consequently, legislative proposals aimed at curtailing the authority of oversight institutions, including the Supreme Court, began to surface in the Knesset.<sup>569</sup>

A distinctive feature of Israel's legislative process, uncommon among the world's democracies, is the absence of a formal constitution to delineate the procedures for passing ordinary laws versus Basic Laws.<sup>570</sup> As a result, the exercise of constituent power is conflated with that of constituted power.<sup>571</sup> This means that constitutional norms can be amended by an absolute majority of the Legislature—provided they do not violate the material limits established by the Supreme Court.

The counterrevolution pursued by Netanyahu and his coalition operates on multiple fronts. While seeking to curtail the Supreme Court's authority over judicial review and access to the judiciary, they have also pushed for reforms to the judicial selection committee and the seniority-based process for appointing the Court's president. One such initiative involved a proposed Basic Law that, among other provisions, sought to concentrate judicial review authority exclusively in the Supreme Court, preventing lower courts from exercising this power.<sup>572</sup> While Roznai argues that this measure is not inherently problematic in isolation, he notes that when combined with other

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565. Doron Navot & Yoav Peled, *Towards a Constitutional Counter-Revolution in Israel?*, 16 *CONSTELLATIONS* 429, 429 (2009).

566. *o caso de Israel*, *supra* note 103.

567. *A Crisis of Liberal Democracy?*, *supra* note 101, at 362; Benjamin Netanyahu, *ENCYC. BRITANNICA*, <https://www.britannica.com/biography/Benjamin-Netanyahu> (Dec. 14, 2025).

568. *Id.* at 8.

569. *Id.* at 9.

570. LERNER, *supra* note 548, at 56.

571. *Id.*

572. *A Crisis of Liberal Democracy?*, *supra* note 101, at 363–64.

elements of the proposal, the broader intent becomes evident.<sup>573</sup> Other provisions included severe restrictions on the Court's institutional capacity, such as requiring a supermajority of justices to invalidate legislation and granting the Knesset the power to override Supreme Court rulings by a simple majority.<sup>574</sup> The Netanyahu government justified these proposals by arguing that the "constitutional revolution created a flaw in Israeli democracy that must be corrected."<sup>575</sup>

In December 2022, after being out of office for just over a year following his departure in mid-2021, Netanyahu was re-elected as Israel's prime minister.<sup>576</sup> Leading a right-wing nationalist coalition with 64 of the 120 Knesset seats, he now faced corruption and fraud charges that posed a direct threat to his political survival.<sup>577</sup> These factors contributed to the renewed push to weaken or, as some argue, to bring the Supreme Court under control with greater urgency.<sup>578</sup>

According to Roznai, Dixon, and Landau, in January 2023, Justice Minister Yariv Levin announced a sweeping set of legal reforms during a special press conference.<sup>579</sup> The first phase consisted of a package with six key elements, five of which imposed substantive restrictions on the Supreme Court's authority and that of other courts, while also altering the judicial selection process.<sup>580</sup>

The first element sought to limit judicial review.<sup>581</sup> Historically, all Israeli courts had the ability to review acts of the executive and legislature, albeit in a diffuse manner.<sup>582</sup> The reform aimed to centralize this power in the Supreme Court.<sup>583</sup> While this might seem reasonable in principle, its implementation was far from it: under the new framework, judicial review could only be exercised by the full 15-member bench, and striking down a law would require a supermajority of 12 justices.<sup>584</sup>

The second element stripped the Judiciary of its authority to review the constitutionality of Basic Laws.<sup>585</sup> The Supreme Court had previously established that even when enacting Basic Laws, the Knesset could not

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573. *Id.*

574. *Id.* at 9.

575. *Id.* at 15.

576. *o caso de Israel*, *supra* note 103.

577. *Id.*

578. *Id.*

579. *Judicial Reform or Abusive Constitutionalism*, *supra* note 90, at 295.

580. *Id.*

581. *Id.*

582. *Id.*

583. *Id.*

584. *Id.*

585. *Id.*

violate “the core values of the state as both Jewish and democratic”—effectively creating an implicit eternity clause.<sup>586</sup> Eliminating the Court’s ability to review Basic Laws would not only subject the population to unchecked parliamentary power, but would also be fundamentally at odds with modern constitutionalism.<sup>587</sup>

The third element introduced an override clause into Israeli law.<sup>588</sup> If passed, it would allow an absolute majority of the Knesset (61 out of 120 members) to override a Supreme Court ruling of unconstitutionality and reinstate the invalidated provision.<sup>589</sup> Combined with the supermajority requirement for judicial review, this reform would significantly undermine the Court’s authority, jeopardizing fundamental rights and freedoms while granting the executive near-unlimited power, particularly in Israel’s parliamentary system.<sup>590</sup>

The fourth element of the proposal abolished the reasonableness doctrine for reviewing administrative actions.<sup>591</sup> This standard, used by the Israeli Supreme Court, allows for judicial review of all administrative measures.<sup>592</sup> According to Roznai, Dixon, and Landau, while the Court intervenes only in extreme cases in practice, the broad scope of the standard grants it significant leeway for intervention.<sup>593</sup> From the executive’s perspective, the main concern appears to be the Court’s use of reasonableness to justify interventions in the appointment process, particularly regarding ministers.<sup>594</sup>

The fifth element aimed to reform the judicial selection committee.<sup>595</sup> Currently, Supreme Court justices in Israel are appointed by a nine-member committee comprising two Knesset members, three Supreme Court justices, two government ministers, and two representatives of the Israeli Bar Association.<sup>596</sup> Selections require a qualified majority of seven out of nine members, a structure that grants both the Legislature and the Court veto power, ensuring a balance of influence in the selection process.<sup>597</sup> The initial proposal sought to allow the ruling parliamentary coalition (which is

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586. *Id.*

587. *Id.*

588. *Id.*

589. *Id.*

590. *Id.* at 296.

591. *Id.*

592. *Id.*

593. *Id.*

594. *Id.*

595. *Id.*

596. *Id.*

597. *Id.*

controlled by the government) to appoint Supreme Court justices directly.<sup>598</sup> While this plan was later modified, the final provision still allowed for the unilateral appointment of two justices per government term.<sup>599</sup>

Finally, the sixth element restructured the process of appointing government and ministerial legal advisors.<sup>600</sup> Under the reform, the authority to oversee these appointments was transferred from an independent committee to a system of direct political appointments.<sup>601</sup> Additionally, the role of these advisors was downgraded from binding to non-binding, significantly reducing their ability to constrain government actions.<sup>602</sup>

The introduction of these proposals triggered an unprecedented wave of protests. Israelis repeatedly took to the streets in mass demonstrations against the government's efforts to weaken the Supreme Court.<sup>603</sup> Thousands of citizens—including academics and key figures from the country's economic elite—vocally opposed the proposed amendment to the Basic Law.<sup>604</sup> In an interview, Professor Yaniv Roznai discussed the role of academics in defending Israel's Supreme Court:

I believe that part of the advantage we have seen in terms of the size and intensity of the protests is due to the lessons we have learned from what happened in Poland and Hungary. As constitutional scholars, we have seen democratic erosion occur in other countries and we have been quick to recognize the warning signs. In the past three months, we have been doing an incredible amount of work to raise awareness about the potential implications of the proposed reform. We have given pro bono lectures all around the country, in private homes, schools, and high-tech companies. We have given interviews in the media, both in Israel and abroad, and have produced short videos to share on YouTube, TikTok, and other social media platforms. All of this work has been done to educate the public about the proposed changes and their potential impact.<sup>605</sup>

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598. *Id.*

599. *Id.*

600. *Id.*

601. *Id.*

602. *Id.*

603. *o caso de Israel*, *supra* note 103.

604. *Id.*

605. *Id.* For more information on the work developed by the academic community in Israel in defense of the Supreme Court, see Ittai Bar-Siman-Tov et al., *Scholactivism in the Service of Counter-Populism: The Case of Constitutional Overhaul in Israel*, 23 INT'L J. CONST. L. 1059, 1059–60 (2025).

Despite widespread resistance from civil society, the government pressed forward with its plans, and at the end of July 2023, it passed Amendment No. 3 to the Basic Law.<sup>606</sup> Amendment No. 3 prohibits those with judicial authority from invoking reasonableness as a basis for ruling on cases or issuing injunctions against the government, its ministers, or the prime minister.<sup>607</sup> The restriction also applies to decisions regarding appointments to official positions and the non-exercise of authority.<sup>608</sup>

According to Mordechai Kremnitzer, Amendment No. 3 must be understood in the context of the broader attempt to subjugate the Supreme Court to political power.<sup>609</sup> The government's objective is to free itself from judicial oversight, effectively granting the executive unchecked authority.<sup>610</sup> This, in turn, serves multiple strategic interests: (1) shielding Netanyahu in his corruption trial; (2) removing barriers to government corruption; (3) facilitating the coalition's territorial expansion into Palestinian areas; (4) eroding Israel's liberal foundations in favor of Jewish supremacy; and (5) securing ultra-Orthodox support by exempting them from mandatory military service.<sup>611</sup>

Kremnitzer argues that by legislating rules for judicial review, the Knesset is effectively setting standards for the scrutiny of its own actions—an inherent conflict of interest.<sup>612</sup> By stripping away part of the Supreme Court's oversight powers, Amendment No. 3 weakens the separation of powers, affecting what Adrian Vermeule would describe as “the baseline constitutional strategy for suppressing self-interested decision-making.”<sup>613</sup>

The reasonableness doctrine plays a crucial role in Israel's constitutional framework. At its core, reasonableness ensures that executive actions are legally authorized. “This authorization includes the duty of public officials to pursue the purposes underlying the authorizing law, striking the correct balance among them.”<sup>614</sup> According to Kremnitzer, this legal framework requires public officials to: (1) act in good faith in defense of the public interest; and (2) exercise responsibility, diligence, and sound judgment in

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606. Kremnitzer, *supra* note 161, at 344; Basic Law: The Judiciary (Amendment No. 3), 5783–2023, SH 3066 548 (Isr.), [https://fs.knesset.gov.il/25/law/25\\_lsr\\_2997865.pdf](https://fs.knesset.gov.il/25/law/25_lsr_2997865.pdf) [English version unavailable].

607. *Id.* at 351.

608. *Id.* at 344.

609. *Id.* at 346.

610. *Id.* at 344.

611. *Id.*

612. *Id.* at 345.

613. Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 405 (2001) [hereinafter *Veil of Ignorance Rules*].

614. Kremnitzer, *supra* note 161, at 345.

their decisions.<sup>615</sup> The second duty specifically mandates that public decisions consider all relevant factors—while disregarding extraneous or improper considerations.<sup>616</sup>

In this context, reasonableness serves two key functions. First, it evaluates whether the decision-making process itself was appropriate. This does not mean assessing whether the decision was correct, but rather whether it falls within the range of what would be expected from a reasonable public official. Second, reasonableness—closely tied to the principle of good faith—acts as a safeguard against harmful or arbitrary government decisions by focusing not on the personal motivations of decision-makers, but on the broader impact of their actions.<sup>617</sup>

When it comes to public appointments, the reasonableness doctrine helps prevent arbitrary or corrupt practices by ensuring that key positions are not filled with individuals who lack the necessary qualifications, have criminal convictions, or—due to their past conduct—would be unlikely to secure employment in either the private sector or a well-managed civil service.<sup>618</sup> At the same time, it upholds the principle of equal opportunity by enabling marginalized groups—such as Arabs, women, LGBTQ+ individuals, and Ashkenazim—to access public positions. By eliminating the Supreme Court’s ability to review the reasonableness of government appointments, Amendment No. 3 facilitates political favoritism, allowing unqualified loyalists to assume critical roles while making corruption easier to entrench.<sup>619</sup>

Aeyal Gross views this as a pivotal step in the government’s effort to tame the Supreme Court, affecting both its composition (subjective dimension) and its authority (objective dimension).<sup>620</sup> By restricting judicial review, the Knesset paves the way for altering the Judicial Selection Committee—the body responsible for appointing Supreme Court justices—allowing the government to reshape the Court in its favor.<sup>621</sup>

As the government struggles to implement this maneuver, largely due to political setbacks against the opposition, Justice Minister Yariv Levin has resorted to what appears to be constitutional hardball. Using his position on the Judicial Selection Committee, he has deliberately blocked the panel from convening to appoint new judges—including a replacement for former

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615. *Id.*

616. *Id.*

617. *Id.* at 346.

618. *Id.* at 348.

619. *Id.* at 349.

620. Aeyal Gross, *An Unreasonable Amendment*, VERFASSUNGBLOG (July 24, 2023), <https://verfassungsblog.de/an-unreasonable-amendment/>.

621. *Id.*

Supreme Court President Esther Hayut, who was mandatorily retired in October 2023.<sup>622</sup>

According to Kremnitzer, Amendment No. 3 carries enormous destructive potential.<sup>623</sup> It could enable the government to “dismantle liberal democracy” by: (1) exerting control over the media; (2) subordinating social welfare policies to the ruling coalition’s agenda; and (3) escalating violations of Palestinian rights in the occupied territories.<sup>624</sup> These measures, among others, threaten the foundational principles of Israel’s legal and political system, enabling the government to implement them with little resistance.<sup>625</sup>

Ultimately, Israel’s constitutional identity itself is at stake. Despite the 2018 Basic Law declaring Israel a Jewish state, the Supreme Court has continued to affirm Israel’s dual identity as both Jewish and democratic, emphasizing the principle of equal citizenship.<sup>626</sup> However, as Barak Medina and Ofra Bloch argue, Amendment No. 3 is part of an illegitimate attempt<sup>627</sup> “to transform Israel’s constitutional identity from a (limited) democratic and Jewish state into a state that is first and foremost Jewish, with no promise of equal citizenship.”<sup>628</sup>

However, in October 2023, Hamas launched the largest terrorist attack in Israel’s history, killing over 1,000 Israeli citizens.<sup>629</sup> In response, Benny Gantz and his National Unity Party joined the government to address the national emergency.<sup>630</sup> As part of their agreement, no law could be passed without the approval of both Netanyahu and Gantz.<sup>631</sup> While this arrangement might appear to have halted Netanyahu’s judicial reform, Amendment No. 3 had already been enacted two months earlier.<sup>632</sup>

As a result of the attack—and the subsequent war—the future of Netanyahu’s government beyond the conflict became uncertain. With the administration fully focused on the war effort, the Supreme Court appeared

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622. *Id.*

623. Kremnitzer, *supra* note 161, at 353.

624. *Id.* at 347.

625. *Id.*

626. *Id.* at 317.

627. Medina and Bloch’s approach to the legitimacy of the Amendment is social and representative in nature, and procedural and normative. *Cf.* Barak Medina & Ofra Bloch, *The Two Revolutions of Israel’s National Identity*, 56 *ISR. L. REV.* 305, 317–18 (2023).

628. *Id.*

629. *Israel Revises Down Toll from October 7 Attack to ‘Around 1,200’*, ALJAZEERA: NEWS (Nov. 10, 2023), <https://www.aljazeera.com/news/2023/11/10/israel-revises-death-toll-from-october-7-hamas-attack-to-1200-people>.

630. Aeyal Gross, *Did the Israeli Supreme Court Kill the Constitutional Coup?*, *VERRFASSUNGSBLOG* (Jan. 9, 2024), <https://verfassungsblog.de/did-the-israeli-supreme-court-kill-the-constitutional-coup/>.

631. *Id.*

632. *Id.*

to seize the moment to assert its authority. On the first day of 2024, the Court struck down Amendment No. 3 to the Basic Law.<sup>633</sup>

The ruling, decided by a narrow 8–7 majority, was authored by former Supreme Court President Esther Hayut.<sup>634</sup> Among the key takeaways, 12 of the 15 justices affirmed the Court’s power to invalidate Basic Laws that constitute an overreach of the Knesset’s constituent authority.<sup>635</sup> Of the remaining three justices, one argued that only extreme violations of fundamental rights could justify such intervention, while the other two rejected the notion that the Court had the authority to review Basic Laws at all.<sup>636</sup>

Now, the stage is set for the next move in this constitutional showdown.<sup>637</sup> Will Netanyahu muster the political strength to challenge the ruling and escalate the constitutional crisis? For now, the Supreme Court remains the only effective check on the power of the legislature.

### III. ANCHORING JUDICIAL INDEPENDENCE

It is the institutions that help us preserve decency. They need our help as well. Do not speak of “our institutions” unless you make them yours by acting on their behalf. Institutions do not protect themselves. They fall one after the other unless each is defended from the beginning. So, choose an institution you care about—a court, a newspaper, a law, a labor union—and take its side.<sup>638</sup>

The countries examined in the previous Part illustrate why autocrats and authoritarian actors, in general, have a particular interest in supreme and constitutional courts. The path to illiberalism almost invariably involves the subjugation of these institutions. In most of the cases analyzed, constitutional safeguards proved insufficient to preserve judicial independence.

Drawing from these experiences, I propose several strategies for protecting judicial institutions. My approach is divided into two dimensions: sociological and institutional. The sociological dimension examines how a

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633. *Id.*

634. Despite having retired in October 2023, the Court’s statute, in Article D § 15(a), allows its judges to sign decisions that will be issued up to three months after their retirement. Section 15(a), The Courts Law (Consolidated Version), 1984, LSI 38 271 (1983–1984), [https://www.nevo.co.il/law\\_html/law00/74849.htm](https://www.nevo.co.il/law_html/law00/74849.htm).

635. *See* HCJ 5658/23 Movement for Quality Government v. Knesset (2024) (Isr.) 36–37, 65–66, 131–33 [English Translation].

636. *Id.*

637. *Constitutional Showdowns*, *supra* note 300, at 991–92.

638. SNYDER, *supra* note 163, at 22.

court's own actions can undermine its credibility and weaken its role within a constitutional system.

The institutional dimension, in turn, consists of two approaches: preventive and repressive. The preventive approach explores aspects of constitutional design that can help safeguard courts, even in times of political turmoil. To develop this framework, I draw from both constitutional law and political philosophy. The repressive approach, on the other hand, presents arguments in defense of the judiciary's authority to strike down legal changes that could facilitate its subjugation.

#### *A. Paths to Build Sociological Legitimacy*

The wave of protests against judicial reform in Israel lasted over six months.<sup>639</sup> As Roznai observed, Israelis appear to have drawn lessons from Hungary and Poland regarding the implementation of illiberal projects.<sup>640</sup> This mobilization of civil society contributed to strengthening the Supreme Court, enabling it to invalidate Amendment No. 3 with significant public support.

A similar, albeit less intense, phenomenon occurred in Brazil under the Bolsonaro government. Pro-democracy demonstrations took place across multiple state capitals,<sup>641</sup> and a letter signed by more than 900,000 individuals was read at the Law School of the University of São Paulo.<sup>642</sup> Despite the damage caused by the January 8, 2023 attack on the headquarters of all three branches of government, the resilience of Brazilian democracy suggests that, like Israel, Brazil has learned valuable lessons in resisting authoritarian populism.

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639. See generally Bethan McKernan, *What Is Israel's Judicial Overhaul About and What Happens Next?*, GUARDIAN (Sept. 12, 2023), <https://www.theguardian.com/world/2023/jul/24/what-is-israel-judicial-overhaul-vote-about-what-happens-next>; Yasmeen Serhan, *After 29 Weeks of Protest, Israel Passes Landmark Legislation That Will Test Its Democracy*, TIME (July 24, 2023), <https://time.com/6297024/israel-judicial-reform-protest/>; Dan Williams, *Demographics and Grievances Jaundice Israel's Judicial Divide*, REUTERS (July 24, 2023), <https://www.reuters.com/world/middle-east/demographics-grievances-widen-israeli-judicial-divide-2023-07-24/>.

640. *o caso de Israel*, *supra* note 103.

641. *Capitais têm atos em defesa da democracia nuestra quinta-feira [Capital Cities Are Holding Events in Defense of Democracy This Thursday, the 11th]*, G1 (Aug. 11, 2022), <https://g1.globo.com/politica/eleicoes/2022/noticia/2022/08/11/ato-em-defesa-da-democracia-e-do-sistema-eleitoral-reune-artistas-juristas-empresarios-professores-no-brasil.ghtml>.

642. *Carta pela democracia é lida na USP, e ato tem protesto contra Bolsonaro [Letter in Favor of Democracy Is Read at USP, and the Event Includes a Protest Against Bolsonaro]*, CNN BRAZ. (Aug. 11, 2022), <https://www.cnnbrasil.com.br/politica/cartas-pela-democracia-sao-lidas-na-faculdade-de-direito-de-usp/>.

In Poland, despite PiS's extensive use of patronage politics, electoral law manipulation, and state media control,<sup>643</sup> the opposition led by Donald Tusk secured victory in the October 2023 elections.<sup>644</sup> Tusk's return to the prime ministership signals that, beyond learning from past mistakes, Poland may now be in a position to reverse what Sadurski termed a constitutional breakdown.<sup>645</sup>

Other courts worldwide have faced similar pressures. In Argentina, former President Alberto Fernández clashed with the Supreme Court over a budget allocation ruling.<sup>646</sup> After initially refusing to comply with the Court's decision,<sup>647</sup> Fernández announced impeachment proceedings against four justices, including Chief Justice Horacio Rosatti.<sup>648</sup> In the United States, the constitutional hardball tactics surrounding Merrick Garland's nomination resulted in an additional conservative seat on the Supreme Court. With a 6–3 conservative majority, the Court has increasingly shifted to the right, prompting discussions among scholars<sup>649</sup> and politicians<sup>650</sup> about court-packing as a potential countermeasure.

One key lesson from these events is sociological in nature, encapsulated by U.S. Supreme Court Chief Justice John Roberts's assertion that “public trust is essential, not incidental, to our function.”<sup>651</sup> Tomasz Tadeusz Koncewicz further elaborates on this argument, emphasizing that “[a]s important as institutions might be as focal points of the constitutional system, they have a chance of survival only when their institutional pedigree and prestige are built on the popular support of civil society.”<sup>652</sup>

What, then, can a court do to achieve public trust? The answer to this question has two dimensions: one endogenous and the other exogenous. The endogenous dimension concerns the court's own conduct and decision-

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643. Wojciech Sadurski, *Poland's Elections: Free, Perhaps, but Not Fair*, VERFASSUNGSBLOG (Sept. 20, 2023), <https://verfassungsblog.de/polands-elections-free-perhaps-but-not-fair/>.

644. *Id.*

645. POLAND'S CONSTITUTIONAL BREAKDOWN, *supra* note 90, at 29.

646. *Argentina President Rejects Supreme Court Ruling, Sparking Backlash*, REUTERS (Dec. 23, 2022), <https://www.reuters.com/world/americas/argentina-president-rejects-supreme-court-ruling-sparking-backlash-2022-12-23/>.

647. *Id.*

648. *Argentina President Seeks Impeachment of Supreme Court Chief*, ALJAZEERA (Jan. 3, 2023), <https://www.aljazeera.com/news/2023/1/3/argentina-president-seeks-impeachment-of-supreme-court-chief>.

649. Daly, *supra* note 129, at 1071–72; Weill, *supra* note 130, at 2710 & n.12.

650. Shail Kapur, *Democrats to Introduce Bill to Expand Supreme Court from 9 to 13 Justices*, NBC NEWS (Apr. 14, 2021), <https://www.nbcnews.com/politics/supreme-court/democrats-introduce-bill-expand-supreme-court-9-13-justices-n1264132>.

651. JOHN G. ROBERTS, 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3 (2021).

652. Koncewicz, *supra* note 431, at 118.

making. Courts must exercise their powers in a way that preserves their independence. Martin Shapiro argues that when constitutional designers entrust courts with conflict resolution, they inherently accept the institutional consequences of that choice—both positive and negative.<sup>653</sup> This includes the judiciary’s potential role in rulemaking and self-preservation. However, he cautions that “courts that owe their existence to democratic institutional choice must act prudently, or the choice may be withdrawn.”<sup>654</sup>

Taking a different approach, Barry Friedman links judicial authority to the concept of political capital.<sup>655</sup> He argues that a supreme court’s legitimacy depends on its ability to strategically allocate its accumulated political capital when making controversial rulings.<sup>656</sup> He illustrates this with *Bush v. Gore*, a case in which the U.S. Supreme Court effectively decided a presidential election.<sup>657</sup> Despite the case’s deep political implications, Friedman suggests that the Court’s political capital at the time was sufficient to ensure public acceptance of its decision.<sup>658</sup>

Other scholars, such as Theunis Roux, conceptualize judicial authority without relying on the notion of political capital.<sup>659</sup> Roux identifies two key components of judicial authority: independence and legal legitimacy. Independence refers to a court’s ability to demonstrate that its decisions are free from external pressures, particularly political interference.<sup>660</sup> Rather than being a binary trait (present or absent), independence exists on a spectrum, manifesting in varying degrees. Legal legitimacy, on the other hand, reflects a court’s ability to rule within a range of societal tolerance, thereby ensuring institutional respect and reinforcing its authority.<sup>661</sup>

In this context, a court that engages in constitutional hardball risks eroding public trust and weakening its authority. *Catimba Constitucional*, adapted from the broader concept of constitutional hardball, refers to actions that, while technically legal, violate the fundamental principles underlying a

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653. Martin Shapiro, *The European Court of Justice: Of Institutions and Democracy*, 32 *ISR. L. REV.* 3, 30 (1998).

654. *Id.* at 30.

655. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 358 (2009).

656. *Id.*

657. *Id.*

658. *Id.*

659. *See generally* THEUNIS ROUX, *THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995–2005* (2013) (attributing the notion of conceptualizing judicial authority without relying on the notion of political capital to scholar Theunis Roux).

660. *Id.* at 87.

661. *Id.* at 24, 85.

legal system.<sup>662</sup> As Rubens Glezer explains, when a court opportunistically alters its precedents or excessively intervenes in political affairs, its legitimacy suffers.<sup>663</sup> Likewise, perceptions of partisanship can further undermine judicial authority. For instance, public trust in the U.S. Supreme Court reached a historic low of 25% in 2022.<sup>664</sup> In polarized societies, such crises of confidence create fertile ground for increasing political influence over judicial appointments.<sup>665</sup>

Beyond the judiciary's own conduct, public trust in courts contains an exogenous dimension. From this perspective, courts may retain institutional protection not because of their actions, but despite them. In this scenario, courts may lack substantial political capital or even suffer a legitimacy deficit among segments of the population. Yet, this does not necessarily preclude democratic mobilization in their defense. The case of the Israeli Supreme Court exemplifies this dynamic. Despite facing widespread criticism, both the American and Israeli courts have benefited from significant public mobilization aimed at preserving their institutional integrity.

I believe this phenomenon is partly attributable to what can be termed *constitutional culture*. Following Jason Mazzone's framework, constitutional culture refers to the set of invisible forces that lead citizens to respect and uphold the constitutional order.<sup>666</sup> It is this sociological element that compels individuals to:

[A]ccept that they are governed by a written document, one that creates institutions of government and sets limits on what the government may do; the accepted belief that the governing charter is created by the citizenry; the knowledge that the charter is not timeless, but rather that the citizens may change it or revoke it under certain circumstances; and the understanding that until the charter is changed we are bound by it and required to go along with its ultimate results even though we are free to disagree with them.<sup>667</sup>

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662. RUBENS GLEZER, CATIMBA CONSTITUCIONAL: O STF DO ANTIJOGO À CRISE CONSTITUCIONAL [CONSTITUTIONAL GAMESMANSHIP: THE SUPREME COURT, FROM ANTI-GAMES TO CONSTITUTIONAL CRISIS] 33 (2021).

663. *Id.*

664. Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), <https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx>.

665. Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 262 (2019).

666. Jason Mazzone, *The Creation of a Constitutional Culture*, 40 TULSA L. REV. 671, 672 (2005).

667. *Id.*

Andrew Siegel’s work provides a valuable framework for understanding this concept. He describes constitutional culture as “the black box through which the Constitution’s words are transformed into concrete consequences.”<sup>668</sup> While acknowledging the difficulty of defining the term precisely, Siegel characterizes constitutional culture as “an interlocking system of practices, institutional arrangements, norms, and habits of thought that determine what questions we ask, what arguments we credit, how we process disputes, and how we resolve those disputes.”<sup>669</sup>

This constitutional culture played a key role in motivating the Israeli population to take to the streets in defense of their Supreme Court. A similar phenomenon occurred in Brazil, where popular support played a crucial role in shielding the Supreme Federal Court from political attacks. This is not to deny that many demonstrators may have had partisan motivations, but rather to recognize that the successful defense of an institution, like an apex court, requires a level of support that transcends ideological divides.

For such a mobilization to be possible, there must be a shared understanding that, despite any flaws a given court may have, an independent judiciary remains a better alternative than one that has been politically subdued. This fundamental belief in the necessity of judicial independence—despite imperfections—is a direct product of constitutional culture.

### *B. A Few Lessons of Constitutional Design*

Supreme and constitutional courts can also be safeguarded institutionally—often the most common approach to ensuring their independence. Both ordinary and constitutional legislators can establish protective mechanisms to limit efforts aimed at subjugating the judiciary. In this Part, I explore how constitutional design can be leveraged to deter and mitigate the destructive potential of ill-intentioned actors.

#### 1. Avoiding the Sirens

In 1791, during the French Revolution, the National Constituent Assembly concentrated both original and derived constituent powers. According to Jon Elster, this arrangement created an inherent conflict of interest between these powers.<sup>670</sup> By holding both responsibilities, the

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<sup>668</sup>. Andrew M. Siegel, *Constitutional Theory, Constitutional Culture*, 18 J. CONST. L. 1067, 1107 (2016).

<sup>669</sup>. *Id.*

<sup>670</sup>. JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 140 (2000).

Assembly effectively acted as a judge in its own cause because it was tasked with balancing power between the Legislative and Executive Branches while simultaneously possessing the authority to determine its own future powers. This dynamic created an incentive for the Assembly to grant excessive authority to the Legislature.<sup>671</sup>

In response to this concern, Maximilien Robespierre addressed the Assembly advocating for a “self-denying ordinance.”<sup>672</sup> His argument prevailed, leading the constituents to adopt a clause rendering them ineligible for the first ordinary election immediately following the drafting of the constitution.<sup>673</sup>

This type of safeguard exemplifies what Elster refers to as *pre-commitment*—a constraint that an agent imposes on itself in the present to secure long-term benefits.<sup>674</sup> To illustrate this concept, Elster invokes the Odyssey and the episode of Ulysses and the Sirens.<sup>675</sup> Aware that he would soon pass through waters inhabited by these mythical creatures, whose song lured sailors to their deaths, Ulysses took precautionary measures: he ordered his crew to plug their ears with wax, ensuring they would not succumb to temptation.<sup>676</sup> However, desiring to hear the Sirens’ song himself, he instructed his sailors to bind him to the mast and ignore his pleas to be released.<sup>677</sup>

Similarly, pre-commitments can take the form of eternity clauses in constitutions. Just as Ulysses made his decision while in a rational state of mind, constitutional designers establish pre-commitments during moments of stability to protect foundational elements of the constitution during times of social or political upheaval. Thus, even if an ill-intentioned actor manages to rally widespread public support—akin to the Sirens’ song—the constitution remains safeguarded,<sup>678</sup> barring a full-scale revolution.<sup>679</sup>

While pre-commitments can exist independently of constitutional design, they have increasingly been integrated into it. Constitutional framers must therefore establish rules that enhance the rationality of the system and minimize self-interest in governmental decision-making. This can be

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671. *Id.*

672. *Id.* at 141.

673. *Id.*

674. *Id.* at 142.

675. *Id.* at 94.

676. *Id.*

677. *Id.*

678. Lenio Luiz Streck, *Entre fetiches por ditadura e vivandeirismo, o que o Direito pode fazer?* [Between Fetishes for Dictatorship and Camp Worship, What Can the Law Do?], CONSULTOR JURÍDICO (Apr. 18, 2022), <https://www.conjur.com.br/2022-abr-18/streck-entre-fetiches-vivandeirismo-direito/>.

679. ELSTER, *supra* note 670, at 94.

achieved through broad structural choices—such as opting for a presidential or parliamentary system—or through more specific measures concerning the composition, powers, and appointment procedures of a constitutional court. The latter set of protections warrants particular attention.

Observing the factors that contributed to the erosion of Poland's Constitutional Court and the decline in public trust in the U.S. Supreme Court, Konrad Duden proposed reforms to strengthen the German Federal Constitutional Court.<sup>680</sup> He warned that a simple majority in the Bundestag could be used to manipulate the Court's composition and authority.<sup>681</sup> According to Duden, key elements such as the duration of judicial terms and the voting threshold required for judicial appointments are not enshrined in Article 94 of Germany's Basic Law; instead, they are regulated by the Federal Constitutional Court Act—making them more vulnerable to political interference.<sup>682</sup>

To address this vulnerability, Duden recommended that Germany introduce stronger protections for its Constitutional Court.<sup>683</sup> First, he argued that changes affecting the Court's independence should not be left to simple parliamentary majorities.<sup>684</sup> Instead, the provisions governing the Court's structure and operation should be entrenched in the Constitution itself.<sup>685</sup> Additionally, he suggested that any modifications to these provisions should require either a qualified parliamentary majority or approval from the Court itself.<sup>686</sup>

In December 2024, taking into account both external threats and internal developments—particularly the rise of the far-right Alternative for Germany (*Alternative für Deutschland*), widely regarded as an extremist party—German lawmakers adopted part of these recommendations.<sup>687</sup> By an overwhelming majority of 600 to 69, they amended the Constitution to entrench the rules governing the Constitutional Court.<sup>688</sup> As a result, any future changes to these provisions now require a two-thirds parliamentary majority, significantly raising the threshold for potential manipulation.<sup>689</sup>

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680. Konrad Duden, *Protect the German Federal Constitutional Court!*, VERFASSUNGSBLOG (Feb. 13, 2024), <https://verfassungsblog.de/protect-the-german-federal-constitutional-court/>.

681. *Id.*

682. *Id.*

683. *Id.*

684. *Id.*

685. *Id.*

686. *Id.*

687. *German Lawmakers Back Plan to Protect Supreme Court Against Meddling by Authoritarians, Extremists*, AP (Dec. 19, 2024), <https://apnews.com/article/germany-constitutional-court-protection-vote-parliament-3b9a3c3966f6ac5e52d87f57c4f2b05f>.

688. *Id.*

689. *Id.*

## 2. Courts on the Top

The use of qualified majorities in constitutional design can be structured in layers, as Landau and Dixon explain. Their tiered constitutional design approach seeks to integrate the strengths of two predominant constitutional models: one characterized by conciseness, abstraction, and rigidity, and the other by extensive detail and flexibility.<sup>690</sup>

By combining “the virtues of rigidity and flexibility,” tiered constitutional design establishes a constitutional amendment framework with varying rules depending on the significance of each constitutional provision.<sup>691</sup> This model helps mitigate some of the weaknesses of more traditional approaches. For instance, the U.S. Constitution has endured for over 200 years in part due to the strict amendment procedures outlined in Article V.<sup>692</sup> However, this rigidity has also made it extraordinarily difficult to modernize, preventing democratic forces from incorporating contemporary principles into its text.<sup>693</sup> Conversely, constitutions that are rigid in theory but highly amendable in practice—such as Brazil’s, which has been amended more than 140 times in just 37 years—could benefit from a tiered amendment system.<sup>694</sup> Such a system would serve two key purposes: first, it would allow less fundamental issues to be modified with relative ease, and second, it would prevent excessive amendments from eroding public trust in the constitutional framework.<sup>695</sup>

When applied to judicial protection, this approach could be used to impose stricter amendment procedures on provisions related to judicial independence. Safeguards such as judicial irremovability, tenure security, retirement age, appointment procedures, and the scope of constitutional courts’ authority, if adequately protected, can serve as a shield against antidemocratic encroachments.

I use the word *can* here for a pragmatic reason: no legal safeguard is entirely insurmountable to political power—a reality well understood by

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690. Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 GEO. WASH. L. REV. 438, 440 (2018) [hereinafter *Tiered Constitutional Design*].

691. *Id.* at 438.

692. Article V stipulates that, to be approved, constitutional amendments must receive two-thirds of the votes in each house of Congress and three-quarters of the votes in the State Legislatures. U.S. CONST. art. V.

693. *Tiered Constitutional Design*, *supra* note 690, at 440.

694. *Id.*; *Parlamentares aprovaram 14 emendas à Constituição em 2022* [Lawmakers Approved 14 Amendments to the Constitution in 2022], CÂMARA DOS DEPUTADOS (Dec. 27, 2022), <https://www.camara.leg.br/noticias/931900-parlamentares-aprovaram-14-emendas-a-constituicao-em-2022/>.

695. *See* ALBERT, *supra* note 374, at 43.

scholars of the *state of exception*.<sup>696</sup> While we can design the most effective legal mechanisms available to preserve democracy, the law itself has limits. Ultimately, it is up to constitutional legislators to adopt the most robust protections possible for democratic institutions—and hope they prove sufficient.

Despite these limitations—and an acknowledgment of the model’s imperfections—Landau and Dixon argue that tiered constitutional design can serve as a useful tool in resisting the global third wave of illiberalism.<sup>697</sup> This trend, identified by Anna Lührmann and Staffan I. Lindberg, has been unfolding since the 1990s.<sup>698</sup>

### 3. Blinding the Decisionmakers

Constitutional design can also safeguard courts by introducing uncertainty into the political equation—what Adrian Vermeule refers to as applying the *veil of ignorance* to constitutional law.<sup>699</sup> Rules based on the veil of ignorance subject decision-makers to “uncertainty about the distribution of benefits and burdens that will result from a decision.”<sup>700</sup> The benefits of the veil of ignorance can be achieved in two ways: (1) ensuring that decision-makers do not know their future identities and attributes, and (2) preventing them from knowing whether they will ultimately benefit from the rules they establish.<sup>701</sup>

By incorporating veil of ignorance rules into constitutions, constitutional designers can curb self-interest and promote impartial decision-making. Consider the example of presidential succession rules. Imagine a constitution that fails to specify a clear line of succession in the event that a sitting president becomes unable to perform their duties. Such an omission could lead to a constitutional crisis, with competing political factions vying for control of the presidency. Until a resolution is reached, the country would be left leaderless, creating instability and governance paralysis. By introducing explicit succession rules,<sup>702</sup> constitutional designers provide a universally acceptable solution, as the predetermined order of succession applies regardless of who holds the office.

Examples of veil of ignorance rules can be found in several constitutions worldwide. The Brazilian Constitution, for instance, establishes the

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696. GIORGIO AGAMBEN, *ESTADO DE EXCEÇÃO* 20 (Iraci D. Poleti trans., 2d ed. 2004).

697. *Tiered Constitutional Design*, *supra* note 690, at 503.

698. Lührmann & Lindberg, *supra* note 3, at 1102.

699. *Veil of Ignorance Rules*, *supra* note 613, at 399.

700. *Id.* at 399.

701. *Id.*

702. *Id.* at 400–01.

presidential line of succession in Article 80 for cases where both the President and Vice President are unable to serve. It designates the following order: the President of the Chamber of Deputies, followed by the President of the Federal Senate, and then the President of the Supreme Federal Court.<sup>703</sup> A similar approach was used in Venezuela's 1961 Constitution, which remained in effect until it was replaced following the Constituent Assembly convened by Hugo Chávez.<sup>704</sup> Articles 186, 187, and 188 of that Constitution regulated presidential succession using veil of ignorance rules, as does Article 106 of the Turkish Constitution.<sup>705</sup>

In the context of the third wave of autocratization, societies<sup>706</sup>—especially those experiencing high levels of political polarization—can leverage the veil of ignorance to craft rules that limit the ability of authoritarian actors to manipulate constitutional courts. For example, if a president seeks to expand the number of seats on a constitutional court, the constitution could stipulate that any such expansion will only take effect in the next presidential term. This provision forces the incumbent to confront the possibility that their political rival, rather than themselves, may ultimately benefit from the change.

The veil of ignorance can also serve as a safeguard against court taming in other forms. Constitutional provisions can mandate that any changes affecting a court's jurisdiction or authority take effect only in the subsequent legislative or judicial term. Similarly, in cases where a government attempts to lower the mandatory retirement age for judges—effectively enabling the appointment of new justices aligned with the ruling party—the constitution can impose a delay on such changes, ensuring they do not immediately grant the executive branch a majority on the court.

### C. *Emergency Hermeneutics*

Thus far, I have examined preventive measures aimed at shielding supreme and constitutional courts from political subjugation. However, the process of judicial taming does not always occur abruptly. This raises a crucial question: What should be done when preventive mechanisms fail?

In such situations, courts must assert their authority to preserve their independence. The argument here is that supreme and constitutional courts, when facing an active taming process, possess the power to invalidate acts,

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703. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 40 (Braz.).

704. CONSTITUCIÓN DE LA REPÚBLICA DE VENEZUELA Jan. 23, 1961, art. 187 (Ven.).

705. Türkiye Cumhuriyeti Anayasası [Constitution of the Republic of Türkiye], Nov. 9, 1982, art. 106 (as amended by Act No. 6771, April 16, 2017) (Turk.).

706. Lührmann & Lindberg, *supra* note 3, at 1095.

laws, and even constitutional amendments that threaten their constitutionally assigned functions.

This proposal, however, carries the inherent risk of expanding judicial authority—an issue that cannot be overlooked. For this reason, I seek to establish interpretative parameters that courts can follow when exercising these exceptional powers. While no framework is perfect, I hope this approach introduces a degree of rationality into the process.

Suzie Navot highlights a key characteristic of democratic backsliding: no single law, amendment, or provision typically delivers a fatal blow to democracy.<sup>707</sup> Rather, the cumulative effect of multiple legal maneuvers leads to systemic decay.<sup>708</sup> “It is the big picture, the whole series of legal moves, that brings about a fundamental change in the state’s regime until it is no longer a liberal democracy.”<sup>709</sup>

The process of court taming often mirrors the gradual demise of democratic institutions. In Hungary, for example, Fidesz initiated its power grab with a constitutional overhaul. This was followed by changes in judicial appointment procedures, a reduction in judges’ retirement age, and the establishment of the National Judicial Office—incrementally stripping the Constitutional Court of its independence.<sup>710</sup> A similar pattern unfolded in Poland, where successive legislative changes gradually eroded the Constitutional Court’s authority.<sup>711</sup>

Against this backdrop, the actions of the Israeli Supreme Court illustrate the argument advanced here. In an extensive ruling spanning hundreds of pages, the Court concluded that the amendment approved by the Netanyahu government fundamentally undermined its ability to fulfill its constitutional role as a check on government power.<sup>712</sup>

For courts to act in self-defense, the first step is recognizing their authority to strike down not only ordinary legislation but also constitutional amendments that threaten judicial independence. While judicial review of ordinary laws is a cornerstone of liberal constitutionalism—a power explicitly granted in many legal systems—the power to invalidate constitutional amendments is far less common.

Nevertheless, some courts have asserted this authority through interpretative reasoning. The Brazilian Supreme Federal Court, the Supreme

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707. Suzie Navot, *An Overview of Israel’s ‘Judicial Overhaul’: Small Parts of a Big Populist Picture*, 56 *ISR. L. REV.* 482, 483 (2023).

708. *Id.*

709. *Id.* at 482.

710. *See supra* Part II.C.

711. *See supra* Part II.D.

712. *See* HCJ 5658/23 *Movement for Quality Government v. Knesset* (2024) (Isr.) [English Translation].

Court of India, and the Israeli Supreme Court have each claimed the power to review and invalidate constitutional amendments that violate fundamental constitutional principles.<sup>713</sup>

The Brazilian case stands out due to its incorporation of eternity clauses. Article 60, Section 4 of the 1988 Constitution explicitly prohibits amendments that tend to abolish core democratic principles: federalism, the separation of powers, and individual rights.<sup>714</sup> This provision has enabled the Supreme Federal Court to assert its authority to strike down constitutional amendments deemed materially incompatible with these fundamental principles.<sup>715</sup>

In constitutional systems with tiered amendment procedures, there is an implicit recognition of a hierarchy of constitutional values—a concept Richard Albert refers to as the *symbolic function of amendment rules*.<sup>716</sup> For example, Cuba’s Constitution enshrines socialism as an immutable principle, signaling the regime’s core ideological commitment.<sup>717</sup> Similarly, South Africa’s Constitution establishes three levels of amendment procedures, with the most stringent requirements reserved for provisions defining the country’s fundamental values.<sup>718</sup>

India’s Supreme Court, however, claimed the power to invalidate constitutional amendments despite the absence of explicit eternity clauses or tiered amendment rules.<sup>719</sup> In *Kesavananda Bharati v. State of Kerala*, the Court ruled that the power to amend the Constitution does not extend to altering its basic structure.<sup>720</sup> This doctrine has since enabled the Indian Supreme Court to hear cases involving judicial independence, including decisions on the process of judicial appointments.<sup>721</sup>

Remarkably, even after India’s democratic decline under Narendra Modi, the Supreme Court has continued to exert significant constraints on the executive<sup>722</sup>—making India an outlier among countries that experienced autocratization without their courts being fully captured.

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713. S.T.F, Ação Direta De Inconstitucionalidade No. 5. 105/DF, Relator: Min. Luiz Fux, 1.10.2015, Diário da Justiça [D.J.], 1.10.2015, 1, 37 (Braz.).

714. CONSTITUIÇÃO FEDERAL [C.F.][CONSTITUTION] art. 60 (Braz.).

715. S.T.F, Ação Direta De Inconstitucionalidade No. 5. 105/DF, Relator: Min. Luiz Fux, 1.10.2015, Diário da Justiça [D.J.], 1.10.2015, 1, 37 (Braz.).

716. ALBERT, *supra* note 374, at 47.

717. *Id.* at 47–48.

718. *Id.* at 48–49.

719. *Kesavananda Bharati Sripadagalvaru v. State of Kerala*, (1973) 4 SCC 225 (India).

720. *Id.*

721. Rangin Pallav Tripathy, *Unveiling India’s Supreme Court Collegium: Examining Diversity of Presence and Influence*, 18 ASIAN J. COMP. L. 179, 179 (2023).

722. Since the 1970s, India’s score on the Judicial Constraints on the Executive Index has remained above 0.7, reaching 0.8 in the 1990s and maintaining that level until 2014, when it started to

As Yaniv Roznai notes, *Kesavananda Bharati* did not specify a definitive list of untouchable constitutional principles.<sup>723</sup> However, subsequent jurisprudence has clarified that the basic structure doctrine protects elements such as constitutional supremacy, the rule of law, separation of powers, judicial review, judicial independence, human dignity, national unity, free and fair elections, federalism, and secularism.<sup>724</sup>

Similarly, on January 1, 2024, the Israeli Supreme Court recognized its authority to invalidate amendments to Israel's Basic Law.<sup>725</sup> Like India, the Israeli Supreme Court effectively judicially created an unalterable constitutional principle, asserting that the country's identity as a Jewish and democratic state cannot be legislatively undermined.<sup>726</sup>

The histories of these countries share a crucial element that, to some extent, legitimized their Supreme Courts' bold actions: a foundational commitment to liberal democracy. In Brazil, for instance, Article 1 of the 1988 Federal Constitution explicitly defines the country as a Democratic State of Law.<sup>727</sup> Additionally, its eternity clauses in Article 60, Section 4 enshrine core principles of liberal democracy, such as the separation of powers and the protection of individual rights and guarantees.<sup>728</sup> Similarly, India declares itself a Democratic Republic in its preamble, affirming its duty to uphold fundamental democratic principles such as liberty, equality, and fraternity.<sup>729</sup> Turkey's Constitution also makes an explicit commitment to liberal democracy, a theme reiterated throughout its text.<sup>730</sup>

Israel, in turn, affirms its democratic character in Articles 1A of the Basic Law: Human Dignity and Liberty and 7A of the Basic Law: The Knesset.<sup>731</sup> The latter provision goes even further by barring candidates whose actions—express or implied—deny Israel's status as a Jewish and

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decline. In the most recent evaluation (2023), the index recorded 0.71, continuing the downward trend. See *Judicial Constraints on the Executive Index*, *supra* note 84.

723. YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 46 (2017).

724. *Id.* at 46–47.

725. HCJ 5658/23 Movement for Quality Government v. Knesset (2024) (Isr.) [English Translation].

726. See *supra* Part II.F.

727. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 1 (Braz.).

728. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 60 (Braz.).

729. India Const. pmb1.

730. Türkiye Cumhuriyeti Anayasası [Constitution of the Republic of Türkiye], Nov. 9, 1982, art. 2 (Turk.).

731. Basic Law: Human Dignity and Liberty art. 1A, 5752–1992, LSI 45 150 (1991–1992) (Isr.) [English Translation]. Article 1A states: “The purpose of this Basic Law is to protect human dignity and liberty, in order to embed the values of the State of Israel as a Jewish and democratic state, in a basic law.” *Id.* § 1A.

democratic state.<sup>732</sup> The Polish Constitution similarly recognizes the democratic nature of its government and explicitly commits to the rule of law.<sup>733</sup> In El Salvador, the Constitution defines the government as republican, democratic, and representative.<sup>734</sup> Even Hungary's Constitution—drafted under Viktor Orbán's government—retains formal commitments to democracy and the rule of law.<sup>735</sup>

Why do autocratic regimes continue to include democratic commitments in their constitutions? The answer has both domestic and international dimensions, but in both cases, it can be summarized in a single word: legitimacy. Only the people can confer legitimacy on a regime, which is why even authoritarian leaders feel compelled to maintain the illusion that they govern in the people's name.

This creates an inherent contradiction. A leader cannot claim the legitimacy of democracy while simultaneously dismantling the principles that sustain it. Allowing such a scenario effectively renders constitutional commitments meaningless, stripping them of any normative force and undermining the very system they were designed to uphold.

In this context, it is essential to understand that liberal democracy, the rule of law, and modern constitutionalism are co-original—in the Habermasian sense.<sup>736</sup> Emerging from liberal revolutions, these concepts developed together and cannot be meaningfully separated. Systems that incorporate some of these elements while rejecting others inevitably become dysfunctional from a democratic perspective.

While democracy itself may be an essentially contested concept,<sup>737</sup> the notion of liberal democracy carries certain non-negotiable elements. Rosalind Dixon and David Landau refer to this as the democratic *minimum core*, a concept derived from the overlapping provisions found in constitutional democracies worldwide.<sup>738</sup> In essence, the democratic minimum core consists of: (1) a commitment to free, fair, and regular multiparty elections; (2) political freedoms and rights; and (3) a system of

732. Basic Law: The Knesset art. 7A, 5746–1985, LSI 39 216 (1984–1985) (Isr.) [English Translation].

733. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] art. 2 (Pol.).

734. CONSTITUTION OF THE REPUBLIC OF EL SALVADOR [CONSTITUTION] 1983, art. 85 (El Sal.).

735. MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, art. B(1).

736. Habermas uses co-originality to explain that popular sovereignty and fundamental rights—public and private autonomy—are mutually presupposing and equally basic, so that neither can be derived from or subordinated to the other. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 104 (William Rehg trans., 1996) (1992).

737. W. B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167, 168 (1956).

738. ABUSIVE CONSTITUTIONAL BORROWING, *supra* note 74, at 27.

checks and balances necessary to preserve the previous items.<sup>739</sup> Under this framework, a constitutional court may invalidate changes to its structure if the changes, either individually or cumulatively, result in a violation of the democratic minimum core.<sup>740</sup>

How would this principle function in practice? Consider a scenario in which a president proposes reforms to the U.S. Supreme Court, including changes to its authority and an expansion of its membership from 9 to 15 justices. If these reforms are likely to disrupt the separation of powers—subjecting the Court to presidential influence or impairing its ability to function independently—the Court could justifiably declare them unconstitutional.

However, does this mean that expanding the Supreme Court from 9 to 15 members is inherently unconstitutional? Not necessarily. If none of the existing justices were appointed by the president proposing the reform, or if the proposed changes did not undermine the Court’s institutional capacities, the reform might be acceptable. The evaluation must be contextual, considering not just the reform in isolation but its systemic impact on the constitutional order.<sup>741</sup>

Well-intentioned political actors can implement similar reforms while preserving democratic integrity. One way to achieve this is by distributing the reform’s effects over time to prevent an immediate imbalance of power. For example, if a president wishes to expand the Court, they could stipulate that the first two new seats be filled immediately, while the remaining four are allocated across subsequent presidential terms. Introducing uncertainty—in this case, the possibility that the president will not be re-elected—removes the taint of self-interest from the proposal, thereby strengthening its legitimacy. By ensuring that political opponents might also benefit from the reform, the proposal becomes more difficult to interpret as an attempt to undermine judicial independence.<sup>742</sup>

For these reasons, I consider court-packing inherently illegitimate, even when justified as an effort to enhance democracy. Court-packing inherently assumes that newly appointed judges will be politically aligned with those who appointed them—creating a far greater threat to the separation of powers than a court composed of judges who may, to some degree, be resistant to democratic ideals.

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739. *Judicial Reform or Abusive Constitutionalism*, *supra* note 90, at 294.

740. *Id.*

741. *Id.*

742. *Veil of Ignorance Rules*, *supra* note 613, at 399–400.

*D. Key Takeaways*

A key conclusion from this Article is that there is no universal model for safeguarding constitutional courts and democracy. The rules designed to protect judicial independence must be tailored to the specific legal and political contexts of each country. This personalized approach, informed by the case studies examined, underscores the importance of solutions adapted to the unique constitutional frameworks and societal dynamics of each nation.

No single model, on its own, is sufficient to guarantee the protection of constitutional courts. However, when combined, these mechanisms can create a robust defense against authoritarian encroachments. Even so, constitutional design is not infallible; in moments of crisis, it may fail, necessitating recourse to emergency hermeneutics. Yet such measures can only be sustained with strong public support. This is because, in times of constitutional abnormality, the rule of law alone may prove inadequate. As Gilberto Bercovici aptly observes, “legislation of exception deals with something that, in reality, it cannot handle. The legitimacy of acts carried out during the exception depends on political and popular support, not legal provisions.”<sup>743</sup>

This lesson was illustrated in Brazil between 2020 and 2022, when the Supreme Federal Court issued a series of rulings—many of questionable constitutionality—to counter an authoritarian threat that ultimately culminated in an attempt to overturn the electoral results on January 8, 2023.<sup>744</sup>

The conceptual and typological framework presented, alongside the case studies analyzed, reinforces the necessity of a multi-layered system for protecting the most vital elements of a constitutional order—particularly supreme and constitutional courts. Only through such a comprehensive approach can judicial independence be effectively preserved against illiberal threats.

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743. GILBERTO BERCOVICI, *SOBERANIA E CONSTITUIÇÃO: PARA UMA CRÍTICA DO CONSTITUCIONALISMO* 40 (2d ed., 2013) (author’s translation).

744. Théo G. de Sá-Kaye, *Examining the Brazilian Supreme Federal Court’s Expanded Powers in the Bolsonaro Era: A Win for Democracy or a Turn Toward Autocracy?*, 56 U. MIAMI INTER-AM. L. REV. 320, 352–53 (2025); Thomas Bustamante & Emilio Peluso Neder Meyer, *The Brazilian Federal Supreme Court’s Reaction to Bolsonaro: Mixed Responses and the Need to Preserve the Court*, VERFASSUNGSBLOG (Sept. 26, 2022), <https://verfassungsblog.de/the-brazilian-federal-supreme-courts-reaction-to-bolsonaro/>.

## FINAL REMARKS

The taming of a court constitutes an unequivocal violation of the democratic minimum core, as it renders the judiciary incapable of effectively fulfilling its role in the system of checks and balances. This conclusion is reinforced by the experiences of the countries analyzed in this Article—all of which were electoral or liberal democracies that underwent regime transitions following intensified constitutional erosion, often driven by changes in the objective or subjective dimensions of their supreme or constitutional court.

Make no mistake: court taming alone is not enough to dismantle a democracy, but it has proven to be one of the most favored and effective strategies through which authoritarian actors have advanced the third wave of autocratization. This cyclical phenomenon cannot be ignored.

There is also the question of the varying degrees of risk posed by different methods of court taming. While context plays a crucial role in determining the extent of the damage, it seems evident—at least *prima facie*—that court expansion and reduction present particularly significant threats to a country's democratic structure.

Thus, through comparative analysis, I have sought to establish a framework for identifying how the court taming process unfolds. My goal—and I hope I have achieved it—was to present parameters that maximize objectivity, allowing academics, policymakers, and civil society members to assess court restructuring measures with a rigorous analytical tool.

The most challenging—and likely most controversial—aspect of this Article is my discussion of emergency hermeneutics. Advocating for the expansion of judicial powers, even under exceptional circumstances, is an interpretation that many will understandably reject. After all, the debate over who has the final say on constitutional matters remains far from settled.

In this context, Barry Friedman's insights on political capital and Theunis Roux's analysis of legal legitimacy help illuminate the judiciary's precarious position—despite its broad institutional powers. Recognizing this fragility is essential for understanding when a court is exceeding its legitimate authority, particularly in the absence of an extraordinary crisis.

Beyond exercising institutional restraint, courts can solidify their legitimacy through the personal conduct of their members—returning to the idea of sociological legitimacy. When judges exercise discretion, maintain personal reserve, and remain distanced from political and economic interests, their courts gain credibility. Conversely, when judges—especially those on apex courts—attend events sponsored by corporations whose cases they may later adjudicate, accept lavish gifts from billionaires, or publicly express

political opinions, they gradually erode the legitimacy of their courts. This erosion occurs incrementally: event by event, interview by interview, gift by gift.

Defending a court is an essential act in safeguarding democracy. However, this role is not always fulfilled through praise alone. Courts are also protected through criticism—provided that such criticism is constructive rather than anti-institutional. By criticism, I refer not to attacks that seek to abolish courts or undermine their constitutional role, but rather to critiques that are methodologically rigorous and aimed at institutional improvement rather than destruction. As Conrado Hübner Mendes aptly puts it, “[s]ubjecting judicial misconduct to legal criticism is a constitutional matter.”<sup>745</sup>

Protecting courts—and, by extension, judicial independence—requires foresight on the part of legislators, who must anticipate potential risks and implement institutional safeguards to mitigate them. However, above all, it depends on the unwavering commitment of both society and the judiciary to the values of liberal democracy. These values may very well constitute the last line of defense against autocratization.

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745. Conrado Hübner Mendes, *Defender o STF de seus ministros* [*Defending the Supreme Federal Court and Its Ministers*], FOLHA DE S.PAULO (June 5, 2024), <https://www1.folha.uol.com.br/colunas/conrado-hubner-mendes/2024/06/defender-o-stf-de-seus-ministros.shtml>.

# THE UNCONSTITUTIONALITY OF STUDENT DRESS CODES

Ronald C. Den Otter\*

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## INTRODUCTION

This Article is about the constitutionality of mandatory student dress code and uniform policies.<sup>1</sup> The issue of what students may wear in American public junior high and high schools (schools) has been contentious for years. Although the U.S. Supreme Court has not addressed this issue in more than 50 years, students usually lose such cases in the lower courts.<sup>2</sup> Given the undeniable communicative aspects of dress,<sup>3</sup> it is perplexing that judges have provided so little constitutional protection for this effective mode of communication when students are on campus, where they spend much of their day during the school year. Dress can not only serve as expressive conduct, but as an extremely effective means of communication, especially in a school setting. In some situations, dress can be more effective at communicating than pure speech, whether oral or written. However, under the constitutional status quo, state lawmakers, school board officials, and administrators have considerable authority to enact and enforce dress codes without raising any serious First Amendment problems. This Article approaches this constitutional question from the perspective of the constitutional and moral importance of student speech and relies heavily on the imperative of ensuring that school authorities respect the personal autonomy of every student because of—not in spite of—the fact that many of them are not yet adults.

The American Civil Liberties Union has expressed constitutional concerns about dress codes and mandatory uniform policies.<sup>4</sup> Such codes can be racist and sexist.<sup>5</sup> They make it harder for marginalized students,

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1. Dress codes could cover length of skirts and shorts, sleeveless tops, spaghetti straps, leggings, pajamas, bare midriffs, necklines, hairstyles, gang attire and accessories, bulky clothing, loose shirts, head coverings, sunglasses, tattoos, piercings, and tight or revealing clothing. Megan Cooper, *School Dress Codes: What They Are & Why Students Are Fighting Back*, LOVE TO KNOW, <https://www.lovetoknow.com/parenting/teens/school-dress-codes> (last updated July 22, 2024). This list is not exhaustive. Under this broad definition, I include mandatory uniform policies and physical appearance as well. However, I do not include clothing with writing, which would be pure speech, like a T-shirt that expresses a political message.

2. TODD A. DEMITCHELL, *THE LEGAL AND POLICY CHALLENGES OF STUDENT DRESS AND GROOMING CODES: BALANCING RIGHTS AND RESPONSIBILITIES* xiii (2024) [hereinafter *THE LEGAL AND POLICY CHALLENGES*].

3. See, e.g., DIANA CRANE, *FASHION AND ITS SOCIAL AGENDA: CLASS, GENDER, AND IDENTITY IN CLOTHING* 100 (2000).

4. Sherwin et al., *4 Things Public Schools Can and Can't Do When It Comes to Dress Codes*, ACLU (Sept. 21, 2022), <https://www.aclu.org/news/womens-rights/4-things-public-schools-can-and-cant-do-dress-codes>.

5. Li Zhou, *The Sexism of School Dress Codes*, ATLANTIC (Oct. 20, 2015), <https://www.theatlantic.com/education/archive/2015/10/school-dress-codes-are-problematic/410962/>; see Christopher Rodgers, *Don't Touch My Hair: How Hegemony Operates Through Dress Codes to Reproduce Whiteness in Schools*, 19 DU BOIS REV.: SOC. SCI. RSCH. ON RACE 175, 176 (2022).

including those who are gender non-conforming, to fight back against stigmatization.<sup>6</sup> Dress restrictions may also inhibit or prevent religious students from practicing their respective religions and expressing their deepest convictions.<sup>7</sup> Last but not least, dress can convey political viewpoints. Doctrinally, political speech is core speech in almost all other contexts, whether a student is wearing a Make America Great Again or Black Lives Matter cap.<sup>8</sup> Beyond these concerns, dress codes are coercive; they enforce conformity at an age where students are impressionable—precisely when they should be learning how to express their respective identities for themselves. At minimum, in a society that is supposed to be committed to diversity and freedom of expression, this current state of affairs must be scrutinized more carefully. For some students, their choice of clothing may be the primary means of expressing their individuality.<sup>9</sup> Because school dress codes often interfere with the ability of teenagers to communicate how they see themselves to others, they chill valuable speech; equally important, they impede the development of teenagers' autonomous capacities.<sup>10</sup> This sort of censorship should not occur, particularly when students are at a critical stage of their moral and intellectual development.

This Article builds on John Stuart Mill's profound insights into what makes a human life worthwhile, namely self-development and individuality.<sup>11</sup> A Millian approach lends itself to normative constitutional analysis of student dress codes by accounting for the considerable room adolescents need for experimentation as they form and revise their identities as they near adulthood. With these concerns in mind, this Article constructs a perfectionist Millian argument to defend the constitutional conclusion that school authorities may not dictate to their students how they may dress. This Article argues that constitutional protection for expressive conduct through student dress and appearance more generally serves this end. The effect of dress codes is to deprive many students of an easily accessible, rhetorically powerful channel of communication when they need it the most.

This Article first provides an overview of the theoretical and historical background of student speech and dress codes, including the applicable case

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6. Wendy Cummings-Potvin, *The Politics of Dress Codes and Uniform Policies: Towards Gender Diversity and Gender Equity in Schools*, 122 INT'L J. EDUC. RSCH., Sept. 25, 2023, at 1, 6.

7. In this article, I do not engage in free exercise of religion analysis.

8. The term "core" speech is found in academic literature on free speech, denoting the importance of political speech in a democracy. See generally RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 13–14 (1992) (explaining the importance of free speech to self-governance).

9. *Bear v. Fleming*, 714 F. Supp. 2d 972, 983 (D.S.D. 2010).

10. See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 957–58 (4th ed. 2011) (noting the protection of personal autonomy as a rationale for free speech).

11. ALAN RYAN, J.S. MILL 125–33 (2016).

law. Second, it elaborates on the legal concept of expressive conduct and discusses how dress codes negatively impact racial minorities, women, and other marginalized students. Third, it spells out the place of personal autonomy in American constitutional law and its relationship to free speech, with attention to how such autonomy can be cast in the perfectionist language of Millian self-development and individuality. Specifically, it draws on Mill's idea of experiments in living to elaborate on how dress, as self-expression, can serve these ends. Fourth, it explains how dress can enhance the communicative impact of what a student is saying about themselves and why content-neutral dress codes unfairly take an essential channel of communication away from them. Fifth, this Article addresses countervailing state interests: incitement to violence, threats, safety, substantial disruptions to the learning environment, and reducing socioeconomic competition. It concludes by showing that while some state interests are important, it is not evident that dress codes are substantially related to these interests.

## I. THEORETICAL AND HISTORICAL BACKGROUND

### A. Student Free Speech Rights

Not until the late 1960s did federal courts finally start to take constitutional challenges to restrictions on student speech more seriously.<sup>12</sup> In the last 50 years, the Court has exhibited ambivalence about the value of junior high and high school students' speech.<sup>13</sup> In fact, even the recent *Mahanoy* decision may not provide sufficient room for students to criticize administrators for how they are doing their jobs.<sup>14</sup> If the fact pattern had been different—imagine that B.L. was not off-campus on a weekend—the Court may not have protected what she had said, including her vulgar language. After the famous *Tinker* decision, which created the *substantial disruption test*, the Justices gradually curtailed student free speech rights on campus; then in the recent *Mahanoy* decision, they protected some off-campus speech outside of school hours on social media.<sup>15</sup> They did not protect speech that might be substantially disruptive.<sup>16</sup> One legal scholar downplayed the benefits of letting students exercise their free speech rights in a book-length

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12. JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 72 (2018).

13. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, (1988); *Morse v. Frederick*, 551 U.S. 393 (2007); *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021).

14. Justin Driver, *The Coming Crisis of Student Speech*, 76 *STAN. L. REV.* 1515–23 (2024).

15. *Tinker*, 393 U.S. at 513–14; *Mahanoy*, 141 S. Ct. at 2046–47.

16. *Mahanoy*, 141 S. Ct. at 2048.

treatment of the topic, instead calling attention to its bad consequences.<sup>17</sup> This position is predicated on two assumptions: (1) student speech, including dress and appearance more generally, is not particularly important or comparable to the importance of student speech on a college campus;<sup>18</sup> and (2) the countervailing state interests in censorship are strong enough in the context of secondary education to supersede the importance of students' personal decisions on how to dress.<sup>19</sup>

The lack of concern for the value of student speech extends far beyond dress codes. Currently, school officials can ban student speech that is substantially disruptive,<sup>20</sup> sexually themed<sup>21</sup> (or perhaps merely offensive or inappropriate), school-sponsored (when the imprimatur of the school is on the speech, like an article in a student newspaper),<sup>22</sup> or that advocates the consumption of illegal drugs<sup>23</sup> (or arguably, other kinds of illegal activity). In other words, student speech is afforded considerably less constitutional protection at public schools compared to other venues, even when the speech is political, provided that it falls into one of the aforementioned unprotected categories developed for the context of secondary education. Not only is too much of the law on the school officials' side, but officials have strong incentives to restrict student speech as well. Understandably, they want to control the educational environment, avoid controversy, and not antagonize parents and other members of the community. Expressive conduct and free speech more generally may disrupt the educational environment. At best, there will be trade-offs.

### *B. Judicial Decisions*

The *Tinker* decision did not extend constitutional protection to the regulation of skirt length, clothing type, or hairstyle.<sup>24</sup> Therefore, *Tinker*'s substantial disruption test may not apply when it comes to dress codes.<sup>25</sup> 15 years ago, the Ninth Circuit upheld a school uniform policy.<sup>26</sup> That

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17. ANNE PROFFIT DUPRE, *SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS* (2009) (arguing that constitutional protection of student speech in public schools interferes too much with the primary purpose of education because order is needed in such an environment).

18. *Id.* at 15, 17.

19. *Id.* at 17.

20. *Tinker*, 393 U.S. at 513.

21. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986).

22. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988).

23. *Morse v. Frederick*, 551 U.S. 393, 410 (2007).

24. *Tinker*, 393 U.S. at 507–08.

25. DAVID L. BRUNSMA, *THE SCHOOL UNIFORM MOVEMENT AND WHAT IT TELLS US ABOUT AMERICAN EDUCATION: A SYMBOLIC CRUSADE* 55 (2004).

26. *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 441 (9th Cir. 2008).

decision reflects a trend that began in the 1990s where dress codes became more prevalent in American public schools, ostensibly as a response to gang violence.<sup>27</sup> In 1996, President Bill Clinton called for mandatory dress codes.<sup>28</sup> In the name of putting “discipline and learning back in our schools,” President Clinton had the Department of Education send manuals to every school district in the country explaining how to enforce a school uniform policy.<sup>29</sup> As two legal scholars explain:

In a relatively short period of time, the overlapping communities of lawyers, politicians, opinion-makers, and ordinary citizens who comprise our constitutional culture reconsidered the constitutionality of public school uniforms and broad student dress codes. The constitutional culture shifted from a set of background assumptions that understood such policies as antithetical to our collective constitutional values and unlikely to survive constitutional scrutiny to a new set of assumptions that treated such dress policies as constitutionally unproblematic.<sup>30</sup>

At present, across the country, dress codes vary from school to school, yet they are not uncommon.<sup>31</sup> Indeed, mandatory uniforms are increasingly required in American public schools.<sup>32</sup> It is difficult for parents to sue schools that may have violated their children’s free speech rights.<sup>33</sup> In cases where parents, on behalf of their children, challenge the legality of such dress codes, some judges defer to school officials, trusting them to use their judgment appropriately.<sup>34</sup> The assumption appears to be that school officials know best because they are experts in education and base their decisions on years of experience. In the eyes of critics, if students have the constitutional right to

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27. David L. Hudson Jr., *Clothing, Dress Codes & Uniforms*, FIRST AMEND. CTR. (Apr. 1, 2002), <https://web.archive.org/web/20160322232800/http://www.firstamendmentcenter.org/clothing-dress-codes-uniforms>.

28. Alison Mitchell, *Clinton Will Advise Schools on Uniforms*, N.Y. TIMES (Feb. 25, 1996), <https://www.nytimes.com/1996/02/25/us/clinton-will-advise-schools-on-uniforms.html>; Bill Clinton, *The President’s Radio Address*, 1 PUB. PAPERS 324–25 (Feb. 24, 1996).

29. *Id.*

30. Deborah M. Ahrens & Andrew M. Siegel, *Of Dress and Redress: Student Dress Restrictions in Constitutional Law and Culture*, 54 HARV. C.R.-C.L. L. REV. 49, 52–53 (2019).

31. *Id.* at 51.

32. *School Uniforms*, INST. OF EDUC. SCI., <https://nces.ed.gov/fastfacts/display.asp?id=50> (last visited Dec. 14, 2025).

33. CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS’ FIRST AMENDMENT RIGHTS 5 (2015).

34. See CHEMERINSKY, *supra* note 10, at 1193; RICHARD FOSSEY & TODD A. DEMITCHELL, STUDENT DRESS CODES AND THE FIRST AMENDMENT: LEGAL CHALLENGES AND POLICY ISSUES 102 (2014) (noting that “the outcome of this [dress code] litigation has been mixed”).

dress how they choose, then some students would dress in ways that are vulgar, offensive, or too sexually provocative.<sup>35</sup>

Many schools implement such codes or uniform policies to improve their educational environments.<sup>36</sup> Many policymakers likely have admirable intentions in the sense that they believe what they're doing is best for their students' education and welfare. However, some of them may have partisan reasons for not allowing students to dress in certain ways, which may amount to viewpoint discrimination. Those who support dress codes maintain that they improve discipline, prevent gang-related violence, reduce socioeconomic divisions, foster school spirit, and help staff identify trespassers.<sup>37</sup> Other proponents believe that dress codes create "a purposeful learning environment that reflects community values."<sup>38</sup> These days, school districts must worry about learning and safety.<sup>39</sup> According to two commentators, "dress-code litigation subverts a primary mission of public education, which is to instill a decent respect for community values and civil speech."<sup>40</sup>

The point is not that all school administrators will be hostile to protecting student expressive conduct through dress; rather, it is that some and perhaps too many of them will not care enough. This indifference necessitates a more proactive approach on the part of judges to enlarge the scope of the constitutional right to free speech in public schools to cover expressive conduct like clothing choices. In one case, a principal punished students for wearing "I ♥ Boobies!" bracelets to promote breast cancer awareness.<sup>41</sup> In another case, school officials suspended students for wearing Confederate Flags on the back of their T-shirts.<sup>42</sup> In the *Canady* case, involving mandatory school uniforms, the Fifth Circuit applied the *O'Brien Test*<sup>43</sup> for content-neutral speech restrictions and upheld the lower court's decision to grant summary judgment.<sup>44</sup> In that decision, the court implied that the First

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35. Todd A. DeMitchell, *The Law and Student Clothing*, in *THE SCHOOL UNIFORM MOVEMENT AND WHAT IT TELLS US ABOUT AMERICAN EDUCATION: A SYMBOLIC CRUSADE* 51, 52 (Daniel L. Brunsma ed., 2004).

36. David L. Hudson, Jr. & Mahad Ghani, *School Dress Codes: A First Amendment Breakdown*, FREEDOM F., <https://www.freedomforum.org/clothing-dress-codes-uniforms> (last visited Dec. 14, 2025).

37. *Id.* According to the National Center for Education Statistics, in the 2019–2020 school year, 18.8% of public schools required that students wear uniforms. *School Uniforms*, *supra* note 32.

38. FOSSEY & DEMITCHELL, *supra* note 34, at 3.

39. Eesha Pendharker, *School Dress Code Debates, Explained*, EDUCATIONWEEK (Dec. 27, 2022), <https://www.edweek.org/leadership/school-dress-code-debates-sexist-explained/2022/12>.

40. FOSSEY & DEMITCHELL, *supra* note 34, at 103.

41. *H. v. Easton Area Sch. Dist.*, 827 F. Supp. 2d 392, 399 (E.D. Pa. 2011).

42. *Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 538 (6th Cir. 2001).

43. *See infra* Part IV.B.

44. *Canady v. Bossier Par. Sch. Bd.*, 240 F.3d 437, 443, 445 (5th Cir. 2001).

Amendment applied to student dress, and therefore recognized that student dress, as expressive conduct, may contain sufficient communicative content to trigger First Amendment analysis.<sup>45</sup> After all, dress can be communicative: it “can indicate either conformity or resistance to socially defined expectations for behavior.”<sup>46</sup> The burden of proof is on the student challenging the constitutionality of the dress code to show the communicative elements of her expressive conduct.<sup>47</sup>

## II. EXPRESSIVE CONDUCT

### A. *The Law*

The legal concept of expressive conduct itself is complicated because of the existence of both speech and non-speech elements. How judges conceptualize expressive conduct makes an enormous difference as well when they examine dress codes to determine their constitutionality. Many kinds of expression do not take the form of words.<sup>48</sup> Nor is written or spoken language necessarily the best medium for expressing ideas.<sup>49</sup> Think of the rhetorical power of the rainbow symbol or a black fist raised in the air. The Court has not provided consistent precedent to help determine when nonverbal communication is subject to First Amendment analysis.<sup>50</sup> Since 1931, the Court has treated expressive conduct (previously known as symbolic speech) as if it were akin to pure speech.<sup>51</sup> Such conduct requires free speech analysis when someone does something to “say something,” or, with the particular concern of this Article in mind, when a student wears something to convey a message without words.<sup>52</sup> In *Spence*, the Court established two requirements for conduct to be expressive enough to trigger First Amendment analysis: (1) a particularized message (the speaker’s intent) and (2) the likelihood that a reasonable person in the audience would understand it (while exactly how well they have to understand the message

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45. *Id.* at 440.

46. RUTH P. RUBINSTEIN, *DRESS CODES: MEANINGS AND MESSAGES IN AMERICAN CULTURE* 3 (2d ed. 2001).

47. *Spence v. Washington*, 418 U.S. 405, 409 (1974).

48. MARK V. TUSHNET ET AL., *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT* 18 (2017).

49. Lea Salje & Robert Mark Simpson, *Composing Thoughts: Free Speech and the Importance of Thinking Aloud in Music and Images*, 30 *LEGAL THEORY* 83, 84 (2024).

50. TUSHNET ET AL., *supra* note 48, at 18.

51. *Stromberg v. California*, 283 U.S. 359, 369 (1931).

52. Katrina Hoch, *Expressive Conduct*, *FREE SPEECH CTR.* (Dec. 1, 2025), <https://firstamendment.mtsu.edu/article/expressive-conduct/>; see CHEMERINSKY, *supra* note 10, at 1097–98.

remains an open question).<sup>53</sup> On top of that, there must not be an important governmental interest that supersedes the right to free speech.<sup>54</sup> A driver who flips off a law enforcement officer, for instance, is not only intending to express disdain for the police or how the officer is doing her job; others who witness the incident, including the addressee herself, would also get the gist of the message. If the speech is covered by generally expressive media like painting, music, poetry, parading, displaying flags, or wearing armbands, even when the speech act lacks a “particularized message,” it constitutes expression.<sup>55</sup>

Traditionally, student dress fails to meet the second prong of *Spence*’s expressive conduct test. The trouble is that all dress codes infringe upon the clothing choice of students, even when they are meant to be expressive. Mandatory uniforms are even worse in this regard because they may constitute compelled speech.<sup>56</sup> The *Spence* test developed for expressive conduct is not appropriate for free speech analysis of dress codes in public schools. First, the message clothing choice is trying to convey may be vague, ambiguous, or hard to interpret for other reasons. The student themselves may not be entirely clear on what they are trying to say. A student might wear a Colin Kaepernick jersey because they are a San Francisco 49ers fan or supports Black Lives Matter (or both). Under free speech doctrine, though, nobody should be penalized for being inarticulate. If a student walks around their neighborhood with a sign containing a confusing political message, that sign still constitutes speech; it is just speech that is open to considerable interpretation. The meaning of dress can be “undercod[ed]” in American society, “leaving much to the imagination of the perceiver.”<sup>57</sup> Above all, the choice of clothing may be intended to be communicative and, therefore, may constitute self-expression.<sup>58</sup> Some students “choose their school clothing to make some sort of statement.”<sup>59</sup> The point is not that all fashion choices on the part of students have this purpose; it is that enough of them probably do, in one way or another, to merit a presumption of constitutional protection.

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53. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (“An intent to convey a particularized message was present, and the likelihood was great that the message would be understood by those who viewed it.”); see *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

54. *Spence*, 418 U.S. at 411; *Johnson*, 491 U.S. at 403 (noting that content-based regulations require a stronger state interest than content-neutral regulations).

55. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp.*, 515 U.S. 557, 569 (1995).

56. See THE LEGAL AND POLICY CHALLENGES, *supra* note 2, at 234–36 (describing dress codes and compelled speech).

57. Kimberly A. Miller-Spillman, *Dress as Nonverbal Communication*, in THE MEANINGS OF DRESS 79, 80 (Bloomsbury Publ’g 3d ed. 2012) (1999).

58. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 52 (1982).

59. FOSSEY & DEMITCHELL, *supra* note 34, at ix.

Furthermore, the Court has not applied the *Spence* test since *Texas v. Johnson*.<sup>60</sup> As such, it is arguably no longer good law.<sup>61</sup> Applying this approach to school dress codes to determine whether expressive conduct triggers free speech analysis carries the unacceptable risk of protecting too little valuable speech. Self-expression can be extremely valuable, like disclosing one's feelings about an unjust war as in the fact pattern of *Tinker*, even if the idea expressed will not contribute much to the marketplace of ideas. The Court has not yet expanded the legal definition of expressive conduct to make it less underinclusive.

That is the bad news. The good news is that recently, in a different context, two conservative justices have been willing to do the latter. In *303 Creative*, both parties stipulated that graphic and website design are expressive in nature.<sup>62</sup> As it turns out, a customized wedding website design is pure speech.<sup>63</sup> Although the Court decided *Masterpiece Cakeshop* on free exercise of religion grounds, Justices Clarence Thomas and Neil Gorsuch maintained that the baker should have won on the free speech theory.<sup>64</sup> In Justice Thomas's concurrence, in which Justice Gorsuch joined, Justice Thomas contended the baker's conduct was expressive and, therefore, was compelled speech.<sup>65</sup> As Justice Thomas correctly notes:

[T]he Court has recognized a wide array of conduct that can qualify as expressive, including nude dancing, burning the American flag, flying an upside-down American flag with a taped-on peace sign, wearing a military uniform, wearing a black armband, conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag.<sup>66</sup>

For Justice Thomas, these cases do not require a "particularized message."<sup>67</sup> In Michael McConnell's view, a baker who makes custom cakes, like a dressmaker who refuses to design an inaugural gown for Melania Trump, may not be legally compelled to make a wedding cake for a

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60. Richard P. Stillman, Note, *A Gricean Theory of Expressive Conduct*, 90 U. CHI. L. REV. 1239, 1243 (2023).

61. *Id.* at 1244 (stating that one interpretation of "the Court's repeated snubbing of the *Spence* test . . . [is that the test,] as originally stated, is no longer good law").

62. *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2309 (2023).

63. *Id.* at 2312.

64. *Masterpiece Cakeshop v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1740 (2018) (Thomas, J., concurring).

65. *Id.* at 1742.

66. *Id.* at 1741–42.

67. *Id.* at 1742.

same-sex couple to avoid celebrating ideas which the baker rejects.<sup>68</sup> Both a wedding cake and an inaugural gown can be expressive.<sup>69</sup> No doubt, some ideas ought to be rejected. For instance, it stands to reason that very few bakers would want to be forced by the law to make a birthday cake for a white supremacist with a chocolate swastika on top. But with McConnell's approach, "[t]here is no need to draw lines between architects, speech writers, public relations firms, photographers, musicians, bakers, or florists: no one engaged in an expressive activity can be compelled to use their talents in support of a cause they disapprove of."<sup>70</sup> For McConnell, *Masterpiece Cakeshop* was a compelled speech case because the creator of the cake was being forced to speak and endorse a viewpoint that he rejected. As McConnell puts it, the "fashioning of expressive symbols cannot be compelled."<sup>71</sup> Along similar lines, a mandatory uniform policy may make students express a message they do not want to, such as school spirit.<sup>72</sup> If this is the case, there may be a compelled speech issue as well.<sup>73</sup>

Despite a U.S. Court of Appeals' earlier ruling to the contrary, it may be appropriate to extend the aforementioned rationales to clothing choices of students.<sup>74</sup> In colonial America, dress denoted social standing, and gentleman deliberately dressed differently to distinguish themselves from commoners.<sup>75</sup> Sumptuary laws in Europe reinforced social hierarchy and patriarchy by preventing certain people "from wearing certain fabrics, colors, and garments."<sup>76</sup> As they always have, people will continue to use clothing to convey a wide range of messages, as this author does when he wears his San Francisco 49ers jersey. Most of these acts will be trivial, yet enough of them will be consequential or have the potential to be so.

A court cannot concern itself with whether a speech act happens to be trivial, assuming a standard could be agreed to in the first place, due to obvious concerns about selective enforcement. The First Amendment

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68. Michael W. McConnell, *Dressmakers, Bakers, and the Equality of Rights*, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 378, 380 (William N. Eskridge, Jr. ed., 2019).

69. *Id.* at 384.

70. *Id.*

71. *Id.*

72. *See* *Frudden v. Pilling*, 877 F.3d 821, 831 (9th Cir., 2017) (finding a school logo on a uniform, "Tomorrow's Leaders," to be unconstitutional).

73. *See* THE LEGAL AND POLICY CHALLENGES, *supra* note 2, at 234–36 (describing dress codes and compelled speech).

74. *See, e.g.,* *Zalewska v. Sullivan*, 316 F.3d 314, 320 (2d Cir. 2003) ("[A] person's choice of dress or appearance in an ordinary context does not possess the communicative elements necessary to be considered speech-like conduct entitled to First Amendment protection.").

75. GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 33 (1992).

76. Deborah L. Rhode, The Injustice of Appearance 61 STAN. L. REV. 1033, 1074 (2009).

protects all ideas, not only those that are well formulated or articulated.<sup>77</sup> Surely, a speaker or writer does not have to be bright or knowledgeable to be allowed to say or write whatever they happen to believe.

The few categories of unprotected speech, moreover, are narrow. For example, it is deliberately designed to be hard for the government to prove that speech is incitement<sup>78</sup> or obscene,<sup>79</sup> or for a public figure to prove they have been defamed.<sup>80</sup> Generally, when it comes to pure speech, the mode of expression is equally as important as the content of the speech itself.<sup>81</sup> Judges should be willing to deviate from tradition given that society has been slow to recognize that speech can take new non-verbal forms. The appropriate scope of free speech may change over time. With the advent of artificial intelligence (AI), the world is on the cusp of new technological changes in communication that will force courts to view expressive conduct differently.

Many students will not use their appearance to make political statements or share their identities with others, which is fine. For instance, students who play football—or may only want to let their classmates know that they are football players—can share this information by wearing their jerseys to school on a Friday before the game (or they may want to express solidarity with their teammates). That a student wants to dress in a certain way to be cool or trendy should not take away from the fact that dress can be used to communicate other, less-trivial information effectively. In an environment with no risk of punishment, and only peer pressure and social media to worry about, students may reflect more deeply on how they see themselves and how they want others to see them.

The primary concern about restrictions on clothing choices is that these restrictions prevent students from dressing how they want to dress, thereby depriving them of their voice when it's needed most. Lower courts need more guidance regarding the distinction between mere conduct and expressive conduct.<sup>82</sup> While the traditional approach is defensible—not all conduct is expressive, after all—the particularized message requirement should be relaxed in the context of secondary schools. By incorporating a strong presumption that the speaker intended to convey some message through

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77. There is no Supreme Court decision in modern free speech doctrine that imposes a requirement that the oral or written expression of an idea be eloquent. Indeed, speakers and writers may use vulgar words. *See* *Cohen v. California*, 403 U.S. 15 (1971). In fact, the Court allowed a student to use the “F” word in the recent *Mahanoy* decision. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 3028, 2043 (2021).

78. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

79. *Miller v. California*, 413 U.S. 15, 23–24 (1973).

80. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964).

81. *See Cohen*, 403 U.S. at 21, 26 (1971).

82. *Ross*, *supra* note 33, at 299.

dress, even when the student's intention is vague or ambiguous, courts can err on the side of free speech, reducing the risk of false positives (where the student intended to say something through their dress but their intention is in dispute). They can also establish a more flexible standard to decide whether the audience would understand the message.

Doctrinally, the most promising way of defending student expressive conduct more generally is to highlight how such codes compromise political speech and point out how a dress code could constitute viewpoint discrimination. This concern arose in *Tinker* with respect to the black armbands the children wore to school.<sup>83</sup> In the last decade, students have made critical statements about immigration policy by wearing T-shirts.<sup>84</sup> A student who wears a Colin Kaepernick jersey to school could be commenting on policing, racial justice in America, or how the National Football League mistreated the former quarterback when the owners blackballed him. A student who wears a Nick Bosa jersey may be making a statement in support of Make America Great Again. A student who wears a Brock Purdy jersey may just be a passionate San Francisco 49ers fan, which is its own message—just not a political one. Yet, it could be a political message if the fan was also trying to say something about Purdy's religious beliefs and group prayers on the field after games.

It is possible that a student who wears a Colin Kaepernick jersey to school because they are a San Francisco 49ers fan and cannot afford a newer Brock Purdy jersey. Intentions can be vague or ambiguous, even in verbal or written communication, and could be deliberately so. Regarding expressive conduct, it will be nearly impossible to always identify the student who does not intend to say anything by how they dress as opposed to the student who intends to say something but is not allowed to do so under the school dress code. Under such circumstances, students should be given the benefit of the doubt because their speech is instrumental to teenagers' Millian self-development. Judges ought to interpret the particularized message requirement as generously as possible to avoid under-protecting student speech. After all, even nude dancing can qualify as speech, albeit low value speech.<sup>85</sup>

In 1998, a girl violated her school dress code that banned hats by wearing an African headdress, and the court found that others would not comprehend

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83. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510–11 (1969).

84. *See, e.g., Madrid v. Anthony*, 510 F. Supp. 2d 425, 427 (S.D. Tex. 2007) (describing a student walk-out to protest immigration policy).

85. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991) (stating that nude dancing lies only “within the outer perimeters of the First Amendment” and is “only marginally” expressive).

her cultural message.<sup>86</sup> This case illustrates why the second part of the *Spence* test for expressive conduct—which requires establishing that a reasonable observer would likely understand the message—must also be relaxed or discarded. Here, it is enough to know that she is identifying herself as being proud of her African heritage. Even the most obtuse student, teacher, or administrator is likely to understand what is being “said” more or less. The audience should not have to know exactly what the student is saying by wearing a headdress for her speech to qualify as expressive conduct. The exercise of free speech should not turn on the cultural or religious literacy of those who are exposed to the message(s).

### *B. Marginalized Students*

Fashion choices also implicate important free speech issues concerning culture, race, sex, sexual orientation, and gender non-conformity.<sup>87</sup> Considerable empirical evidence indicates that racial minorities and LGBTQ+ are disproportionately affected by the imposition of dress codes.<sup>88</sup> In a country like the United States, which has denigrated racial and ethnic identities (and other minorities) for most of its history, judges should not overlook the potential for dress to be a means of resistance or dissent. Students of color should not feel like they have no other choice but to adopt Eurocentric dress or hairstyles in a country that has a record of trying to forcefully assimilate different minority groups and appropriating many of their distinct contributions to American culture. The Court has not yet decided the extent to which schools may restrict the hairstyles of their students.<sup>89</sup> At some schools, marginalized students will find themselves in precarious situations where they experience bullying, microaggressions, or worse.<sup>90</sup> The opportunity to engage in expressive conduct is crucial for those who want to fight back. As Ruth Rubinstein remarks, “[s]uch dress may serve as a public announcement that the group has declined to accept the ideas or values of mainstream culture; their clothes indicate heresy.”<sup>91</sup>

In a liberal society, there should be no such thing as heresy. Dress can function as counterspeech, calling into question widespread taboos, norms, and beliefs that may be unjust or lack evidentiary support. In *Bivens v.*

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86. ROSS, *supra* note 33, at 132.

87. *Id.*

88. Alyssa Pavlakis & Rachel Roegman, *How Dress Codes Criminalize Males and Sexualize Females of Color*, 100 PHI DELTA KAPPAN 54, 54 (2018).

89. Hudson & Ghani, *supra* note 36.

90. *See, e.g.*, ELIZABETH KANDEL ENGLANDER, BULLYING AND CYBERBULLYING: WHAT EVERY EDUCATOR NEEDS TO KNOW 19–20 (2013).

91. RUBINSTEIN, *supra* note 46, at 14.

*Albuquerque Public Schools*, the judge questioned whether sagging pants convey any particular message, stating “[s]agging is not necessarily associated with a single racial or cultural group, and sagging is seen by some merely as a fashion trend followed by many adolescents all over the United States.”<sup>92</sup> Evidently, the Judge meant that even if sagging pants amounted to a message, the student who had the burden of proof did not show that reasonable observers would recognize any particular message coming from wearing pants in that particular manner. Much depends on how one interprets the totality of the circumstances, of course. No doubt, some administrators and judges will be less racially and culturally sensitive than they should be. The lives of lower-income young Black and Latino men already are heavily policed in different ways.<sup>93</sup> Wearing sagging pants could be an act of defiance against the White norms of American society. Surely, that possible intention cannot be ruled out in advance.

In disclosing one’s identity, dress can encourage other students to reflect on how they see themselves and their place in society as well. The choice of clothes can signal who one is, what one cares about, and what that individual thinks our society ought to be like; its communicative value should never be underestimated just because a student happens to be on campus at a public school. Dress is both speech and conduct; a sharp distinction between them is unhelpful.<sup>94</sup> Another serious concern with dress codes, then, through their foreseeable disparate impact, is that they discriminate against those who find themselves in racial or ethnic minority groups.<sup>95</sup> As an example, a Black high school student was suspended for more than a month for wearing a natural hairstyle.<sup>96</sup>

The list of possible examples is endless. A Palestinian student may wear a Keffiyeh to campus or a shirt with a Hamas flag to criticize the war in Gaza or to call for Palestinian statehood. A Sikh student might have kesh (uncut hair) wrapped in a turban for religious reasons.<sup>97</sup> A Native American student

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92. *Bivens v. Albuquerque Pub. Schs.*, 899 F. Supp. 556, 561 (D.N.M. 1995) (arguing that the expressive conduct message would not have been understood by those who were merely exposed to it).

93. VICTOR M. RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS* 5, 7 (John Hagan ed., 2011).

94. MATTHEW H. KRAMER, *FREEDOM OF EXPRESSION AS SELF-RESTRAINT* 25–26 (2021).

95. *Hair, Discipline, and Race: A Call to Cut Discrimination Out of School Dress Codes*, EQUITY ALL., <https://equityalliance.stanford.edu/content/hair-discipline-and-race-call-cut-discrimination-out-school-dress-codes> (last visited Dec. 14, 2025); Cole Claybourn, *Why School Dress Codes Are Often Unfair*, U.S. NEWS: EDUC. (Dec. 23, 2022), <https://www.usnews.com/education/best-high-schools/articles/why-school-dress-codes-are-often-unfair>.

96. THE LEGAL AND POLICY CHALLENGES, *supra* note 2, at 204. However, by 2023, “twenty states had passed CROWN [(Creating a Respectful and Open World for Natural Hair)] Acts.” *Id.* at 206.

97. MARCI A. HAMILTON, *GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY* 155 (2d rev. ed., 2014).

may want to wear their hair long as a symbol of cultural pride. A cisgender woman might want to appear in traditionally male attire at her prom to protest sex stereotypes about how women are supposed to dress and act at formal events. A non-binary student may want to cross-dress or dress in a non-gendered way to subvert gender fashion norms. A transgender student most likely desires to dress in a manner that corresponds with their chosen gender to convey to others how they see themselves (and how they want others to see them). A young Black person may want to wear locs, braids, corn rows, or an afro to make a statement about pride in their heritage. A Muslim student may want to wear a hijab.

As Justice Anthony Kennedy writes, “[t]he Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”<sup>98</sup> The disclosure of a student’s identity, through dress and physical appearance, can be intrinsically valuable, regardless of the effects of the dress. Even in an egalitarian society, there are bound to be disadvantages to being a member of any minority group. One of these disadvantages is that members of the majority may not understand or even make the effort to learn how members of the minority see themselves.

### C. Young Women

Over time, clothing has functioned as a vehicle of gender socialization.<sup>99</sup> Even today, dress codes have unfairly targeted young women,<sup>100</sup> which can cause them to conceal their sexuality.<sup>101</sup> In *Peltier*, the Fourth Circuit struck down a charter school’s skirts-only rule under equal protection and recognized that Title IX applies to sex-based dress codes.<sup>102</sup> However, the Fourth Circuit’s earlier 2021 panel decision was vacated on rehearing en banc.<sup>103</sup> Several writers worry about the contribution of dress codes to such

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98. *Obergefell v. Hodges*, 576 U.S. 644, 651–52 (2015).

99. RUBINSTEIN, *supra* note 46, at 103–04.

100. “Young women” in this section refers to teenagers.

101. Recent federal data supports this conclusion:

According to GAO’s nationally generalizable review of public school dress codes, districts more frequently restrict items typically worn by girls—such as skirts, tank tops, and leggings—than those typically worn by boys—such as muscle shirts. Most dress codes also contain rules about students’ hair, hair styles, and head coverings, which may disproportionately impact Black students and those of certain religions and cultures, according to researchers and district officials.

U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-105348, K-12 EDUCATION: DEPARTMENT OF EDUCATION SHOULD PROVIDE INFORMATION ON EQUITY AND SAFETY IN SCHOOL DRESS CODES (2022).

102. *Peltier v. Charter Day Schs., Inc.*, 8 F.4th 251, 274 (4th Cir. 2021) (creating a double standard by not requiring boys to wear the same attire).

103. *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 130–31 (4th Cir. 2022).

discrimination.<sup>104</sup> One commentator focuses on gender (understood as a chosen identity, not a biological category) discrimination and attempts to establish that coerced conformity causes poor academic and mental health outcomes.<sup>105</sup> Another commentator, who endorses one rationale behind student dress codes,<sup>106</sup> bemoans the lack of clear constitutional standards delineating what students may wear while they are on campus.<sup>107</sup>

In American society, the tremendous social pressure to care about appearances falls disproportionately on women, who often internalize this pressure.<sup>108</sup> The phenomenon of lookism—where people are judged on their physical appearance and are treated differently in accordance with it—is ubiquitous.<sup>109</sup> A more permissive dress code for young women may help them to develop a positive body image amid so much social pressure to care so much about their physical appearance. Above all, what they wear must be their choice. Back in the day, as more than a mere fashion statement, a belly shirt, low-cut jeans, or spaghetti string tank top could be a way of bucking convention about how “proper” young women were expected to dress and behave. In other words, what women wear can be transgressive. In the past, young women have been adversely affected by dress codes.<sup>110</sup> There have been more dress code restrictions on women because schools demanded that they dress more modestly to cover their bodies (according to traditional views of feminine modesty).<sup>111</sup> That practice is a kind of sex discrimination and slut-shaming; it reflects a fear that young women are dressing too provocatively, thereby serving as a distraction.<sup>112</sup> Teenagers should not be

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104. See, e.g., Ariel G. Siner, Note, *Dressing to Impress? A Legal Examination of Dress Codes in Public Schools*, 57 SANTA CLARA L. REV. 259 (2012) (demonstrating how dress codes reinforce widely-held stereotypes about how young women are supposed to behave and how they are supposed to understand their sexuality); Meredith Johnson Harbach, *Sexualization, Sex Discrimination, and Public Dress Codes*, 50 UNIV. RICHMOND L. REV. 1039 (2016) (discussing school dress code sexualization of girls and its broader cultural implications).

105. See Deanna J. Glickman, *Fashioning Children: Gender Restrictive Dress Codes as an Early Point for Trans\* School to Prison Pipeline*, 24 J. GENDER, SOC. POL’Y & L. 263 (2015) (arguing that dress codes dictate to students that their gender is supposed to conform to their biological sex).

106. That is, to teach students how to dress appropriately in the workplace.

107. See Jeremiah R. Newhall, *Sex-Based Dress Codes and Equal Protection in Public Schools*, 12 APPALACHIAN J.L. 209 (2013).

108. See generally HEATHER WIDDOWS, *PERFECT ME: BEAUTY AS AN ETHICAL IDEAL* (2018).

109. See generally ANDREW MASON, *WHAT’S WRONG WITH LOOKISM? PERSONAL APPEARANCE, DISCRIMINATION, AND DISADVANTAGE* (2023). By contrast, later in life, men tend to be judged by their income and professional status. NANCY ETCOFF, *SURVIVAL OF THE PRETTIEST: THE SCIENCE OF BEAUTY* 79–80 (1999).

110. See generally Rebecca Raby, “*Tank Tops Are Ok but I Don’t Want to See Her Thong:*” *Girls’ Engagements with Secondary School Dress Codes*, 41 YOUTH & SOC’Y 333 (2010).

111. ROSS, *supra* note 33, at 132.

112. See Hudson & Ghani, *supra* note 36 (discussing the illegality of double standards when it comes to dress codes for young men and women).

taught that there is something shameful about women's bodies (or sexuality) or that women are somehow to blame for their role in stoking young straight men's sexual desires and their inappropriate (or worse) behavior. The situation is not that of Iran, but the rationale for covering women's bodies is disturbingly similar—namely, to blame them for attracting attention.<sup>113</sup> Anyone who has been on a college campus when the weather is nice knows that straight young men are expected to behave appropriately even when young women dress as if they were going to the gym or the beach. Women are not responsible for catcalls and staring. A society that is committed to sex equality should not reinforce a double standard.

### III. SELF-DEVELOPMENT AND INDIVIDUALITY

#### *A. The Place of Autonomy in American Constitutional Law*

One advantage of a Millian approach to self-expression is that it covers considerably more expression than other traditional arguments used to defend free speech. Nobody must attempt to draw a line between what is political (or close enough) and what is not. Nor should anyone attempt to explain how the way a student dresses might contribute to the search for truth<sup>114</sup> or make our country more democratic.<sup>115</sup> As noted, a non-binary or transgender student may use their clothing to convey to classmates, teachers, staff, and administrators that people should have the right to define their own gender. This act would be perceived as political now, yet would not have been perceived as such until relatively recently when people finally began to discuss the topic more openly.<sup>116</sup>

In previous Parts, this Article has tried to show that student dress can be expressive conduct and ought to be treated as such. More is at stake than meets the eye. Above all, a student's decision to dress a certain way is their own choice and must be treated as such to respect their autonomy. Furthermore, dress codes inhibit the introspection that comes from experimenting with different identities at a crucial stage of students' personal development. By definition, expressive conduct occurs when someone acts

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113. Jiyar Gol, *Iran Pauses Controversial New Dress Code Law*, BBC (Dec. 16, 2024), <https://www.bbc.com/news/articles/c0mv83m4z7vo>.

114. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

115. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 27 (1948).

116. Jay Prosser, *Trans Rights and Political Backlash: Five Key Moments in History*, CONVERSATION (Aug. 10, 2022) <https://theconversation.com/trans-rights-and-political-backlash-five-key-moments-in-history-187476>.

to convey a message,<sup>117</sup> such as when a person burns a draft card, an American flag, or a cross to make a political point. The merits of the viewpoint being expressed are beside the point; it is not the place of government or school authorities to assess the viewpoint.

This Part examines how self-expression through dress is conducive to self-development and individuality as students learn to exercise their autonomous capacities and improve their ability to do so over time. In a society like the United States, the pressure to conform can be extraordinary. From an early age, people are told to act in certain ways, as if nonconformity is obviously unacceptable. In American society, the refusal to comply with norms and take orders may be admired in theory, but not much in practice. In what follows, this Article relies upon the place of individual autonomy in a good human life—understood as personal choice with respect to the most important life decisions—in perfectionist terms.

There are many conceptions of autonomy. According to the Stanford Encyclopedia of Philosophy, “[i]ndividual autonomy is an idea that is generally understood to refer to the capacity to be one’s own person, to live one’s life according to reasons and motives that are taken as one’s own and not the product of manipulative or distorting external forces, to be in this way independent.”<sup>118</sup> An autonomous person reflects on their options and makes their own decisions, even when others disagree with them and have compelling reasons for such disagreement. As John Christman writes, “one must be able to consider reasons that one has for one’s lower-order judgements, the connections these reasons have to one’s identity, and the implications of those values for one’s future and for interaction with others.”<sup>119</sup> As an agent with a wide range of choices about how she wants to live, a woman should trust her own judgment in determining how she will act and take responsibility for her decisions. The government, or anyone else for that matter, should not make those deeply personal choices for her or prevent her from making the decision for her own good according to a paternalistic rationale. While the exercise of autonomy does not always produce good consequences—indeed, many people make bad choices repeatedly—it enables cultivation of their rational capacities to transform themselves into the kind of human being they desire or aspire to be. Such learning opportunities increase the likelihood that they will have the kind of life that is best suited. Because of where they are on the learning curve, there should

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117. See CHEMERINSKY, *supra* note 10, at 1097–99.

118. John Christman, *Autonomy in Moral and Political Philosophy*, STAN. ENCYC. PHIL. ARCHIVE (Aug. 22, 2025), <https://plato.stanford.edu/archives/fall2025/entries/autonomy-moral>.

119. John Christman, *Autonomy and Liberalism: A Troubled Marriage*, in THE CAMBRIDGE COMPANION TO LIBERALISM 141, 150 (Steven Wall ed., 2015).

be plenty of room for teenagers to experiment and a lot of tolerance for their mistakes as they go through the learning process.

Respect for autonomy on the part of government is not only morally important, but constitutionally important as well. Even post-*Dobbs*,<sup>120</sup> American constitutional doctrine still supports the view that people must be allowed to make personal decisions about their respective life plans without governmental interference. *Barnette*,<sup>121</sup> *Griswold*,<sup>122</sup> *Yoder*,<sup>123</sup> *Lawrence*,<sup>124</sup> *Cruzan*,<sup>125</sup> and *Obergefell*<sup>126</sup> suggest that American constitutional doctrine incorporates something like a principle of respect for personal autonomy, where the right to make the most personal decisions about how to live is constitutionally protected. In Justice Anthony Kennedy's words, the Constitution protects "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."<sup>127</sup> The disagreements are about its scope, that is, which deeply personal choices the Constitution covers, such as the right to die. Although *Roe* is no longer good law, it is inconceivable that a court would uphold a law that forced women, who want to have children, to abort their fetuses in the name of population control or because they could not afford to raise them.<sup>128</sup> Americans must be able to decide for themselves how to live; at the same time these decisions should not harm others, create unnecessary risk, or unreasonably infringe upon others' equally important right to make their own life choices.<sup>129</sup> That is one reason why those who adhere to liberalism (as a political theory of government) frown upon legally moralistic and

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120. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (upholding a state's near-total ban on abortion).

121. See *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (refusing to uphold a law that required all students to salute the American flag at the beginning of the school day in public schools and creating an exception for Jehovah's Witness children who refused to worship what they saw as a false idol).

122. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating a ban on the use of contraceptives by married couples).

123. See *Wisconsin v. Yoder*, 406 U.S. 205 (1971) (striking down a compulsory school attendance law for Amish students after eighth grade).

124. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (creating a constitutional right of same-sex intercourse for consenting adults).

125. See *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261 (1990) (upholding a state requirement that there must be clear and convincing evidence of an incompetent patient's wishes before withdrawing life-sustaining treatment).

126. See *Obergefell v. Hodges*, 576 U.S. 644 (2015) (establishing a constitutional right to same-sex marriage).

127. *Id.* at 663.

128. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

129. See H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 5–6 (1963).

paternalistic rationales for laws that everyone is subject to.<sup>130</sup> Free speech is not an exception to this rule. Indeed, in *On Liberty*, Mill devotes considerable time explaining its importance and putting forth different arguments on its behalf.<sup>131</sup> It requires considerable arrogance to assume you know better than the person whose life it is to justify not letting them make their own decisions. One important way of respecting the autonomy of a person is to let them speak their mind even when you are convinced they are wrong. That right includes expressive conduct like dress, even when many people do not care for what a person is saying or how they are saying it.

### *B. Millian Self-Development and Individuality*

Philosophically, personal autonomy can be connected to Millian self-development by underscoring the moral objective of respecting the freedom to make one's own choices about who to be and how to live. This freedom can be characterized as an ongoing endeavor to turn oneself into a unique individual who lives an authentic life, irrespective of what others think of its merits. Mill did not view public opinion positively.<sup>132</sup> Above all, what matters is that your only life is fully your own. In many important respects, human beings are profoundly different in terms of what they care about, how they prefer to spend their time, where their talents and interests lie, what they find fulfilling, and what ends they want to pursue.

As a political theory, liberalism is predicated on a commitment “to a conception of freedom and of respect for the capacities and the agency of individual men and women.”<sup>133</sup> As such, there must be considerable space and encouragement to be the person one really is (or wants to be) even if that identity turns out to be idiosyncratic. For Mill, human beings must be free for self-development to take place and for happiness to result.<sup>134</sup> In Mill's eyes, rights are synonymous with the conditions for individual self-development.<sup>135</sup> Only a handful of legal scholars have defended free speech in terms of self-development.<sup>136</sup> That is unfortunate because Mill's thought has the kinds of resources conducive to defending the free speech rights of

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130. See Shane D. Courtland et al., *Liberalism*, STAN. ENCYC. PHIL. (Feb. 22, 2022), <https://plato.stanford.edu/entries/liberalism/> (citing Section 1.1 The Presumption in Favor of Liberty).

131. See generally JOHN STUART MILL, *ON LIBERTY AND OTHER WRITINGS* 1 (Stefan Collini ed., 1989).

132. RYAN, *supra* note 11, at 135.

133. JEREMY WALDRON, *LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991*, at 36 (1993).

134. JOHN SKORUPSKI, *WHY READ MILL TODAY?* 18 (2006).

135. Alan Ryan, *Mill in a Liberal Landscape*, in *THE CAMBRIDGE COMPANION TO MILL* 497, 529 (John Skorupski ed., 1988).

136. SCHAUER, *supra* note 58, at 55; SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 87–88 (2014).

teenagers on developmental grounds. The exercise of such rights can have transformative effects, including moral ones, not only on the student themselves but on other community members, who may learn from or be inspired by the student example. A student who sees one of their classmates making a statement through dress may encourage others to come out of the closet rather than conceal their identities. After all, the closet does not only apply to the gay and lesbian community.<sup>137</sup>

The transformative effects of free speech on self-development are particularly important for marginalized students who are socially isolated or feel unwelcome at school. “[S]ome students,” as two authors write, “choose their school clothing to make some sort of statement.”<sup>138</sup> As a result, whether school officials realize it, a dress code is not only a manifestation of governmental coercion but may also incorporate viewpoint discrimination, intimating that some identities are problematic. A school that refuses to let a young man dress as a woman or vice versa is sending a very strong message to the student body about “proper” gender roles, intentionally or otherwise.

This Article proposes a Millian approach designed specifically for adolescents who need encouragement to resist the pressures of conformity. As Christopher Macleod states:

The dominance of the majority, Mill held, presented new threats of tyranny over the individual—freedom was no less at risk from a newly empowered many, than from an absolute monarch. The restrictions over freedom that concerned Mill included, to be sure, legislatively enacted restrictions of liberty—but they also took in broader “compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion.” Informal mechanisms of social pressure and expectation could, in mass democratic societies, be all-controlling. Mill worried that the exercise of such powers would lead to stifling conformism in thought, character and action.<sup>139</sup>

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137. See generally CHARLES ANTHONY SMITH ET AL., *THE POLITICS OF PERVERTS: THE POLITICAL ATTITUDES AND ACTIONS OF NON-TRADITIONAL SEXUAL MINORITIES* (2024) (outlining the first study of the political attitudes of non-traditional sexual minorities like furies, nudists, and polyamorists).

138. FOSSEY & DEMITCHELL, *supra* note 34, at ix.

139. Christopher Macleod, *John Stuart Mill*, STAN. ENCYC. PHIL. (Aug. 25, 2016), <https://plato.stanford.edu/entries/mill> (citing Section 4.5 *On Liberty* and Freedom of Speech).

Communication, critical thinking, and self-reflection are interconnected. Everyone needs exposure to the perspectives of others to figure out for themselves how to meet the demands of this life before it is over too quickly. Communicative interactions with others are indispensable to the developmental process that makes us the unique person we are (or could be with the right sorts of opportunities for self-expression). For Mill, everyone must continuously try to figure out which kind of life best captures their uniqueness: “[H]is own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode.”<sup>140</sup>

The advantage of reliance on a perfectionist Millian conception of autonomy, with emphasis on the means of self-development, is that students would become accustomed to deciding for themselves how they want to live, even when their decisions contradict societal expectations. Teenagers must be able to begin this learning process as soon as possible without fear of being punished for a silly dress code violation. There are already plenty of other reasons why teenagers may not feel comfortable deciding for themselves how they want to live, like peer pressure, bullying, and fear of being embarrassed on social media. Indeed, most people self-censor more than they realize or will admit.<sup>141</sup> Most people seem to think that it is good to have a filter, yet what they forget is the importance of being sincere. For Mill, objectively good lives are those which people create via experimentation, in the gradual process of distinguishing themselves from others.<sup>142</sup> There is no substitute for personal experience as an individual strives to make their life as authentic as possible. In Mill’s eyes, “it is only the cultivation of individuality which produces, or can produce, well-developed human beings.”<sup>143</sup>

With this objective in mind, the individual must also find themselves in circumstances that are conducive to such self-development. American constitutional doctrine can help schools provide exactly such an environment. A society that does not legally or constitutionally protect self-expression (or for that matter, encourage its practice) is a society that does not appreciate the centrality of such an educational process in a good human life. A society that is too homogeneous and fails to value diversity will not be conducive to the kind of experimentation that fosters, or even permits, non-conformity. Mill speaks of the pressure to conform, the tyranny of public

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140. MILL, *supra* note 131, at 67.

141. See Samson Yuen & Francis L.F. Lee, *Echoes of Silence: How Social Influence Fosters Self-Censorship under Democratic Backsliding*, 32 DEMOCRATIZATION 1213, 1213–15 (2025) (studying social influences on self-censorship in authoritarian political cultures, while also noting that self-censorship “need not depend on the presence of an external censoring entity”).

142. Elizabeth S. Anderson, *John Stuart Mill and Experiments in Living*, 102 ETHICS 4 (1991).

143. MILL, *supra* note 131, at 64.

opinion, and the despotism of custom.<sup>144</sup> In his view, public opinion can stifle difference.<sup>145</sup> According to John Gray, “an autonomous agent must also have distanced himself in some measure from the conventions of his social environment and from the influence of the persons surrounding him.”<sup>146</sup> Thus, individuals must be able to resist the temptation to fit into the crowd and should instead not care too much about what others think of them.

The effort to resist, however, may be exhausting. First, most people are afraid of being mocked, ridiculed, or humiliated—fears that are exacerbated in an era of social media where one mistake can irreparably damage one’s reputation. Second, fear of being called out or being “trolled” online may compel individuals to be overly cautious. Third, people may lack the self-confidence to stand on their own or have the courage of their convictions. It takes tremendous courage to be different when many people fear difference, do not understand it, and make no effort to do so.<sup>147</sup>

These concerns are magnified with respect to American teenagers. While Victorian England is not the equivalent of the United States or a typical American public school in 2025, Mill’s worry about the challenges of individuals being able to turn themselves into the unique person they could be remains pertinent. Novels like *The Chocolate War* and films like *Cool Hand Luke* showcase the high costs of non-conformity.<sup>148</sup> Indeed, it may be natural to want to take the path of least resistance, complying with social expectations instead of transgressing them. The human behavioral predisposition not to incur social disapproval clashes with Mill’s imperative of the cultivation of individuality. According to Mill, the actual experience of trying to make reflective choices and acting upon them is indispensable in the process.<sup>149</sup> Nobody can do that for someone else. As Mill notes, “it is the privilege and proper condition of a human being, arrived at the great maturity of his faculties, to use and interpret experience in his own way. It is for him to find out what part of recorded experience is properly applicable to his own circumstances and character.”<sup>150</sup>

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144. *Id.* at 57–59.

145. ALEX ZAKARAS, *INDIVIDUALITY AND MASS DEMOCRACY: MILL, EMERSON, AND THE BURDENS OF CITIZENSHIP* 127 (2009).

146. JOHN GRAY, *MILL ON LIBERTY: A DEFENCE* 74 (2d ed. 1996).

147. It is worth noting here that American historical figures or free speech martyrs, like the abolitionist Elijah Lovejoy, faced much more serious threats—including violence—for refusing to stop printing an anti-slavery newspaper. Lovejoy was killed by a mob in 1837 defending the warehouse that housed his printing press. KEN ELLINGTON, *FIRST TO FALL: ELIJAH LOVEJOY AND THE FIGHT FOR A FREE PRESS IN THE AGE OF SLAVERY* 282–83 (2021).

148. ROBERT CORMIER, *THE CHOCOLATE WAR* (1974); *COOL HAND LUKE* (Warner Brothers 1967).

149. MILL, *supra* note 131, at 58.

150. *Id.* at 58.

*C. Millian Experiments in Living*

The lifelong process of cultivating individuality requires experimentation with different identities, necessitating trial and error. As Gray writes, “[p]art of the rationale for encouraging experiments in living, after all, is that they are aids in attaining self-knowledge.”<sup>151</sup> Self-expression constitutes an essential part of Millian experiments in living because human beings can only form and revise their identities by disclosing them to others and vice versa. In that way, dress can be communicative, and the process of self-development through experiments in living is invariably social. In the absence of a venue for such expression, it will be harder to see a wide range of possibilities. For Mill, there are also benefits for others: “In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore more capable of being valuable to others.”<sup>152</sup>

In the contemporary United States, this right of self-expression is particularly important for marginalized people to be themselves and express difference in the face of intolerance. As Jeremy Waldron states, “it is through speech that we make a distinct and undistracted choice to disclose who we are and where we stand on issues of value.”<sup>153</sup> In the 1970s, gay men developed a “handkerchief code” to communicate their sexual availability and particular preferences.<sup>154</sup> In 2025, wearing rainbow colors or appearing in drag might have a similar effect. A dress code in a workplace, based on traditional norms regarding how men and women are supposed to dress, may not only be sexist or misogynistic but also oppressive, as it makes it much harder for a person to be authentic. Similarly, forcing a gay man to conform to traditionally straight dress may make him feel that he must deny who he really is, which undoubtedly could have tremendous personal costs, including developing mental health problems.<sup>155</sup> People should be allowed to and even encouraged to be creative when they express themselves, particularly when they are younger and more impressionable. Such creativity may enable them to communicate more effectively than they could through pure speech. Doctrinally, privileging some forms of expression over others

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151. GRAY, *supra* note 146, at 79.

152. MILL, *supra* note 131, at 63.

153. JEREMY WALDRON, *THE HARM IN STATE SPEECH* 164 (2012).

154. Drew Hofbauer, *The Power of Dress: Expressing Gender Identity Through Fashion*, VOX MAG. (May 27, 2021), [https://www.voxmagazine.com/features/fashion-identity-expression-lgbtq-gender-outfits/article\\_19464a90-b410-11eb-ac21-b71e3a6aba42.html](https://www.voxmagazine.com/features/fashion-identity-expression-lgbtq-gender-outfits/article_19464a90-b410-11eb-ac21-b71e3a6aba42.html).

155. John E. Panchankis et al., *The Mental Health of Sexual Minority Adults in and Out of the Closet: A Population-Based Study*, 83 J. CONSULT CLINICAL PSYCH. 1, 2 (2015) (noting that while there are mixed results in studies on how being in the closet affects the health of gay men, there is evidence to suggest it can increase mental health or psychological problems).

unfairly favors individuals who happen to be more articulate in a conventional medium.

*D. As Applied to Public Schools*

The opportunity for self-expression is even more urgent in American public schools, which can be enclaves of conformity.<sup>156</sup> While Mill did not have children or adolescents in mind,<sup>157</sup> this Article contends that his proposal for cultivating individuality—through experiments in living—requires considerable freedom for students to engage in self-expression because they learn to communicate in non-verbal ways. Self-expression through dress can serve individuality. Mill thought that experiments in living would cause people to be more reflective about their choices.<sup>158</sup> In that regard, freedom of thought and action are interconnected.<sup>159</sup> Experimenting with different identities in the presence of others would likely prompt individuals to be more introspective. This introspection would likely include not only the choices they had made previously, but also the choices they could make in the future to improve their life (and prompt others to reflect on their own lives as well).

At a formative stage in their lives, students need the opportunity to engage in self-expression without the risk of punishment. This opportunity will help them continue to develop their individuality by instilling the belief—and then reinforcing it—that there is nothing wrong with being different. American history contains numerous examples of how majorities have marginalized minorities and individuals for their differences (or have used their ostensible differences as a pretext for treating them unequally). Even in the absence of dress codes or uniform policies, social pressure still may produce widespread conformity. Students not only have the opportunity to express themselves through dress, art, or music—they must have the opportunity to experiment with their identity through their physical appearance in social spaces, such as in school. Students spend a considerable amount of time during the academic year interacting with their peers;

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156. Ayla Iqbal, *Resisting the Pressure to Conform*, REALCLEAR EDUC. (Oct. 22, 2021), [https://www.realcleareducation.com/articles/2021/10/22/resisting\\_the\\_pressure\\_to\\_conform\\_110654.html](https://www.realcleareducation.com/articles/2021/10/22/resisting_the_pressure_to_conform_110654.html).

157. Mill focuses on adults in *On Liberty* and does not discuss children or adolescents. See MILL, *supra* note 131.

158. Ryan Muldoon, *Expanding the Justificatory Framework of Mill's Experiments in Living*, 27 UTILITAS 179, 180 (2015).

159. Fred Wilson, *John Stuart Mill*, STAN. ENCYC. PHIL. (July 10, 2007), <https://plato.stanford.edu/archives/spr2012/entries/mill/>.

likewise, they interact on social media, where they share pictures and videos of themselves.

All students should be allowed to choose how they want to dress and not be forced to conform to what school authorities or school board members (and probably many parents) happen to believe to be appropriate (which often will be subject to disagreement and misunderstandings). School authorities are no more qualified to dictate how students must dress than anyone else simply because they happen to be professional educators. Additionally, many dress codes can be arbitrary.<sup>160</sup> Equally importantly, if school officials disagree with the viewpoint expressed by what a student wears, then they are welcome to counteract the students' "bad" speech with their own "good" speech through non-censorious alternatives, like public announcements through loudspeakers or social media. While a school is free to suggest or recommend how students ought to dress, school administrators should not be allowed to impose that view on the students—most of whom are required to be there. At most, if a student really is dressed "inappropriately"—which is subjective to begin with—a teacher or administrator could say something to the student or arrange a parent-teacher conference. This alternative is not equivalent to having the power to order a student to change and to discipline them for non-compliance—such as by compelling the student to wear attire that identifies them as a dress code violator and is designed to humiliate.<sup>161</sup> There is a world of moral difference between the authority to coerce students and persuasion. If a student has been coerced to dress in a certain way, that is where the line must be drawn.

By definition, any minority is non-conformist. A liberal society is supposed to tolerate those who behave unconventionally.<sup>162</sup> Judges should not minimize the extent to which unconventional expressive conduct in public schools could have considerable value—especially in the long term—due to its cumulative effects. While most Americans probably have more sympathy when students have religious reasons for dressing in a certain way or displaying religious symbols, that reaction likely would not apply to marginalized religions. For instance, a court ruled that a school could prevent a student from wearing a five-pointed star (the central symbol of Wicca).<sup>163</sup>

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160. Whitney Bellephant, *Enforcement of Dress Codes is Sexist, Arbitrary*, BEACHCOMBER (Sept. 11, 2014), <https://bcomber.org/editorials/2014/09/11/enforcement-if-dress-codes-is-sexist-arbitrary/>.

161. *Student Forced to Wear 'Shame Suit' for Dress Code Violation*, ABC NEWS (Sept. 4, 2014), <https://abcnews.go.com/US/student-forced-wear-shame-suit-dress-code-violation/story?id=25252041>.

162. WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 259–63 (1991) (explaining John Locke's understanding of the practice of toleration and its importance).

163. HAMILTON, *supra* note 97, at 163.

By contrast, when a student wants to wear a cross, yarmulke, head scarf, or turban to school—even in the absence of a Free Exercise Clause or state and federal Religious Freedom Restoration Acts—many Americans might be willing to acknowledge their right to wear such symbols because they appreciate the important role that religion can play in human life. By implication, Americans also recognize why it is critical to let people disclose their religious identities. In any liberal democracy, people should be allowed to make statements about themselves, their religious beliefs, and their way of life without the permission of legislative majorities.

The challenge is to convince Americans that other deep convictions may be just as important to nonreligious people. Suppose that at a high school, a student assigned male at birth wants to cross-dress because the student identifies as a woman. A student assigned male at birth who wants to wear a dress to school, or a woman who wants to wear a tuxedo to the prom,<sup>164</sup> would be communicating something very powerful about themselves and gender norms in America. By refusing to conform to traditional fashion norms, these students highlight broader controversies, including the denial of gender-affirming medical care in some states, transgender bathroom access, and who should play on which high school sports teams. There would not be too many more emotionally powerful ways to make such a statement; it would be hard to ignore and would prompt conversations.

While dressing non-traditionally could offend some or perhaps many faculty, staff, and students, such as those who are wedded to more traditional gender roles, their offense or shock is beside the point, constitutionally. After all, offensive speech is constitutionally protected.<sup>165</sup> Moreover, being offended, or even seriously offended, is often subjective and hardly counts as being harmed in a meaningful way.<sup>166</sup> Just because speech is offensive to some, many, or all people does not mean that the message being conveyed is not valuable in terms of either its truth value or as a means of self-disclosure. Those who are bothered by gender-bending attire are free to ignore what they have seen. They are also equally free to reveal who they are or why they think resisting new gender norms is called for, either by pure counterspeech or their own expressive conduct. Such counterspeech or expressive conduct is the traditional remedy for “bad” speech.

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164. *McMillen v. Itawamba Cnty. Sch. Dist.*, 702 F. Supp. 2d. 699, 701 (N.D. Miss. 2010) (finding viewpoint discrimination for a woman wearing a tuxedo to prom).

165. *Cohen v. California*, 403 U.S. 15 (1971) (holding that people may use vulgarities like the “F” word when they criticize the government).

166. See ANDREW SNEDDON, OFFENSE AND OFFENSIVENESS: A PHILOSOPHICAL ACCOUNT 56, 81 (2021) (noting that being offended, even seriously offended, likely does not rise to the level of being harmed).

One could respond that wearing a dress is not analogous to wearing a yarmulke or head scarf for free speech purposes. However, that response misses the point. First, not all Jews or Muslims believe that such dress is a religious requirement. The expression of who you are may be necessary to living the life that you want to live, letting others know who you are, and reminding yourself of what you believe to be most worthwhile in life. In that respect, an Orthodox Jew wearing a yarmulke is the equivalent of a young man cross-dressing, given the importance of disclosing one's identity in a society that is often hostile to differences. At a junior high or high school, no student should be coerced or pressured into dressing like a stereotypical man or woman. By implementing such a policy, the school is implying that it is wrong for a young man to identify as a woman or for a lesbian student to identify as more masculine.

If a student is allowed to challenge conventions by how they dress, they may gain a better appreciation for why others ought to have the same right to be themselves. As tweens and teenagers, they are bound to be impressionable and vulnerable to being overinfluenced by the authority figures in their life. For this reason, they should be free to choose from a long menu of options in Millian experiments in living. As Mill writes:

It is desirable, in short, that in things which do not primarily concern others, individuality should assert itself. Where, not the person's own character, but the traditions or customs of other people are the rule of conduct, there is wanting one of the principal ingredients of human happiness, and quite the chief ingredient of individual and social progress.<sup>167</sup>

Thus, a school should not be granted the authority to interfere in this vital process of self-discovery, self-creation, or both by inhibiting teenagers from expressing themselves and shielding their classmates from exposure to such self-expression for their own good.<sup>168</sup> In such an environment, a greater number of students will think more deeply about what they wear and what they are trying to communicate through their physical appearance. A student who cross-dresses may encourage others who are not as courageous to feel safe subverting gender norms if that is what they desire. In this way, the exercise of free speech can normalize differences.

These sorts of concerns are not hypothetical. A school cancelled its prom rather than let a lesbian student bring her girlfriend to the prom and wear a

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167. MILL, *supra* note 131, at 57.

168. Or because their peers, parents, faculty, staff, or administrators find the message being conveyed off-putting.

tuxedo.<sup>169</sup> As Justin Driver observes, “When a school prohibits articles of clothing through individualized assessments, opportunities for arbitrary discrimination present themselves.”<sup>170</sup> During most of American history, and still in too many places, a different-sex interracial couple holding hands as they walk down the hall in a public school would be conveying a message about the nature of love, romantic relationships, and race relations. They would be conveying this message even though they are not expressing themselves orally or in writing. The same would be true of a same-sex couple. In such situations, allowing students to engage in symbolic speech constitutes a way of fighting intolerance. At the same time, although many other teenagers may be reluctant to share their identities with others, they should not fear being suspended or expelled for doing so. Ultimately, dress codes have a chilling effect and infringe upon the right students have to decide for themselves what kind of person they want to be. When school authorities deny their students one of the most effective means of self-expression, they inhibit Millian self-development, notwithstanding their intentions. The consequences are foreseeable.

People not only are different in some important respects but should be allowed to be so in public spaces, as long as they are not harming others or unreasonably putting them at risk. That is a lesson that must be imparted to students long before they are set in their ways. There is nothing wrong with being unlike everyone else. In fact, such individuality makes us the distinct person that we are; that, in itself, is important.<sup>171</sup> Unfortunately, some people have their identities thrust upon them; for example, racism forces people of color to identify in one way rather than another because, socially, they have no genuine options and assimilation has much lower personal costs.<sup>172</sup>

Students must be left alone so they can experiment with new identities as they find their place in the world. Far too often, they have already been told what to do, which discourages them from taking ownership of their decisions.<sup>173</sup> For many teenagers, that experimentation may amount to doing something conventional, like dyeing their hair, getting a tattoo, or having some body part pierced, which is fine. After all, they must start somewhere. By striking down dress codes as unconstitutional, judges can empower students to engage in trial and error, thereby teaching them that the process

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169. *McMillen*, 702 F. Supp. 2d. at 701.

170. DRIVER, *supra* note 12, at 131.

171. SHIFFRIN, *supra* note 136, at 89.

172. Zuva Seven, *Cultural Assimilation—How it Affects Mental Health*, VERYWELLMIND (May 19, 2023), <https://www.verywellmind.com/what-is-cultural-assimilation-5225960>.

173. Giselle Galoustian, *All Work, No Independent Play Cause of Youth Declining Mental Health*, FLA. ATL. U. NEWS DESK (Mar. 9, 2023), <https://www.fau.edu/newsdesk/articles/child-play-independence-study>.

matters as much as the outcome. Early in life, such experiences may be formative and probably will affect how students see themselves and others in the future. Empirical evidence suggests that members of minority sexual communities are less judgmental of non-conformity and more accepting of others as they are, rather than as society expects them to be.<sup>174</sup>

#### IV. THE ENHANCEMENT OF SPEECH

##### *A. Rhetorical Effects*

For some students, speaking through dress may be preferable if they are uncomfortable with public speaking or lack confidence in their writing skills. One way or another, their voices should be heard. Dress can also enhance the rhetorical impact of the message that the student is trying to convey, helping it to reach a wider audience in an age of social media, where young people take a lot of selfies. The idea of the significance of enhancing the rhetorical efficacy of speech is found in Justice John Marshall Harlan II's majority opinion in the famous *Cohen v. California* case, also known as the *F\*\*\* the Draft Case*.<sup>175</sup> Dress can amplify any message. Indeed, it may be much more effective than pure speech at times due to its shock value. As the old saying goes, "a picture is worth a thousand words."

In Justice Harlan's view, the Constitution protects the emotive function of speech.<sup>176</sup> The implication is that how something is said is as important as what is being said. Drawing on the fact pattern in *Cohen*, the use of vulgar words may pack a more powerful rhetorical punch because they reveal how strongly the speaker feels about the issue.<sup>177</sup> By contrast, a more polite alternative may not have the same impact. The point is that expressive conduct can be more rhetorically consequential, depending on the circumstances. In taking away from students an essential channel of communication in a digital age, where students can create their own videos, schools fail to respect their students' rights to decide how they say what they want to say. It would be strange to claim that people have a right to freedom of speech yet are only allowed to say what they want to say in a way prescribed by the state. Indeed, it may be hard to separate the medium from the message. Obviously, *Draft* ☺ on the back of a leather jacket is not exactly the same as *F\*\*\* the Draft*.

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174. SMITH ET AL., *supra* note 137, at 230.

175. 403 U.S. 15, 16 (1971).

176. *Id.* at 26.

177. *Id.*

Compared with pure speech, one advantage of expressive conduct more generally is that it can capture and keep people's attention, and maybe even go viral. The claim is that dress may be more effective in making a deeper impression than verbal or conventional alternatives. Imagine that a high school student wears a T-shirt depicting Officer Derek Chauvin kneeling on George Floyd's neck to convey a political message about police brutality and identify themselves as a Black Lives Matter supporter. Because it engages emotions, such a T-shirt could easily be more communicative than the words "I can't breathe," which would count as pure speech. The former sort of expressive conduct is likely to draw attention and prompt conversations on campus about what is happening with regard to policing in this country. No doubt, people can be clever with spoken and written words as well. But some students will be more articulate than others, orally or in writing. Dress is a clever way to convey a message through expressive conduct because dress can be artistic or creative, which makes it harder for others to ignore the statement being made.

### B. Content-Neutral Restrictions

Doctrinally, the strongest constitutional argument in defense of student dress codes is that they are content neutral. To be content neutral, the rationale of the restriction must have nothing to do with the viewpoint being expressed.<sup>178</sup> In this Part, this Article elaborates on why allowing school officials to defend the constitutionality of restrictions of student dress on content-neutral grounds is problematic. A content-neutral speech restriction is also known as a "time, place, and manner" restriction.<sup>179</sup> In *United States v. O'Brien*, the Court developed the *O'Brien* test for determining the constitutional permissibility of content-neutral speech restrictions and later supplemented it with an additional requirement—namely, the restriction must leave open ample alternative channels of communication.<sup>180</sup>

In effect, the original test asks two questions. The government bears the burden of satisfying both elements before the speech in question can be suppressed: (1) does the restriction on speech further an important or substantial governmental interest; and (2) is the incidental restriction on speech no greater than is necessary to the furtherance of that important or

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178. CHEMERINSKY, *supra* note 10, at 960–62.

179. Kevin Francis O'Neill, *Time, Place and Manner Restrictions*, FREE SPEECH CTR.: MIDDLE TENN. STATE UNIV. (July 9, 2024), <https://firstamendment.mtsu.edu/article/time-place-and-manner-restrictions/>.

180. 391 U.S. 367, 376–77 (1968); *Clark v. Cmty. Creative Ctr. for Non-Violence*, 468 U.S. 288, 293 (1984) (leaving open ample alternative channels of communication to the *O'Brien* Test).

substantial state interest?<sup>181</sup> Put differently, are there any alternatives that would serve the state interest equally well but do not require the suppression of speech? The third part asks whether ample alternative channels of communication have been left open so that the speaker may convey their point through another medium of communication. The trouble is not with the test per se but with how the Court and lower courts have applied it. This application makes it too easy for such restrictions on speech to pass constitutional muster. The test is supposed to incorporate the intermediate scrutiny standard of review.<sup>182</sup>

For content-neutral restrictions, courts must balance competing considerations, such as the possible value of student self-expression and the school's interest in making the educational environment on campus conducive to student learning.<sup>183</sup> For that reason, in this context, perhaps content-neutral restrictions should not be subject to strict scrutiny, when strict scrutiny is supposed to mean "strict in theory, but fatal in fact."<sup>184</sup> At the same time, judges should not uphold content-neutral restrictions so casually, as if they were applying something more like rational basis standard of review. As Justice Thurgood Marshall points out in his dissent in *Clark*:

The minimal scrutiny prong of this two-tiered approach has led to an unfortunate diminution of First Amendment protection. By narrowly limiting its concern to whether a given regulation creates a content-based distinction, the Court has seemingly overlooked the fact that content-neutral restrictions are also capable of unnecessarily restricting protected expressive activity.<sup>185</sup>

In *Jacobs*, a court upheld a uniform policy because the restriction on student speech was content neutral.<sup>186</sup> The school defended its policy by referencing three state interests: "increasing student achievement, promoting safety, and enhancing a positive school environment."<sup>187</sup> The court found these goals to be important.<sup>188</sup> In Judge Michael Daly Hawkins's words, "it is hard to think of a government interest more important than the interest in

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181. *O'Brien*, 391 U.S. at 376–77.

182. CHEMERINSKY, *supra* note 10, at 552–54.

183. FOSSEY & DEMITCHELL, *supra* note 34, at x.

184. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (internal quotations omitted); see CHEMERINSKY, *supra* note 10, at 554 (explaining strict scrutiny).

185. *Clark*, 468 U.S. at 313 (Marshall, J., dissenting).

186. *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 441 (9th Cir. 2008).

187. *Id.* at 422.

188. *Id.* at 435.

fostering conducive [sic] learning environments for our nation's children."<sup>189</sup> Thus, intermediate scrutiny was satisfied.<sup>190</sup> In this fact pattern, the strongest state interest is a "distraction-free educational environment."<sup>191</sup> The rationale of this decision is in sync with that of *Tinker*. In *Tinker*, restrictions on student speech can only be constitutionally permissible in the event that the speech in question would be likely to substantially disrupt the educational environment.<sup>192</sup>

There are three problems with the way in which courts tend to employ content-neutral analysis in the context of free speech in public schools. First, notwithstanding the intent of those who created the dress code, such codes may infringe upon the constitutional right of free speech, including the expression of political viewpoints (and these restrictions on the choice of clothing may not be trivial). Many African American students will not be indifferent to a dress code that prevents them from wearing their hair in a manner that expresses their racial and cultural identity in a country where there still is pressure to "act white." Second, when a judge decides that the restriction is content neutral, the infringement on student speech probably will be ruled constitutional, without the kinds of considerations that would be weighed if strict scrutiny were the applicable standard of review.<sup>193</sup> Third, dress codes do not leave open ample, equally effective alternative channels of communication.<sup>194</sup> Because it is situational—and cannot be otherwise—dress can be a much more effective mode of communication than the alternatives.

Usually, it will not be too challenging for school authorities to come up with content-neutral reasons in support of their dress codes. For Judge Thomas in *Jacobs*, though, the uniform policy was not viewpoint-neutral because pro-school messages were permitted.<sup>195</sup> By contrast, according to the majority, there was no evidence of pretext.<sup>196</sup> The school logo on the uniform was not intended as a pro-school message.<sup>197</sup> Even if that was not the intent of the school officials, it is reasonable to infer that someone who was wearing the school's logo on their uniform is showing support for the school, possibly against their will, unless the message is somehow meant

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189. *Id.* at 435–36.

190. *Id.* at 437.

191. *Id.* at 437.

192. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)

193. See CHEMERINSKY, *supra* note 10, at 554 (summarizing strict scrutiny).

194. *Clark v. Cmty. Creative Ctr. for Non-Violence*, 468 U.S. 288, 308 (1984) (Marshall J., dissenting).

195. *Jacobs*, 526 F.3d at 444 (Thomas, J., dissenting).

196. *Id.* at 436–37.

197. *Id.* at 433.

ironically. Again, there appears to be a compelled speech problem here. From the plaintiffs' standpoint, the real goal of the school was to establish conformity.<sup>198</sup>

In *Jacobs*, the school threw a bunch of state interests at the wall, hoping one of them would stick, like “increasing student achievement,” “promoting safety,” or “enhancing a positive school environment.”<sup>199</sup> As Judge Thomas wrote in his dissent:

So what is the “important or substantial” government purpose here? It is not, as some have suggested in similar contexts, to reduce socio-economic divisions. Rather, the state[d] purpose of the school uniform and printed message ban is to promote “school spirit.” Assuming this is an important government purpose—an assumption indeed—the majority neglects to consider whether the record demonstrates that the school uniform policy actually furthers this interest. The school argues that the imposition of mandatory school uniforms and the ban on expressive messages results in an improvement of the educational process in individual schools through increasing student achievement, promoting safety, and enhancing a positive school climate. There is no empirical evidence of this in the record, only conclusory affidavits filed by school officials.<sup>200</sup>

Apart from concerns about compelled speech, this decision reveals why judges almost always uphold content-neutral restrictions. The school does not actually have to show that its purported interest is important or that there are no less restrictive means of serving that interest. In other contexts, intermediate scrutiny has more bite, like that of sex classifications.<sup>201</sup> It is unlikely that any of the interests offered to defend the uniform policy were genuinely important—like promoting school spirit—given the normal legal meaning of “important,” whereas they would have been legitimate under the first part of the rational basis standard of review.

On top of that, the Court has not established a definitive or clear standard, allowing schools to defend their dress codes on whatever grounds strike them as being conducive to protecting the educational environment.<sup>202</sup>

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198. *Id.* at 435.

199. *Id.*

200. *Id.* at 444–45 (Thomas, J., dissenting).

201. *See, e.g.,* *United States v. Virginia*, 518 U.S. 515, 596 (1996) (Scalia, J., dissenting).

202. *Hudson & Ghani, supra* note 36.

Obviously, in social science, causal inference can be tricky. This claim is almost self-evident; trying to explain cause and effect in the human world is difficult, and social scientists often disagree on methodology.<sup>203</sup> Also, very few judges have training in the nuances or even basics of social science.<sup>204</sup> Moreover, in the eyes of the majority, ample channels of communication were left open.<sup>205</sup> However, that probably was untrue, given that we are in an age of camera phones and social media, where there is so much emphasis on the visual. In his dissent in *Clark*, Justice Thurgood Marshall alludes to the rhetorical impact of having large numbers of unhoused people sleeping overnight in a public park to dramatize the gravity of the problem of homelessness in America.<sup>206</sup>

School officials can always fall back on the non-trivial doctrinal distinction between content-based and content-neutral speech restrictions, where only the former triggers strict scrutiny standard of review.<sup>207</sup> Surely, many schools have content-neutral reasons for institutionalizing dress codes.<sup>208</sup> Again, the rationale for such a distinction may be plausible in many situations more generally, where there are overriding reasons for allowing government to enforce content-neutral restrictions—for example, when someone wants to drive a sound truck through a residential neighborhood at midnight, blaring “Vote for Robert Kennedy, Jr.” That said, judges should not be so deferential to what school authorities decide to do with respect to student dress when equally or more effective alternative channels of communication are not left open. A transgender student who cannot dress to subvert traditional gender norms due to the dress code has been deprived of a particularly promising means of disclosing who they are. The ease of showing that dress codes are constitutional for content-neutral reasons enables school authorities to conceal sex biases.<sup>209</sup> A fundamental assumption of modern free speech doctrine is that government (or here, school authorities), cannot be competent or impartial when it comes to censorship decisions.<sup>210</sup> There is no reason to believe that school officials are any better in this regard.

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203. *See generally*, ALEXANDER ROSENBERG, PHILOSOPHY OF SOCIAL SCIENCE 4 (2d ed. 1995).

204. David L. Faigman, *Judges As “Amateur Scientists”*, 86 B.U. L. REV. 1207, 1211 (2006).

205. *Jacobs*, 526 F.3d at 437.

206. *Clark v. Cmty. Creative Ctr. for Non-Violence*, 468 U.S. 288, 302–06 (1984) (Marshall, J., dissenting).

207. CHEMERINSKY, *supra* note 10, at 961.

208. *See id.* at 1193–94.

209. *See Harbach, supra* note 104, at 1058 (noting that teachers may unwittingly contribute to sexualization and urging schools to consider how “dress coding” perpetuates it and to examine curricula for implicit messages).

210. Helen Norton, *Distrust, Negative First Amendment Theory, and the Regulation of Lies*, KNIGHT FIRST AMEND. INST. (Oct. 19, 2022) <https://knightcolumbia.org/content/distrust-negative-first->

## V. STATE INTERESTS

In the previous Parts, this Article demonstrates why it is imperative for students to dress however they please in the name of respecting their autonomous capacities and facilitating the development of their individuality. In this last Part, the Article shifts focus, explaining why none of the state interests typically offered on behalf of dress codes are strong enough to justify bans on any kind of clothing on campus. In plain English, a state interest that is strong enough may supersede the right of a student to dress however they want to dress. Typical state interests include preventing violence on campus, minimizing substantial disruptions to the learning environment, and reducing socioeconomic inequality. The trouble is not that these state interests are not important per se or are pretexts. Instead, it is far from evident that dress codes do much, if anything, to serve them. In defending their dress codes in court, most school districts do not allege that such policies foster academic achievement; they focus on disruptions and distractions.<sup>211</sup> It appears that defenders of dress codes do not deny that student dress or appearance can constitute self-expression. Instead, they assume that most student speech, including expressive conduct through dress or physical appearance, is not likely to be valuable enough to supersede countervailing school interests.<sup>212</sup> According to Fossey and DeMitchell, “school authorities adopt dress codes with the simple goal of creating a purposeful learning environment that reflects community values.”<sup>213</sup> However, a weak state interest, coupled with potentially valuable speech, ought to lead to the constitutional conclusion that the student speech in question is presumptively protected.

*A. Incitement, Safety Concerns, and Bans on Gang Attire*

These days, the safety of students on campus is on everyone’s mind. Consider the example of a prohibition on gang attire, where students are not allowed to wear clothing that displays their affiliation with or support for a certain street gang.<sup>214</sup> Some proponents of such dress codes insist that these restrictions will reduce the likelihood of violence.<sup>215</sup> As an example, in the San Joaquin Valley in California, a gang member could wear sports attire

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amendment-theory-and-the-regulation-of-lies (explaining that the distrust of government is important in contemporary First Amendment interpretation).

211. THE LEGAL AND POLICY CHALLENGES, *supra* note 2, at 5–6.

212. FOSSEY & DEMITCHELL, *supra* note 34, at ix–x, 3–4.

213. FOSSEY & DEMITCHELL, *supra* note 34, at 3.

214. *Id.* at 44.

215. THE LEGAL AND POLICY CHALLENGES, *supra* note 2, at 67.

where the team initials represent the gang, like a Padres cap for the Posole gang or a Fresno State cap for the Fresno Bulldogs.<sup>216</sup> They could also be decked out in matching colors—hats, shirts, shorts and shoes—to communicate their affiliation, coupled with overall appearance, language, and mannerisms. When school districts ban the wearing of such caps, they assume that some of the students who wear them are engaging in expressive conduct, conceding that it is speech. After all, the problem seems to concern the message conveyed, even when a particular student is not intending to convey such a message.

Under the *Brandenburg* Test, to constitute incitement, three conditions must be satisfied: (1) the speaker intends to incite others to commit violence; (2) the lawless conduct must be imminent; and (3) there is a high likelihood of success.<sup>217</sup> Applying this to clothing as expressive conduct, in a typical fact pattern, it is improbable that a student's wearing a Padres or Fresno State cap would satisfy all three parts. In terms of the first condition, the speaker might not be intending to incite others, like their friends, to attack classmates from rival gangs—and the speaker must be given the benefit of the doubt.<sup>218</sup> Rather, they may be articulating their membership in a particular group and expressing group solidarity. For the second and third conditions, the mere wearing of such a cap is unlikely to immediately provoke someone to attack someone else. In fact, students could wear caps for a variety of reasons.

Like many others, Marci Hamilton subscribes to the view that school officials should be able to reduce gang activity by singling out gang colors, insignias, and jewelry.<sup>219</sup> The prevention of violence in an educational environment, so that a school is safe enough for all students to learn, is an important or probably compelling state interest. The trouble lies in whether the approach is narrowly or substantially tailored, which is the second requirement of a heightened standard of review.<sup>220</sup> At most, the causal relationship between bans on gang attire and gang activity or violence in public schools is attenuated; it is not established by the data.<sup>221</sup> Nor is it

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216. Under California education law, Section 35183, schools may ban students from wearing “gang-related apparel” if the school has adopted that type of a dress code. CAL. EDUC. CODE § 35183(b) (2024).

217. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

218. *See Hess v. Indiana*, 414 U.S. 105, 109 (1973) (holding that the State failed to meet its burden to prove intent and likelihood of imminent disorder because “there was no evidence, or rational inference from the import of the language, that [appellant’s] words were intended to produce, and likely to produce, imminent disorder”).

219. HAMILTON, *supra* note 97, at 160.

220. CHEMERINSKY, *supra* note 10, at 554.

221. Caroline Mimbs Nyce, *Can School Dress Code Help Curb Gang Violence?* ATLANTIC: CULTURE (May 24, 2016), <https://www.theatlantic.com/culture/archive/2016/05/can-dress-codes-rules-help-curb-gang-violence/623934/>.

evident where the burden of proof ought to lie. Given the potential value of student dress and the presumption that it is entitled to constitutional protection that this article has defended, my position is that burden of proof should be on school officials, who would have to make the case for such a connection before censorship is permitted. After all, their reasons could be pretexts. It is hard to believe that gang problems would disappear or be mitigated simply because students could not wear certain clothes. Indeed, there are so many other ways to express gang affiliation, like language, signs, and slang. Lastly, there are non-censorious alternatives available.<sup>222</sup>

When it comes to bans on gang attire, another issue is whether a student should be prohibited from wearing certain clothing—as opposed to making their own decision—because how they dress renders them more vulnerable to criminal assault and battery. This rationale for censorship is very hard to defend as well. If a school were full of anti-Semites, we would not allow school officials to reduce the likelihood that they would be targeted by preventing Orthodox Jewish students from wearing a yarmulke. That approach would be based on an unacceptable victim-blaming rationale. Besides, there is a substantial risk that school authorities would enforce bans on gang colors or clothing in a discriminatory manner, where students of color, unlike their white counterparts, are singled out. Laws that permit such discretion on the part of school authorities can easily be selectively enforced. A nice illustration of this point appears in a Texas case, where a student was disciplined for wearing a rosary.<sup>223</sup>

### *B. True Threats*

Like incitement, true threats—where one person directly threatens another with violence—fall outside the scope of First Amendment protection.<sup>224</sup> True threats incorporate a reasonable person standard.<sup>225</sup> The individual, who conveys the threat, also must know that the communication will be viewed in that way.<sup>226</sup> Obviously, a student should not be able to directly threaten other students with violence, especially in an educational setting. According to the legal definition, the wearing of gang attire does not

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222. FOSSEY & DEMITCHELL, *supra* note 34, at 48.

223. *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 671 (S.D. Tex. 1997).

224. *Watts v. United States*, 394 U.S. 705, 708 (1969).

225. ERWIN CHEMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 117 (2017).

226. NADINE STROSSEN, *HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP* 60 (2018).

amount to a true threat.<sup>227</sup> The mere existence of such attire does not qualify as a verbal threat of violence. In other words, wearing a cap or NFL jersey, or even gang tattoos, does not reflect an intention to threaten others with violence. If one student threatens another with violence, attacks them, or both, punishment and other preventative measures would be called for. Because of valid concerns about safety, it is easy to see why school officials overreact. At the same time, our society tends to stigmatize gang members, who are disproportionately low income and people of color, and treat many non-gang members as if they were affiliated.<sup>228</sup> At the end of the day, when a student identifies with a particular gang, that identification is also self-expression and ought to be treated as such, even though many people do not care for such speech. Schools can beef up security when gang activity or violence is a problem, or deal with the situation in a more speech-friendly manner.

### C. Substantial Disruptions

Given the nature of an educational environment, perhaps the strongest state interest—other than safety—concerns when a student’s appearance may be too distracting, causing a substantial disruption on campus. Under *Tinker*, if the speech or expressive conduct in question is likely to cause such a disruption, school authorities can ban it.<sup>229</sup> They can demand that the student change, and if they refuse, they can be sent home or suspended. Under the *Tinker* Substantial Disruption Test, the school has the burden to prove that the student’s expressive conduct must “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”<sup>230</sup> The school must demonstrate that “its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>231</sup> This rule

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227. See Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL’Y 284, 290–91 (2001) (explaining that, at the most basic level, “threats are speech which communicate[] the possibility of future use of physical force or violence against the intended victim or those close to the victim, or unlawful damage of valuable property”).

228. See JAMES DIEGO VIGIL, *A RAINBOW OF GANGS: STREET CULTURES IN THE MEGA-CITY 6* (2023) (describing concentration of street gangs in low-income ethnic-minority neighborhoods, documenting law-and-order crackdowns in minority areas, and explaining how physical and cultural markers are used to draw social boundaries that subject minorities to prejudice and discrimination).

229. ROSS, *supra* note 33, at 134.

230. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1996)).

231. *Id.*

denies school officials the authority to restrict student speech for other reasons, such as those that are unrelated to the operation of the school.

In many situations, though, what constitutes a substantial disruption will be a judgment call. As Anne Proffitt Dupre observes, “[t]he [*Tinker*] opinion did not explain how clear the fear of disturbance needed to be before school officials could act to control it.”<sup>232</sup> Take an extreme example. Imagine that a young woman comes to school dressed in saran wrap to make a statement about body positivity.<sup>233</sup> If someone were to allege that a near-nude student was child pornography, one could respond that mere nudity does not meet the legal definition of child pornography.<sup>234</sup> Most of the time, at a school, there are few scenarios in which such dress would be so distracting in the classroom that students could not concentrate and, therefore, could not learn. In a digital world, public schools are full of distractions. Many students have short attention spans, and many of them are glued to their phones.<sup>235</sup> The legal rule should not be predicated on the worst-case scenarios. Here, a precautionary rule is preferable. Normally, a student’s attire will not be so distracting that nobody will be able to concentrate on what the teacher is saying in class, even when there are some rare exceptions. Outside the classroom, moreover, students are usually not a captive audience. At most, how someone dresses might be somewhat distracting for a short period, but it is not clear that the person who may have dressed to attract attention is blameworthy.<sup>236</sup>

#### *D. Socioeconomic Equality*

Lastly, some people defend dress codes or uniform policies in the name of creating a more socioeconomically egalitarian environment in schools by concealing socioeconomic difference and discouraging competitive

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232. DUPRE, *supra* note 17, at 16.

233. I thank Bill and Stephanie Niemi for this not-so-hypothetical example.

234. *United States v. Kemmerling*, 285 F.3d. 644, 645–46 (8th Cir. 2002) (“We have held that more than mere nudity is required before an image can qualify as ‘lascivious’ within the meaning of the statute. A picture is ‘lascivious’ only if it is sexual in nature. Thus, the statute is violated, for instance, when a picture shows a child nude or partially clothed, when the focus of the image is the child’s genitals or pubic area, and when the image is intended to elicit a sexual response in the viewer.”) (citation omitted).

235. See Jen Hatfield, *72% of U.S. High School Teachers Say Cellphone Distraction is a Major Problem in the Classroom*, PEW RSCH. CTR. (June 12, 2024) <https://www.pewresearch.org/short-reads/2024/06/12/72-percent-of-us-high-school-teachers-say-cellphone-distraction-is-a-major-problem-in-the-classroom/>.

236. Americans continue to have odd reactions to nudity. That a (nude) dating show in the United Kingdom, “Naked Attraction,” could be so popular for so long but would be unacceptable in the U.S. strongly suggests that such standards are culturally relative.

dressing.<sup>237</sup> From a progressive standpoint, this objective is well-intentioned due to the importance of social leveling. Forcing all students to dress in the same way has the appeal that it does inasmuch as there may be less conflict and resentment if privileged students are not allowed to flaunt their wealth through their fashion choices. However, there is virtually no peer-reviewed research about the extent to which dress codes reduce socioeconomic inequality (or the perception of it). At most, it is a guess. Usually, an advocate does not have much trouble in finding some study that supports the legal conclusion that they are arguing for. If that were not concerning enough, it does not take much to certify an expert witness at trial, when the judge has so much discretion.<sup>238</sup> The certification is largely left up to the judge, for better or for worse.

Presumably, the theory is that mandatory uniforms will make it much more difficult for students to know who qualifies as low income and for a social hierarchy to exist. There are numerous ways that wealthier students can display their economic privilege. This includes showing off cash, credit cards, the electronic devices that they use, the car that they drive, what they wear outside of school at parties and school events, what they talk about, and who their friends are. Likewise, unhoused and other socioeconomically disadvantaged students will not be able to hide their status simply by dressing like everyone else. Other noticeable signs of poverty exist assuming they are able to regularly attend school in the first place.

#### CONCLUSION

As this Article has demonstrated, dress codes have a much higher cost than most people realize when the importance of self-expression for teenagers is factored in during a critical time in their journey to adulthood. School officials should not be able to act like the morality police by forcing conformity. Upon closer inspection, the reasons offered on behalf of such codes turn out to be dubious when school officials cannot show the alleged negative effects of their dress codes. Too many of these effects seem to be in the eye of the beholder. At public junior high and high schools, student expressive conduct in the form of dress must be constitutionally protected even when school officials have content-neutral reasons for restricting what

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237. *Frudden v. Pilling*, 877 F.3d 821, 825 (9th Cir. 2017) (stating that one reason the superintendent supported a school dress code was because she believed it would “help even the playing field for those students who could not afford expensive clothes”).

238. FED. R. EVID. 702 (permitting opinion testimony by a witness “qualified as an expert by knowledge, skill, experience, training, or education” if the proponent shows it is “*more likely than not*” that Rule 702(a)–(d) are satisfied) (emphasis added).

students wear to school. In making a perfectionist Millian argument, this Article has highlighted the importance of self-development and individuality for teenagers, considering where they are on the learning curve and the environment they find themselves in, amid ubiquitous social pressure to conform. Even when school officials have plausible content-neutral reasons for such codes, they still produce a tremendous chilling effect. The threat of punishment most likely dissuades many students from revealing aspects of who they are or their views about society that could be quite important, either to themselves or others, at that very moment or in the distant future.

Although this Article has mainly used examples that progressives would have sympathy for, conservatives also have good reasons not to empower school authorities to formulate and enforce dress codes. Free speech should be a principle that transcends partisan disagreements. Religious and conservative viewpoints and expressions of identity also are in danger when school authorities may censor them. In *Jacobs*, the student was disciplined for wearing a religious symbol.<sup>239</sup> At minimum, this Article has sought to cast doubt—on free speech grounds—on the widely shared view that school officials should have *carte blanche* to regulate how students dress on campus. It has also highlighted the comparative weakness of the state interests that school authorities use to defend dress codes. If that were not enough, school authorities will never come up with viewpoint-neutral policies that are enforced even-handedly. Like other government officials, elected school board members and administrators cannot be expected to protect unpopular kinds of expressive conduct, including student dress. If they did so consistently, then the First Amendment and judicial review might not be necessary. To give school officials the authority to regulate student dress is to give them the power to censor student speech. That problem should not be ignored just because students are teenagers. Their free speech rights matter as well.

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239. *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 423 (9th Cir. 2008).

# LOCKING UP THE RIGHT TO PROCREATE

Grace Carolyn Palcic\*

## ABSTRACT

*There is no question that Dobbs v. Jackson Women’s Health Organization impacted more than just abortion rights—from access to assisted reproductive technologies (ARTs), contraception, marriage rights, family privacy, and parental rights—Dobbs has unsettled the constitutional ground these rights rest on. One contributing factor is that abortion rights have been bundled up with other reproductive, family, sexual, and privacy rights over the years, allowing Dobbs to shake the grounds of a wide range of constitutional protections. This Article sets out to unbundle one of those rights: the right to procreate.*

*In analyzing the history and judicial development of the right to procreate, this constitutional right was identified before other family and privacy rights, avoiding initial tangling with these other rights. However, shortly after being identified, constitutional rights and protections in other areas (abortion, contraception, family rights, etc.) started to emerge, providing alternative grounds to argue for reproductive rights. Further, most forced-sterilization programs had been rebranded by the government to avoid legal challenges under the right to procreate. These factors left us with few cases where the right to procreate had truly been defined and refined. That is, outside of prisons.*

*While constitutional rights are not terminated at the prison doors, the government can more easily restrict constitutional rights in prisons. First, a right is only protected in prisons if it is not inconsistent with the goals of incarceration. Second, a right that survives incarceration can be limited based on an analysis of the Turner factors: the relationship between the restriction and a valid governmental interest; whether there are alternative means of exercising the right; the impact of accommodating the right; and whether there are ready alternatives to affording the right. Initially, the right to procreate was determined to be inherently at odds with incarceration because procreation necessarily involved sexual reproduction, which opposed a prison’s goals of punishment and seclusion while posing security*

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\* 2025–2026 Law Clerk, U.S. District Court, J.D., University of California, Irvine. All views expressed in this Article are my own. Thank you to Professor Shauhin Talesh for the feedback throughout the writing process and for organizing the workshops where the Article took shape. Many thanks to all those that discussed the topic, provided feedback, and workshopped this Article throughout the process, including Sayid Bnefsi, Claire Foster, Jennifer Keute, Bryant Jackson-Green, Kanomé Jones, Maki O’Bryan, DJ Swartz, and Devin Ton.

*and safety risks. Yet, when ARTs became available, courts did not extend the right to procreate to include utilizing ARTs while incarcerated. These decisions were based on a misguided understanding of both the right to procreate and modern medical knowledge related to reproduction. When applying the right to procreate under the limited case law we have, and through the guidance of current medical knowledge, we get a different result: one that protects the right to procreate in prisons and to use ARTs.*

*Looking at the right to procreate in prisons is not just important for incarcerated individuals. When a constitutional right is available for those in prison, it is also available broadly. This is particularly important for finding that the right to procreate can be interpreted separately from other reproductive and family rights, and for finding that the right to procreate protects access to ARTs. Two metaphors for the post-Dobbs environment help us understand why “unbundling” the right to procreate from other fundamental rights is important: one metaphor looks at Dobbs like a window into a home built from the bundle of rights, and another looks at Dobbs as if it pulled a foundational Jenga block out of the tower that many freedoms sat upon. Under either of these, being able to recognize the right to procreate as an independent right serves to create a means for constitutional arguments for protection. Returning to the metaphors, the right to procreate serves as a wall that limits the government’s ability to look through the window into the house of reproductive rights, or as an independent Jenga block to rest the argument for rights on. By identifying the right to procreate—and specifically the right to procreate using ARTs—within prisons, the right to procreate may serve as a vehicle for protecting ART access and other methods of reproduction.*

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## INTRODUCTION

In recent U.S. history, reproductive rights have been at the forefront of political and social battlegrounds in congressional chambers and courtrooms across the country.<sup>1</sup> In 2023, reproductive rights took a major hit; the constitutional right to abortion was reversed in the Supreme Court case, *Dobbs v. Jackson Women's Health Organization*.<sup>2</sup> Soon after this loss at the federal level, the fight over abortion took off with battles across state governments.<sup>3</sup> As a tactic to restrict abortion access, a number of states have enacted *fetal personhood laws*, which extend the legal recognitions and protections of legal personhood to a fetus or, in some cases, even an embryo outside the human body.<sup>4</sup> However, fetal personhood laws are a threat to reproductive rights beyond just abortion rights. In states such as Alabama, fetal personhood laws have turned into ammunition,<sup>5</sup> shooting holes in legal access to *in vitro fertilization* (IVF)<sup>6</sup> and other types of *assisted reproductive technologies* (ARTs).<sup>7</sup> Whether or not intentional, these laws have created

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1. Although *Roe v. Wade* is often regarded as the start of politicization of the reproductive rights movement, it certainly was not the first major legal battle or social push for reproductive rights. 410 U.S. 113 (1973). For example, Congress passed the Comstock Act in 1873 to prohibit the mailing of “obscene matter,” including information about birth control. 18 U.S.C. § 1461. Similarly, in *Buck v. Bell*, the Court upheld state sterilization programs that forcibly sterilized certain people to prevent them from having children. 274 U.S. 200, 207 (1927). Additionally, until *Levy v. Louisiana*, states commonly used illegitimacy laws to deter having children outside of marriage by creating substantial legal burdens on non-marital children. 391 U.S. 68, 71–72 (1968); see Melissa Murray, *Legitimizing Illegitimacy in Constitutional Law*, 99 WASH. U. L. REV. 2063, 2070 (2022) (“[T]he increasing incidence of nonmarital births dovetails with the law’s liberalization of the legal impediments that traditionally have been associated with illegitimacy.”).

2. 597 U.S. 215, 263–92 (2022).

3. See, e.g., Kelly Baden & Jennifer Driver, *The State Abortion Policy Landscape One Year Post-Roe*, GUTTMACHER (June 16, 2023), <https://www.guttmacher.org/2023/06/state-abortion-policy-landscape-one-year-post-roe> (summarizing state legislative actions related to reproductive health after *Dobbs* shifted the fight to states).

4. Adam Edelman, *An Uptick in State Personhood Bills Fuels Growing Fears Over IVF Restrictions*, NBC NEWS (Feb. 23, 2024), <https://www.nbcnews.com/politics/personhood-bills-ivf-restrictions-alabama-rcna140228> (explaining current state bills “which aim to establish that an embryo or fetus should have the full rights of a person based on the idea that life begins at conception”).

5. *LePage v. Ctr. for Reprod. Med., P.C.*, 408 So. 3d 678, 695–97 (Ala. 2024).

6. IVF is a reproductive technique where an egg is fertilized outside a person’s body and, after fertilization, implanted into their uterus. See generally *In Vitro Fertilization (IVF)*, MAYO CLINIC (Sept. 1, 2023), <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716>; Aria Bendix, *Pauses on Embryo Transfers Out of Alabama Leave IVF Patients with Few Options*, NBC NEWS (Feb. 23, 2024), <https://www.nbcnews.com/health/health-news/pauses-embryo-transfers-alabama-leave-ivf-patients-options-rcna140052>.

7. Kim Bellware & Maham Javaid, *Third Ala. IVF Clinic Halts Operation After State High Court Ruling*, WASH. POST (Feb. 22, 2024), <https://www.washingtonpost.com/nation/2024/02/22/third-alabama-ivf-clinic-pauses-treatment/>. There are a range of definitions of ART, however, ART generally refer to any reproductive procedure that handles eggs or sperm outside of the human body. See *Assisted Reproductive Technology: Definition*, YALE MEDICINE, <https://www.yalemedicine.org/clinical->

new obstacles—and for some people, effective prohibitions—on the right to procreate.

The right to procreate was recognized by the Supreme Court as a fundamental right in 1942.<sup>8</sup> Despite referencing the right to procreate in many cases, the Court has not further defined this right since initially recognizing it—even in lower courts, it is rarely addressed.<sup>9</sup> One reason the right to procreate has been largely ignored is that the abortion<sup>10</sup> and

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keywords/assisted-reproductive-technology (last visited Dec. 14, 2025) (“Assisted reproductive technology (ART) refers to a group of medical procedures and treatments designed to help individuals who are experiencing fertility issues or have difficulty conceiving naturally. These techniques involve the manipulation of eggs, sperm, or embryos in a laboratory setting to increase the chances of successful conception and pregnancy.”); *NCI Dictionary of Reproductive Terms: Assisted Reproductive Technology*, NAT’L CANCER INST., <https://www.cancer.gov/publications/dictionaries/genetics-dictionary/def/assisted-reproductive-technology> (last visited Dec. 14, 2025) (“Procedures that use donor or nondonor eggs and sperm to create embryos in vitro. Examples of assisted reproductive technology include in vitro fertilization (IVF), gamete intrafallopian transfer (GIFT), and zygote intrafallopian transfer (ZIFT). These procedures may be used prior to preimplantation genetic testing (PGT). Also called ART.”); *Assisted Reproductive Technology*, AM. MED. ASS’N CODE OF ETHICS, <https://code-medical-ethics.ama-assn.org/ethics-opinions/assisted-reproductive-technology> (last visited Dec. 14, 2025) (“‘Assisted reproductive technology’ is understood as all treatments or procedures that include the handling of human oocytes or embryos. It encompasses an increasingly complex range of interventions—such as therapeutic donor insemination, ovarian stimulation, ova and sperm retrieval, in vitro fertilization, gamete intrafallopian transfer—and may involve multiple participants.”). For purposes of this article, ART refers to any method of reproduction that goes beyond traditional sexual reproduction, including techniques that are a part of larger reproductive methods. This can include medical and laboratory procedures such as egg retrieval, IVF, intrauterine insemination (often referred to as “IUI”), intracytoplasmic sperm injection (often referred to as “ICSI”), sperm washing, embryo incubation, preimplantation genetic testing (often referred to as “PGT”), embryo transfers, and cryopreservation of embryos and genetic materials. However, this definition also includes reproductive techniques that can be done outside of a medical setting such as artificial insemination, sperm donation, and “traditional” surrogacy in which the surrogate’s genetic material is used rather than a donor egg or embryo.

8. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

9. *See infra* Part I.

10. The *abortion cases* are the set of cases that explained the right to abortion between 1973 and 2022—between the establishment of this right in *Roe* and the reversal in *Dobbs*. The set of cases evolved over the period, with some cases overturning and refining the decisions in previous ones. These cases includes: *Roe v. Wade*, 410 U.S. 113, 162–64 (1973) (deciding that a state’s interest in protecting potential fetal life cannot overrule the privacy and personal autonomy a person has for ending a pregnancy); *Bellotti v. Baird*, 443 U.S. 622, 647–48 (1979) (prohibiting states from requiring parental consent for a minor to receive an abortion without having an additional alternative for approval); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 431–52 (1983) (striking down multiple restrictions on abortion access); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 764 (1986) (finding that a state could not require a doctor to provide information about fetal development and abortion alternatives); *Hodgson v. Minnesota*, 497 U.S. 417, 450–55 (1990) (ruling against strict parental consent notification policies); *Planned Parenthood v. Casey*, 505 U.S. 833, 874–79 (1992) (replacing the “trimester” test with the “undue burden” test for determining abortion rights); *Stenberg v. Carhart*, 530 U.S. 914, 929–46 (2000) (striking down a state’s “partial birth abortion” ban); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 325 (2006) (requiring abortion restrictions to include protections for the health of pregnant people); *Gonzales v. Carhart*, 550 U.S. 124, 146–68 (2007) (allowing states to enact “partial birth abortion” bans out of interest in protecting potential life); *Whole Woman’s Health v. Hellerstedt*,

reproductive privacy cases<sup>11</sup> entered the judicial scene shortly after the right to procreate was recognized. These cases provided more explicit protections that could be used to argue for greater access to reproductive choices, such as ARTs and reproduction outside of traditional family structures.<sup>12</sup> Another factor contributing to the judicial neglect of the right to procreate is due to the government reshaping forced-sterilization programs into voluntary ones,<sup>13</sup> eliminating the direct attack on the right to procreate. As a result, of the few cases that center on the right to procreate, most have originated from carceral settings.<sup>14</sup>

Even after recognizing the right to procreate, prisons, jails, and immigration detention facilities have continued to put policies in place to prevent individuals in government custody from procreating. Initially, these policies were framed as prohibitions on sexual relationships while incarcerated, regardless of whether they were for procreative purposes.<sup>15</sup> As scientific developments increased the types and accessibility of ARTs, the government continued to deny incarcerated people the ability to procreate, this time preventing procreation through both sexual and non-sexual means.<sup>16</sup>

With reproductive freedoms at a constant risk, and with advances in medical knowledge changing our understanding of reproduction,<sup>17</sup> it is necessary to reevaluate the right to procreate. Specifically, we must address

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579 U.S. 582, 609–24 (2016) (finding that requirements for abortion clinics were an undue burden when they forced most clinics to close despite limited medical support for the requirement). In addition to the previous cases, there were decisions during this time period addressing First Amendment rights related to abortion and government funding of reproductive health.

11. See *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (finding the right to consensual sex between adults in private); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (establishing right to access contraceptives as a matter of privacy); *Eisenstadt v. Baird*, 405 U.S. 438, 447–55 (1972) (granting privacy protections for contraceptives regardless of marital status).

12. See *infra* Part I.C (discussing debates over reproductive rights and the impact the various approaches have in reproductive choices).

13. See MICHELE GOODWIN, *POLICING THE WOMB* 15–27 (2020) (describing how the government continues to limit procreation by policing, incarceration, and deceptive voluntary sterilization programs).

14. See *infra* Part I.D.

15. See *infra* Part II.B.

16. See *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990) (denying an incarcerated person the ability to procreate through sexual or non-sexual means); *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002) (same).

17. See generally Ali H. Brivanlou & Norbert Gleicher, *The Evolution of Our Understanding of Human Development Over the Last 10 Years*, NATURE COMMUN., July 2021, at 1 (providing an overview of the changes in scientific understandings of reproduction and providing citations to more in-depth descriptions).

how this right has been treated within U.S. carceral settings.<sup>18</sup> Prisons are one of the few places where the right to procreate has been examined independent from the bundle of family and privacy rights.<sup>19</sup> This indicates that the right to procreate can effectively be separated from other family and privacy rights, and provides a source to evaluate how this right should be interpreted on its own. Additionally, incarcerated people have fewer protections for their constitutional rights.<sup>20</sup> Therefore, using prisons as the starting place ensures that protections for procreation are strong enough to withstand even weakened levels of constitutional protection. Further, creating a right to access ARTs by leveraging the right to procreate could result in a constitutional protection for all people. In the prison setting, the state is given more power to curtail a right; however, to do so requires that all avenues for protecting the right be considered.<sup>21</sup> While restricting sexual procreation in prison may be done for legitimate penological reasons, restricting non-sexual procreation through ARTs is harder to justify. This indicates that access to ARTs is protected by the right to procreate. Identifying a right to ART access in prisons also extends that right outside of carceral settings, which can provide a tool to address restrictions on IVF and other ARTs.

Part I provides background on the development and application of the right to procreate. This Part highlights how the right to procreate has been lumped into other family and privacy rights, creating a limited understanding of this right on its own. Part II begins by looking at how constitutional rights are applied in prisons, then, using this understanding, evaluates the right to both sexual<sup>22</sup> and non-sexual<sup>23</sup> procreation while incarcerated. Part III then

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18. Additionally, the right to procreate in prisons has recently been getting attention abroad. *See Right to Life Includes Convict's Right to Procreate: Delhi High Court*, NAT'L HERALD INDIA (Dec. 23, 2023), <https://www.nationalheraldindia.com/national/right-to-life-includes-convicts-right-to-procreate-delhi-high-court> (explaining a recent court ruling in India that protected incarcerated people's right to procreate through non-sexual means); Ariane Amado, *Do Prisoners Have the Right to Create a Family?*, 236 PRISON SERV. J. 55 (2022) (explaining a European Court of Human Rights ruling that limits states from interfering with incarcerated individuals' rights to procreate through ARTs, then comparing the ability of incarcerated people in the U.K., France, and Belgium to access ARTs).

19. *See infra* Part I.D (addressing the limited case law defining the right to procreate), Part IV.A (discussing the bundle of family and privacy rights).

20. *See Turner v. Safley*, 482 U.S. 78, 84–99 (1987) (creating the test for limiting constitutional rights within prisons).

21. *Id.* at 90.

22. "Sexual procreation," as I am using it, refers to procreation that occurs directly from sexual intercourse, without the involvement of outside reproductive material. For example, using donor sperm (from someone who collected and transferred ownership of their sperm prior to or independent of the sexual acts) during sexual intercourse would not count as "sexual procreation," since it involves using the genetic material of someone not participating in the sexual relationship.

23. I am using the phrase "non-sexual procreation" to refer to any means of procreation not covered in traditional "sexual procreation." This includes procreation that uses donor eggs or sperm, IVF

dives deeper into how the right to procreate should be applied in prisons. The analysis focuses on *Skinner*'s foundational rationale for the right to procreate and uses current medical and scientific understandings to contextualize that right today. Part III concludes by determining that access to ARTs in prison balances the penological interests of prison operations with the constitutional rights of incarcerated people, finding that the right to procreate includes access to ARTs. Part IV then explains how the right to access ARTs in prisons can effectively defend reproductive freedoms involving ART use outside of prisons.

### I. THE RIGHT TO PROCREATE

In 1942, the Supreme Court first recognized a fundamental right to procreate in *Skinner v. Oklahoma*.<sup>24</sup> *Skinner* challenged Oklahoma's Habitual Sterilization Act, a law which sexually sterilized individuals who were convicted of three or more "felonies involving moral turpitude."<sup>25</sup> The decision focused largely on how the state drew "conspicuously artificial lines" when classifying felonies as "involving moral turpitude."<sup>26</sup> This classification system ultimately resulted in different punishments for nearly identical crimes.<sup>27</sup> The Court used larceny and embezzlement as examples.<sup>28</sup> Under Oklahoma law, these crimes involved virtually the same elements but with slightly different intent requirements.<sup>29</sup> Based on this slight distinction, larceny was classified as a felony involving moral turpitude while embezzlement was classified as a normal felony.<sup>30</sup> Thus, someone convicted of larceny three times could be sterilized under Oklahoma's Habitual Sterilization Act, but a person who caused nearly the same harms by committing embezzlement three times would not face sterilization.<sup>31</sup> The Court noted that the arbitrary distinction between crimes was significant because that distinction determined whether the punishment intruded on the ability to procreate, something the Court described as "one of the basic civil

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(where the egg is fertilized outside the body), and surrogacy that occurs through either IVF or artificial insemination.

24. 316 U.S. 535, 541 (1942).

25. *Id.* at 537. According to the statute, the court would enter a judgment for sexual sterilization after a judge or jury had determined that the individual (1) met the definition of "habitual criminal," and (2) could be sterilized "without detriment to his or her general health." *Id.*

26. *Id.* at 536.

27. *Id.* at 542.

28. *Id.*

29. *Id.* at 539.

30. *Id.* at 538.

31. *Id.* at 539.

rights of man.”<sup>32</sup> To illustrate the harms of arbitrary sterilization, the Court explained that “[m]arriage and procreation are fundamental to the very existence and survival of the race” and that “[t]he power to sterilize, if exercised, may have subtle, far-reaching and devastating effects.”<sup>33</sup> This provided the first indication of a fundamental right to procreate.

Despite arguments that the Court only intended *Skinner* to be an Equal Protection case,<sup>34</sup> there is a general understanding that *Skinner* articulated a fundamental right to procreate.<sup>35</sup> This understanding comes largely from how the Court itself has referenced and utilized the case, citing *Skinner* in multiple opinions as an example of a fundamental right.<sup>36</sup> While some cases describe the fundamental right in *Skinner* as the “right not to be sterilized,”<sup>37</sup> most cases reference *Skinner* for the right to procreate.<sup>38</sup> But what exactly does the right to procreate mean?

Beyond these occasional mentions, the Court has elaborated on how to interpret and apply the right to procreate as a self-standing right in only two other opinions. In *Cleveland Board of Education v. LaFleur*, the Court found that a government employer’s overly restrictive maternity leave policy

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32. *Id.* at 541.

33. *Id.*

34. See VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR TRIUMPH OF AMERICAN EUGENICS 89–160 (2008) (arguing that *Skinner* should be read as an Equal Protection case that was used to distance the U.S. from racial and class-based eugenics occurring during WWII, not as a substantive due process case that recognized the right to procreate).

35. See KELSEY Y. SANTAMARIA, CONG. RSCH. SERV., LSB10820, PRIVACY RIGHTS UNDER THE CONSTITUTION: PROCREATION, CHILD REARING, CONTRACEPTION, MARRIAGE, AND SEXUAL ACTIVITY 3–4 (2022) (stating that *Skinner* found a fundamental right to procreate and discussing the right alongside other family and privacy rights).

36. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (listing “rights sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect,” including “procreation” as provided by *Skinner*); *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (listing cases that have constructed the right to privacy in different areas, including *Skinner* “with procreation”); *Zablocki v. Redhail*, 434 U.S. 374, 385 (1978) (explaining that certain decisions, such as the right to procreate, are protected under privacy rights); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684–85 (1977) (listing privacy rights the Court has protected, including procreation). Additionally, concurring and dissenting opinions have mentioned *Skinner* as an example of the right to procreate. See *Doe v. Bolton*, 410 U.S. 179, 211–13 (1973) (Burger, J., concurring) (listing fundamental rights, including “the right to procreation” as provided in *Skinner*); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 547 (1989) (Blackmun, J., dissenting); *Whisenhunt v. Spradlin*, 464 U.S. 965, 971 (1983) (Brennan, J., dissenting) (providing examples of areas of privacy that are protected from “governmental disclosure or interference” and citing *Skinner* for the privacy right of “procreation”); *Hollenbaugh v. Carnegie Free Libr.*, 439 U.S. 1052, 1055 (1978) (Marshall, J., dissenting) (citing *Skinner* as an example of the right to privacy, specifically in the area of procreation).

37. See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 273 (2022) (stating that *Skinner* established the “right not to be sterilized”); *Ingraham v. Wright*, 430 U.S. 651, 673 n.42 (1977) (listing liberty interests that “have not been defined precisely” including *Skinner* and “sterilization”).

38. See cases cited *supra* note 36.

violated employees' ability to exercise their right to procreate without "unwarranted government intrusion."<sup>39</sup>

In *Dandridge v. Williams*, the state of Maryland appealed from a District of Maryland case that invalidated a social welfare program which provided additional aid for every child a family had until the eighth child, at which point, the total aid amount would not increase.<sup>40</sup> In their briefing, appellants argued in that the cap on aid interfered with their fundamental right to procreate by limiting their ability to care for more children.<sup>41</sup> While the majority did not address the fundamental rights issue, Justice Marshall dismissed the appellees' arguments within a footnote in his dissenting opinion, stating "the effect of the maximum grant regulation upon the right of procreation is marginal and indirect at best, totally unlike the compulsory sterilization law that was at issue in *Skinner*."<sup>42</sup> Outside of these two cases, the Court has only discussed the right to procreate when bundled with other family and privacy rights.<sup>43</sup>

To complicate the process of understanding this right even more, U.S. legal scholars tend to gravitate towards simplifying rights into negative rights rather than positive rights.<sup>44</sup> *Negative rights*, also commonly referred to as *rights of noninterference*,<sup>45</sup> are protections against governmental interference in specific areas.<sup>46</sup> Rights to noninterference include ideas such as restrictions on the government from interfering with most speech and forms of expression, the right to determine one's own religious beliefs and to practice them within reason, and protections against governmental searches of private property.<sup>47</sup> *Positive rights* generally refer to rights one is entitled to receive from the government.<sup>48</sup> Examples of positive rights include government-provided or -subsidized healthcare, education, and recreation programs.<sup>49</sup> Despite the positive and negative distinction, rights rarely fit

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39. 414 U.S. 632, 640–48 (1974).

40. 397 U.S. 471, 472–73 (1970).

41. Brief for Appellees, *Dandridge v. Williams*, 397 U.S. 471 (1970) (No. 131), 1969 WL 119896, at \*31–34, 39–41.

42. *Dandridge*, 397 U.S. at 520 n.14 (Marshall J., dissenting).

43. See cases cited *supra* note 36.

44. See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 872–90 (1986) (evaluating the traditional notion that "the Constitution is a charter of negative rather than positive liberties").

45. I use "right(s) of noninterference" throughout this article. However, where a quoted source uses "negative right," the original wording of the source is retained.

46. See Jorge M. Farinacci-Fernós, *Looking Beyond the Positive-Negative Rights Distinction: Analyzing Constitutional Rights According to their Nature, Effect, and Reach*, 41 HASTINGS INT'L & COMP. L. REV. 31, 42–43 (2018).

47. See *id.*

48. See *id.* at 43–45.

49. See *id.*

perfectly into one category.<sup>50</sup> The tendency to interpret rights as rights of noninterference has especially impacted discourse around the right to procreate.

### A. *The Right to Procreate as a Right of Noninterference*

Following the trend to classify every right as a right of noninterference, the leading understanding of the right to procreate is that of noninterference from the government.<sup>51</sup> In general, noninterference in the right to procreate requires that the government refrain from intervening in a person's choice or ability to procreate.<sup>52</sup> However, noninterference can take multiple forms.

#### 1. Narrow Noninterference

Some scholars frame the right to procreate as a prohibition on the government permanently taking away an individual's reproductive ability by physically intruding into an individual's body.<sup>53</sup> However, this interpretation overlooks important aspects in the limited amount of precedent on the right to procreate. It provides a narrow right that only prohibits what sterilization would look like under *Skinner*—state intrusion into an individual's body to remove their ability to procreate.<sup>54</sup> Under this belief, it would not violate the right to procreate if the government restricted or prohibited access to ARTs because doing so would not intrude into an individual to physically alter their reproductive ability.<sup>55</sup>

While this understanding of the rights of noninterference is certainly the easiest to defend as a minimum requirement under *Skinner*, the right to procreate should not be limited to only the most extreme forms of interference. For example, *LaFleur* suggests that the government violates the right to procreate when it acts in a way that deters an individual from

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50. See generally *id.* (explaining how rights often do not fall into the clear-cut positive or negative categories).

51. Glenn Cohen, *The Right(s) to Procreate and Assisted Reproductive Technologies in the United States*, in THE OXFORD HANDBOOK OF COMPARATIVE HEALTH LAW 1009, 1011 (David Orentlicher & Tamara K. Hervey eds., 2020).

52. *Id.*

53. *Id.* at 1013.

54. *Id.*; Radhika Rao, *Constitutional Misconceptions*, 93 MICH. L. REV. 1473, 1485 (1995) (arguing that, if *Skinner* protects from governmental interference in the body to influence reproduction, “then *Skinner* protects only the right to refuse abortion and carry a coital pregnancy to term, as well as the right to resist compulsory contraception or sterilization”).

55. Cohen, *supra* note 51, at 1013.

choosing when to exercise this right.<sup>56</sup> This signifies two important intentions of the Court.

First, the right to procreate protects more than just physical interference in the body. In *LaFleur*, the government action that violated the right to procreate was a maternity policy that deterred teachers from becoming pregnant.<sup>57</sup> Unlike the sterilization in *Skinner*, the right to procreate was violated without physically intervening in the bodies of the teachers affected by the policy.

Second, the right to procreate does not only prevent the government from permanently prohibiting an individual from having children; it also prevents the government from temporarily interfering with an individual's choice to procreate. In *LaFleur*, the school district's maternity policy did not prevent teachers from *ever* having children, instead the policy deterred them from having children when they wanted to.<sup>58</sup> With these two takeaways, the right to procreate should not be seen as a narrow right to noninterference that requires intrusion into the physical body to permanently prevent a person from procreating.

## 2. Broad Noninterference

As driven by Professor John Robertson,<sup>59</sup> a more plausible noninterference theory of the right to procreate is the understanding that the

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56. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 640 (1974). The court in *LaFleur* did not exclusively address the right to procreate, but rather, the “freedom of personal choice in matters of marriage and family life,” including the right to procreate as provided by *Skinner*. *Id.* at 639. Despite privacy and autonomy in family life including multiple protected areas—such as marriage, sexual privacy, the freedom to have children, certain protections for choosing to prevent pregnancies, and how to raise children—the decision in this part of the case is directly relevant to the freedom to procreate without governmental influence.

57. *Id.* at 634–36, 640 (“By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms. Because public school maternity leave rules directly affect ‘one of the basic civil rights of man,’ the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher’s constitutional liberty.” (citation omitted)).

58. *Id.* at 640.

59. See generally JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (4th ed. 1996) (arguing for the right to reproduce using reproductive technology); John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939 (1986) (addressing legal regulations of emerging reproductive technologies); John A. Robertson, *Liberalism and the Limits of Procreative Liberty: A Response to My Critics*, 52 WASH. & LEE L. REV. 233 (1995) (responding to criticism against his arguments in favor of a right to use reproductive technology); John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 AM. J.L. & MED. 439 (2003) [hereinafter *Procreative Liberty in the Era of Genomics*] (explaining legal regulations of genetic selection through reproductive technology); John A. Robertson, *Assisting*

state cannot act in a way that would prevent individual choice in procreative matters.<sup>60</sup> As addressed above, this theory of noninterference includes protections against the government physically taking away an individual's ability to procreate as well as governmental policies that influence the choice of whether and when to have children.<sup>61</sup> Further, some argue that noninterference also prevents the state from intervening into individuals' choices on how they procreate.<sup>62</sup> This includes the choice to procreate within a marriage or not, to use donated genetic material or not, to procreate through traditional sexual reproduction or in vitro fertilization (IVF), and to procreate by giving birth or by using a surrogate.<sup>63</sup>

The ability to make reproductive choices related to marriage, choice of genetic material, and sexual or non-sexual reproduction are all constitutionally protected, but not directly or exclusively by the right to procreate. For example, courts have found that the abortion and contraceptive cases protected the ability to conduct research on embryos.<sup>64</sup> Additionally, the choice to have children outside of marriage is protected not by the right to procreate, but rather by equal protection arguments arising from illegitimacy laws<sup>65</sup> and sexual privacy rights.<sup>66</sup> Similarly, marital privacy and parentage laws have enabled couples to procreate with genetic material from someone outside of the marriage, thus creating the understanding that a genetic relationship to a child does not create a legal parent-child relationship and enabling individuals to procreate with donated reproductive material.<sup>67</sup>

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*Reproduction, Choosing Genes, and the Scope of Reproductive Freedom*, 76 GEO. WASH. L. REV. 1490 (2008) (addressing ethical and legal issues related to reproductive technology).

60. Cohen, *supra* note 51, at 1012.

61. See *supra* Part I.A.1.

62. Cohen, *supra* note 51, at 1013–14.

63. *Id.*; *Procreative Liberty in the Era of Genomics*, *supra* note 59, at 447 (arguing that the right to procreate includes the right to have genetic children).

64. *Lifchez v. Hartigan*, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990); see Cohen, *supra* note 51, at 1015 (explaining the Illinois case and stating that “the case is almost 30 years old and has not been much discussed”); *Forbes v. Napolitano*, 236 F.3d 1009, 1012 (9th Cir. 2000) (striking down a fetal research ban on similar grounds).

65. See *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (finding a state law that prohibited children of unmarried mothers from acquiring property of their deceased mother was unconstitutional, and that the state could not justify the discrimination based on its goal of deterring the immoral behavior of having a child out of wedlock); *Glonn v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73, 75–76 (1968) (holding that it violated the Equal Protection Clause to deny an unmarried mother recovery on an insurance claim for the wrongful death of her son).

66. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (finding that right to contraceptives could not be limited to just married couples).

67. See *Lehr v. Robertson*, 463 U.S. 248, 267 (1983) (holding that the Equal Protection Clause permits states to give different adoption rights to a mother and genetic father when the mother has an established custodial relationship with the child and the father has never developed a custodial, personal, or financial relationship); *Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989) (affirming the marital

On the other hand, there has been very little case law that has evaluated the rights to surrogacy under either the right to procreate or other family and privacy rights.<sup>68</sup>

These examples highlight how the right to procreate *might* be a right to broad noninterference in deciding how to procreate. However, since these examples are rooted in other rights or legal foundations, it is unclear whether the right to procreate necessarily encompasses them.<sup>69</sup> At best, from what we know now, the right to procreate is not inconsistent with broad noninterference in deciding when and how to have children.

### B. *The Right to Procreate as a Positive Right*

Additionally, some have argued that the right to procreate is a positive right and, therefore, the government should act to increase access to procreation.<sup>70</sup> This idea extends beyond typical beliefs that the Constitution only provides for negative rights.<sup>71</sup> A positive rights approach can include reducing social barriers to procreation—such as the costs of having children deterring an individual from procreating, or the social pressures on women and married couples to have children to be recognized as a family—and increasing the availability of ARTs that allow people to procreate who would not otherwise be able to. However, there is no robust support either for or against interpreting the right to procreate as a positive right.

For one, the Court's brief mention of the right to procreate in *Dandridge* seems to dismiss the argument that the government has an obligation to take affirmative steps to allow individuals the freedom to choose whether to procreate.<sup>72</sup> If the government does not violate the right to procreate by

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presumption of parentage that gives legal parental rights to the spouse of the person who gave birth, not a genetic parent outside of the marriage); *Obergefell v. Hodges*, 576 U.S. 644, 667–69 (2015) (recognizing a state interest in protecting the children of same-sex couples, even when both parents do not share a genetic relationship with the child); *Pavan v. Smith*, 582 U.S. 563, 566 (2017) (expanding the right of married women to both be listed on the birth certificate of a child that one of them gave birth to).

68. Cohen, *supra* note 51, at 1014–15.

69. See Ann MacLean Massie, *Regulating Choice: A Constitutional Law Response to Professor John A. Robertson's Children of Choice*, 52 WASH. & LEE L. REV. 135, 161 (1995) (arguing that the procreative liberty is based on privacy rights of marriage, not procreation in and of itself).

70. Kimberly M. Mutcherson, *Procreative Pluralism*, 30 BERKELEY J. GENDER L. & JUST. 22, 73 (2015) (“[I]n order to achieve equality of access, the government likely needs to affirmatively create opportunities for financial assistance to those seeking access to assisted reproduction, which could be done in part through public and private insurance programs.”).

71. See generally Currie, *supra* note 44 (explaining the traditional notion that the Constitution only provides for negative rights).

72. *Dandridge v. Williams*, 397 U.S. 471, 520 n.14 (1970) (Marshall J., dissenting) (highlighting that Justice Marshall dismissed the fundamental rights argument in his dissenting opinion, while the majority did not address it at all).

providing proportionally less aid to larger families,<sup>73</sup> then it would be difficult to argue that the government has an obligation to eliminate barriers to choosing to have children or deciding how many to have. On the other hand, *Dandridge* did not analyze the obligation to provide procreative support; the case only addressed how the state did not violate the right to procreate by limiting governmental support after families had a certain number of children.<sup>74</sup> As such, the case should not be read as finding that the government had no positive obligation to eliminate barriers to reproductive choice. Rather, the case simply recognized that the state did not have an obligation to eliminate *all* barriers that could influence the choice to have children.

Similarly, when reading the right to procreate as the right to have one's own genetic children,<sup>75</sup> providing reproductive healthcare and using ARTs may be the only way for some people to exercise this right. Despite ART access being necessary for some people to have genetic children, it is commonly believed that the government is not required to provide or increase access to ARTs.<sup>76</sup> As Radhika Rao argues, "even if *Skinner* does create a constitutional right to be free from state interference with the use of reproductive technology, it does not follow that the state possesses an affirmative obligation to assure the exercise of procreative choice . . . ."<sup>77</sup> However, like the argument for positive government obligations to eliminate barriers impacting the choice to procreate, there is no evidence that the right to procreate is inconsistent with a positive right to provide access to ARTs and reproductive care.

### C. The Right to Procreate as an Independent Right

The right to procreate has largely been examined in context with other rights stemming from abortion, contraceptives, and sexual privacy.<sup>78</sup> With this in mind, some have argued that the right to procreate should be

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73. *Id.*

74. *See generally id.*

75. *See* John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 423 (1983); Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065, 1118 n.339 (providing an example of procreative liberty as the "right[] to conceive and raise one's children").

76. *See* Massie, *supra* note 69, at 162 (arguing the right to procreate only covers sexual procreation and does not provide protections for ARTs, even for people with fertility issues); Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1078–80 (1998) (arguing protections for ART use should be limited between couples, as to not involve third parties).

77. Rao, *Constitutional Misconceptions*, *supra* note 50, at 1485.

78. *See supra* Part I.A.2.

understood in context with these other areas of family and privacy rights.<sup>79</sup> For example, Ann MacLean Massie argued that the right to procreate is founded on the rights to marriage and sexual intimacy within marriage.<sup>80</sup> Similarly, in explaining how the Supreme Court would likely rule on ART use as procreative liberty, Carl Coleman used arguments from abortion and contraceptive cases to conceptualize a potential response.<sup>81</sup>

While constitutional rights often build on each other, the reversal of abortion rights in *Dobbs* calls into question the strength of other sexual and privacy rights—especially in light of Justice Thomas’s concurring opinion.<sup>82</sup> Despite the bundling of procreation with other rights, *Skinner*’s recognition of the right to procreate came before rights such as sexual privacy between consenting adults,<sup>83</sup> rights to contraceptive use,<sup>84</sup> the now-overturned right to abortion,<sup>85</sup> and modern marriage rights.<sup>86</sup> Further, the right to procreate was found during a time when the U.S. was trying to distance itself from the eugenics movement of WWII.<sup>87</sup> Regardless of how the U.S. continues to limit reproductive rights,<sup>88</sup> it is unlikely the Court would overrule *Skinner* because of its relationship to the American ideals of freedom and self-determination—two traits fundamentally at odds with eugenics and other government programs to forcibly prevent procreation. As such, the “unbundling framework” should be used to determine what the right to procreate independently protects.<sup>89</sup>

#### D. Litigating the Right to Procreate

Regardless of its construction as a positive or negative right, or the extent to which it provides for noninterference, the right to procreate should be evaluated as a separate and distinct right from family, sexual, and privacy

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79. Cohen, *supra* note 51, at 1011 (“Some scholars have discussed a ‘right to procreate’ alongside a ‘right not to procreate.’”).

80. Massie, *supra* note 69, at 161.

81. Carl H. Coleman, *Assisted Reproductive Technologies and the Constitution*, 30 *FORDHAM URB. L.J.* 57, 66–67 (2002).

82. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 332 (2022) (Thomas, J., concurring) (“For that reason, in future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”).

83. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

84. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

85. *Roe v. Wade*, 410 U.S. 113, 154 (1973).

86. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (right to interracial marriage); *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (right to same-sex marriage).

87. See NOURSE, *supra* note 34, at 89–160.

88. See GOODWIN, *supra* note 13, at 15–24.

89. Cohen, *supra* note 51, at 1011.

protections. Without much precedent to flesh out what the right to procreate entails, at minimum it prohibits government interference in a person's ability to procreate through medically and legally unassisted means (i.e., "traditional" sexual procreation or unregulated forms of ART).<sup>90</sup> Not only does this include forced sterilization, but it also prevents the government from imposing certain barriers or deterrents on procreation.<sup>91</sup> Similarly, the it prohibits government from taking permanent or temporary actions to prevent procreating.<sup>92</sup> While few precedents have set baseline protections, there are few indications that the right to procreate has any upper limits that would prevent its application to ARTs.

In addition to the Supreme Court sparsely defining the right to procreate, few individuals have argued that their procreative rights have been violated. As explained above, other sexual, privacy, and family rights have provided more detailed protections with a more robust set of precedents to build on.<sup>93</sup> This makes the bundle of rights a more useful tool to argue for a non-marital right to access certain ARTs.<sup>94</sup>

Furthermore, most attempts by the government to limit procreation have been "facilitated through coercive means" or were achieved as secondary effects to policing and incarceration.<sup>95</sup> Reproductive rights advocacy has generally failed to center forced sterilization in the movement.<sup>96</sup> Advocacy often focuses on abortion and privacy rights instead, which further excludes legislative and judicial advancements on the right to procreate.<sup>97</sup> This leaves incarceration as one of the few areas where this right has been explicitly challenged through litigation.

## II. PROCREATING IN PRISON

As one of the few places where the right to procreate has been directly challenged, prisons can provide insight into how to analyze this right. Prisons can therefore help us to understand how this right can be applied both inside and outside of carceral settings. The government traditionally must meet a high bar to restrict constitutional rights, but that bar is lower when it seeks to

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90. *See supra* Part I.A.

91. *See supra* Part I.A.1.

92. *See* *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 640 (1974).

93. *See supra* Part I.C.

94. *See supra* Part I.C.

95. *See* GOODWIN, *supra* note 13, at 14–27.

96. *See* Melissa Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, 63 WM. & MARY L. REV. 1599, 1632 (2022).

97. *Id.*

restrict the constitutional rights of incarcerated people.<sup>98</sup> As such, the constitutional rights applied in prisons are the absolute bare minimum—rights that are strong enough to withstand even weakened levels of protection. In other words, the right to procreate in carceral settings represents the floor for this right’s protections in non-carceral settings.

In this Part, I first look at how constitutional rights are applied in prisons, identifying both the process and standards used to determine whether a right extends to those in prison. I then turn to past decisions where courts have completely blocked access to the right to procreate while incarcerated. Applying the right to procreate as a stand-alone right, I argue that the decisions restricting access to assisted reproductive technology (ART) in prisons were based on both legal and medical misunderstandings of human reproduction. I conclude by arguing that the constitutional right to procreate should be extended to non-sexual forms of reproduction while incarcerated.

### A. Fundamental Rights in Prison

Although “lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights,”<sup>99</sup> an incarcerated person “retains those . . . rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.”<sup>100</sup> In *Turner v. Safley*, the Supreme Court reaffirmed the modified application of constitutional rights to incarcerated persons.<sup>101</sup> *Turner* created a two-pronged test, with the second prong containing the four Turner factors, used to analyze the extent to which prison regulations can burden a constitutional right in prisons.<sup>102</sup>

The first prong of the *Turner* test determines whether the constitutional right in question is inconsistent with the goals of incarceration.<sup>103</sup> If the right

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98. See *infra* Part II.A.

99. *Price v. Johnston*, 334 U.S. 266, 285 (1948).

100. *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

101. *Turner v. Safley*, 482 U.S. 78, 84 (1987) (“Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.”). Since establishing the *Turner* test, Congress has implemented additional protections for the free exercise of religion, requiring a different test for claims related the Free Exercise Clause and Establishment Clause of the First Amendment. Additionally, it is important to note that the standard for restricting constitutional rights is different for pretrial detainees, as there are more protections given to the rights of people who have not yet been convicted.

102. *Id.* at 89–90. Often the first prong is combined into the analysis for the second prong; however, a determination that the first prong fails is enough to deny a constitutional right in carceral settings. See *Gerber v. Hickman*, 291 F.3d 617, 623 (9th Cir. 2002) (discussed *infra* Part II.C.1). Additionally, the first prong evaluates the constitutional right itself, while the second prong looks at the prison regulation that burdens the right. *Id.* As such, I look at the analysis as two separate prongs. *Id.* at 620.

103. *Turner*, 482 U.S. at 89.

is not inconsistent with the goals of incarceration, the court then moves onto the second prong—the *Turner* factors.<sup>104</sup> To do so, *Turner* provides four factors to determine whether a prison regulation justifiably burdens the constitutional rights of the incarcerated individual.<sup>105</sup> The *Turner* factors are: (1) whether there is “a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it”;<sup>106</sup> (2) “whether there are alternative means of exercising the right that remain open to prison inmates”;<sup>107</sup> (3) what “the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally”;<sup>108</sup> and (4) whether there are “ready alternatives” the prison could use to accomplish the goal while still affording the incarcerated person their right.<sup>109</sup>

In *Turner*, the Court applied this test to two issues: communication between inmates and marriage.<sup>110</sup> For communication between inmates, the Court ruled the first prong was met because communication was a form of free speech and expression protected under the First Amendment, and was not inconsistent with the goals of incarceration.<sup>111</sup> Moving to the second prong, the Court applied the *Turner* factors, ultimately holding the prison’s restriction on communication was constitutional because (1) the regulation of First Amendment speech rights between inmates was rationally connected to the legitimate governmental interest of preventing prison gangs; (2) neither the prison officials nor the plaintiffs in the case could propose any other reasonable means of exercising free speech rights between inmates; (3) the only other proposed means to solving the issue would have required more work and would not have been as effective; and (4) the restriction only limited speech and expression between some groups of people, but did not prohibit all forms of constitutionally protected expression and speech.<sup>112</sup>

On the other hand, under the *Turner* test, the prison’s restriction on marriage was found to burden a constitutionally protected right of incarcerated people.<sup>113</sup> Looking at the first prong, the Court determined that

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104. *Id.* at 89–90. Note that a constitutional right does not have to be *consistent* with the goals of incarceration, rather, the right must *not be inconsistent*. *Id.* at 95. As discussed more below, the constitutional right does not need to advance the goals of incarceration to be protected; instead, the right must not operate counter to the goals of incarceration.

105. *Id.* at 89–90.

106. *Id.* at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

107. *Id.* at 90.

108. *Turner v. Safley*, 482 U.S. 78, 90 (1987).

109. *Id.* at 90–91.

110. *Id.* at 91.

111. *Id.* at 91–93.

112. *Id.*

113. *Id.* at 94–96.

the right to marriage is not inherently inconsistent with the goals of incarceration because certain aspects of marriage can exist within confinement.<sup>114</sup> Turning to the *Turner* factors in the second prong, the prison's restriction on marriage was found unconstitutional.<sup>115</sup> The Court reasoned that there was no evidence that the regulation was related to, or could further, the prison's stated interests of promoting security and rehabilitating individuals who have a history of dependency and abuse.<sup>116</sup>

Prison regulations alleged to burden a constitutional right of incarcerated people are analyzed under the *Turner* framework.<sup>117</sup> This includes challenges to prison regulations that restrict rights to association, sexual activity between consenting adults, and procreation. The following Parts provide an overview of how courts have applied the *Turner* test to rights related to the ability to have children.

### *B. Sexual Procreation and Freedom of Association in Prison*

Traditionally, prisons have indirectly limited the ability for incarcerated people to procreate by enacting policies that prohibit physical relationships inside detention facilities.<sup>118</sup> Under the *Turner* test, prison regulations that prohibit or restrict conjugal visits and other forms of sexual relationships have been upheld based on the idea that constitutional rights to sexual relationships do not withstand incarceration, thus failing the first prong.<sup>119</sup> Further, while some forms of First Amendment freedoms survive incarceration, courts have widely determined that association—including restricting associative rights necessary for sexual or procreative relationships—can constitutionally be limited due to the “exigencies and operational considerations of [the] penal system.”<sup>120</sup>

Even if there was a constitutionally protected right to sexual relationships, which would meet the first prong of the *Turner* test, it is unlikely that a right to sexual relationships would withstand the four factors

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114. *Turner v. Safley*, 482 U.S. 78, 96 (1987).

115. *Id.* at 97.

116. *Id.* at 97–99.

117. *Id.* at 84.

118. See generally Rachel Michael Kirkley, Note, *Prisoners and Procreation: What Happened Between Goodwin and Gerber?*, 30 PEP. L. REV. 93 (2002) (discussing the limitation of the right to procreate while incarcerated); Sarah L. Dunn, Note, *The “Art” of Procreation: Why Assisted Reproductive Technology Allows for Preservation of Female Prisoners’ Right to Procreate*, 70 FORDHAM L. REV. 2561 (2002) (discussing the limitations of the right to procreate focused on incarcerated women).

119. *Hernandez v. Coughlin*, 18 F.3d 133, 137 (2d Cir. 1994); see *Gerber v. Hickman*, 291 F.3d 617, 621 (9th Cir. 2002) (citing *Kentucky Dep’t of Corrs. v. Thompson*, 490 U.S. 454, 460 (1989) (no due process right to unfettered visitation)).

120. See *Hernandez*, 18 F.3d at 137; *Gerber*, 291 F.3d at 621.

of the second prong in light of the proposed legitimate penological interests at stake. For example, states have justified restrictions on sexual relationships in prisons by citing the need to prevent sexually transmitted infections, limit costs from pregnant inmates, further the goal of isolation in imprisonment, and promote prison security.<sup>121</sup> Similarly, denying conjugal visits has been justified based on the high costs associated with supervising conjugal visits, the lack of evidence that conjugal visits increase good behavior or decrease recidivism, the need to prevent disease from entering prisons, and the penological goal of isolating people during incarceration.<sup>122</sup> While some of these justifications are based on misguided ideas or could be accomplished through means that do not restrict rights to procreate sexually, courts will likely continue to rely on the justifications of safety and control to uphold prison regulations that restrict incarcerated individuals' sexual rights.

Moreover, individuals have been unsuccessful in bringing claims alleging that policies prohibiting sex unconstitutionally prohibit their right to procreate. For example, in *Hernandez v. Coughlin*, Hernandez was denied conjugal visits with his wife.<sup>123</sup> The Second Circuit explained that while prisoners have the right to marry, “[r]ights of marital privacy, like the right to marry and procreate, are necessarily and substantially abridged in a prison setting.”<sup>124</sup> To further explain the limitation on rights during incarceration, the court explained that “inmates possess the right to maintain their procreative abilities for later use once released from custody, even though this right is restricted.”<sup>125</sup> *Hernandez* created two understandings about sexual relationships while incarcerated. The first is that incarcerated people do not have a constitutionally protected right to sexual relationships.<sup>126</sup> The second, although misguided, is that incarceration does not violate the right to procreate because prisons do not take affirmative steps to strip incarcerated people of their ability to procreate after they are released from custody.<sup>127</sup> Whether correctly determined or not, the focus on sex and sexual procreation has enabled courts and prisons to justify a broad curtailment of the right to procreate.

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121. Kirkley, *supra* note 118, at 101–02.

122. Molly Hagan, *Controversy and Conjugal Visits*, JSTOR DAILY (Feb. 13, 2023), <https://daily.jstor.org/controversy-and-conjugal-visits/>.

123. *Hernandez*, 18 F.3d at 135.

124. *Id.* at 137.

125. *Id.* at 136.

126. *Id.* at 137.

127. *Id.* at 136.

*C. Non-Sexual Procreation in Prisons*

On the other hand, prison regulations that prevent non-sexual procreation cannot use the same justifications as those used to prohibit sexual procreation. Because sex and procreation are two distinct acts,<sup>128</sup> courts should not dismiss the right to procreate based on the ability for prison administrators to limit sexual relationships. This approach requires courts to apply the *Turner* test to procreation directly, first examining whether the right to procreate survives incarceration or whether the right is “inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system,” and then analyzing the prison’s justifications for the restrictions under the four *Turner* factors.<sup>129</sup> So far, there have been two major cases that have examined the right to non-sexual procreation while incarcerated.<sup>130</sup> I describe those two cases below. In Part III, I provide an analysis of the decisions.

*1. Goodwin v. Turner—No Burden under the Turner Factors*

With a little less than eight years until his release date and about four years until he was eligible for parole, Steven Goodwin filed a request with the prison where he was incarcerated, asking the prison to allow him to collect his sperm and send it to his wife so she could attempt to conceive.<sup>131</sup> On appeal, the Eighth Circuit refused to decide whether the right to procreate was a constitutional right that survived incarceration.<sup>132</sup> Instead, the court assumed it did and subsequently analyzed the factors in the second prong of the *Turner* test.<sup>133</sup>

Here, the prison argued that if it were to treat all prisoners equally, it would be required to provide both men and women equal opportunities to procreate.<sup>134</sup> In looking at the first factor, the court found that “treating all

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128. *See infra* Part II.D.

129. *Turner v. Safley*, 482 U.S. 78, 95–96 (1987).

130. *See Percy v. State Dept. of Corr.*, 651 A.2d 1044 (N.J. Super. Ct. App. Div. 1995) (denying an incarcerated person the ability to use artificial insemination); *State v. Oakley*, 629 N.W.2d 200 (Wis. 2001) (upholding a probation condition that prohibited an individual from procreating until he could support another child). In addition to these cases, the use of ARTs to exercise or preserve procreative rights while in prison has been challenged elsewhere; however, the other decisions follow the rulings of the two cases described above.

131. *Goodwin v. Turner*, 908 F.2d 1395, 1396–97 (8th Cir. 1990).

132. *Id.* at 1398.

133. *Id.* Despite these cases sharing the name “*Turner*,” it is important to note that any reference to the “*Turner* test” is to the test developed in *Turner v. Safley*; *Goodwin v. Turner* simply applies that framework.

134. *Id.* at 1400.

inmates equally” was a legitimate penological interest that met the “valid, relational connection” requirement of the first factor.<sup>135</sup> Building off the equality issue, the court ruled that the third factor also favored the prison because the goal of equality would require large amounts of money and resources to be allocated to women who wanted to exercise their right to procreate while incarcerated.<sup>136</sup> The court also found the second and fourth factors favored the prison because there were no clear alternatives the prison could pursue that protected the right to procreate while maintaining prison functionality.<sup>137</sup> As such, the court concluded that it was constitutional to prevent Goodwin from attempting to procreate through non-sexual means because the prison’s regulation met the burden of the second prong of the *Turner* test.<sup>138</sup>

## 2. *Gerber v. Hickman*—No Constitutional Right under the First *Turner* Prong

About a decade later, William Gerber made a request similar to Goodwin’s. He asked the prison he was incarcerated in for permission to collect his sperm and send it to his wife so she could use it in an artificial insemination procedure outside of the prison.<sup>139</sup> In *Gerber*, the Ninth Circuit began with the first prong of the *Turner* test by analyzing whether the right to procreate survives incarceration.<sup>140</sup> The court pointed out that “[i]ncarceration, by its very nature, removes an inmate from society. A necessary corollary to this removal is the separation of the prisoner from his spouse, his loved ones, his friends, family, and children.”<sup>141</sup> The court also noted that, after release from incarceration, a person can return to their family and friends, “[b]ut not until then.”<sup>142</sup> The court further reasoned that, unlike the permanent sterilization in *Skinner*, denying access to artificial insemination does not remove the potential ability to procreate after release from custody.<sup>143</sup> As such, the court determined there was no constitutional right that survives incarceration and thus did not analyze the *Turner* factors.<sup>144</sup>

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135. *Id.* at 1399.

136. *Id.*

137. *Id.*

138. *Id.* at 1400.

139. *Gerber v. Hickman*, 291 F.3d 617, 619 (9th Cir. 2002).

140. *Id.* at 620–22.

141. *Id.* at 620 (citation omitted).

142. *Id.*

143. *Id.* at 622.

144. *Id.* at 622.

Between these two cases, the respective courts both concluded that the two prongs of the *Turner* test—first, identifying a constitutional right that survives incarceration, and second, determining that the constitutional right is burdened based on an analysis of the *Turner* factors—fail to protect a right to procreate non-sexually while incarcerated. However, the decisions use a misguided understanding of the right to procreate and fail to adequately analyze reproduction with current scientific and medical knowledge.<sup>145</sup>

*D. Right to Procreate, Right to Sexually Procreate, or Sexual Rights and Freedoms?*

Before analyzing the right to procreate according to modern medical and scientific knowledge, it is important to determine the relationship between advocacy based on the right to procreate and advocacy based on advancing sexual rights and freedoms. Protections for procreative and sexual freedoms are not mutually exclusive, yet they have different limitations and outcomes.

Over the last few decades, there has been an array of discourse around sexuality in prison. In addition to exploring ways to reduce sexual assault in prisons and theorizing the possibility for incarcerated individuals to consent to sexual acts, this discourse has also examined the theory that interpersonal and sexual relationships can benefit the rehabilitation of incarcerated individuals, promote prison safety, and serve as a protection for basic human dignity and psychological well-being.<sup>146</sup> Further, with an updated view on reproduction, it may be found that the four factors in the second prong of the *Turner* test show that prison regulations limiting incarcerated people's sexual rights burden their constitutional rights.<sup>147</sup>

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145. See *infra* Part III.

146. See Brenda V. Smith, *Analyzing Prison Sex: Reconciling Self-Expression with Safety*, HUM. RTS. BRIEF 17, 19–20 (2006) (explaining how increased self-expression through sexuality can further penological interests, such as promoting family bonds that are important during incarceration and after; teaching about safe sexual practices before release from incarceration; better managing sexually transmitted infections in prisons; decreasing prison rape; and providing better tools for prison officials to understand incidents on sexual conduct within prisons); Prithivi Raj, *Sexual Rights of the Prisoners*, 17 SUPREMO AMICUS 356, 372 (2020) (“If rehabilitation remains the favoured goal, as it now seems to be, the benefits of conjugal visiting should tip the scales in the prisoner’s favour.”); Sarah Gross & Ben Stickle, *Policies on Consensual Sexual Activity in State Prisons*, 32 CRIM. JUST. POL’Y REV. 546, 557 (2021) (“[P]olicies should be crafted to allow for some level of sexual relief, take into consideration consensual behavior when punishing inmates, and examine current research on the relationship between violence and consensual sexual behavior.”); Kimberly R. Greer, *The Changing Nature of Interpersonal Relationships in a Women’s Prison*, 80 PRISON J. 442, 452–53 (2000) (finding that reasons for sexual relationships between female inmates included “economic motivation, sincere relationship, loneliness, curiosity, sexual identity, peer pressure, and other (sexual release and diversion from the boredom)”).

147. For example, prohibitions on sexual acts in prison are arguably not related to the penological interest of the state—such as findings that sexual freedoms promote health, safety, and rehabilitation—or

However, rights related to sexual freedoms and the right to procreate should not be lumped together for two main reasons. First, rights related to sexual freedoms are valuable, independent of the role sex can have in procreation. In *Lawrence v. Texas*, the Court determined there is a right to privacy for sexual acts between consenting adults—regardless of marital status—including privacy for non-procreative sexual acts and sexual acts between same-sex adults.<sup>148</sup> Although rights related to sexual freedom were historically limited to married couples,<sup>149</sup> these protections have applied regardless of reproductive ability, providing the same protections for people who are capable of procreating as those who are unable to have children due to age, medical conditions, or use of contraceptives.<sup>150</sup> Further, the First Amendment may offer protections for some forms of sexual acts, or depictions of them, when they serve as forms of speech or expression.<sup>151</sup> Taken as a whole, these examples establish the idea that sexual privacy and expression are protected because of the distinct value that sex can provide to an individual or a relationship, not because of the role sex has in procreation and marriage.

Second, sex is not a necessary aspect of procreation. While traditional sexual reproduction—which involves the creation of an embryo by sperm released during sexual intercourse—is the most common way to procreate, human use of artificial insemination<sup>152</sup> has been documented as far back as

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that the impact of accommodating sexual freedoms are negligible based on potential benefits. See Smith, *supra* note 146, at 19–20.

148. 539 U.S. 558, 567, 578 (2003).

149. See *id.* at 564–65 (“The Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom. After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship.”).

150. This idea was solidified in *Obergefell v. Hodges* in which the Court held:

An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

576 U.S. 644, 669 (2015). See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (privacy rights for married couples to use contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (granting privacy rights for unmarried individuals to access contraceptives).

151. See *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (finding a First Amendment right to possess and view obscene materials in private); see generally James Weinstein, *Democracy, Sex and the First Amendment*, 31 N.Y.U. REV. L. & SOC. CHANGE 865, 866 (2007) (arguing that pornography is not inherently obscene under the First Amendment and can be a form of political speech).

152. The term *artificial insemination* references multiple techniques where sperm is introduced into a person’s reproductive system with the hope of the sperm fertilizing an egg. See *infra* notes 131–35 for more information on methods of artificial insemination. Instead of using the term artificial insemination, many medical providers use terms that specify the type of artificial insemination (e.g.,

the late 1700s.<sup>153</sup> Artificial insemination involves collecting sperm that is then inserted either into a person's vagina near the cervix<sup>154</sup> or, with recent technological advances, directly into a person's uterus.<sup>155</sup> Thus, artificial insemination allows for procreation without direct sexual contact between the person providing sperm and the person intending to become pregnant. Other scientific advances<sup>156</sup> and social developments<sup>157</sup> have created additional opportunities for non-sexual reproduction.<sup>158</sup> Beyond offering an alternative method to sexual reproduction,<sup>159</sup> artificial insemination techniques are sometimes the only method by which someone can have children.<sup>160</sup>

Understanding the difference between sexual and procreative rights is important distinction when advocating for reproductive choices. This is especially true in the prison context because advocating for sexual rights does not necessarily protect an individual's ability to procreate. For example, sexual procreation may provide the opportunity for many to reproduce, but not everyone capable of procreation will be able to conceive and have a child through sexual means. Focusing on the right to procreate, rather than sexual

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intrauterine, intravaginal) and sometimes specify the source of the sperm (e.g., "by donor" or "by husband").

153. W. Ombelet & J. Van Robays, *Artificial Insemination History: Hurdles and Milestones*, 7 FACTS VIEW VIS OBGYN 137, 138 (2015).

154. This method, also referred to as *intracervical insemination* or *intravaginal insemination*, is what most people think of with the term artificial insemination. Intracervical/intravaginal insemination is often done without medical intervention and involves injecting sperm near the cervix or placing sperm in a cup near the cervix. This method can use unprocessed semen or sperm that has been processed/washed by medical professionals to reduce chances of transmitting infectious diseases and to remove motile sperm from the seminal fluid. Elizabeth S. Ginsburg & Zachary Wendell Walker, *Donor Insemination*, UPTODATE (June 8, 2023), <https://www.uptodate.com/contents/donor-insemination#H3737261335>.

155. *Intrauterine insemination* is a medical procedure in which a healthcare professional inserts processed sperm directly into a person's uterus. Intrauterine insemination should be done in a medical setting and is usually done with a semen sample that has first been processed/washed. Elizabeth S. Ginsburg, *Procedure for Intrauterine Insemination (IUI) Using Processed Sperm*, UPTODATE (Oct. 31, 2023), <https://www.uptodate.com/contents/procedure-for-intrauterine-insemination-iui-using-processed-sperm>.

156. These include egg retrieval procedures, IVF, and the ability to freeze embryos and gametes.

157. For example, egg and sperm donation and the recognition of surrogacy.

158. See Ombelet & Van Robays, *supra* note 153, at 140–42.

159. Non-sexual methods of reproduction may also enable people to have children who medically could reproduce through sexual means, but for various reasons, are unable to do so. Reasons include single women who want to start a family on their own, same-sex couples who use donated reproductive material and/or surrogates, transgender people who have ranging physical and psychological abilities to reproduce, and people who have medical conditions that limit pregnancy or pose a risk of passing on infections to sexual partners or potential children.

160. Non-sexual reproductive technologies provide some the opportunity to reproduce who would not otherwise be able to through traditional sexual reproduction. This is especially important for people with low sperm count, irregular ovulation, and some genetic conditions that an embryo can be screened for through preimplantation genetic testing.

rights, enables society to include more people, including many LGBTQ+ individuals and people with certain medical conditions.

Furthermore, incorporating sexual freedoms in prisons may not extend to sexual reproduction. For example, a prison administrator may remove prohibitions on masturbation, arguing that this provides incarcerated people some sexual freedom while preventing undesired consequences such as assault.<sup>161</sup> However, permitting masturbation does not open the door to procreation because it does not involve another person or a mechanism of transporting reproductive material. Similarly, a prison may permit sex between incarcerated people but prohibit sex between visitors and incarcerated people.<sup>162</sup> With most prisons being single gender, advancing sexual rights by enabling sex between incarcerated people fails to enable sex for procreative purposes.<sup>163</sup> Lastly, concerns over health, safety, and security may allow administrators to easily limit sexual rights in prisons.

Advocating for sexual rights in prisons can only go so far in promoting procreative rights. Sexual rights are still important and can be used to advocate for greater reproductive rights. However, they should not be the center of the advocacy. Similarly, some may argue that the right to procreate

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161. For an argument in favor of advancing sexual rights of incarcerated people through eliminating masturbation bans, see generally Yaniv Kot, *The Fundamental Right to Sexual Autonomy in Prison*, 56 AM. CRIM. L. REV. 511 (2019).

162. In *Allen v. Clendenin*, the court upheld an all-male state psychiatric hospital's policy of permitting consensual sex between patients but prohibiting sex between patients and visitors. 2023 U.S. Dist. LEXIS 170457, at \*32 (E.D. Cal. Sept. 22, 2023). The court rejected the plaintiff's argument that the policy violated the Equal Protection Clause by discriminating based on sexual orientation. *Id.* at \*23–29. The court found “no equal protection claim here where the policy is neutral as to sexual orientation, and there are no allegations showing that the policy was intended to discriminate against persons based on their sexual orientation.” *Id.* at 26. Additionally, the court noted that the policy was intended to counter security concerns that contact visits create. *Id.* at 28.

163. This is not to ignore that single-sex prisons may have transgender or intersex people who are capable of procreating with other incarcerated people. As of the end of February 2025, there are around 2,000 transgender people incarcerated in federal prison out of the 155,000 or so total incarcerated, with additional transgender people in state prisons. Jaclyn Diaz, *Federal Prisons Prep to Move Trans Inmates as Early as This Week*, NPR (Feb. 25, 2025), <https://www.npr.org/2025/02/21/nx-s1-5305282/trans-inmates-federal-prison-policy-transfers> (“[A]s of Feb. 20, the BOP has 2,198 transgender inmates within the federal prison system . . . . The [Bureau of Prisons’] website has since removed references to its trans population.”). The relatively small proportion of transgender federal inmates should not justify ignoring the mistreatment and experiences of incarcerated transgender people. Instead, the small number is relevant for contextualizing the possibility for procreation in single-sex prisons. In addition to the small numbers, there are other factors that limit the possibility of transgender people procreating in single-sex prisons, such as policies that assign incarcerated people based on sex assigned at birth rather than gender identity, prison practices of segregating transgender people, medical transitions that restrict the ability to procreate through sexual means, inadequate medical treatment, and personal choices involved with procreation. For an overview of current issues transgender people face in prisons, see generally Richard Saenz, *A Crisis Behind Bars: Legal Issues Impacting Transgender People in Prisons*, 38 CRIM. JUST. MAG. 3 (2024).

only protects sexual procreation.<sup>164</sup> However, with the countervailing state interest in restricting sexual activity in prisons, the government<sup>165</sup> must consider all possible means of protecting the right to procreate.<sup>166</sup> As such, the remainder of this Article looks at the right to procreate broadly, considering both sexual and non-sexual procreation under the guidance of current medical and scientific understandings of human reproduction.

### III. APPLYING SCIENTIFIC UNDERSTANDINGS OF PROCREATION TO THE *TURNER* TEST

Like all constitutional rights, the right to procreate does not automatically end when entering a prison.<sup>167</sup> Rather, a right that is not inherently inconsistent with incarceration can only be completely restricted if the legitimate penological interests outweigh the exercise of any form of the right.<sup>168</sup> This analysis requires identifying the entire scope of what the right protects and investigates how each aspect or form of the right fits into the larger justifications of prison operations. When examining the aspects of the right to procreate and the scope of its protections, one can see that this entire right is not inherently at odds with incarceration. Although parts of this right—such as physical conduct or sexual acts—may justifiably be restricted in a prison setting, the *Turner* test requires an examination of all aspects of a right before deciding that it can be completely restricted in prisons.<sup>169</sup> As such, the analysis below follows the *Turner* test, starting by breaking down the right to determine if it survives incarceration, then applying the *Turner* factors to weigh the justifications on both sides.

#### *A. Prong 1: Procreation as a Right that Survives Incarceration*

The first prong of the *Turner* test requires identifying a constitutional right, then determining if the right survives incarceration.<sup>170</sup> As addressed above, even though the right to procreate has not been clearly defined, there

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164. *See supra* Part I.A.1.

165. As throughout the article, “government” refers to both the federal government and local governments. This follows from the Fifth Amendment protecting from federal government interference with fundamental rights and the Fourteenth Amendment protecting from state and local government interface with fundamental rights.

166. *See supra* Part I.D.

167. *Turner v. Safley*, 482 U.S. 78, 84 (1987).

168. *Id.* at 89–90.

169. *Id.* at 96.

170. *Id.* at 84.

is wide acceptance of a constitutional right to procreate.<sup>171</sup> The next question becomes: Does the right to procreate survive incarceration?

In general, “a prison inmate retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.”<sup>172</sup> Therefore, for a right to survive incarceration, it must not be inconsistent with the purpose of incarceration or run counter to the prison’s function. Courts have approached this requirement by identifying the practical and social attributes the right protects and determining how the attributes translate into the realities of being incarcerated and the goals of the correctional system.<sup>173</sup>

For example, when analyzing the right to marriage in *Turner*, the Court identified how marriage can be an expression of support and commitment, can promote religious expression, and can be consummated after release.<sup>174</sup> The Court also noted that marriage is a prerequisite to government benefits and protections such as Social Security benefits, property rights, and legal recognitions of children.<sup>175</sup> The Court concluded that these attributes of the right to marriage provide a mechanism to demonstrate commitment and serve as a means for personal and religious fulfillment—things that can, and already do, exist in a prison setting.<sup>176</sup> Additionally, the Court looked at the state’s justifications for preventing incarcerated people from exercising the right to marriage, finding that security and rehabilitation can be legitimate penological interests, but that the restriction on marriage was not reasonably related to legitimate penological interests.<sup>177</sup> Overall, the Court used these factors to determine that the right to marriage is a right that survives incarceration and cannot be unconstitutionally burdened.<sup>178</sup>

In *Gerber*, the court found that there was no fundamental right to procreate that survives incarceration.<sup>179</sup> This decision rested largely on the idea that attributes of the right to procreate (1) protect against physical and permanent sterilization by the government and (2) promote the rights of

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171. *See supra* Part I.

172. *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Although *Pell* created this test specifically for First Amendment rights, it has been extended to other constitutional rights. *See Turner*, 482 U.S. at 95 (applying the test to free speech and marriage rights); *Gerber v. Hickman*, 291 F.3d 617, 620–22 (9th Cir. 2002) (applying the test to the right to procreate).

173. *Turner*, 482 U.S. at 96–97. *Turner* used the term “incidents” rather than “attributes.” *Id.* at 96. However, courts have used a variety of terms to reference the concept. For clarity, I am using “attributes” as the *Gerber* decision did.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 97–99.

178. *Id.* at 96.

179. *Gerber v. Hickman*, 291 F.3d 617, 622–23 (9th Cir. 2002).

intimate association<sup>180</sup> and privacy.<sup>181</sup> The Court characterized intimate association and privacy as inherently inconsistent with incarceration and emphasized that incarceration is not the same as sterilization.<sup>182</sup> By narrowly construing the right to procreate in this way, the Court was able to conclude that the right to procreate was inconsistent with incarceration.<sup>183</sup> However, the analysis in *Gerber* overlooks many attributes of the right to procreate and misapplies these to the goals of incarceration. Below, I describe other attributes of the right to procreate and then analyze this full picture to determine the consistency with incarceration.

### 1. Attributes of the Right to Procreate

To fully identify the attributes of the right to procreate, it is helpful to first look back to *Skinner* to see what the Court believed this right protected. Then, we should reflect on current law to determine whether our current medical understanding would include any additional attributes. Although *Skinner* dealt with a case of medically intrusive and permanent sterilization used as a punishment for certain criminal convictions, the Court was addressing more broadly the government's power to make decisions about which individuals and groups could have children:

Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.<sup>184</sup>

Although this passage is oriented around sterilization, as was the issue in *Skinner*, it also addresses the broader messages of anti-eugenics and individual liberty. Thus, *Skinner* can apply to temporary and permanent acts

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180. Intimate association is used in the First Amendment right to association context. *Id.* at 621 (“Intimate association protects the kinds of relationships ‘that attend the creation and sustenance of a family—marriage, childbirth, the raising and education of children, and cohabitation with one’s relatives . . . .’”) (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984)).

181. *Id.* at 621.

182. *Id.* at 621–22.

183. *Id.* at 623.

184. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

by the state that limit procreation by physically sterilizing a person or putting them into a situation where they cannot procreate.

For one, *Skinner* should be understood to apply to both governmental acts that biologically prevent procreation and acts that situationally prevent it. Despite not explicitly mentioning it, the case came at a time when the eugenics movement in Germany was receiving significant public attention.<sup>185</sup> The Court highlighted this in the passage above by mentioning the role procreation has in creating future generations and also noting how governmental intervention in procreation can have devastating effects on certain groups of people.<sup>186</sup>

The harms of preventing procreation arise regardless of the specific method the government uses. Sterilization procedures open a range of additional harms, such as privacy violations, issues with consent, and medical risks.<sup>187</sup> However, these additional harms should not be conflated with the goal of preventing governmental restrictions on a person's ability to procreate. Situational prevention of the right to procreate can occur when the state confines a person in a setting where the individual may retain their physical capabilities to procreate, but is denied access to reproductive material, necessary medical care, or the privacy and psychological environment necessary to procreate. While a person may still be able to procreate in theory, these types of state actions result in the same harm to the right to procreate as physical sterilization.

Second, the anti-eugenics messaging in *Skinner* should be understood to apply to both permanent and temporary governmental prohibitions on procreation. The anti-eugenics undertone is particularly important to remember when considering policing patterns and incarceration rates.<sup>188</sup> While a total and permanent restriction on procreation gives the government the greatest ability to limit certain people from having children, many temporary restrictions can still deprive a person of the right forever. For example, claiming that a person retains their right to procreate after release

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185. Michael J. Davis, *Skinner v. Oklahoma: How Two McAlester Lawyers Derailed Criminal Sterilization in America and the U.S. Supreme Court Invented 'Strict Scrutiny' as a Result*, OKLA. BAR J., May 2023, at 12, 15.

186. *Skinner*, 316 U.S. at 541–42.

187. See *supra* Part I.D. (discussing risks from deception and coercion).

188. See, e.g., Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2025*, PRISON POL'Y INITIATIVE (Mar. 11, 2025), <https://www.prisonpolicy.org/reports/pie2025.html> (finding that Black Americans make up 41% of the prison population despite only being 14% of the overall population in the U.S.; there is an aging prison population; and "excessively long sentences" have kept people incarcerated; that the rates of incarceration of women is growing substantially faster than men's incarceration rates; that immigration is used to confine people in the criminal penal system and the immigration detention system; and that people with mental health conditions are more likely to be incarcerated).

from incarceration ignores that human biology creates a finite window for reproduction<sup>189</sup> and that the vast majority of people are incarcerated during periods of their typical childbearing ability.<sup>190</sup> Additionally, even short-term incarceration can restrict reproductive ability, especially with over-policing certain communities and impractical probation requirements resulting in frequent rearrest, and incarceration of any length creating biological and social impacts on a person.<sup>191</sup> Further, *Skinner* looked at a criminal statute that applied regardless of whether a person previously had children or what their reproductive ability was.<sup>192</sup> As such, *Skinner* prevents governmental intervention in an individual's ability to procreate regardless of whether they have children, how many children they have, or their current reproductive ability.

These readings of *Skinner* show the practical and social effects of the right to procreate. One of these effects is the ability to be free from governmental intervention that prevents a person from determining when to have children and how many children to have. If the state stops a person from procreating, the right to procreate has been violated regardless of whether someone already has children. Similarly, if the state previously prevented someone from having the freedom to procreate, but gives that freedom back later, the right has still been intruded on because the individual's choice in deciding when and how many children to have was previously revoked. Additionally, with *Skinner* serving as a response to limit the potential for eugenics, the right to procreate also provides individuals with the liberty to try to have genetic children.

Reflecting on the current understanding of the right to procreate, another attribute of this right is its place in fulfilling religious, personal, and familial roles. As addressed above, the right to procreate has been bundled with other

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189. See generally Mark V. Sauer, *Reproduction at an Advanced Maternal Age and Maternal Health*, 103 FERTILITY & STERILITY 1136 (2015) (addressing infertility and health risks to women with increasing age, disputing conceptions that technology has extended the age at which women can reproduce); Rakesh Sharma et al., *Effects of Increased Paternal Age on Sperm Quality, Reproductive Outcome and Associated Epigenetic Risks to Offspring*, 13 REPROD. BIOLOGY & ENDOCRINOLOGY, no. 35, 2015, at 1, 11 (discussing findings that increased age correlates with increased male infertility as well as reproductive risks that prospective parents may wish to consider).

190. Jennifer G. Clarke & Rachel E. Simon, *Shackling and Separation: Motherhood in Prison*, 15 AM. MED. ASS'N J. ETHICS 779, 779 (2013) ("The majority of women in prison and jail are in their reproductive years with a median age of 34.").

191. See, e.g., Crystal M. Hayes et al., *Reproductive Justice Disrupted: Mass Incarceration as a Driver of Reproductive Oppression*, 110 AM. J. PUB. HEALTH S21, S22 (2020) ("Although jail stays may be short, current sentencing laws can keep women behind bars for a long time. Because a woman's fertility in general declines with age, this means that a woman who is released from prison after a lengthy sentence will have less fecundity than when she entered."); see Sawyer & Wagner, *supra* note 188 (finding that one in four people who go to jail will be arrested again within the same year).

192. See *Skinner v. Oklahoma*, 316 U.S. 535, 536–37 (1942).

family, privacy, and reproductive rights.<sup>193</sup> Part of the reason these rights have been bundled together is because of their importance in advancing marital and family relationships. However, the right to procreate on its own is still used to fulfill marital and family needs. Additionally, the right to procreate also serves a role in advancing the personal and religious fulfillment that can come from having children.

Beyond these attributes, the right to procreate may have additional practical and social impacts based on broader readings of the right. For example, if the right to procreate is determined to be a right afforded broad noninterference, then the right may also have implications for how ART is regulated and controlled. A positive right approach may also extend to medical care and ART, and work to eliminate social and political barriers to having children. However, there has not been confirmation by the courts or a general legal consensus that the right extends to such care. Therefore, the only attributes that must be considered when determining whether the right is not inconsistent with incarceration are: (1) the freedoms of an individual to have children when they want, (2) protections for trying to have genetic children, and (3) the right's role in religious, personal, and familial fulfillment.

## 2. Consistency with Incarceration

While there may be some aspects or methods of procreation that are considered inconsistent with incarceration, the right as a whole should not be dismissed as inherently inconsistent.<sup>194</sup> Even accepting the Court's statement in *Gerber* that "[t]he loss of the right to intimate association is simply part and parcel of being imprisoned for conviction of a crime,"<sup>195</sup> not all forms of intimate association are inconsistent with incarceration. For example, the Court in *Gerber* explained that intimate association protects "the creation and sustenance of a family—marriage, childbirth, the raising and education of children, and cohabitation with one's relatives."<sup>196</sup> While there may be a legitimate penological interest related to curtailing cohabitation with family or the ability to make day-to-day decisions on how to raise a child, the right to marriage has been found to survive incarceration.<sup>197</sup> Therefore, like marriage, just because the right to procreate can be a part of the right to

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193. See *supra* Part I.

194. See *Turner v. Safley*, 482 U.S. 78, 95 (1987) ("The right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration. Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life.").

195. *Gerber v. Hickman*, 291 F.3d 617, 621 (9th Cir. 2002).

196. *Id.* (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984)).

197. See *Turner*, 482 U.S. at 100.

intimate association does not mean that it is inherently inconsistent with incarceration.

Additionally, attributes of the right to procreate exist outside of intimate association. Procreation is not a single event that occurs in a single way. While sexual procreation necessarily involves close and sexual contact between people, other forms of procreation exist. For example, collecting reproductive material and then sending it outside of the prison, either for use now or later, does not involve close sexual contact. In the case of sperm collection, it can be done without close contact with any other person. Therefore, there are methods of procreation that escape the state's concern that procreation is inconsistent with incarceration's goals of isolation and the legitimate interest in preventing security issues resulting from contact visits.

First, it is important to note that pregnancy and childbirth do occur in prisons and jails.<sup>198</sup> Some constitutional rights may be inconsistent with incarceration, even when prisons allow limited access.<sup>199</sup> Still, the reality of pregnancy and childbirth while incarcerated helps show that pregnancy in prison is treated primarily as a medical condition rather than a social activity.<sup>200</sup>

Second, a person who collected their genetic material or created embryos before incarceration may have a genetic child conceived and born with virtually no involvement during incarceration. This avenue is rare due to costs associated with storing reproductive materials. However, it demonstrates another way that someone may have children while incarcerated. As a counter to equal protection arguments,<sup>201</sup> it is also valuable to note that through surrogacy, men and women could both have a genetic child with pre-collected reproductive materials and a child may even be born while a genetic parent is incarcerated despite no pregnancy occurring in prison.

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198. Susan Hatters Friedman et al., *The Realities of Pregnancy and Mothering while Incarcerated*, 52 J. AM. ACADEMY PSYCHIATRY & L. 365, 365 (2020) (“A Bureau of Justice report noted that four percent of women reported that they were pregnant at the time of admission to state prison, and three percent were pregnant at the time of admission to federal prison. Other reports have higher estimates of 5 to 10 percent being pregnant at reception.”).

199. See *Hernandez v. Coughlin*, 18 F.3d 133, 137 (2d Cir. 1994) (finding conjugal visits inconsistent with incarceration even though the state prison system had a program to allow some family visits).

200. Despite the number of people who enter prisons and jails pregnant, most facilities lack the resources and programs to provide adequate care during pregnancy. My argument here is not to detract from the need to improve the care of pregnant people who are incarcerated. Rather, I intend to highlight how the existing structure views parts of procreation separate from intimate association.

201. See *Goodwin v. Turner*, 908 F.2d 1395, 1396–97 (8th Cir. 1990); *Gerber v. Hickman*, 264 F.3d 882, 891 (9th Cir. 2001), *rev'd en banc*, 291 F.3d 617 (9th Cir. 2002) (equal protection not discussed in *en banc* opinion).

Third, there may be reasons why a person wishes to collect their reproductive material while incarcerated to use post-confinement. In these cases, there is no pregnancy occurring at the moment nor is there any guarantee that the individual will ever attempt to use the reproductive material, but it may be the only way procreation is possible once released. These three examples show that some aspects of procreation can exist without countering the goals of incarceration, with some aspects currently occurring in prisons.

Other penological goals may suggest that procreation is inherently inconsistent with incarceration. However, this Part demonstrates that procreation is not an isolated act that can only occur in one way. As such, it is difficult to maintain that all methods are inherently inconsistent with incarceration. Similarly, there are many logistical considerations that could limit a prison's functioning—additional care for pregnancy and childbirth, costs for egg collection and fertility treatments, health and safety risks for pregnant people and their fetuses, concerns over privacy and coercion, and so forth. However, none of these potential technical reasons apply universally to all forms and aspects of procreation. Having some limitations on the right to procreate does not mean it is inconsistent with incarceration; therefore, the right to procreate survives incarceration.<sup>202</sup> Any prison restriction that burdens the right to procreate should be analyzed under the *Turner* factors to determine whether the restriction is constitutional.

### *B. Prong 2: Procreation as a Burdened Constitutional Right*

A constitutional right that survives incarceration can be limited by the government in ways that would not be permitted in typical settings. However, the limitation may not be burdened beyond what is necessary based on the *Turner* factors.<sup>203</sup> Without a specific prison restriction in question, this Part proceeds by addressing each of the four *Turner* factors broadly based on common arguments, then concludes by identifying examples of restrictions that would be constitutional or not.

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202. See Kristen M. Davis, *Inmates and Artificial Insemination: A New Perspective on Prisoners' Residual Rights to Procreate*, 44 J. URBAN & CONTEMP. L. 163, 165–70 (1993) [hereinafter Kristen M. Davis] (providing a case law-based approach for finding the right to procreate survives incarceration).

203. *Gerber*, 291 F.3d at 622.

## 1. Relationship Between the Restriction and a Valid Governmental Interest?

The first factor of the *Turner* analysis looks to identify a legitimate governmental interest and then to whether the restriction is rationally related to that interest.<sup>204</sup> Below, I look at interests that have been proposed for restricting the right to procreate in prisons, both generally and in unique or new circumstances. For purposes of analysis, I grouped the asserted governmental interests across all types of restrictions into the broad categories of security, safety, punishment, equity, costs, and ethics. As technologies and beliefs adapt, it is possible for new interests to emerge, but these are intended to represent the main governmental interests that have previously been and currently are being argued.

### a. Security

Prison security is one of the main governmental interests asserted to justify restrictions on procreation. There is no doubt that prison security is an important governmental interest in the current carceral system; beyond protecting prison property and workers, security can be necessary for protecting incarcerated people from unnecessary harm.<sup>205</sup> However, the right to procreate must actually pose a legitimate security risk to justify restricting it in prisons. Typically, security concerns arise from close contact between people and the movement of people and materials in and out of a prison.<sup>206</sup> Below, I further explain how these security risks are constructed across methods of procreation. I then look at whether restricting procreation advances the state's interest in promoting security.

The most widely acknowledged security risk related to procreation in prisons is close contact between incarcerated people.<sup>207</sup> For example, conjugal visits fall outside of protected rights while in prison.<sup>208</sup> This is partly due to concerns that prohibited items can be brought into the prison and easily transferred to an incarcerated person during contact visits.<sup>209</sup> These same security concerns are used to argue against incarcerated women accessing ARTs because it is necessary for a medical professional to make physical

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204. *Turner v. Safley*, 482 U.S. 78, 89–90 (1987).

205. *Id.* at 91.

206. See Kristen M. Davis, *supra* note 202, at 172–73, 190.

207. *Id.* at 172.

208. *Hernandez v. Coughlin*, 18 F.3d 133, 137 (2d Cir. 1994).

209. *Id.* at 191, 192 n.195.

contact with the person undergoing the procedure.<sup>210</sup> The same argument could also be made for preventing additional pregnancies in prisons, as pregnancy also increases the number of people required to make close contact with someone who is incarcerated.

However, broadly restricting close contact related to procreation is not always necessary to promote security. Some prison programs allow incarcerated people to have physical—and sometimes even private—contact with family members.<sup>211</sup> In these cases, restricting procreation does not prevent the possibility of close physical contact any more than is already possible.<sup>212</sup> Therefore, restricting the right to procreate cannot be justified by claiming that it prevents security risks associated with incarcerated people having close contact with others. However, many prisons do not have these programs, and in the ones that do, not every person incarcerated in the facility has access to them.<sup>213</sup>

In most prisons it may be easier to justify restricting the right to procreate with the interest of preventing close contact under the justification of security. However, not all close contact is the same. For example, the close contact required for sexual procreation is different than close contact between an incarcerated person and a medical professional conducting an ART procedure.<sup>214</sup> This distinction is important because the *nature of the contact* and the *type of relationship* underpinning the close contact are fundamentally distinct. Close contact with a medical professional is inevitable in prison. As such, there are already established procedures for screening medical professionals before they work in prison facilities, on top of existing professional rules that are enforced regardless of the setting. Similarly, any medical procedure can put a person in a vulnerable position or require revealing traditionally private locations on the body. Because of this, people working in reproductive health are trained to provide care in a way that minimizes a sexual connotation, and rather focus care on treating a person or medically assisting with reproduction.

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210. Richard Guidice Jr., *Procreation and the Prisoner: Does the Right to Procreate Survive Incarceration and Do Legitimate Penological Interests Justify Restrictions on the Exercise of the Right*, 29 FORDHAM URB. L.J. 2277, 2307 (2002) (discussing deference to prisons for security interests).

211. See Hagan, *supra* note 122.

212. There may be other interests that are promoted by a restriction on procreation in these scenarios. These are likely to include safety, punishment, and health. However, these interests should be examined on their own, not as a part of security justifications.

213. See Hagan, *supra* note 122.

214. See SARA MATTHIESEN, REPRODUCTION RECONCEIVED: FAMILY MAKING AND THE LIMITS OF CHOICE AFTER ROE V. WADE 35 (Rickie Solinger et al. eds., 2021) (“In 1952, a woman incarcerated . . . became pregnant despite having been incarcerated for several years at the all-female institution . . . the woman admitted that during one of her finance’s visits he slipped her a vial of his semen, with which she then inseminated herself using a syringe from the doctor’s office.”).

Additionally, the right to procreate creates a security risk because it involves people and things coming in and out of prisons. Most notably, childbearing requires a third party who is not a part of the prison system to come in. Further, sperm collection inside of prisons has been denied based on the argument that it necessarily involves items entering and leaving the prisons.<sup>215</sup> While many physical things come in and out of prison facilities, sperm is arguably different because it is something that an incarcerated person creates. Unlike a letter that an incarcerated person may write, sperm must be transported outside of the facility within a narrow timeframe, which limits thorough inspection.<sup>216</sup>

These same security concerns are also used to argue that incarcerated women should not have access to ARTs. For example, the potential of egg collection in prisons has been criticized because either an incarcerated person will have to be transported outside of the prison or medical professionals will have to come into it with specialized equipment.<sup>217</sup> Similarly, pregnancy can create a security risk<sup>218</sup> because it increases the chances an incarcerated person will need to be transported off-site for specialized care or to treat complications from childbirth. Additionally, pregnancy and childbirth within the prison facility ultimately results in more people coming into the prison, such as those tasked with caring for the child.

Like with preventing close contact, restricting people and things that are necessary for procreation from coming in and out of prisons does not always advance security interests. Although third parties entering a prison for sexual procreation can pose a wide array of potential risks, medical professionals and social workers do not pose the same security risks. Unlike third parties, individuals who are acting in a professional capacity are overseen by the prison system and are subject to certain standards and liability.<sup>219</sup>

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215. See Kristen M. Davis, *supra* note 202, at 190–92.

216. *Health Library: Sperm*, CLEVELAND CLINIC (July 25, 2024), <https://my.clevelandclinic.org/health/body/sperm> (“Sperm can live up to an hour outside your body in a room temperature environment—68 degrees Fahrenheit (20 degrees Celsius). Exposure to different temperatures can kill sperm quickly.”).

217. See *Goodwin v. Turner*, 908 F.2d 1395, 1400 (8th Cir. 1990); Guidice, *supra* note 210, at 2308–09.

218. Beyond the additional medical care needed, which increases the close contact between the incarcerated person and medical and prison staff, pregnant people also need different security precautions, such as alternative restraints, in order to avoid harm to the individual or fetus. See CAROLYN SUFRIN, PREGNANCY AND POSTPARTUM CARE IN CORRECTIONAL FACILITIES 7 (2018) (“Usual security precautions that are applied to nonpregnant inmates, such as the use of restraints, pose risks for pregnant women.”).

219. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-25-106404, MATERNAL HEALTH CARE IN STATE PRISONS AND LOCAL JAILS 34 (2024) [hereinafter *Maternal Health Care*] (finding that some prisons and jails allow doulas to assist pregnant incarcerated people but first require the doulas to undergo a screening process); FED. BUREAU PRISONS, U.S. DEPT. OF JUSTICE, NO. 3420.12, STANDARDS OF

Additionally, medical staff, social workers, and other professionals (e.g., teachers, lawyers, government officials) regularly enter prisons through established security mechanisms. These mechanisms could be used for any additional professionals who must enter the facility to preserve the right to procreate.

Similarly, items moving in and out of prisons can open up security concerns, but not all items should be treated the same. For example, specialized medical equipment that is coming in and out of a prison is unlikely to pose a large security risk because of its medical nature.<sup>220</sup> Transporting reproductive material outside of the prison is also unlikely to raise any security risks because the process—from the time of collection to transport out of the facility—happens quickly, reducing the number of people who can access it.<sup>221</sup> The actual material could be moved either by trained professionals who are held to professional standards or it can be moved by itself in small and clear containers. Additionally, while there are security risks associated with moving incarcerated people in and out of a prison facility to access ART procedures or to receive pregnancy care, these concerns can be mitigated in other ways and do not extend to all aspects and methods of procreation.<sup>222</sup>

Some security interests may be served by restricting the right to procreate, but any restriction must be more specific than an absolute prohibition. The main security risk that can be mitigated by restricting this right is the risk associated with third party individuals who are not associated with the prison entering the space. However, only sexual procreation

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EMPLOYEE CONDUCT 25–35 [hereinafter STANDARDS OF EMPLOYEE CONDUCT] (providing employee disciplinary actions for violations of employment standards, including those aimed at safety and security).

220. In addition to established procedures and policies aimed at ensuring prison employees create a safe and secure environment, *see generally* STANDARDS OF EMPLOYEE CONDUCT, *supra* note 219, many prisons have already created policies for increasing safety related to medical devices that incarcerated people have control over and use in their day-to-day activities, such as eyeglasses and breathing devices. *See* FED. BUREAU PRISONS, U.S. DEPT. OF JUSTICE, NO. 6031.05, PATIENT CARE 65–67 (2024). This is not to dismiss the increased safety and security risks of any medical care or device within carceral settings. *See* Jill Moore, *Public Health behind Bars: Health Care for Jail Inmates*, POPULAR GOV'T 16, 19 (2005) (“[M]edical equipment can become a weapon, or a health care provider can become a hostage.”). However, contextualizing the risk shows that prisons already have policies to mitigate security risks related to medical devices and the people who use them.

221. *See Health Library: Sperm*, *supra* note 216 (discussing short timeframe and temperature range for sperm to live outside the body); Amin Sedaghat Herati, *Sperm Banking*, JOHNS HOPKINS MED. (last visited Dec. 14, 2025), <https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/sperm-banking> (“It’s not possible to successfully freeze sperm at home. Sperm freezing needs to happen in a laboratory with the proper quality controls in place.”).

222. For example, a prison could extend traditional screening procedures for medical staff to professionals working with reproductive treatments. *See Maternal Health Care*, *supra* note 219, at 34 (discussing screening for healthcare workers in prisons). Similarly, a prison may choose to permit only non-sexual methods of reproduction.

necessarily involves a third party entering the space, and in some scenarios, such as approved conjugal visits, the third party may already have access to the space. Therefore, restricting the right to procreate is only related to the state's security interests when sexual procreation is at issue. Outside of this, security should not be used as a justification for limiting this right.

#### b. Safety

Another state interest often given as a justification for limiting the right to procreate is the promotion of safety for both incarcerated people and people outside of prison who may be involved. Safety, broadly speaking, is of course a valid state interest. But like security, it must be related to the restriction on the right to procreate. Typically, safety concerns are framed in one of two ways: concerns for medical or pregnancy complications in prison and concerns that non-incarcerated people may be forced into creating or parenting a child.

The first approach to safety arguments focuses on safety for an incarcerated person who is undergoing a medical procedure related to an ART or becoming pregnant. This can involve fears that the prison setting cannot provide a proper environment for reproductive procedures as well as safety concerns for people who are recovering from childbirth or medical procedures. It should be emphasized that there is an inherent risk with all pregnancies and medical procedures. There is evidence of an increased risk associated with pregnancy while incarcerated, both to the pregnant person and the fetus.<sup>223</sup> Pregnancy-associated risks can come from the stress of incarceration, lack of proper care and nutrition, physical abuse originating from other incarcerated people or prison staff, and other similar factors.<sup>224</sup> This data is not simply theorized, but reflects real-world outcomes among people who were pregnant while incarcerated.<sup>225</sup>

To avoid these risks, an incarcerated person may collect their reproductive material for a spouse, partner, other intended parent, or surrogate who could then attempt to conceive. Alternatively, an incarcerated

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223. See generally Am. Coll. Obstetricians & Gynecologists, *Reproductive Health Care for Incarcerated Pregnant, Postpartum, and Nonpregnant Individuals*, 138 *OBSTETRICS & GYNECOLOGY* e24 (July 2021); AZHAR GULAIID & EVELYN F. MCCOY, *REPRODUCTIVE HEALTH CARE IN CARCERAL FACILITIES* 8–9 (2022).

224. See Am. Coll. Obstetricians & Gynecologists, *supra* note 223, at e28–e29; GULAIID & MCCOY, *supra* note 223, at 8–9. Prisons should have a duty to address these issues—unfortunately, discussing this duty is beyond the scope of this Article—which would help to alleviate the potential risks to people who choose to become pregnant while incarcerated. Until then, the interest of protecting maternal and fetal health may continue to be asserted as a valid state interest, but prohibiting the right to all aspects of procreation is not related to this goal.

225. See Am. Coll. Obstetricians & Gynecologists, *supra* note 223, at e28–e31.

person may freeze their reproductive material so they can use it after being released. All these options avoid the increased risk of being pregnant in prison.

Those who procreate using ARTs are subject to varying levels of medical care and unique risks. The egg collection process is one of the most involved. It requires injections in the weeks leading up to the collection procedure, examination under anesthesia, and involves risks of complications, such as ovarian hyperstimulation syndrome.<sup>226</sup> However, only around 5% of patients who undergo ovarian stimulation today have some form of ovarian hyperstimulation syndrome,<sup>227</sup> and the risks of severe complications occur in only 0.1–2% of all patients.<sup>228</sup> Other complications from egg collection, such as those from anesthesia or medical mistakes, are rare and generally mild.<sup>229</sup> It is also important to note that the complications typically come from either existing conditions<sup>230</sup> or from medical mistakes,<sup>231</sup> not conditions related to incarceration.

Other areas of safety concerns, including the need for multiple injections and recovery from anesthesia, can be accomplished through existing procedures prisons have created for other medical conditions.<sup>232</sup> However, not all aspects of ARTs are extensive medical procedures like the egg collection process for IVF. While it is ideal for sperm collection to take place in a sterile environment, it is functionally a non-medical process that does not create any substantial risks. Similarly, in a situation where becoming pregnant in prison is deemed safe, intracervical insemination can be done with very little special equipment and poses few risks.<sup>233</sup> Similarly, intrauterine insemination, where an embryo is placed directly in the uterus,

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226. See *In Vitro Fertilization (IVF)*, *supra* note 6.

227. *Ovarian Hyperstimulation Syndrome (OHSS)*, CLEVELAND CLINIC (Dec. 5, 2023), <https://my.clevelandclinic.org/health/diseases/17972-ovarian-hyperstimulation-syndrome-ohss>.

228. Angel Petropanagos et al., *Social Egg Freezing: Risk, Benefits and Other Considerations*, 187 CANADIAN MED. ASS'N J. 666, 667 (2015).

229. *Freezing Embryos*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/freezing-embryos> (last visited Dec. 5, 2025).

230. Existing conditions that lead to complications include age, hyperstimulation, or sensitivity to anesthesia. See *supra* notes 227–29; NAT'L RSCH. COUNCIL, *Potential Risks Associated with Egg Retrieval*, in ASSESSING THE MEDICAL RISKS OF HUMAN OOCYTE DONATION FOR STEM CELL RESEARCH: WORKSHOP REPORT 31, 34–37 (2007) (noting anesthesia and hyperstimulation risks).

231. One of the biggest risks—most unique to egg retrieval procedures due to the minimally invasive procedure conducted with a needle—is medical staff puncturing organs other than the ovaries, resulting in bleeding or potentially greater complications. See NAT'L RSCH. COUNCIL, *supra* note 230, at 32–33.

232. See *Maternal Health Care*, *supra* note 219, at 34 (discussing screening for healthcare workers in prisons).

233. Ginsburg & Walker, *supra* note 154.

is an outpatient procedure that allows the patient to leave almost directly after.<sup>234</sup> Even the embryo transfer portion of IVF is typically conducted in an outpatient setting with minimal equipment needed, and the patient can return to near normal activities shortly after.<sup>235</sup>

The second approach to safety arguments looks at safety for others involved in the process. Arguments for safety have included an interest in protecting people from being coerced into becoming pregnant, creating an embryo, or parenting a child. Fears of coercion are particularly emphasized when factoring in potentially abusive relationships. Financial and social harms can also arise from having an incarcerated parent who is typically unable to provide financial or parental support. While these concerns are legitimate, they are not unique to incarcerated people. Parenthood and children are commonly used as a tool of control in abusive relationships.<sup>236</sup> Likewise, there are many scenarios where a person parents on their own or with little support from their child's other parent.<sup>237</sup> Additionally, the risk of sexually transmitted infections (STIs) in prison has raised concerns about incarcerated people collecting their reproductive material for others to use. While these fears are valid given the increase in STIs and similar infections in prisons,<sup>238</sup> there are multiple ways to limit this risk. First, the incarcerated person can be tested for STIs and other infections prior to collecting genetic material or becoming pregnant. Second, reproductive material can be tested for most transmittible conditions before use. Additionally, sperm is typically "washed" before use to mitigate the risk of STIs.<sup>239</sup>

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234. See *Intrauterine Insemination*, MAYO CLINIC (Sept. 12, 2023), <https://www.mayoclinic.org/tests-procedures/intrauterine-insemination/about/pac-20384722> (discussing how the patient can return to normal activities shortly after the IUI procedure and listing infection, spotting, and multiple pregnancy as the risks).

235. *Embryo Transfer*, EMORY UNIV. SCH. OF MED., <https://med.emory.edu/departments/gynecology-obstetrics/patient-care/patient-education/embryo-transfer/index.html> (last visited Dec. 5, 2025) (stating "[t]he procedure takes about 15 minutes" and the risks include losing embryos and cramping).

236. Cris M. Sullivan et al., *The Use of Children as a Tactic of Intimate Partner Violence and its Impact on Survivors' Mental Health and Well-being Over Time*, 39 J. FAM. VIOLENCE 153, 153 (2024) ("It is not uncommon for abusive partners and ex-partners to use children they share with survivors as intermediaries of abuse."); Courtney Cross & Gillian Chadwick, *Parenting Under Siege: Reckoning with Coercive Control*, 57 U. CONN. L. REV. 729, 734 (2025) ("Coercive control is a campaign designed to destabilize a survivor's identity and sense of self—as such, survivors' identities as parents, typically mothers, are a common battleground.").

237. This can include single parenting by choice, a parent dying, parents being deported, parents losing custody rights, and many other possibilities.

238. See Anne C. Spaulding et al., *Prevalence and Management of Sexually Transmitted Infections in Correctional Settings: A Systematic Review*, 74 CLINICAL INFECTIOUS DISEASES S193, S193 (2022).

239. See *supra* text accompanying note 154.

Testing before collection should be a regular part of medical care for all people. However, the ability to test and treat reproductive material after collection transfers the burden of safety outside of the prison. Even if procreating while incarcerated creates unique safety concerns for non-incarcerated people involved, broadly prohibiting procreation does not address these issues. For example, many people enter incarceration pregnant or while someone is pregnant with their child.<sup>240</sup> Further, an incarcerated person who has previously collected their reproductive material may be able to have a child while currently incarcerated. Setting these issues aside, a large ban on procreation is, at best, loosely related to the goal of protecting non-incarcerated people's safety. There are many other approaches a state could take to address this concern, such as strengthening victim protection programs, limiting the right to procreate as part of sentencing when it is related to the conviction,<sup>241</sup> or creating some form of oversight and approval for specific types of procreation that involve other people.

Overall, the interest in promoting safety is only related to certain parts of procreation. Namely, risks associated with childbearing while incarcerated. Other often-cited safety concerns related to procreation overstate the level of risk or fail to demonstrate how limiting the right to procreate would actually advance safety.<sup>242</sup>

### c. Punishment

As the Court in *Gerber* alluded to, limiting the right to procreate may advance the state's interest in punishing incarcerated people, which can deter crime and promote rehabilitation.<sup>243</sup> While the Court in *Gerber* addressed this argument in the analysis of the first prong,<sup>244</sup> it is important to address it by applying the *Turner* factors too. Others may believe the right to procreate survives incarceration, but that limiting procreation can be an effective way to advance the state's goal of punishment. The general argument is that prison, as a form of physical isolation, is intended to be a punishment that separates incarcerated people from their families and society.<sup>245</sup> It is hard to

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240. See Friedman et al., *supra* note 198, at 365–66.

241. This could create a new set of issues; however, it would at least create recognition of the way incarceration is limiting the right to procreate.

242. As discussed earlier in this Section, procedures such as egg and sperm collection or the various methods of artificial insemination have fairly low risks.

243. *Gerber v. Hickman*, 291 F.3d 617, 622 (9th Cir. 2002) (“Our conclusion that the right to procreate is inconsistent with incarceration . . . is a conclusion that stems from consideration of the nature and goals of the correctional system, including isolating prisoners, deterring crime, punishing offenders, and providing rehabilitation.”).

244. *Id.* at 621–22.

245. See *id.*; *Hernandez v. Coughlin*, 18 F.3d 133, 136–37 (2d Cir. 1994).

deny that our modern prison system is not intended to punish; however, there are many ways to punish someone that do not involve stripping away a fundamental right.

First, if a state restricts the right to procreate in prisons as a means to punish—even if just part of the sentencing—this should be viewed more like a criminal sterilization statute rather than a decision about prison policies. *Turner* only applies when determining whether a fundamental right can be constitutionally limited within the prison system, not for analyzing criminal sentences and punishments.<sup>246</sup> Consequently, sentencing restrictions are outside the scope of the *Turner* test; instead, these restrictions should receive strict scrutiny under the traditional fundamental rights analysis.<sup>247</sup> Although states are not currently sentencing people under mandatory sterilization statutes, similar concerns can arise from state practices such as state-wide restrictions on procreation in prisons, uniform prison policies that prohibit all forms of procreation, or sentencing patterns that correlate with reproductive age.<sup>248</sup> Since states are rarely open about their intent to use prisons to restrict procreation, even bad intentions arguably are prevented by *Turner* instead. Regardless, it is unlikely that restrictions on procreation are related to the state's interest in using prisons to punish.

The right to procreate should not be restricted simply as a means of punishment for three main reasons. First, physical separation as a part of incarceration may limit contact with family members,<sup>249</sup> but it does not mean that one legally loses their family or their right to associate with them in non-

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246. See Kate Weisburd, *Rights Violations as Punishment*, 111 CALIF. L. REV. 1305, 1346–50 (2023) (evaluating the *Turner* test as a standard for protecting rights in sentencing but noting a downside is that “it does not easily translate to the non-carceral setting”).

247. The Supreme Court has not directly explained the level of scrutiny applicable when limiting a fundamental right as part of a criminal sentence. On one hand, the Court has noted that “person who *has* been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment.” *Chapman v. United States*, 500 U.S. 453, 465 (1991). On the other, a criminal sentence which restricts a person's right to procreate is the exact matter that was found unconstitutional in *Skinner* based on fundamental rights grounds. *Skinner v. Oklahoma*, 316 U.S. 535, 537–41 (1942). The call to apply strict scrutiny to sentencing is not a new concept, nor is it an impossible task to so. See Salili Dudani, *Unconstitutional Incarceration: Applying Strict Scrutiny to Criminal Sentences*, 129 YALE L.J. 2112, 2134–58 (2020) (discussing advocacy in favor of applying strict scrutiny to sentencing, then explaining how strict scrutiny could be applied to sentencing under various theories of criminal punishment).

248. These are methods I propose as an attempt to identify and track functional sterilizations and/or temporary limits of the right to procreate. There are likely other effective methods or data points as well.

249. *Gerber*, 291 F.3d at 621 (“A necessary corollary to this removal is the separation of the prisoner from his spouse, his loved ones, his friends, family, and children.”).

physical ways.<sup>250</sup> There are many people who are incarcerated and have some form of relationship with their children or are able to form a relationship after being released. The state should not use restrictions on the right to have a family or on preserving the possibility of having children in the future as a form of punishment. Second, even assuming that physical isolation is necessary as punishment, it can still be possible to accommodate the right to procreate by permitting non-sexual forms of procreation. Blocking all forms of procreation goes beyond a state's interest in punishment by physical separation. Third, not everyone is capable of procreating, nor does everyone want to. Restricting a right that only some people can and want to exercise is not an effective way to further an interest in punishment. There is not a clear relationship between restricting the right to procreate and the state's goal of punishment; there are alternative ways the interest in punishment could be accomplished more effectively.

#### d. Equity

In *Goodwin*, the Court explicitly mentioned sex equity as a reason to limit all people's access to ARTs.<sup>251</sup> In a dissenting opinion, Judge McMillian explained that providing an incarcerated person with a cup and space to collect his sperm would not cost or burden the prison much.<sup>252</sup> However, the court feared women would use the state's prison equity policy to demand that prisons accommodate either expensive ART procedures or pregnancy while incarcerated.<sup>253</sup> Similarly, there have been concerns that people sentenced to death would assert their right to procreate.<sup>254</sup> While collecting sperm could easily accommodate the right without much interference in the prison, having to accommodate a pregnancy has the potential to delay a scheduled execution.<sup>255</sup>

As demonstrated by federal constitutional requirements and the state prison guidelines in *Goodwin*, sex equity is a legitimate interest that a prison can assert.<sup>256</sup> Yet this argument fails to acknowledge biological differences that require different treatment. Although the *en banc* decision in *Gerber* did

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250. COLUMBIA HUMAN RIGHTS LAW REVIEW, A JAILHOUSE LAWYER'S MANUAL 643–49 (13th ed. 2020) (explaining the First Amendment protections incarcerated people have for communicating with those who are outside of the prison, including family, friends, and the general public).

251. *Goodwin v. Turner*, 908 F.2d 1395, 1399 (8th Cir. 1990).

252. *Id.* at 1406 (McMillian, J., dissenting).

253. *Id.* at 1400 (noting that the court did not decide on constitutional grounds but rather on the Missouri Prison Bureau's policy which required roughly equal treatment between men and women's prison conditions).

254. Kristen J. Davis, *supra* note 202, at 188–92, 190 n.179.

255. *Id.* at 190 n.179.

256. *Goodwin*, 908 F.2d at 1399–40.

not address the equal protection claim, the overturned initial Ninth Circuit decision recognized that, because the sexes are not similarly situated in regard to procreation, there was no equal protection violation.<sup>257</sup> As Judge McMillan explained in the dissent of *Goodwin*, “equal treatment of inmates is not a legitimate interest when it is accomplished at the expense of denying the exercise of an otherwise accommodatable constitutional right.”<sup>258</sup> A concern that men and women will not have access to the same things should not be used to deny everyone the right altogether.

#### e. Costs

Operating on a limited budget, states have an interest in reducing the costs associated with prisons. While sexual procreation may only marginally increase costs associated with extra security and space, it is no secret that ARTs can be expensive.<sup>259</sup> But even ART costs can vary quite substantially, with techniques such as collecting sperm being relatively cheap compared to a complete IVF process.<sup>260</sup> Further, there is no obligation for a prison to cover every possible procedure of every type of ART. For example, collecting reproductive material in the prison’s health clinic necessarily involves spending money on staffing and supplies. But accommodating these costs does not mean that the prison must also pay for freezing the reproductive material, storage fees, or costs associated with subsequent use of the material. Additionally, the person choosing to participate in the process could pay for certain costs, reducing the burden on the prison.<sup>261</sup> While this would cause

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257. *Gerber v. Hickman*, 264 F.3d 882, 891 (9th Cir. 2001), *rev’d en banc*, 291 F.3d 617 (9th Cir. 2002).

258. *Goodwin*, 908 F.2d at 1405 (McMillan, J., dissenting).

259. See U.S. DEPT. HEALTH & HUM. SERVS., FACT SHEET: IN VITRO FERTILIZATION (IVF) USE ACROSS THE UNITED STATES (2024) (finding the average cost for IVF “can easily exceed \$40,000”).

260. See *id.*; *Sperm Banking*, PENN MEDICINE, <https://www.pennmedicine.org/treatments/sperm-banking> (last visited Dec. 5, 2025) (“Sperm banking is less expensive than other fertility preservation methods.”); *Donor Sperm*, COLUMBIA UNIV. FERTILITY CTR., <https://www.columbiadoctors.org/specialties/obstetrics-gynecology/our-services/columbia-university-fertility-center/our-services/third-party-reproduction/donor-sperm> (last visited Dec. 5, 2025) (stating that vials for sperm cost between \$400 to \$1,000, the intake fee for sperm is \$150 per shipment, and storage for sperm is approximately \$45 a month).

261. For example, in *Goodwin*, Judge McMillan explained in a dissenting opinion that: Goodwin’s right to procreation can be accommodated at a negligible cost to prison security, administration, and allocation of resources. In order to accommodate Goodwin’s right, all the Bureau needs to do is provide Goodwin with a clean container in which to deposit his semen and allow the container to be given to his wife. The container need not be sterile, and Goodwin has repeatedly offered to pay whatever minimal expenses are incurred. Any impact in accommodating Goodwin’s right is obviously *de minimis*.  
*Goodwin*, 908 F.2d at 1406 (McMillan, J., dissenting).

an access issue by limiting procreation only to those who have money, prisons have not let economic inequalities stop them from allowing different access to rights. For example, many prisons charge for phone calls, emails, and letter-writing materials; all of which are necessary for expressing First Amendment rights to communicate with those outside the prison.<sup>262</sup> Although communication materials are much cheaper than most ART processes, and can often be bought with money earned from prison jobs, economic inequalities to access are not an established reason to prohibit a constitutional right for everyone. Work should be done to lessen this gap, but it must extend beyond prisons to expand access for everyone.

Similarly, costs of pregnancy can be high when factoring in medical care, special diets, and institutional changes to accommodate a pregnant person in the prison setting.<sup>263</sup> However, prisons cannot discard a constitutional right simply because of costs.<sup>264</sup> Over time, prisons can learn how to minimize these costs or share them with government agencies that otherwise would be covering them.<sup>265</sup> Additionally, the costs associated with pregnancy would only be shifted to the government for the people who are incarcerated while pregnant—this excludes most men as well as women who use a surrogate or choose to freeze their reproductive material. It does not further the interest of reducing costs to prevent all methods of procreation just because pregnancy is expensive.

#### f. Ethics

The last major area of concern is the ethical implications related to procreating while incarcerated. Regardless of their current behavior, prison officials *should* have an unofficial interest in acting ethically and promoting ethical actions within the prison system. However, ethical arguments against

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262. See Daniel Webster, *The Cost of Communication: How Jails and Prisons Charge Incarcerated Persons for Phone Use*, GEO. J. POVERTY L. & POL'Y (Jan. 18, 2024), <https://www.law.georgetown.edu/poverty-journal/blog/the-cost-of-communication-how-jails-and-prisons-charge-incarcerated-persons-for-phone-use/>; Tiana Herring, *For The Poorest People in Prison, It's a Struggle to Access Even Basic Necessities*, PRISON POL'Y INITIATIVE BLOG (Nov. 18, 2021) <https://www.prisonpolicy.org/blog/2021/11/18/indigence/> (noting mailing costs, email fees, and other communication charges).

263. See *Goodwin*, 908 F.2d at 1400 (discussing how accommodating pregnancy would be a cost burden on prisons).

264. See *Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 341–43 (3d. Cir. 1987) (holding that limited resources cannot justify a prison denying an incarcerated person access to an abortion).

265. See Friedman et al., *supra* note 198, at 368 (“The MBU cost is estimated at \$24,000 per infant per year of prison nursery; the annual cost of a child in foster care was similar at approximately \$22,000 per year.”).

the right to procreate can sometimes fail to advocate for a truly ethical stance or fail to make a rational connection between the ethical principle and the restriction. Additionally, without clearly agreed-upon moral principles, interests rooted in ethics may not constitute “legitimate” governmental interests under the *Turner* test.<sup>266</sup> Setting this aside, I look at some of the main ethical arguments related to procreation, including concerns over who should have genetic children, potential harms children can face by having an incarcerated parent, and ethical worries over pregnancy in prisons.

On an extreme end, ethical arguments can claim it is morally wrong to allow certain bad people to pass on their genetics, and therefore, the state has an interest in preventing criminals from having genetic children, at least while in prison. Notably, there is actual disagreement on whether it is morally right to prevent some people from having kids.<sup>267</sup> Additionally, an ethical argument like this runs into eugenics-based ideas that *Skinner* functionally countered.<sup>268</sup>

Even if this were a legitimate interest that could be promoted, restricting all people in prison from having children most likely harms more than just the *bad people*. Some people are wrongfully convicted and then incarcerated for years before possibly being exonerated. Even if it is morally right to stop some people from having children based on their past acts, some *bad* people may be released from prison and still able to procreate, while other *good* people will be unable to do so. Not only is it hard to argue that preventing incarcerated people from having children promotes an ethical interest related to eugenics, but a restriction can hardly be related to promoting an ethical interest either.

Along the same lines, some people express ethical worries over the situation a child would be born into. Children can face stigmas related to their parents’ incarceration, which can be exacerbated if they grow up with only one parent able to provide economic and emotional support.<sup>269</sup> Putting aside whether this is a legitimate ethical interest, preventing all procreation is not rationally related to preventing these stigmas. First, an incarcerated person

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266. Even ethicists cannot agree on which moral philosophy supports the government’s role in procreation or parenthood. See generally Elizabeth Brake & Joseph Millum, *Parenthood and Procreation*, STAN. ENCYC. OF PHIL. (Oct. 27, 2025), <https://plato.stanford.edu/entries/parenthood/> (describing debates in moral philosophy about access to parenthood and procreation); see also Karen A. Jordan, *The Emerging Use of a Balancing Approach in Casey’s Undue Burden Analysis*, 18 U. PA. J. CONST. L. 657, 661–87 (2015) (providing an overview of the undue burden test and the role of “legitimate state interests”).

267. See generally Brake & Millum, *supra* note 266.

268. See *supra* Part III.A.1.

269. See Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 NAT’L INST. JUST. J. 11, 11 (2017) (describing the effects of parental incarceration on children).

may not be having a child while in prison but may be taking steps to help preserve the possibility of having a child by freezing their genetic material. This would thereby avoid concerns related to children having a currently incarcerated parent.

A related ethical concern involves the social harms a child could face for having a previously incarcerated parent. However, this premise is overbroad. Individuals may be seen positively by community members for the action that resulted in conviction, might later be found innocent, or the prior prison sentence may not be discussed in the community. This also ignores that many children have a parent who was sent to prison after they were born or a parent who gave birth to them in prison,<sup>270</sup> meaning that the stigma of having an incarcerated parent will always exist. Restricting incarcerated people from procreating may make this perception worse.

Further, even if a child is born while their parent is incarcerated, modern family structures are increasingly diverse.<sup>271</sup> This makes it hard to claim real ethical concerns about stigmas related to single-parent households or a child's emotional harm from being raised without knowing their genetic parent. Even if a parent is never released from prison, recent changes in social norms around families<sup>272</sup> make it hard to argue that it would have been better for the child never to be born than to be born to a genetic parent with whom they may never have a close relationship with. More plausibly, some people are in prison because they are violent, or are non-violent individuals who have picked up bad habits or dangerous connections while in prison.<sup>273</sup> It certainly seems morally right to want to protect a child from being born into a harmful parent-child relationship, yet restricting procreation broadly is not related to this goal. With this logic, incarceration alone would justify permanent termination of parental rights, which is an overbroad position that

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270. See *supra* Part III.

271. See Daniel R. Meyer et al., *Increases in Shared Custody After Divorce in the United States*, 36 DEMOGRAPHIC RSCH. 1137, 1147–57 (2022) (examining demographic data for divorced parents and children living in shared-custody arrangements); *A Portrait of Stepfamilies*, PEW RSCH. CTR. (Jan. 13, 2011), <https://www.pewresearch.org/social-trends/2011/01/13/a-portrait-of-stepfamilies/> (looking at the number of children raised with step-parents involved in their family structures); Paul Hemez & Chanell Washington, *Percentage and Number of Children Living with Two Parents Has Dropped since 1968*, U.S. CENSUS BUREAU (Apr. 12, 2021), <https://www.census.gov/library/stories/2021/04/number-of-children-living-only-with-their-mothers-has-doubled-in-past-50-years.html> (finding that the number of two-parent families has decreased).

272. These norms include those that have emerged with donated reproductive material, single- and same-sex parenting, adoption, and normalization of extended family members serving as a parent.

273. Christopher Ingraham, *Even Violent Crime Victims Say Our Prisons are Making Crime Worse*, WASH. POST (Aug. 5, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/08/05/even-violent-crime-victims-say-our-prisons-are-making-crime-worse/> (“52 percent of victims said that prison makes people *more* likely to commit crimes again.”).

is not based on individualized circumstances.<sup>274</sup> Similarly, preventing procreation on the ground that incarceration makes someone a risk to a child is not rationally related to protecting children's well-being. Instead, despite their flaws, there are systems in place to ensure the safety of all children.<sup>275</sup> Additionally, prisons could create screening mechanisms to make sure that a person is not trying to procreate for reasons that would raise red flags as harmful to a child such as an interest in having children solely as a means for economic support or having children shortly after a conviction of child neglect or abuse.

Another line of ethical interests is reducing the amount of people in prisons who are undergoing pregnancy, childbirth, and recovery from medical procedures. There is extensive evidence documenting the poor conditions in prisons, especially for people who are pregnant, new parents, or managing other medical conditions such as substance abuse or STIs.<sup>276</sup> It may be reasonable to prevent people from being exposed to these harms, but that goal can be achieved in many other ways that do not also restrict the right to procreate. Reducing these harms directly would help protect a broader group, including those whose pregnancies or medical conditions cannot be avoided. Further, reducing these harms would prevent emotional and social harms that result from having the right to procreate restricted. As it stands, poor prison conditions are part of a cycle that causes harm and creates stigmas that impact procreation and beyond. However, preventing some forms of harm by restricting the right to procreate ultimately creates new personal, relational, and social harms from having the right taken away, while also furthering harmful ideas about who can be a good parent.

#### g. Conclusion on Penological Interests

As seen above, many of the interests may be legitimate penological interests, but very few of them are *truly* rationally related to a broad

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274. See Richard Hines-Norwood, *After Prison, I Became a Better Dad*, MARSHALL PROJECT (June 13, 2019), <https://www.themarshallproject.org/2019/06/13/after-prison-i-became-a-better-dad>; Peggy C. Giordano et al., *Parenthood and Crime: The Role of Wantedness, Relationships with Partners, and SES*, 39 J. CRIM. JUST. 405 (2013) (finding parenthood can reduce recidivism rates in certain circumstances).

275. These include traditional child protective services within state level departments of children and family services. Additionally, these include public education systems, community-based support for parents, and social welfare programs like WIC which are designed to promote access to education and basic needs for children regardless of income. See EARLY CHILDHOOD POLICIES AND PROGRAMS THROUGH A COMMUNITY LENS, HARV. GRADUATE SCH. ED. (n.d.), <https://csc.developingchild.harvard.edu/child-policy-and-programs/> (accessible by visiting the website, scrolling to bottom, and clicking "Download a PDF about Child Policy and Programs").

276. See Am. Coll. Obstetricians & Gynecologists, *supra* note 223, at e26–e31.

restriction on procreation. Rather, a few interests may be rationally related to a restriction on specific types or aspects of procreation. Notably, sexual reproduction is the most vulnerable, because it based on existing precedent for both procreation and ideas related to isolation. Similarly, there may be reasons that restrictions on pregnancy could be found to be rationally related to goals such as safety. Many potential restrictions are not rationally related to any one interest, yet, these interest can generally be lumped together into a general interest in “efficient prison functioning.” In the following Parts, I look at aspects and methods of non-sexual procreation under the remaining *Turner* factors.

## 2. Alternative Means of Exercising the Right?

The next *Turner* factor examines whether there is any other way to exercise the fundamental right when the restriction is in place.<sup>277</sup> In the case of procreation, the *Gerber* court claimed that individuals retain their right to procreate after being released from incarceration.<sup>278</sup> This is a vast overstatement and misunderstanding of the ability to procreate.<sup>279</sup> On one hand, there are a number of people who die while incarcerated.<sup>280</sup> Effectively, the right to procreate is stripped from individuals at the moment of incarceration. On the other hand, most people do get out of prison,<sup>281</sup> but many get out after their peak reproductive years.<sup>282</sup> This can effectively prevent procreation even after release. Additionally, data shows that most people who are incarcerated for long periods of time were imprisoned young, often around the age when people commonly have children.<sup>283</sup> When individuals are incarcerated from the time they would start having children through the time when they are most likely to successfully conceive and give birth, incarceration prevents any other way to exercise their right to procreate.

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277. *Turner v. Safley*, 482 U.S. 78, 90 (1987).

278. *Gerber v. Hickman*, 291 F.3d 617, 622 (9th Cir. 2002).

279. *Id.*

280. See generally BUREAU JUST. STAT., U.S. DEP'T JUST., NCJ 300953, MORTALITY IN STATE AND FEDERAL PRISONS, 2001–2019 – STATISTICAL TABLES (2021).

281. See ASHLEY NELLIS, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE SENTENCES 4 (2021) (“One in 7 people in U.S. prisons is serving a life sentence, either life without parole (LWOP), life with parole (LWP) or virtual life (50 years or more), totaling 203,865 people.”).

282. See Emily Widra, *The Aging Prison Population: Causes, Costs, and Consequences*, PRISON POL'Y (Aug. 2, 2023), <https://www.prisonpolicy.org/blog/2023/08/02/aging/> (stating “the U.S. median age rose to a high of 38.9 years”); Lauren Porter et al., *How the U.S. Prison Boom has Changed the Age Distribution of the Prison Population*, 54 CRIMINOLOGY 30, 33 (2016) (finding the median age of an incarcerated person in the U.S. prison has been increasing over time, in part due to cycles of recidivism).

283. See *supra* Part II.A.

Further, it would be inconsistent with the application of other rights to claim that exercising the right to procreate after release from prison is a true alternative way to exercise it. For example, incarceration does not permanently deprive individuals of their right to free speech and expression. Despite this, there are still protections for forms of free speech in prisons. Similarly, the right to marriage is protected during incarceration regardless of the fact that a possibility to exercise the right exists once released from prison.<sup>284</sup> Like these rights, allowing individuals to exercise the right to procreate only after release is not an acceptable alternative to being able to exercise that right at a time of their choosing.

Importantly, procreation can be restricted during different parts of the process. For example, prohibiting only sexual procreation does not inherently restrict non-sexual procreation through ARTs. Additionally, restricting only certain aspects of procreation, such as pregnancy, does not completely eliminate alternative means of exercising the right to procreate. Of course, these are not perfect solutions, because the more restrictions there are, the fewer people will be able to freely participate in them due to costs, biology, connections outside of prison, and criminal sentences. Considering who can access the right to procreate through alternative means is important to keep in mind when weighing restrictions that leave narrow alternatives open.

### 3. Impact of Accommodating the Right?

The third *Turner* factor examines the impact that accommodating the right to procreate would have on prisons.<sup>285</sup> If this right could be widely accommodated—allowing for sexual procreation and providing access to ARTs for non-sexual procreation—there is potential for significant impacts on prisons. Most notably would be the costs associated with paying for treatments, caring for more pregnant prisoners, covering additional staffing needs related to security, and administrative costs from creating and managing programs that give access to the right to procreate. However, limiting access to this right can reduce some of the financial impacts. For example, methods of procreation that create high security risks, such as ones involving a third party coming into the prison, do not have to be accommodated. Similarly, high-cost procedures or methods could be made available but have the individual bear the costs of the procedure. When it comes to costs associated with pregnancy, states or individual prisons could take this as an opportunity to create dedicated procedures and areas for

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284. *See supra* Part II.A.

285. *Turner v. Safley*, 482 U.S. 78, 90 (1987).

childbearing. This could improve treatment overall and help to reduce costs compared to ad hoc accommodations for the occasional pregnant person.

Accommodating the right to procreate may create impacts outside of the prison system as well.<sup>286</sup> Many of these impacts were discussed in the interests Part above, such as ethical concerns about impacts on children born to incarcerated parents, potential for procreation to be used as a means of abuse or control, or the logistics of ART procedures being completed partially within prisons and partially outside of them.<sup>287</sup> However, the potential impacts to third parties and entities are often exaggerated or can be addressed by existing structures.

Notably, accommodating an unrestricted right to procreate may be very burdensome to prisons, but accommodating parts of this right can have a small impact. The level of impact can also vary from facility to facility or state to state. For example, a prison system with a program for incarcerated people who are pregnant or new parents may be less affected by a potential increase in pregnancies and parents. Likewise, a prison that allows conjugal or private visits may not have a large impact caused by security needs related to sexual procreation.

#### 4. Ready Alternatives to Affording the Right?

The last *Turner* factor considers if there are other ways the prison could provide access to the right.<sup>288</sup> Determining the exact alternatives requires knowing the specifics of the restriction. For example, prisons that prohibit all forms of procreation do not leave any avenue for exercising the right. However, a prison that restricts the right to sexually procreate could still accommodate the right to procreate by offering access to non-sexual means of procreation. Many of these alternatives were discussed above,<sup>289</sup> but these only apply when prisons do not have a blanket ban on the right to procreate.

When there are ready alternatives for affording the right, prisons can easily justify a particular restriction because it does not constitute an overall ban on the right. Alternatives need not offer the same level of access to the right, meaning that a restriction preserving a right under specific circumstances is still favored over an outright ban.<sup>290</sup> On the other hand, the lack of any alternative means to affording the right should direct attention

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286. *Percy v. State Dept. of Corr.*, 651 A.2d 1044, 1046 (N.J. Super. Ct. App. Div. 1995) (stating that “[o]f course, social and economic concerns beyond the prison walls could also be considered” when determining if a prison must accommodate incarcerated people participating in artificial insemination).

287. *See supra* Part III.B.1.

288. *Turner*, 482 U.S. at 90.

289. *See supra* Part III.

290. *Turner*, 482 U.S. at 78.

back to the interest that the prison claims the restriction advances. A restriction that prevents exercise of the right more than necessary to achieve the asserted interest should be further investigated to determine if there really is a need for such a far-reaching restriction. For example, a complete ban on all procreation likely burdens the right more than is necessary to achieve any legitimate state interest. Although a restriction on a fundamental right in prison does not have to be narrowly tailored, this should raise a red flag for a court to examine any alternative means to exercising the right and the impacts accommodating the right would create. Further, a restriction that allows some incarcerated people to exercise the right, but prevents others from exercising it, should be held to the same analysis to determine if the restriction unconstitutionally burdens particular groups.

### *C. What the Turner Test Tells Us*

The right to procreate is not inherently at odds with the goals of incarceration. As such, an individual still has constitutional protections for their right to procreate even when incarcerated. While strict scrutiny would normally apply to restrictions on fundamental rights, the prison setting uses the *Turner* test to balance factors related to the ability to exercise the right with the government's interest in operating prisons. When looking at potential interests and the restrictions that may be used to advance the interest, it is clear that a broad restriction on procreation goes beyond what should be constitutionally permitted. Generally, restricting the right for sexual procreation in prison is easy to justify, as it is clearly rationally related to many legitimate goals of prisons facilities. It also does not completely foreclose other non-sexual means of procreation. The constitutionality of restrictions on non-sexual procreation will be more dependent on the individual circumstances of the particular prison. Although allowing forms of non-sexual procreation does not clearly harm any legitimate prison interest, maintaining access to methods of non-sexual procreation helps to keep the right to procreate in prisons available, at least in some form. Some forms of non-sexual procreation may burden the prison system more than others, especially from related costs. However, not all aspects or forms of ART have high costs, and regardless, some costs may fall beyond the prison's reasonability.

The right to procreate has been recognized as a fundamental constitutional right for nearly eight decades;<sup>291</sup> however, it has been functionally prohibited for people who are incarcerated. Compared to

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291. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

grouping this right with other family and privacy rights, examining it as a distinct and independent right shows it was intended to protect an individual's freedom to bear children without governmental influence. While incarceration will add some form of governmental influence to every decision, the right to procreate protects against more than just forced sterilization. Restrictions on procreation in prisons can harm the right during incarceration and can also effectively prevent this right from ever being exercised when incarceration occurs during a person's reproductive age. As such, ARTs have a vital role in reconciling the tension between the right to procreate and countervailing governmental interests. Like all fundamental rights, the right to procreate does not offer a special right just in prisons. The relationship between ARTs and the right to procreate also extends beyond prisons.

#### IV. APPLICATION TO PROCREATION BEYOND PRISONS

Reproductive rights have been at the forefront of political and social debate for decades. However, in a post-*Dobbs* world where fetal personhood laws are quickly expanding to prevent access to ARTs,<sup>292</sup> the negative right or noninterference in the right to procreate is now at risk. Looking at the right to procreate in the prison context ultimately can advance the right outside prisons too. The first way it does this is by separating the right to procreate from other reproductive and family rights.<sup>293</sup> Unlike how reproductive and family rights have been bundled together, these rights have remained largely separate within the prison setting. This allows us to see how a right can stand on its own and compare it to other rights it is often grouped with. Next, the prison setting also provides an example of how to interpret and apply the right to procreate to determine the extent of what it protects. As addressed above, fundamental rights are easier to restrict in prison compared to other settings.<sup>294</sup> However, the right to procreate in prisons shows us that it not only applies to non-sexual procreation, but should also extend to ARTs.

Below, I first look at how the right to procreate can be separated from other rights and explain why this is useful. I then turn to how the right to procreate should be understood, using the prison context to explain the minimum scope of the right. Lastly, I look at how this construction of the right to procreate can help protect access to ARTs when challenged by state interests in protecting potential life.

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292. See sources cited *supra* note 7.

293. See *supra* Part I.C.

294. See *Turner*, 482 U.S. at 89–90; *supra* Part II.A.

*A. The Right to Procreate as a Constitutional Reproductive Right*

As discussed above, the right to procreate has an over eighty-year history as a recognized constitutional right, pre-dating other major reproductive and privacy rights.<sup>295</sup> However, the right to procreate was quickly bundled together with rights stretching across abortion, contraception, marital privacy, and parental control.<sup>296</sup> It was rare to see any court discuss one area of reproductive rights without touching on another. The right to procreate from *Skinner* was cited in the decision for extending the right to contraceptives to unmarried people,<sup>297</sup> just as contraceptive rights from *Eisenstadt* were cited in the decision granting same-sex marriage rights.<sup>298</sup> In instances like these, rights rarely build directly on one another. Rather, the Court used these rights to construct the idea of privacy and autonomy within family and reproductive matters. As rights in the sphere of family and reproductive privacy were questioned and developed, the Court leaned into other existing rights in these areas, further bundling the rights together.

For about half a century, the bundle of rights was an effective way to argue for noninterference in matters of reproductive and family decisions.<sup>299</sup> When a right in one area of reproductive decision-making and family privacy was strengthened, the entire sphere of privacy and the corresponding bundle of rights would benefit.<sup>300</sup> However, *Dobbs* substantially changed this. Now

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295. See *supra* Part II.A.; cases cited *supra* notes 10–11.

296. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (grouping the right to procreate into privacy rights); *Zablocki v. Redhail*, 434 U.S. 374, 385 (1978); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684–85 (1977); *Roe v. Wade*, 410 U.S. 113, 152–54 (1973); *Bellotti v. Baird*, 443 U.S. 622, 639–40 (1979); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 426–27 (1983); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 771 (1986); *Hodgson v. Minnesota*, 497 U.S. 417, 434 (1990); *Planned Parenthood v. Casey*, 505 U.S. 833, 847–48 (1992).

297. *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (1972).

298. *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015).

299. See *Roe*, 410 U.S. at 152 (using case law that established a right to privacy for other issues to find a right to privacy extending to abortion); *Bellotti*, 443 U.S. at 639–40 (relying on established privacy and abortion rights cases to rule in favor of access to abortion for minors); *City of Akron*, 462 U.S. at 426–27 (citing broad family and privacy rights to set the grounds for affirming a Court of Appeals ruling that invalidated a number of abortion restrictions); *Thornburgh*, 476 U.S. at 772 (citing cases that have developed a “private sphere of individual liberty [that] will be kept largely beyond the reach of government” as support for invalidating a state’s abortion restrictions); *Hodgson*, 497 U.S. at 434 (relying on a number of abortion, contraception, and procreation cases to invalidate a two-parent notification requirement for minors to receive abortion care); *Casey*, 505 U.S. at 847–48 (citing a number of cases establishing family and privacy rights to invalidate a law requiring that a woman notify her husband before receiving an abortion). Of course, the family and reproductive privacy rights were not a perfect solution even before their dismantling by *Dobbs*. However, they functioned as a recognized bundle of rights that was rooted in our Constitution.

300. See, e.g., *Obergefell*, 576 U.S. at 664–69 (strengthening the right to marriage by relying on precedent in sexual freedoms, contraception, and family privacy).

that *Dobbs* has opened up one area of reproductive privacy and autonomy, states want to do the same for other areas, particularly when they can operate under the guise of protecting children.<sup>301</sup> While some will argue that *Dobbs* was a narrow decision that only overturned an erroneously founded fundamental right to abortion,<sup>302</sup> *Dobbs* has clearly been used both explicitly and implicitly to chip away at other reproductive and family rights.<sup>303</sup> These impacts are evident across reproductive and family rights, but access to IVF and other ARTs has taken center stage in many anti-abortion states.<sup>304</sup> Two distinct but related rationales underlie the attack on these rights.

### 1. Creating a Window into Reproductive and Family Privacy

The first rationale for chipping away at reproductive and family rights views *Dobbs* as creating a window into a private enclosure created by the rights. In this approach, the combination of reproductive and family rights helps to build an enclosure that the state cannot see into without special approval, which is essentially what a house does for Fourth Amendment protections. There have always been small peepholes for the state to see into the private space, such as to protect viable fetal life<sup>305</sup> or to intervene into

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301. Beyond limiting abortion and extending fetal personhood to embryos outside of the human body, this logic has also been used to limit parental rights related to providing gender-affirming care to minors. See *L.W. v. Skrmetti*, 83 F.4th 460, 475–78 (6th Cir. 2023) (discussing how parental rights can be limited to “protect” a child from a parent who allows the child to access gender-affirming care); Mary Anne Pazanowski, *Parents’ Rights Take Focus in Oklahoma Trans Care Ban Arguments*, BLOOMBERG L. (Jan. 17, 2024), <https://news.bloomberglaw.com/litigation/parents-rights-take-focus-in-oklahoma-trans-care-ban-arguments>.

302. See *Emma Waters on the Alabama IVF Ruling*, CSPAN (Mar. 3, 2024), <https://www.c-span.org/video/?533973-5/emma-waters-alabama-ivf-ruling>.

303. See sources cited *supra* notes 3–4; *LePage v. Ctr. for Reprod. Med., P.C.*, 408 So. 3d 678, 684 n.6, 685 (Ala. 2024).

304. See sources cited *supra* notes 3–4, 6–7; *LePage v. Ctr. for Reprod. Med., P.C.*, 408 So. 3d 678, 684 n.6, 685 (Ala. 2024).

305. See *Roe v. Wade*, 410 U.S. 113, 156–64 (1973) (discussing the balance with a state’s interest in protecting unborn or potential life); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 443–49 (1983) (clarifying that while the Court is overturning state abortion regulations in this case, states can impose regulations and restrictions as allowed by the Constitution); *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 461–62 (1986) (confirming states have an ability to impose some abortion regulations that further their own interests); *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992) (analyzing when a “[s]tate’s profound interest in potential life” can overcome the constitutional right to abortion); *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) (addressing a “[s]tate’s interest in regulating abortion previability”); *Gonzales v. Carhart*, 550 U.S. 124, 146–67 (2007) (analyzing a state’s ability to prohibit or restrict a certain type of abortion procedure); *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582, 607–24 (2016) (examining a state’s ability to regulate abortion providers as a way to restrict access to abortion).

family privacy to prevent harm to a child.<sup>306</sup> However, like peepholes on the front doors of houses, the viewer can functionally only see what is in the direct line of sight. Therefore, a state could not see or control much in the private sphere beyond pregnancies that had *viable* potential life.

By finding that states can assert an interest in protecting any fetal life, *Dobbs* granted states permission to convert the peephole into a window. Unlike a peephole that gives focused sight into a space, a window enables someone on the outside to see what is directly behind the window. Plus, by repositioning the line of sight, it also lets them see things in the peripheral. Although *Dobbs* only explicitly allowed states to create a window to monitor and control pregnancies, the window is large enough for states to see things to the side of fetal life during a pregnancy.<sup>307</sup> Thus, the window lets states glance to the side of pregnancy to see *potential life* outside of a human body; shifting the viewpoint slightly allows the state to monitor contraception, and looking to the other side, gives a line of sight to parental rights in medical decisions for their minor child, such as abortion care and gender-affirming health care.<sup>308</sup> Even though these areas are beyond fetal life, the state draws a connection between them because of their relationship to protecting the life of a child or potential child.

When *Dobbs* was first decided, states were granted the right to view any part of pregnancy the state classified as potential life. States with fetal personhood laws easily justified a window that framed the entire duration of a pregnancy.<sup>309</sup> However, this large window allowed states to look to the side and see the process of conception outside of the human body (i.e., conception through ARTs).<sup>310</sup> Despite IVF creating an embryo, the destruction of an embryo that was created for IVF—one that has never been inside of a human body—is necessarily different from the common understanding of an abortion. However, fetal personhood laws allowed states to justify expanding the window once again to peer into the act of conception and not just pregnancy. As a result, states have justified restricting the destruction of embryos created outside of the body.<sup>311</sup> With this larger window, states can

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306. See David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 544–48 (2000) (discussing the limitations in the fundamental right to family privacy and the right parents have to raise their children how they choose).

307. See sources cited *supra* notes 3–4, 6–7; *LePage v. Ctr. for Reprod. Med., P.C.*, 408 So. 3d 678, 684 n.6, 685 (Ala. 2024).

308. See, e.g., *L.W. v. Skrmetti*, 83 F.4th 460, 475–78 (6th Cir. 2023) (using *Dobbs* to argue for limiting parental rights to access gender-affirming care for their children).

309. See GUTTMACHER, *supra* note 3.

310. See *Bendix*, *supra* note 6.

311. See *LePage*, 408 So. 3d at 683–88 (applying wrongful death of a minor statute to frozen embryos created in vitro); LA. STAT. ANN. §§ 121–133 (2025) (designating an embryo as a legal person and preventing destruction of any embryo).

look to the side of IVF to start scrutinizing other forms of ART such as egg and sperm donation, intracytoplasmic sperm injection, and preimplantation genetic testing. Once in clear sight, the state can easily regulate and control it.

Currently, the bundle of reproductive and family rights function as one big wall of protection that shields reproductive and family decisions from the government's view. By reframing how we see the rights—as individual walls at different angles and depths, rather than one big wall—we can create a set of walls that limit the government's view from the *Dobbs* window. For example, if the right to procreate stands perpendicular to abortion rights, then we can prevent the government from looking to the side to then intervene in ART. Similarly, we could position the wall of procreative rights parallel and behind the wall of abortion rights, creating a second room with privacy for IVF and other aspects of reproduction that occur before an embryo or reproductive material is inside a person.

## 2. Tipping the Tower of Reproductive and Family Privacy

The second justification for disregarding reproductive and family rights envisions the set of rights like a tower of Jenga blocks that has become unstable after pulling out a piece. In the tower, each block represents a different right within the broad realm of family and privacy rights. When the Court first recognized these rights, the block representing each right sat next to one another as their own distinct rights. However, once the Court started to use the existing rights to find related protections, the blocks began to stack. Over the next half decade or so, a tower of rights came together to represent the cumulation of family and privacy rights. Some of the blocks were pushed slightly out of the tower by subsequent cases on the topic,<sup>312</sup> but later court decisions generally added more blocks or helped to close any gaps in the tower.<sup>313</sup> That was, until *Dobbs*.

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312. See *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (setting the grounds for states to constitutionally restrict the abortion rights of minors); *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (creating the undue burden standard to balance a state's interest in restricting abortion); *Gonzales v. Carhart*, 550 U.S. 124, 150–67 (2007) (upholding a ban on a specific abortion procedure).

313. *Loving v. Virginia* first strengthened marriage rights by ruling racial-based marriage requirements unconstitutional. 388 U.S. 1, 12 (1967). Then *Obergefell v. Hodges* strengthened marriage rights again by ruling sex-based marriage requirements unconstitutional. 576 U.S. 644, 671–72 (2015). Similarly, *Griswold v. Connecticut* established the right to contraception for married individuals, but *Eisenstadt v. Baird* extended the right to contraception to unmarried individuals. 381 U.S. 479, 506–07 (1965); 405 U.S. 438, 453 (1974).

When *Dobbs* was decided, the Court pulled the block representing abortion rights out of the tower,<sup>314</sup> a block established by *Roe* in 1973.<sup>315</sup> As *Roe* set the abortion rights block early in the process of building the tower of family and privacy rights, removing the block that represented abortion rights caused instability throughout the tower by unsettling a foundational piece. Moreover, some of the blocks in the tower were built to strengthen and expand abortion rights—such as finding the right to abortion applied to incarcerated people and to minors in immigration custody.<sup>316</sup> Since the cases that built these blocks often supported other rights in reproductive and family rights, many have shifted so that the block is half in and half out of the tower, with the *good* law in the tower and the *bad* law hanging off the side. Although parts of the cases are still supporting the tower, the parts hanging off furthered the instability by throwing off the balance and creating holes in the structure.

Issues arise when something needs support from the tower of rights. Previously, when a case dealing with a reproductive or family right found its way into litigation, the right in question could be placed on the top of the tower and was supported by the blocks of privacy and autonomy beneath it. Now, even a *lightweight* case placed on top of the tower could cause it to come crashing down. Some of the blocks representing the rights would likely be fine—for example, the right to procreate would likely be protected because it came into existence relatively independently of other family and privacy rights. After the tower falls, we must rely on the individual blocks to build our arguments rather than the previous structure.

Other rights are more uncertain. Some rights have already been identified as vulnerable—like the right to same-sex marriage or contraception.<sup>317</sup> If the wrong question is placed on the tower by the Court, these blocks may fall, breaking on the way down to prevent their independent use, and even risk taking out other presumably more secure blocks as they fall.<sup>318</sup> By refraining from leaning on the tower, there is a hope that some of

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314. Prior to the Court releasing its official ruling and pulling the abortion rights block out of the tower, the leaked *Dobbs* opinion was like a minor earthquake. Shaking the tower just enough to show it was unstable, but not enough to knock it over yet.

315. *Roe v. Wade*, 410 U.S. 113, 154 (1973).

316. *Monmouth Cnty Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 341–43 (3d. Cir. 1987) (finding a prison could not restrict access to abortion only based on medical necessity); *Garza v. Hargan*, 874 F.3d 735, 736 (D.C. Cir. 2017) (finding that immigration custody officials could not physically prevent a minor from leaving the facility to access an abortion).

317. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 332 (2022) (Thomas, J., concurring).

318. For example, in defending the right to access IVF or other ARTs, there is a risk that if the bundle or tower of family and privacy rights is relied on, the court will identify a *weak* right that relied on abortion rights or similar logic. After identifying the weak right, other pieces will start to fall, eliminating rights not even directly in question. As a more extreme potential, the Court may also disrupt rights that

these rights can be pushed back into the tower once a more favorable Court revisits them. Importantly, it prevents additional and unnecessary harm that could result from relying on the falling tower.

Therefore, when states attempt to restrict reproductive or family rights, the former tower of rights is not there to support the claim. Additionally, taking blocks for a corresponding right out of the tower is risky because it is unclear whether a pulled block depends on a right found in another block. When IVF is challenged or fetal personhood laws are extended, we can try to pull the blocks for procreation and privacy out of the tower to defend the rights. However, we cannot have much certainty on how the right would be applied or whether the right would even stand on its own anymore.

### 3. Developing an Independent Right to Procreate

The two approaches above demonstrate that the right to procreate itself does not make reproductive rights vulnerable to attack. Rather, they show that our understanding and use of the right is not productive as a shield in its current form. Separating the right to procreate from the bundles of other family and reproductive rights can help alleviate the issues raised by both approaches. Notably, separating the right to procreate does not mean it cannot be used in conjunction with, or as support for, other reproductive and family rights. It means that we can use it without the risk of other rights weakening it.

So how would separating the right benefit both approaches addressed above? First, pulling the right to procreate out of the Jenga tower is helpful because we know that the right was developed independent of other reproductive rights.<sup>319</sup> This allows us to use the right without fear that its existence is dependent on a series of shaky cases and rights. The downside of this is that the right to procreate has seen very little development in case law.<sup>320</sup> However, analyzing the right to procreate in prisons shows us that this right can be used productively on its own. Unlike in non-carceral settings, most of the bundle of reproductive and family rights are restricted or prohibited in prisons.<sup>321</sup> Of those that do exist, they are often greatly

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were determined completely separate from abortion rights, using the argument in *Dobbs* that courts in the past functionally made up fundamental rights without proper support.

319. The Court in *Skinner* did mention marriage in the decision in explaining why it found the right to procreate, despite illegitimacy and fornication laws to the contrary. *Skinner* did not classify the right to procreate as a right marital couples have. Rather, marriage was used to explain the significance procreation has in U.S. history. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

320. See *supra* Part I.

321. See *Goodwin v. Turner*, 702 F. Supp. 1452, 1454–55 (W.D. Mo. 1988) (explaining how the rights to marriage, procreation, and privacy are abridged while incarcerated).

curtailed.<sup>322</sup> As such, the right to procreate is not based off sexual rights, marital privacy rights, or parental rights. Instead, our understanding of the right to procreate in prisons—even if the ultimate argument on the definition and bounds of the right to procreate were to be constructed differently—is based almost exclusively off the independent right from the limited case law that has developed it.

Second, distinguishing the right to procreate as its own right can help rebuild the privacy and autonomy rights around it. Even if we think of procreation as part of the house of reproductive and family rights, the rights do not have to build just the exterior walls of the house. Instead, individual rights can also form interior walls that can block sight into the home. By using the right to procreate to put up a wall between procreative liberties and pregnancy, the state cannot use the abortion window to look in. Instead, protection within the private sphere of family and reproductive rights can be further protected. However, to know where the right to procreate can put up its wall, we need to know more about what it protects. Once again, turning to procreation in prisons can help determine this.

### *B. The Right to Procreate Including ARTs*

Looking at the right to procreate in prisons provides insights into what the right entails. Since constitutional rights in prisons can be restricted with less scrutiny than normal, the rights identified in the prison context are the minimum rights that should apply outside of confinement. The first major thing to note is that the right to procreate protects the freedom of an individual to try to have a child when they want. This is more than the belief that the right simply protects against state intrusion into a person's body to physically take away their right to procreate. We can reach this conclusion by applying *Cleveland Board of Education v. LaFleur*—which suggested that the government violates the right to procreate when it acts in a way that deters an individual from choosing when to exercise this right<sup>323</sup>—to the prison context. In applying *LaFleur*, a court would find that a prison sentence can be used to deny someone their right to procreate—even though it is not the same level of intrusion into the body as sterilization in *Skinner*—because a prison sentence can put up physical barriers that prevent procreation while

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322. See *Gerber v. Hickman*, 291 F.3d 617, 621 (2002) (“Rights of marital privacy, like the right to marry and procreate, are necessarily and substantially abridged in a prison setting. Incarceration is simply inconsistent with the vast majority of concomitants to marriage, privacy, and personal intimacy.”).

323. 414 U.S. 632, 640 (1974).

incarcerated. Even if a person is released from incarceration, their right to procreate was still restricted by the sentence.<sup>324</sup>

Another important aspect demonstrated by analyzing the right to procreate in the prison setting is that this right also protects access to non-sexual procreation. For settings where sexual procreation can be banned because of countervailing penological interests—interests that could not be argued outside of prison<sup>325</sup>—non-sexual procreation with ARTs can offer a way to preserve an incarcerated person’s right to procreate while balancing a prison’s penological interests. Even though non-sexual procreation through ARTs is an alternative to sexual procreation in prison, the same right should extend outside of prison settings regardless of whether the freedom to sexually procreate is available.<sup>326</sup> This is especially true when remembering that some people are only able to procreate through ARTs.

In prisons, the government creates an artificial regulation on sexual procreation. While this restriction is typically temporary and does not physically intrude into a person’s body to permanently alter it, non-sexual procreation preserves the right from complete interference.<sup>327</sup> Similarly, if the government were to restrict ART access based on an argument that the right to procreate is not affected because sexual procreation was a *possibility* people could pursue, the restriction would effectively block many people from being able to procreate. Moreover, with a baseline understanding that the right to procreate involves access to ARTs and non-sexual methods because these are necessary for some people, we can also conclude that this right to choice in reproductive methods applies to everyone, regardless of the need to use ARTs to procreate.

Fundamental rights do not become new or different rights in the prison context; they are the same rights that apply outside prison. Likewise, the fact that some people need ARTs to procreate should not be treated as creating a special right available only to them. Thus, just as in the prison context, access to ARTs and non-sexual procreation generally should be seen as protected under the fundamental right to procreate.

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324. See discussion *supra* Part III.B.

325. For example, limits on procreation as a means to punish, promote security, or to reduce costs are restrictions that may be plausible in a prison context but are essentially unjustified in other settings. See *supra* Part II.A (describing the test for limiting constitutional rights in prisons, which permits rights that otherwise could not be limited to be restricted for reasons such as costs, punishment, or security).

326. If the right is found to be protected within prisons, even if the right to ART access is an “alternative” to the full right to procreate through sexual or non-sexual methods, then the *full right* should be constitutionally protected outside of prison settings. See *generally* *Turner v. Safley*, 482 U.S. 78 (1987) (analyzing when a constitutional right that otherwise could not be restricted could be limited within prison settings).

327. See *supra* Part III.B.

Lastly, the right to procreate applies to having your own genetic child (i.e., having a biological child through birth). The emergence of the right to procreate originated out of the desire to deter sterilization. Prior to *Skinner*, sterilization was used predominantly against criminals, mentally ill and disabled people, and poor people.<sup>328</sup> The reasons for sterilization included wanting to deter bad genetics from being passed on and a desire to prevent poor people from raising children.<sup>329</sup> This background is helpful as we try to decide how to apply a modern understanding of reproduction to the right that developed before genetic and biological aspects of reproduction were understood. Reading this alongside the historical justifications for sterilization, the right to procreate developed protections for people whose genetics the state did not want passed on and for people the state did not want to raise a child due to their status or circumstances. Today, this can help protect the rights of people to have their own genetic child and to become pregnant with a child from donated genetic material. Procreation in prison shows us that an individual can procreate in many different ways—some of which depend on the use of donor genetic material or the use of a surrogate. Permitting the donation of genetic material and the use of surrogacy helps further the goals of noninterference in procreation and should extend to people inside and outside of prisons.

This analysis shows that the right to procreate, at a minimum, should include protection from wide noninterference with procreation in various sexual and non-sexual methods. A governmental restriction restricting when or how we procreate can violate our rights. The government may have even more of an obligation to advance the right to procreate outside of prison settings as well. However, additional rights or positive obligations are likely to take shape with the independent development of the right to procreate over time. Despite all this, rights can be constitutionally limited, especially if they interfere with another constitutional right.

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328. Alexandra Minna Stern, *Forced Sterilization Policies in the US Targeted Minorities and Those with Disabilities – and Lasted into the 21st Century*, CONVERSATION (Aug. 26, 2020), <https://theconversation.com/forced-sterilization-policies-in-the-us-targeted-minorities-and-those-with-disabilities-and-lived-into-the-21st-century-143144>; Nicole Novak & Natalie Lira, *Forced Sterilization Programs in California Once Harmed Thousands—Particularly Latinas*, MICH. SCH. PUB. HEALTH (Apr. 16, 2018), <https://sph.umich.edu/pursuit/2018posts/forced-sterilization-programs-in-california.html>.

329. See *Buck v. Bell*, 274 U.S. 200, 205–06 (1927) (upholding a statute that permitted sterilization of “defective persons who if now discharged would become a menace but if incapable of procreating” with the justification that “[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind”).

*C. Balancing ARTs with Interests in Potential Life*

Now that we know the right to procreate can be isolated as its own right and used to support the freedom to choose reproductive methods, the next important step is to determine where the right can be limited. The most glaring area is the tension between the right to procreate using ARTs and asserted state interests that certain ART procedures harm either potential or actual human life. For example, recent attention surrounding IVF has shown how legal frameworks in Alabama<sup>330</sup> and Louisiana<sup>331</sup> classify an embryo as a person, even when the embryo is created outside of a person.

Balancing these rights with state interests yields no single, definitive outcome. However, state interests must still accommodate the constitutional rights of individuals. As such, there may be a situation where it is determined that states can define personhood at the moment of conception and can therefore provide protections for an embryo. However, the protections for potential embryonic life should not be able to ultimately prohibit all IVF. For example, states should not make a moral judgment about IVF and ban it. If the valid state concern is rooted in protecting embryos, then it should only be able to restrict IVF to the extent necessary to prevent unnecessary destruction of embryos outside of the body.<sup>332</sup> While this would limit access, particularly because of costs,<sup>333</sup> it would preserve at least some access.

Further, states should not be able to prohibit its residents from using ART options available in other states. This is a necessary precaution as states are criminalizing abortions within state borders and attempting to criminalize abortions that their residence had legally performed in other states.<sup>334</sup> Additionally, the right to procreate should be understood to protect the ability to use donor egg, sperm, or both, as well as the ability to use or be a surrogate; This would expand access and protection to these options.<sup>335</sup> Of

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330. *LePage v. Ctr. for Reprod. Med., P.C.*, 408 So. 3d 678, 682–88 (Ala. 2024).

331. LA. STAT. ANN. §§ 121–133 (2025) (assigning personhood at the moment an egg and sperm combine, then prohibiting destruction of the embryo unless for specific reasons such as creation solely for research purposes or being deemed statutorily nonviable).

332. *See id.* (prohibiting destruction of an embryo created outside of a person).

333. Alexandra Busto et al., *Recent Cases and Legislative Developments Impacting IVF Services*, NIXON PEABODY (June 26, 2024), <https://www.nixonpeabody.com/insights/alerts/2024/06/26/recent-cases-and-legislative-developments-impacting-ivf-services> (“The increased risk of liability could lead to increased costs and expenses for IVF clinics, resulting in higher costs for patients.”).

334. *See* Hannah Rahim, *The Constitutionality of Banning Interstate Travel for Abortion*, PETRIE-FLOM CTR. (Oct. 16, 2023), <https://blog.petrieflom.law.harvard.edu/2023/10/16/the-constitutionality-of-banning-interstate-travel-for-abortion/>.

335. *See, e.g., Assisted Reproductive Technologies*, 24 GEO. J. GENDER & L. 337, 355 (Leanne Aban et al. eds., 2023) (explaining how some states have permissive surrogacy laws, some will only recognize a surrogacy contract from outside the state or after the child is born, and some states punish or prohibit surrogacy).

course, states can attempt to restrict access to these methods based on arguments such as preventing coercion and maintaining health. However, these restrictions must meet the requirements of strict scrutiny because even a burden on one potential method of procreation is a government restriction on this fundamental right.

#### CONCLUSION

In a society where prisons exist in their current state, prioritizing basic human rights and dignities is an important step in countering the harms produced by our carceral systems. This not only helps to humanize incarcerated people, but can help with rehabilitation, individual wellness, and prison functions. One aspect of this is protecting the fundamental right to procreate. Beyond the potential governmental and societal benefits that arise from protecting incarcerated people's right to procreate, the government also has a duty to protect this constitutional right for all people.

While the right to procreate has not received much attention from the courts, it may be one of the few resources to rely on in the constitutional battle over reproductive rights. As a fundamental right recognized prior to other privacy and family rights, the right to procreate does not rest on the foundation of *Roe* or other family, reproductive, or privacy rights. This makes the right to procreate in prisons even more important—it stands as one of the few areas where litigation has defined it as an independent right, rather than as part of the bundle of other privacy and family rights. In the aftermath of *Dobbs*, further developing the right to procreate may serve as an important tool for defending reproductive rights—such as access to ARTs and other medical tools—that can preserve and promote the ability to have children.

# THE OLD NATURAL MONOPOLY SOLUTION TO THE NEW BIG TECH PROBLEM

Tyler McNish\*

## ABSTRACT

*Is there such a thing as a “good monopoly”? In the 20th century, many people thought so. The concept of natural monopoly posited that certain goods and services were better produced by a regulated monopoly than by a competitive market. Today, however, almost no one uses this idea. We have not identified any new technology as a natural monopoly since the 1930s, and the concept is conspicuously absent from contemporary work on problems of industrial organization, including “Big Tech” market power. This Article reviews 150 years of intellectual history to explain how natural monopoly disappeared from our worldview. I trace the concept’s perceived irrelevance to its vestigial neoclassical features. We continue to define natural monopoly as an exception to the general rule of perfect competition, even though we stopped believing in that rule 100 years ago. In this way, we turned natural monopoly into a unicorn—possible to describe in theory but non-existent in the real world. Drawing on the lessons of the imperfect competition revolution and the deregulatory era of the 1970s–1990s, I propose a five-part test for determining whether a product or service should be regulated as a natural monopoly. I then show how this updated theory can help rationalize the respective roles of various proposed Big Tech policy interventions, including antitrust, vertical separations, nondiscrimination rules, interoperability mandates, and shared governance.*

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## INTRODUCTION

When we say that something is a “natural monopoly,” we mean that it ought to be provided by a single enterprise, not by multiple competitors, and (typically) that the enterprise’s pricing and conduct ought to be regulated by a specialist public utility commission.<sup>1</sup> Conceived in the late 19th century to explain why the great technological innovations of the era—railroads, telecommunications, and electric power—did not obey the laws of competition as then understood by economic science,<sup>2</sup> the concept of natural monopoly was a fixture of competition policy discourse for most of the 20th century.<sup>3</sup> As late as the deregulatory era of the 1990s, natural monopoly continued to be widely invoked as the criterion for whether or not an industry should remain subject to public utility regulation.<sup>4</sup>

Today, the concept of natural monopoly is conspicuously absent from contemporary debate about the market power of large internet technology enterprises. The dominant line of thinking understands the “Big Tech Problem” as a problem of anticompetitive conduct, to be solved by antitrust, not regulation.<sup>5</sup> The ongoing actions in which the government has challenged various business practices used by Google, Meta, Apple, and Amazon follow this line of thought.<sup>6</sup> So does much of the leading academic work on the subject. The New Brandeisian movement argues that reforms to antitrust doctrine are needed,<sup>7</sup> while antitrust centrists tend to think that proper

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1. Richard Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 548 (1969) [hereinafter *Natural Monopoly and Its Regulation*].

2. Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017, 1017–18 (1988) [hereinafter *Regulatory Conflict*].

3. See, e.g., STEPHEN BREYER, REGULATION AND ITS REFORM 158 (1982); ALFRED E. KAHN, THE ECONOMICS OF REGULATION 11–12 (1988) [hereinafter ECONOMICS OF REGULATION]; CHARLES F. PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES 45 (1988).

4. See, e.g., Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1328 (1998); Christopher S. Yoo, *Deregulation vs. Reregulation of Telecommunications*, 36 J. CORP. L. 847, 849 (2011).

5. See *infra* notes 6–8.

6. Cecilia Kang & David McCabe, *After Google Antitrust Ruling, Here’s Where the Other Big Tech Cases Stand*, N.Y. TIMES, <https://www.nytimes.com/2024/08/05/technology/antitrust-google-amazon-apple-meta.html> (Aug. 6, 2024).

7. Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 716 (2017) [hereinafter *Amazon’s Antitrust Paradox*]; Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 982 (2019) [hereinafter *The Separation of Platforms and Commerce*]; TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 14–15 (2018) [hereinafter ANTITRUST IN THE NEW GILDED AGE]; Zephyr Teachout, *Antitrust Law, Freedom, and Human Development*, 41 CARDOZO L. REV. 1081, 1096–97 (2019); JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION 216–17 (2022).

enforcement of the doctrine we already have is enough,<sup>8</sup> but both groups of thinkers look to competition for solutions, not regulated monopoly.<sup>9</sup> The leading “Big Tech” legislative proposals are also consistent with this approach: for example, the American Innovation and Choice Online Act (AICOA), which was proposed in Congress but not passed in 2022, would have defined new forms of anticompetitive conduct to be enforced *ex post facto* in the style of antitrust.<sup>10</sup>

With few but important exceptions,<sup>11</sup> even the writers who do contemplate a regulatory solution to the Big Tech Problem—such as interoperability mandates or line of business restrictions—find little use for the concept of natural monopoly. Instead, they use new concepts to define the set of firms that should be specially regulated, like “dominant digital platforms,”<sup>12</sup> “social infrastructure,”<sup>13</sup> “winner-take-all markets,”<sup>14</sup> and “networks, platforms, and utilities.”<sup>15</sup> Indeed, even those who want to revitalize the public utility tradition would cleanse it of its traditional association with the natural monopoly concept, reclaiming the Progressive ethos of public utility regulation but rejecting the notion that natural monopoly should be its target.<sup>16</sup>

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8. Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 1972 (2021) [hereinafter *Antitrust and Platform Monopoly*]; Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust*, 168 U. PA. L. REV. 1843, 1878 (2020) [hereinafter *Framing Chicago*]; Daniel A. Crane, *Antitrust’s Unconventional Politics*, 104 VA. L. REV. ONLINE 118, 123 (2018) [hereinafter *Antitrust’s Unconventional Politics*].

9. See *supra* notes 7–8.

10. American Innovation and Choice Online Act, S. 2992, 117th Cong. (as reported by S. Comm. on the Judiciary, Mar. 2, 2022).

11. In a recent article, Herbert Hovenkamp treats natural monopoly as the guiding principle for Big Tech regulation and articulates a novel test for determining whether natural monopoly is present. *Antitrust and Platform Monopoly*, *supra* note 8, at 1971–72. My goal in this Article is to justify, amplify, and systematize Hovenkamp’s insights, explaining why we need a new test for natural monopoly. I also take a different view about the required elements of natural monopoly and draw different conclusions from its application to contemporary problems. Two other recent works also use natural monopoly as a guide to tech regulation, but do not grapple with the limitations of the theory. See Tejas Narechania, *Machine Learning as Natural Monopoly*, 107 IOWA L. REV. 1543 (2022) (arguing that machine learning applications may be natural monopolies); Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149 (2008).

12. *Separation of Platforms and Commerce*, *supra* note 7, at 982.

13. BRETT FRISCHMANN, *INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES* 108 (2012).

14. *Antitrust and Platform Monopoly*, *supra* note 8, at 1970 n.67.

15. MORGAN RICKS ET AL., *NETWORKS, PLATFORMS, AND UTILITIES LAW AND POLICY* 7 (2022).

16. K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1638–39, 1680, 1687–88 (2018) [hereinafter *The New Utilities*] (proposing to “excavate” the “ethos” of public utility regulation, not “mechanically copy and reinstate old models of public utility regulation” such as the “tired, old top-down institutional forms we might associate with early twentieth century rate regulation”); see K. Sabeel Rahman,

One thing that is surprising about the disappearance of natural monopoly from contemporary discourse is that the concept has never been officially disavowed as a matter of economic theory.<sup>17</sup> It remains routine for legal academics to recite that “[n]atural monopoly exists when the entire demand for a good or service can be satisfied at lowest cost by one firm,” albeit only as a tangential reference offered for the purposes of completeness<sup>18</sup> or in support of an argument against regulation,<sup>19</sup> not as part of the main analysis or program of reform.<sup>20</sup> Natural monopoly has become a unicorn: possible to describe in theory but not something we expect to ever see in the wild.

This Article traces the evolution of our concept of natural monopoly across 150 years of intellectual history, with the goal of answering two questions.<sup>21</sup> First, why do we no longer find the concept useful? Second, what should we do about that? Should we abandon natural monopoly in theory, as we have (mostly) done in practice? Or is the idea worth rehabilitating, and perhaps renovating?

On the first question, my thesis is that our concept of natural monopoly is “too neoclassical.” By that I mean that we continue to define natural monopoly as an exception to the hypothetical construct of perfect competition, which makes it largely irrelevant to the imperfectly competitive reality in which we now understand ourselves to live. On the second question, my thesis is that natural monopoly, though rarer and more dangerous to regulate than we once may have thought, still describes a real phenomenon, essential to clear thinking about the Big Tech Problem and other contemporary industrial organization problems. If we free the concept of its vestigial neoclassical aspects and update it to work in a world of

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*Infrastructural Regulation and The New Utilities*, 35 YALE J. ON REG. 911, 933, 938 (2018) [hereinafter *Infrastructural Regulation*] (the conventional model of regulating natural monopolies should be replaced with a model regulating “[g]oods exhibiting scale, necessity, vulnerability”); William Boyd, *Public Utility and the Low Carbon Future*, 61 UCLA L. REV. 1614, 1708–10 (2014) (arguing for a “revitalized concept of public utility” that “cannot simply adopt the older concept of public utility” but needs “new ideas and conceptual innovations”).

17. See generally WILLIAM W. SHARKEY, *Natural Monopoly*, in 3 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 603 (John Eatwell et al. eds. 1987) (recounting the intellectual history of natural monopoly).

18. RICKS ET AL., *supra* note 15, at 9; Erik Hovenkamp, *The Antitrust Duty to Deal in the Age of Big Tech*, 131 YALE L.J. 1483, 1491 n.35 (2022) [hereinafter *The Antitrust Duty to Deal in the Age of Big Tech*].

19. Howard Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. PA. L. REV. 1663, 1671, 1675–85 (2013).

20. Lina M. Khan, *The New Brandeis Movement: America’s Antimonopoly Debate*, 9 J. EUR. COMPETITION. L. & PRAC. 131, 132 (2018) [hereinafter *The New Brandeis Movement*] (disclaiming the view that “big is bad” and noting the historical use of regulation, but focusing on antitrust and the promotion of competition, not natural monopoly regulation).

21. In this Article, I use “our” in the general sense.

imperfect competition, it can help us better determine which features of the Big Tech landscape are adequately handled by antitrust and which demand special regulation.

This Article consists of three Parts. Part I sets out the intellectual history of the natural monopoly concept from its invention in the late 19th century to its fall from prominence in the middle of the 20th century, with an emphasis on certain implications of the imperfect competition revolution that have sometimes been neglected in existing literature. In its earliest incarnation, natural monopoly stood for the neoclassical hope that the classical liberal order might be saved by acknowledging but cabining the threatening implications of industrial scale.<sup>22</sup> The idea was that a few industries might have economies of productive scale sufficient to make them naturally monopolistic, but most were—or should be—perfectly competitive: that is, divided amongst numerous firms competing vigorously on price. The imperfect competition revolution of the 1930s exploded this understanding of competition.<sup>23</sup> We came to understand that an industrialized consumer economy would feature a smaller number of larger firms offering partially differentiated products, and that competition amongst those firms would be imperfect but nevertheless workable. A corollary of this understanding was the belief that even in highly concentrated industries, it was usually better to look to antitrust to enforce what competition could be found than to award a regulated natural monopoly.<sup>24</sup>

Part II explains how we retained a vestigial and mostly unhelpful concept of natural monopoly long after the imperfect competition revolution. In part because of the economics discipline's continued fascination with the concept of perfect competition, we neglected to update the concept of natural monopoly for an imperfectly competitive reality. Consequently, when we drew on the concept during the deregulatory era of the 1970s–1990s to guide decisions about which public utility functions could be made competitive and which could not, the results were not inspiring.<sup>25</sup> Our anachronistic neoclassical understanding of natural monopoly told us little about the key task at hand, namely to distinguish natural monopoly from imperfect competition. Today, natural monopoly remains “on the books” as a theoretical possibility that might occur in extreme scenarios. But we have come to expect that it will be of little help in diagnosing real-world problems of industrial organization.<sup>26</sup>

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22. *See infra* Part I.D–E.

23. *See infra* Part I.F.

24. *See infra* Part I.G.

25. *See infra* Part II.B.

26. *See infra* Part II.A.

The dilapidated contemporary state of natural monopoly theory is unfortunate. After all, the deregulatory experience of the 1990s confirmed that some industrial assets or functions *really are* natural monopolies that will resist even our most creative efforts to make them competitive. If natural monopoly is the problem, antitrust alone will not solve it. In the antitrust tradition, monopoly arises from anticompetitive conduct; there is no antitrust liability without such conduct.<sup>27</sup> But if an enterprise controls a natural monopoly, it will not need anticompetitive conduct to dominate its rivals. In that scenario, we will struggle in vain to articulate generally applicable rules of business conduct that correct the market outcomes we are worried about without also netting other conduct that we think is unproblematic. For example, the current wave of Big Tech antitrust litigation challenges Apple's and Google's decisions about which apps to allow on their app stores.<sup>28</sup> Is that conduct more problematic than Walmart's or Costco's curation of their inventories? If so, why? It is difficult to satisfactorily answer this question without resorting to speculation about the inherently monopolistic tendencies of internet platforms<sup>29</sup>—which is the domain of natural monopoly theory, not antitrust.

Part III sets out an updated definition of natural monopoly that frees it of its neoclassical baggage by incorporating the insights of imperfect competition theory and the experience of public utility regulation during the deregulatory era. This requires four main adjustments.<sup>30</sup> First, the traditional technological basis of natural monopoly—economies of scale in production—must be broadened to incorporate some of the characteristics that are often said to make digital industries exceptional, including the centrifugal force of network effects as well as the offsetting centripetal forces of interoperability and multihoming.<sup>31</sup> Second, natural monopoly is only present where product differentiation is substantially absent.<sup>32</sup> Almost all software has economies of scale that would qualify for natural monopoly treatment under the neoclassical understanding of that term. But most software, like many other products and services in an advanced consumer

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27. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966) (noting that the offense of monopoly under the Sherman Antitrust Act requires “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident”).

28. Kang & McCabe, *supra* note 6.

29. See, e.g., Fiona Scott Morton et al., *Equitable Interoperability: The “Supertool” of Digital Platform Governance*, 40 YALE J. ON REGUL. 1013, 1016–19 (2023) [hereinafter *Equitable Interoperability*].

30. See *infra* Part III.A.

31. See *infra* Part III.A.

32. See *infra* Part III.A.

economy, is amenable to product differentiation to a degree that allows workable competition. Third, natural monopoly is best judged at the level of an asset or service, not at the level of an entire firm.<sup>33</sup> The right question is not whether Facebook or Google *is* a natural monopoly, but whether they control natural monopoly assets or offer natural monopoly services. Finally, due to the risk that regulation can entrench inefficiency and delay innovation, humility is in order.<sup>34</sup> We should not rush to regulate natural monopolies. And we should act only when we think the risks of regulation are justified by an equally substantial public interest.

The application of this updated natural monopoly theory to contemporary problems of industrial organization can help us better target some of our most promising proposed regulatory interventions—especially the application of interoperability mandates to “Big Tech” enterprises. These mandates have been widely discussed in the academic literature. They have taken on new importance with the recent district court order in the Google Search antitrust case requiring Google to share certain search index data with competitors.<sup>35</sup> If internet platforms can be made to share certain “back-end” utilities—for example, Google’s web indexer, or Facebook’s database of self-published content—the result may be the kind of competition we most want: multiple “front-ends” built on top of the shared utilities vying to offer us better content moderation systems at lower attentional prices, understood as fewer ads, less behavioral manipulation, less addictive content, or, at the very least, more choices for how to compensate internet gateways for their services. However, the principles that govern the targeting of interoperability remain undertheorized. If Google develops a valuable web indexing platform, and Tesla develops a valuable electric vehicle chassis, why should the law force Google but not Tesla to open its innovation to competitors? For that matter, why Google’s web indexer but not its search algorithms?

An updated theory of natural monopoly supplies the missing criterion for intervention: natural monopoly assets, and only those assets, should be subject to interoperability regimes.<sup>36</sup> It also offers something else that is often missing from the existing literature, which is too sanguine about the feasibility of “light touch” rules: a proven framework for making interoperability work. The natural monopoly asset can be spun off and placed

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33. *See infra* Part III.A.

34. *See infra* Part III.A.

35. *United States v. Google*, No. 1:20-cv-03010-APM, slip op. at 8 (D.D.C. Sept. 2, 2025); *see* Plaintiffs’ Initial Proposed Final Judgment at 18, *United States v. Google*, No. 1:20-cv-03010-APM (D.D.C. 2024) (explaining the Department of Justice’s proposed sharing remedy, which was partially adopted by the District Court).

36. *See infra* Part III.C.

in a public utility, regulated by a specialist commission according to cost-of-service principles developed over a century of regulation.

I do not mean to deny the well-understood imperfections of this approach. We should not imagine that regulation will succeed in setting the prices charged by a social database utility or web indexer utility at the perfectly competitive level—the fool’s errand that consumed too much of the efforts of 20th century public utility regulation.<sup>37</sup> Nor can we avoid the risk that regulation might slow dynamic competition, delaying innovations that might bring us better web indexers or content databases. I contend only that these dangers pale in comparison to the danger of entrusting online content moderation and information prioritization to private oligopolies, or worse, empowering government to regulate online speech. The goal is to use regulated monopoly—in the form of back-end utilities—to promote the kind of competition that will make Big Tech content moderation policies no more threatening than newspapers’ editorial decisions, and their partnerships no more threatening than those of any other business.

#### I. THE BIRTH AND (MOSTLY) DEATH OF NATURAL MONOPOLY, 1875–1950

In this Part, I trace the emergence of our ideas about natural monopoly across nearly a century and situate these ideas within broader developments in economic and legal doctrine. To understand the concept’s original purpose, it is essential to appreciate that late 19th and early 20th century intellectuals perceived big business as an existential threat to classical liberalism.<sup>38</sup> Natural monopoly stood for the hope that the threatening aspects of industrial scale could be cabined in an exceptional category of regulated public utilities, allowing decentralized competition to continue to govern the mainstream of economic life. When the imperfect competition revolution of the 1930s taught us to instead make peace with big business, the crisis evaporated, and so did natural monopoly’s original purpose.

##### *A. Industrial Scale’s Threat to the Classical Liberal Order*

Our legal and economic doctrine first encountered industrial scale in the form of the “railway problem.”<sup>39</sup> The essence of the problem was that “the laws of competition developed in classical economic theory did not work for

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37. *See infra* Part III.D.4.

38. *See infra* Part III.A.

39. HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 141 (1991) [hereinafter ENTERPRISE AND AMERICAN LAW].

the railroads.”<sup>40</sup> In the U.S. and Britain, governments often chartered multiple duplicative railroad companies, and encouraged them to compete.<sup>41</sup> However, competition led to overinvestment and price wars.<sup>42</sup> Sometimes the wars ended in bankruptcy of all but one competitor.<sup>43</sup> In other cases, they ended in the consolidation of all competitors into a single system, either by merger or by pooling into cartels.<sup>44</sup> In all of these scenarios, the industry seemed to evolve inevitably towards an equilibrium that left consumers exposed to monopoly pricing.<sup>45</sup> Special government subsidies were sometimes used to preserve the existence of duplicative competitive lines, but those subsidies, no less than monopoly pricing, had a cost to the public.<sup>46</sup>

Contemporary observers were also fascinated by the unprecedented vertical scope of the railroads, which were the first big businesses.<sup>47</sup> Other 19th century transportation systems consisted of public infrastructure and private carriers that operated on that infrastructure. Corporations organized for public benefit often owned highways, waterways, and bridges pursuant to charters that granted monopoly rights and mandated service on specified rates and terms.<sup>48</sup> The diverse individuals, common carriers, and other traffic that operated on this infrastructure were generally competitive and lightly regulated.<sup>49</sup> Early attempts were made to extend this same public-private architecture to railroads by encouraging multiple competitive rail companies to share the same rail lines, but these schemes ran into difficult coordination problems.<sup>50</sup> The complexity of railroad service appeared to demand the vertical integration of the road and the carriers into a monstrous hybrid that extended private control to traditionally public functions.<sup>51</sup>

Around the turn of the 20th century, the railway problem metastasized into the economy-wide “trust problem.” Throughout much of the economy, large rationally managed enterprises displaced market transactions among

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40. *Id.* at 141; see GEORGE H. MILLER, RAILROADS AND THE GRANGER LAWS 3 (1971).

41. ENTERPRISE AND AMERICAN LAW, *supra* note 39, at 144; *Regulatory Conflict*, *supra* note 2, at 1031, 1038.

42. ENTERPRISE AND AMERICAN LAW, *supra* note 39, at 144.

43. *Id.* at 148.

44. ENTERPRISE AND AMERICAN LAW, *supra* note 39, at 145.

45. See generally CHARLES FRANCIS ADAMS, JR., RAILROADS: THEIR ORIGIN AND THEIR PROBLEMS 81 (N.Y., G.P. Putnam’s Sons 1878) (discussing the history of railroad conflict and consolidation); THOMAS K. MCCRAW, PROPHETS OF REGULATION 6, 9–10, 56 (1984).

46. ENTERPRISE AND AMERICAN LAW, *supra* note 39, at 144–47.

47. MILLER, *supra* note 40, at 3.

48. *Id.*

49. *Id.* at 28, 31–32.

50. *Id.* at 27; *Regulatory Conflict*, *supra* note 2, at 1044.

51. See MILLER, *supra* note 40, at 24 (“As one contemporary student of the rate problem observed, when a highway is no wider than the wheel of the vehicle which moves upon it, a monopoly of trade for one organization is almost inevitable.” (internal quotations omitted)).

individual tradesmen.<sup>52</sup> Increasingly, the “visible hand” of management, not the invisible hand of markets, allocated resources—and productivity appeared to increase in proportion to the change.<sup>53</sup>

In the system of classical economics, this tendency toward monopoly was a puzzle. Classical economics was “antimonopolistic with a vengeance,” but its target was *de jure* monopoly, not *de facto* monopoly.<sup>54</sup> For example, classical economists opposed the grant of exclusive trade franchises to joint-stock enterprises like the British East India Company, the award of letters patent to favored manufacturers, and the cartelization of commerce by incorporated guilds.<sup>55</sup> In the classical system, the grant of such monopoly franchises interrupts the functioning of the self-regulating price mechanism, reducing the efficiency with which resources are allocated throughout the economy, and leaving buyers exposed to the monopolist’s unchecked self-interest, expressed in the form of high prices. Classical economists assumed that, in the absence of government protection, competition would naturally defeat monopoly and “the weakness of collusion” would frustrate cartels, such that *de facto* monopoly, unlike *de jure* monopoly, ought to be transitory and unthreatening.<sup>56</sup> Why, then, did the new industrial monopolies arise without *de jure* monopoly rights and persist for decades?

With the benefit of hindsight, we can see that the emergence of industrial scale exposed a tension that had been latent in classical economic theory since the beginning: the possibility that the most *allocatively efficient* economic system might not be the most *productively efficient* system. Adam Smith’s invisible hand analogy is a theory of allocative efficiency.<sup>57</sup> It posits that competitive market prices adjust to provide a set of incentives and disincentives that guide decentralized human actors to efficiently allocate resources.<sup>58</sup> Smith also had a theory of productive efficiency, which he described with an analogy to a pin factory.<sup>59</sup> Smith observed that an

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52. The business trust was a Gilded Age innovation used to roll up multiple corporations under common management. By the 1890s, the trust fell out of favor as a legal instrument and was replaced by other forms of organization. ENTERPRISE AND AMERICAN LAW, *supra* note 39, at 244–45.

53. See ALFRED D. CHANDLER, JR. THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 1, 6 (1977); RICHARD HOFSTADTER, THE AGE OF REFORM 213–27 (1955).

54. *Regulatory Conflict*, *supra* note 2, at 1030.

55. ADAM SMITH, THE WEALTH OF NATIONS 69, 142–43, 485, 693, 814–15 (Edwin Cannan ed., Modern Library 2000) (1776).

56. Herbert Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 TEX. L. REV. 105, 144 (1989) [hereinafter *Antitrust Movement*]; George J. Stigler, *The Economists and the Problem of Monopoly* 5–6 (U. Chi. Law, Occasional Paper No. 19, 1983).

57. MARK BLAUG, ECONOMIC THEORY IN RETROSPECT 57 (5th ed. 1997) [hereinafter ECONOMIC THEORY].

58. *Id.*

59. SMITH, *supra* note 55, at 4.

individual pin maker could make at most only a few pins per day.<sup>60</sup> In a pin factory, by contrast, the “business of making a pin . . . [is] divided into about eighteen distinct operations . . . all performed by distinct hands,” and this division of labor results in productive efficiencies that allow each worker to make “forty-eight thousand pins in a day.”<sup>61</sup>

Smith thought the invisible hand and pin factory worked in concert, and in his era, they mostly did.<sup>62</sup> In 1776, actual factories with in-firm economies of scale were still a relatively unimportant mode of economic organization.<sup>63</sup> Smith used the division of labor *within* the pin factory merely as a convenient analogy for the division of labor *among* firms throughout the economy.<sup>64</sup>—The latter division of labor was what Smith cared most about, for it drove his theory of economic growth: an expanding market facilitates a finer division of labor amongst individual tradespeople,<sup>65</sup> which increases overall production and prosperity, which further expands the market, and so on, in a positive feedback loop of increasing returns all guided by an invisible hand of price signals.<sup>66</sup> This was the gist of Smith’s famous description of an English laborer’s woolen coat as “the produce of the joint labour of . . . [t]he shepherd, the sorter of the wool, the wool-comber or carder, the dyer, the scribbler, the spinner, the weaver, the fuller, the dresser,” which in turn depend on “[t]he miner, the builder of the furnace for smelting the ore, the feller of the timber,” and so on.<sup>67</sup> Smith thought this division of labor explained why the humble English laborer was better clothed than “many an African king.”<sup>68</sup>

A century later, when the division of labor *inside* firms became impossible to ignore, the logic of Smith’s pin factory came to stand in opposition to the logic of his invisible hand. For if the division of labor increases with the extent of the market, and labor can be more efficiently divided within firms than between them, why not concede the whole market

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60. *Id.*

61. *Id.* at 5.

62. *Id.* at 14–15 (explaining that the “The Principle Which Gives Occasion to the Division of Labor” is self-interested competition).

63. ROBERT L. HEILBRONER, *THE WORLDLY PHILOSOPHERS: THE LIVES, TIMES AND IDEAS OF THE GREAT ECONOMIC THINKERS* 58, 72 (7th ed. 1999).

64. See DAVID WARSH, *KNOWLEDGE AND THE WEALTH OF NATIONS: A STORY OF ECONOMIC DISCOVERY* 38–40 (2006) (explaining the relationship between the pin factory example and Smith’s theory of growth).

65. As Smith put it “*The Division of Labor is Limited by the Extent of the Market.*” SMITH, *supra* note 55, at 19.

66. See WARSH, *supra* note 64, at 38–43 (explaining the relationship between the division of labor and the invisible hand).

67. SMITH, *supra* note 55, at 12.

68. SMITH, *supra* note 55, at 12–13; *ECONOMIC THEORY*, *supra* note 57, at 35.

to a single firm so that it could maximize the division of labor? Why have Coca-Cola and Pepsi-Cola, with duplicative management hierarchies, duplicative marketing budgets, and duplicative bottling plants? Yet if we abandon ourselves to monopoly, we undermine the invisible hand's ability to channel individual decisions under conditions of freedom towards socially productive goals.<sup>69</sup> In this way, the emergence of industrial scale seemed to suggest—contrary to the principles of classical political economy—that we might have to choose between the goals of productive efficiency and the decentralized allocation of resources.<sup>70</sup>

This was not an arcane problem of economic science. It was a threat to the whole 19th century edifice of classical liberalism. American democracy was thought to rest on a political economy of yeoman farmers and small businessmen interacting under conditions of rough equality, but this was threatened by the concentration of economic and political power in large corporations.<sup>71</sup> American morality was thought to require individuals to run the “race of life” according to their own ideas and conscience, but that lifestyle would be unavailable to employees directed by bosses in degradingly hierarchical organizations.<sup>72</sup> American law structured this liberal moral-economic-political order with property rights, freedom of contract, and hostility to “class legislation”<sup>73</sup>—but these doctrines bent sinister when applied to the benefit of corporations instead of individual tradespeople.<sup>74</sup>

Many of the era's intellectuals feared that industrial consolidation led inexorably to socialism. For if the new concentrations of private power could not be checked by the market, they would need to be subjected to the will of the public expressed through a powerful state. Economist John Bates Clark wrote in the *Atlantic Monthly* in 1900 that the question of whether monopoly

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69. As George Stigler later put it: “[H]ere was the dilemma: either the division of labor is limited by the extent of the market, and, characteristically, industries are monopolized; or industries are characteristically competitive, and the [invisible hand] theorem is false or of little significance.” George J. Stigler, *The Division of Labor is Limited by the Extent of the Market*, 59 *J. POL. ECON.* 185, 185 (1951). A similar question led Coase to his theory of the firm: if the invisible hand works so well, why do we have firms at all? Ronald H. Coase, *The Nature of the Firm (1937)*, in *THE NATURE OF THE FIRM: ORIGINS, EVOLUTION, AND DEVELOPMENT* 18, 19 (Oliver E. Williamson & Sidney G. Winter eds., 1993).

70. HEILBRONER, *supra* note 63, at 160–61; JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 106 (3d ed. 2010).

71. HOFSTADTER, *supra* note 53, at 23.

72. *Id.* at 223.

73. WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937* 107, 135 (1998).

74. *See, e.g.,* *Lochner v. New York*, 198 U.S. 45 (1905).

was essential to modern prosperity was “momentous beyond the power of language to measure”<sup>75</sup>:

Answer this question in one way, and you will probably be a socialist; and of course you ought to be one. Answer it in another way, and . . . [y]ou will believe in freedom of individual action, in competition, in the right of contract; in short, in the things that have made our civilization what it is.<sup>76</sup>

Similarly, conservative Seventh Circuit Judge Peter Grosscup wrote in 1905, “what shall it profit our country if it gain the world, and lose its soul?”<sup>77</sup> Grosscup observed that:

The transformation of the ownership of a country’s industrial property, from its people generally, to a few of its people only, reaches the bed-rock of social and moral forces on which, alone, the whole structure of republican institutions rests . . . [I]nstead of depending, each on himself and his own intelligence chiefly for success, the great bulk of our people, increasingly, will become dependents upon others.<sup>78</sup>

This meant “social and, eventually, political revolution.”<sup>79</sup>

In 1914, economists John Bates Clark and John Maurice Clark put it even more plainly: if the trusts have “come to stay,” then society faces “a choice between the devil of private monopoly and the deep sea of state socialism.”<sup>80</sup>

### *B. The Antitrust Tradition vs. the Public Utility Tradition*

The threat of big business inspired two divergent intellectual responses.<sup>81</sup> One response was the antitrust tradition, which coalesced in the Sherman Antitrust Act of 1890. In this tradition, big firms are not typically more productive than small ones. Instead, big firms prevail over smaller

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75. John Bates Clark, *Disarming the Trusts*, ATLANTIC MONTHLY, Jan. 1900, at 49.

76. *Id.*

77. Peter S. Grosscup, *How to Save the Corporation*, MCCLURE’S MAG., Feb. 1905, at 443, 443.

78. *Id.* at 447.

79. *Id.* at 444.

80. JOHN BATES CLARK & JOHN MAURICE CLARK, THE CONTROL OF TRUSTS 1–2 (1914) [hereinafter CONTROL OF TRUSTS 1914].

81. *Id.* at 141.

rivals by using their economic and political power to forestall competition and dominate markets. Law should forbid such anticompetitive conduct in order to revitalize competition and renew the economic foundations of American democracy and moral society.

The second response was the public utility tradition, which emerged out of the railroad regulatory commissions first set up by state legislatures in the 1870s.<sup>82</sup> In this tradition, big firms typically *are* more productively efficient than small firms, because they benefit from economies of scale. The yearning to reinstate atomistic competition is therefore atavistic and quixotic. Law should embrace but regulate monopoly, so that society may benefit from productive efficiencies without being exposed to the high prices, discrimination, and other depredations it might otherwise impose.

For half a century between 1890 and 1940, these two fundamental visions of what to do about the problem of economic scale clashed repeatedly across diverse intellectual battlefields.<sup>83</sup> We now tend to understand antitrust and public utility regulation as two different tools for fine-tuning economic performance, appropriate to different circumstances. In an earlier era, however, each of the two traditions were seen as an economy-wide solution to the fundamental problem of industrial scale, meaning that they pointed in starkly different directions. Writing in the first years of the 20th century, John Bates Clark and John Maurice Clark summarized the scene as follows:

Among those who approach the question fairly and intelligently, there are two kinds of plans proposed, springing from two views of the fundamental nature of the ills that now beset us.

The first, and perhaps most widely held among business men, is that in large-scale business competition has failed completely and monopoly has come to stay. The large plant is more efficient than the small one, the combination is more efficient than the independent, competition is wasteful and unnatural and monopoly the inevitable outcome. . . . If they have their way they will legalize monopoly, and in place of free competition as the regulator of prices, they will place the decrees of a public commission.

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82. *Id.*; ENTERPRISE AND AMERICAN LAW, *supra* note 39, at 127–130 (the discipline of public utilities law evolved from the Supreme Court’s decision in *Munn* to affirm the constitutionality of price regulation by state commission only as applied to “quasi-public” corporations).

83. *See* HOFSTADTER, *supra* note 53 (providing a book-length evocation of this clash and its many ripple effects).

The other way of attacking the problem starts from a widely different diagnosis. It rests on the belief, deep rooted in the minds of the masses of our people, that competition is not yet dead, that the monopolistic power of the trusts are accidental and not inevitable, that they are built upon privileges that can be removed, powers that can be withdrawn, and predatory acts that can be forbidden. Those who hold such a view naturally wish first to forbid every form of unfair advantage which one competitor may take over his rivals, and further to forbid combination, in whatever guise, when it goes beyond the point at which effective competition can survive.<sup>84</sup>

The 1912 presidential election put the choice between these divergent approaches to the electorate.<sup>85</sup> Reversing his previous reputation as a trustbuster, Teddy Roosevelt ran on a platform of monopolizing industry but subjecting it to political control—a public utility-ization of the whole economy.<sup>86</sup> In his view, “[c]ombinations in industry are the result of an imperative economic law which cannot be repealed by political legislation. . . . The way out lies, not in attempting to prevent such combinations, but in completely controlling them in the interest of the public welfare.”<sup>87</sup>

Woodrow Wilson agreed with Roosevelt about the problem, observing that the “one great basic fact which underlies all the questions that are discussed on the political platform at the present moment” was that “the individual has been submerged,” such that “men [now] work, not for themselves, not as partners in the old way in which they used to work, but generally as employees . . . of great corporations.”<sup>88</sup> In contrast to Roosevelt, however, Wilson ran on a platform of antitrust, proposing to “regulate competition,” not “regulate monopoly.”<sup>89</sup> Wilson’s goal was the restoration of an individualistic economy and society in which “eager men were everywhere captains of industry, not employees; not looking to a distant city to find out what they might do, but looking about among their neighbors,

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84. CONTROL OF TRUSTS 1914, *supra* note 80, at 141–43.

85. Daniel A. Crane, *All I Really Need to Know About Antitrust I Learned in 1912*, 100 IOWA L. REV. 2025, 2027 (2015) [hereinafter *All I Really Need to Know*].

86. *Id.*

87. Theodore Roosevelt, *The New Nationalism* (August 31, 1910).

88. Woodrow Wilson, *The New Freedom* 3, 5 (1913).

89. *All I Really Need to Know*, *supra* note 85, at 2031. Wilson was advised by Louis Brandeis, then a leading figure in the antitrust movement and a critic of what he called “the curse of bigness.” *Id.* at 2028.

finding credit according to their character, not according to their connections.”<sup>90</sup>

Wilson won the election, but the debate over what to do about industrial scale was not so finally resolved.<sup>91</sup> During the Great Depression, it sprang again to the foreground. We now understand Depression-era overproduction as a temporary and preventable macroeconomic virus, but at the time it was widely seen as a symptom of the incompatibility of free market capitalism with economies of scale.<sup>92</sup> New Deal economists and reformers were thus absorbed by “the old, scholastic conundrum of 1912,” tending to think “in terms of two general solutions, one involving industrial atomization to restore a self-adjusting economy, the other involving centralized planning and detailed regulation.”<sup>93</sup> In 1938, a contemporary observer summarized the ambivalence as follows:

Two souls dwell in the bosom of this Administration, as, indeed, they do in the bosom of the American people. The one loves the Abundant Life, as expressed in the cheap and plentiful products of large-scale mass production and distribution. . . . The other soul yearns for former simplicities, for decentralization, for the interests of the ‘little man,’ . . . denounces ‘monopoly’ and ‘economic empires,’ and seeks means of breaking them up. Our administration manages a remarkable . . . stunt of being . . . in favor of organizing and regulating the Economic Empires to greater and greater efficiency, and of breaking them up as a tribute to perennial American populist feeling.<sup>94</sup>

The seesaw between the First and Second New Deals expressed this ambivalence. The First New Deal followed the public utilities line of thinking: the National Industrial Recovery Act of 1933 (NIRA) attempted the government-organized cartelization of much of the economy, replacing industrial competition with cooperation and scale.<sup>95</sup> When NIRA was invalidated by the Supreme Court, the Second New Deal pivoted to the reinvigoration of antitrust, and a rhetoric focused on reducing scale and

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90. HOFSTADTER, *supra* note 53, at 224.

91. *Id.* at 245–56.

92. *See id.* at 302–03; ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* 12–13 (1966).

93. HAWLEY, *supra* note 92, at 187, 420.

94. Dorothy Thompson, *On the Record*, N.Y. HERALD TRIBUNE, Jan. 24, 1938, at 17, 17.

95. HAWLEY, *supra* note 92, at 15.

restoring competition.<sup>96</sup> Even this move, however, was shot through with ambivalence: Thurman Arnold, who Roosevelt appointed to lead the effort, was an antitrust skeptic who had previously argued that “[t]he actual result of the antitrust laws was to promote the growth of great industrial organizations by deflecting the attack on them into purely moral and ceremonial channels.”<sup>97</sup> Arnold thought the popular sentiment in favor of antitrust revealed “a society which unconsciously felt the need of great organizations, and at the same time had to deny them a place in the moral and logical ideology of the social structure.”<sup>98</sup>

World War II gave this battle of ideas military form. European fascism had taken the path that the U.S. rejected in 1912 and again in the early 1930s, embracing the rationalization of the economy by monopolies and cartels subordinated to the will of the state.<sup>99</sup> The economic results were striking: Hitler’s Germany nearly doubled the size of its economy between 1932 and 1939.<sup>100</sup> Similarly, the Soviet Union’s rapid industrial development under the Five-Year Plans of the 1920s and 1930s was an economic achievement without precedent in the capitalist economies.<sup>101</sup> Britain and the U.S. carried the flag of free enterprise into World War II, but their victory was procured in large part through wartime industrial planning measures that broke with competitive traditions.<sup>102</sup> As late as 1944, Friedrich Hayek framed his advocacy for free market organization as a voice in the wilderness: he found the English-speaking intelligentsia of his time convinced of the superiority of centralized rationalization of the economy.<sup>103</sup>

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96. *Id.* at 15, 137–38.

97. THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* 212 (1937).

98. *Id.* at 211.

99. Daniel A. Crane, *Fascism and Monopoly*, 118 MICH. L. REV. 1315 (2020) (stating that turn-of-century German law encouraged the rationalization of economic activity by cartels, which banks reorganized as monopolies during the economic crisis of the 1920s, and which then came to form the backbone of the Nazi project of national rearmament in the 1930s).

100. Yuri Kofner, *150 Years of German Monetary History*, INST. FOR MKT. INTEGRATION & ECON. POL’Y (Jan. 4, 2023), <https://miwi-institut.de/archives/2626> (“[T]he first half of the Nazi regime, i.e., from 1933 to 1939, was characterized by a strong economic upswing (annual GDP growth rates of over 8 percent), a reduction in unemployment and low consumer price inflation of around 0.7 percent annually.”).

101. PETER KENEZ, *A HISTORY OF THE SOVIET UNION FROM THE BEGINNING TO THE END* 91–92 (1999).

102. See ZACHARY D. CARTER, *THE PRICE OF PEACE: MONEY, DEMOCRACY, AND THE LIFE OF JOHN MAYNARD KEYNES* 353, 410 (2020).

103. FRIEDRICH HAYEK, *THE ROAD TO SERFDOM* 25 (1944). In fact, these fears persisted in some form well into the 1950s and 1960s. Paul Krugman pointed out that articles in publications such as *Foreign Affairs* during that era routinely concluded that collectivist, authoritarian states were “inherently better at achieving economic growth than free market democracies.” Paul Krugman, *The Myth of Asia’s Miracle*, 73 FOREIGN AFFAIRS, Nov.–Dec. 1994, at 62, 65.

*C. The Natural Monopoly Synthesis*

As originally conceived, the concept of natural monopoly was a kind of synthesis of the antitrust tradition and the public utilities tradition. It stood for the hope that industrial scale could be cabined into a set of exceptional industries—the natural monopolies—such that competition could continue to govern the mainstream of economic life.

The attraction of such an outcome to those who valued the status quo was obvious. Indeed, in *Munn v. Illinois* (1876), the Supreme Court had fashioned a legal doctrine with a similar purpose, a decade or two before the concept of natural monopoly was widely known.<sup>104</sup> The Court held that invasive state economic regulation could be constitutionally applied to an exceptional category of businesses (including railroads) that were “affected by a public interest,” even though such regulation would be unconstitutional under the substantive due process principles of *Lochner*<sup>105</sup> if applied to an ordinary business.<sup>106</sup> For the next 60 years, the Court was called on to decide which industries fell within this special category; the ones that did became the public utilities.<sup>107</sup> This *Munn* line of decisions, however, was famously unpersuasive.<sup>108</sup> The Court never satisfactorily reconciled the idea of “affected with a public interest” with the prevailing principles of classical political economy.<sup>109</sup>

Charles Francis Adams, Jr. was one of the first to articulate a more persuasive economic justification for why some industries might require such special regulation.<sup>110</sup> Adams was a scion of the Adams political dynasty,

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104. *Munn v. Illinois*, 94 U.S. 113 (1876); For useful commentary on *Munn*, see Harry N. Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 PERSPS. AM. HIST. 329 (1971); William J. Novak, *Law and the Social Control of Capitalism*, 60 EMORY L.J. 376, 402 (2010).

105. *Lochner v. New York*, 198 U.S. 45 (1905).

106. See *Munn*, 94 U.S. at 126 (quoting Matthew Hale, *De Portibus Maris*, in A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 45, 78 (Francis Hargrave ed., 1787)).

107. RICHARD F. HIRSH, POWER LOSS: THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN ELECTRIC UTILITY SYSTEM 12–22 (1999); BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 11, 96 (1998).

108. Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 440 (1988); FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 87 (1937).

109. FRANKFURTER, *supra* note 108, at 85.

110. MCCRAW, *supra* note 45, at 9–11; Herbert J. Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 994–97 (1990) [hereinafter *First Great Law & Economics Movement*]. The first glimmerings of the idea appeared in John Stuart Mill’s 1848 treatise, but the point was underdeveloped, and it is not clear whether Mill was talking about the same thing as later users of the term “natural monopoly.” JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 391 (London, Parker & Co. 1848).

Civil War hero, halfhearted lawyer, muckraking literary journalist, pioneering public utility regulator, and railroad executive.<sup>111</sup> By the late 1860s, Adams had worked out that railroads had unusually high economies of scale: “[i]t is an undisputed law of railway economics that the cost of the movement is in direct inverse ratio to the amount moved.” This implied “a conclusion which is at the basis of the whole transportation problem: competition and the cheapest possible transportation are wholly incompatible.”<sup>112</sup> By the 1870s, Adams had worked these ideas up into a fairly complete theory of natural monopoly:

The traditions of political economy to the contrary notwithstanding, there are functions of modern life, the number of which is also continually increasing, which necessarily partake in their essence of the character of monopolies. This they do and always must do as the fundamental condition of their development. Now it is found that, wherever this characteristic exists, the effect of competition is not to regulate cost or equalize production, but under a greater or less degree of friction to bring about combination and a closer monopoly.<sup>113</sup>

In his 1887 essay *The Relation of the State to Industrial Action*, economist Henry C. Adams (no relation) expanded on these ideas and connected them to the doctrine of classical political economy. Henry Adams identified a “class of industries” (including railroads) which “conform[ed] to the law of increasing, rather than to the law of constant or decreasing returns.”<sup>114</sup> He observed that John Stuart Mill—who wrote the century’s leading treatise on classical political economy—was aware of the existence of such increasing returns to scale but failed to appreciate the implications of the phenomenon: namely, that “where the law of increasing returns works with any degree of intensity, the principle of free competition is powerless to exercise a healthy regulating influence.”<sup>115</sup> In this scenario, Henry Adams thought that “there can be no question as to the line which marks the duties

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111. MCCRAW, *supra* note 45, at 2–6.

112. *Id.* at 9 (quoting Charles Francis Adams, Jr., *Railway Commissions*, 2 J. SOC. SCI. 233, 234 (1870) (emphasis omitted)).

113. Charles Francis Adams, Jr., *The State and the Railroads*, ATLANTIC MONTHLY, June 1876, at 691, 692.

114. HENRY C. ADAMS, *THE RELATION OF THE STATE TO INDUSTRIAL ACTION* 57, 59–61 (Balt., Am. Econ. Ass’n 1887).

115. *Id.* at 60.

of the state. . . . The control of the state over industries should be co-extensive with the application of the law of increasing returns.”<sup>116</sup>

Two years later, economist and Progressive reformer Richard T. Ely credited Henry Adams with demonstrating “the impossibility of competition in a business like the telegraph service,” and described such enterprises as “natural monopolies.”<sup>117</sup> Ely argued that “there is a certain class of pursuits for which there is no escape from monopoly. . . . We consequently see that we have a choice between two alternatives, and there is no middle ground between them. These are (a) private monopoly; and (b) public monopoly . . . .”<sup>118</sup> Ely advocated public monopoly as “the lesser of the two evils.”<sup>119</sup>

By the 1890s and early 1900s, the idea of technologically determined natural monopolies that should be subjected to public control was widespread in Progressive literature, with Ely,<sup>120</sup> John Commons,<sup>121</sup> and John Bates Clark<sup>122</sup> all prominently exploring its implications. In an 1894 article, Ely succinctly described what the “natural monopoly” term had come to mean:

There are various undertakings . . . virtually all of them comparatively new . . . which are monopolies by virtue of their own inherent properties. Recent discussions have made these businesses well known. They are railways, telegraphs, telephones, canals, irrigation works, harbors, gasworks, street-car lines, and the like. Experience and deductive argument alike show that in businesses of this kind there can be no competition, and that all appearances which resemble competition are simply temporary and illusory.<sup>123</sup>

The two Adamsses, Ely, and Commons conceived natural monopoly as an apostasy, part of their assault on the *laissez-faire* cathedral of classical economics.<sup>124</sup> Alfred Marshall, however, soon found it convenient to incorporate a similar concept into the mainstream of British political

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116. *Id.*

117. Richard T. Ely, *Telegraph Monopoly*, 149 N. AM. REV. 44, 44–45 (1889).

118. *Id.* at 45–46.

119. *Id.* at 47.

120. Richard T. Ely, *Municipal Ownership of Natural Monopolies*, 172 N. AM. REV. 445 (1901).

121. John R. Commons, *Protection and Natural Monopolies*, 6 Q.J. ECON. 479 (1892).

122. JOHN BATES CLARK, *THE CONTROL OF TRUSTS* 1 (1901).

123. Richard T. Ely, *Natural Monopolies and the Workingman. A Programme of Social Reform* 158 N. AM. REV. 294, 294 (1894).

124. FRIED, *supra* note 107, at 11.

economy.<sup>125</sup> Marshall accomplished this using the tools of the marginal revolution, which marks the break between classical and neoclassical economics. Neoclassical thinkers rebuilt their discipline on the cornerstone of an assumption Marshall called the “law of diminishing return.”<sup>126</sup> On the demand side, this law reflects the fact that consumers tend to value their sixth apple less than their first.<sup>127</sup> On the supply side, it reflects the fact that it costs orchard owners less to pick their first ton of apples than to pick their 6,000th ton, which will be eked from less suitable land, less productive trees, or higher branches.<sup>128</sup> Market-wide, the diminishing returns experienced by consumers and producers add up to the downward-sloping demand curve and upward-sloping supply curve of the famous *Marshallian Cross* diagram, depicted in the left panel of Figure 1.

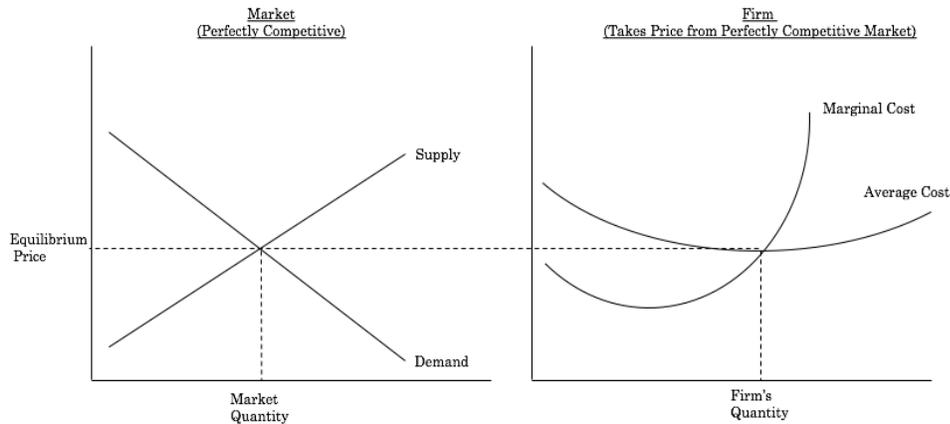


Figure 1: Equilibrium Under Perfect Competition<sup>129</sup>

125. *Infra* notes 122–24 and accompanying text.

126. ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 288 n.1 (8th ed. 1920); ECONOMIC THEORY, *supra* note 57, at 277–78; see BEN B. SELIGMAN, MAIN CURRENTS IN MODERN ECONOMICS 461–65 (2d ed. 1990); WARSH, *supra* note 64, at 76–78. Stanley Jevons, Leon Walras, and Carl Menger are generally credited with the key insights that sparked the marginal revolution. Milton Friedman, *Leon Walras and His Economic System*, 45 AM. ECON. REV. 900, 901 (1955); Herbert Hovenkamp, *The Marginalist Revolution in Legal Thought*, 46 VAND. L. REV. 305, 308–13 (1993). Alfred Marshall compiled their insights into his stylish, comprehensive treatise, which I rely on here as the best summary of the neoclassical perspective. MARSHALL, *supra* note 126.

127. MARSHALL, *supra* note 126, at 78–79.

128. *Id.* at 125.

129. ROBERT H. FRANK, MICROECONOMICS AND BEHAVIOR 348 (3d ed. 1997); MARSHALL, *supra* note 126, at 318 n.1.

This elegant model, still the foundation for “almost everything we know about the behavior of the economic system,”<sup>130</sup> reconciles the above-described tension between the pin factory and the invisible hand. In fact, extended to a general equilibrium context—in other words, to an economy containing multiple linked markets, each with its own supply and demand schedule—the neoclassical model of competition can be shown to result not only in an equilibrium, but in a social optimum.<sup>131</sup> In this happy world of perfect competition, the market-clearing price equals the industry’s marginal cost of production, which equals the marginal consumer’s marginal rate of substitution between the good and all other goods—and, best of all, we can prove this using mathematics.<sup>132</sup>

The result only holds, however, if there is no incompatibility between the optimally productive firm size and the number of firms needed for competition. The neoclassical model denies any such incompatibility by assuming that within a typical firm, increasing returns will be present only up to a certain quantity of production, beyond which they will be dominated by decreasing returns to scale.<sup>133</sup> Thus, a firm’s marginal-cost curve may slope down for a certain range (as it did in Smith’s pin factory), but must ultimately turn upward, as shown in the right panel of Figure 1.<sup>134</sup> As long as these cost curves start sloping upward at a quantity sufficiently below the total market demand, the necessary output will be produced more efficiently by multiple firms than by one—and these firms will compete.<sup>135</sup> Competition is crucial to the neoclassical model, for it is the mechanism that equilibrates price to the marginal firm’s marginal cost of production. A firm that rebels against this market price will merely inspire other firms to ramp up their production, and consumers will purchase these firms’ goods, not the rebel firm’s overpriced offerings.<sup>136</sup>

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130. ECONOMIC THEORY, *supra* note 57, at 337.

131. Mark Blaug, *The Fundamental Theorems of Modern Welfare Economics, Historically Contemplated*, 39 HIST. POL. ECON. 185, 185–86 (2007) [hereinafter *Fundamental Theorems*]; ECONOMIC THEORY, *supra* note 57, at 579.

132. John Geanakoplos, *Arrow-Debreu Model of General Equilibrium*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS 116, 118–19 (John Eatwell et al. eds., 1987); ECONOMIC THEORY, *supra* note 57, at 552–53; Kenneth Arrow, *General Economic Equilibrium: Purpose, Analytic Techniques, Collective Choice*, in NOBEL LECTURES IN ECONOMIC SCIENCES 1969–1980, at 109, 113–15 (Assar Lindbeck ed., 1992); ECONOMICS OF REGULATION, *supra* note 3, at 65 (“The central policy prescription of microeconomics is the equation of price and marginal cost.”).

133. ECONOMIC THEORY, *supra* note 57, at 355–63.

134. *Id.* at 356–57.

135. *Id.* at 362–69.

136. Thus, competitive firms are said to be “price takers”: they are forced to accept the market price for their goods. FRANK, *supra* note 129, at 377.

From the beginning, however, neoclassical economists realized that this elegant reconciliation of competition with efficient firm scale did not describe *every* part of the modern economy. Marshall articulated not only a “law of diminishing returns” but also a “law of increasing returns.”<sup>137</sup> This second law recognized that “in those industries which are not engaged in raising raw produce an increase of labour and capital generally gives a return increased more than in proportion.”<sup>138</sup> In other words, firms in these industries don’t have U-shaped marginal cost curves like that shown in Figure 1. Instead, their marginal cost curves continue to slope downward across the whole range of potential output, meaning that the most productively efficient outcome is for a single firm to serve the entire market.<sup>139</sup>

These industries are natural monopolies, in which competition is unworkable and undesirable, and regulation is necessary for efficiency. In a natural monopoly sector, neoclassical competition drives prices down to marginal cost, just as in other industries. But in natural monopoly sectors, unlike in other sectors, marginal cost pricing is by definition not enough to allow the firm to recover its average total costs. This means bankruptcy.<sup>140</sup> And even if multiple competing firms *could* be sustained (for example, through subsidies), that does not mean they *should* be. The downward-sloping marginal cost curve implies that productive efficiency is highest when just one firm serves the total market.<sup>141</sup> In these special cases, there is a justification for monopoly. There is also a justification for regulating that monopoly to ensure it does not charge inefficiently high prices.<sup>142</sup>

This neoclassical account of the economy suggested that the threat of industrial scale to classical liberalism might not be as severe as many feared. Decentralized competition among small businesses could continue to be the general principle of economic organization; monopolistic big business would be an exception. Antitrust law becomes the tool to break up monopoly and preserve competition in normal markets that can be served by multiple businesses without reducing productive efficiency. Public utility law

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137. *Id.* at 265.

138. MARSHALL, *supra* note 126, at 265–66.

139. WARSH, *supra* note 64, at 77–129 (noting that monopoly is the logical consequence of unchecked increasing returns to scale and describing the features that Marshall included in his system to prevent that result from undermining competition).

140. ECONOMICS OF REGULATION, *supra* note 3, at 122; *see, e.g., Natural Monopoly and Its Regulation*, *supra* note 1, at 548.

141. ECONOMICS OF REGULATION, *supra* note 3, at 74.

142. *See* MARSHALL, *supra* note 126, at 395; James Chen, *The Second Coming of Smyth v. Ames*, 77 TEX. L. REV. 1535, 1537 (1999); ECONOMICS OF REGULATION, *supra* note 3, at 74, 88, 106; FRANK, *supra* note 129, at 410–21.

becomes the tool to regulate the abnormal natural monopoly sectors, where increasing returns to scale make the productive efficiency of monopoly higher than that of competitive industries.

*D. The Unpersuasiveness of the Natural Monopoly Synthesis*

Given the enduring importance of the neoclassical concept of natural monopoly (a phenomenon I will describe below), it may be surprising that Marshall's contemporaries and immediate successors found his theory unpersuasive as a positive description of the economy. At best, Marshall's book described a transitional stage between Adam Smith's economy of individual proprietaries and a modern industrial economy. By the time neoclassical theory was widely known, big businesses benefiting from significant economies of scale were the general rule, not an exception.

Indeed, the "fixed cost controversy," also known as the "marginal cost controversy," shows the extent to which the neoclassical theory's flaws were apparent by the 1910s and 1920s.<sup>143</sup> Essentially, the controversy was what to do about the fact that most modern industries qualified as natural monopolies under the logic described above.<sup>144</sup> Marshall's elegant marginal cost pricing model only worked in industries where fixed costs were zero, but industrial production involves a relatively high ratio of fixed costs (machines, factories, fixed labor forces) to marginal costs (inputs to production, flexible labor).<sup>145</sup> In these sectors, competition will still drive prices down to short-run marginal cost, but marginal cost pricing will be too low to keep any firm with significant fixed costs in business. For some, this implied that we should treat every large industrial enterprise as a natural monopoly and impose public utility regulation throughout the economy.<sup>146</sup> Others proposed to "save" competition by using the government to subsidize fixed costs, thereby enabling multiple competitive firms to sustainably price at the marginal cost level.<sup>147</sup> Still others observed that the taxation required for subsidies was itself as inefficient as the deviation from marginal cost pricing, and also that

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143. ENTERPRISE AND AMERICAN LAW, *supra* note 39, at 308–322; Brett Frischmann & Christiaan Hogendorn, *Retrospectives: The Marginal Cost Controversy*, 29 J. ECON. PERSP. 193, 193 (2015).

144. ENTERPRISE AND AMERICAN LAW, *supra* note 39, at 308–09.

145. *Id.* Marshall himself dodged this issue in part with his famous "biological theory" of the firm, in which even firms with high economies of scale decline lose their advantage as they age, and are therefore subject to competition. MARSHALL, *supra* note 126, at 263.

146. CONTROL OF TRUSTS 1914, *supra* note 80, at 141 (describing the position held by many "business men [sic]").

147. *Id.* at 196 (describing Harold Hotelling's view).

such a system would result in an overproduction of high fixed cost goods relative to substitutes.<sup>148</sup>

In this way, the reality of early 20th century industrialization frustrated the neoclassical hope that classical competition might not need saving. Marshall succeeded in reinventing the discipline of economic science but failed to put the genie of industrial scale back in the bottle.

### *E. The Imperfect Competition Revolution*

Edward Chamberlin's model of "monopolistic competition" and Joan Robinson's model of "imperfect competition," published contemporaneously in the 1930s, were the theoretical breakthrough that finally dissolved the problem of industrial scale.<sup>149</sup> These models posit that firms offer partially differentiated products that appeal to different tastes.<sup>150</sup> Firms enjoy a sort of monopoly power with respect to the market for their product.<sup>151</sup> They therefore can command prices that exceed marginal cost, saving them from the economic ruin that neoclassical models of competition predicted would befall firms suffering from "the fixed cost" problem.<sup>152</sup> At the same time, these firms do not completely foreclose competition in the manner of a neoclassical monopolist because their market power is limited by the existence of relatively close substitutes.<sup>153</sup> In short, where neoclassical theory sought to divide firms into competitive and monopolistic categories, imperfect competition theory regards almost all firms as part monopoly and part competitive.<sup>154</sup>

Chamberlin and Robinson opened the door to microeconomics without perfect competition at its center. In a world of imperfect competition, unlike in Marshall's elegant universe, there are tradeoffs. Neither the allocative efficiency promised by perfect competition nor the productive efficiency promised by monopoly is typically realized in full. And there is no *a priori* basis for supposing that a particular level of concentration is optimal in a particular sector. This was a revolution whose effect, in the words of economic historian Mark Blaug:

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148. *Id.* at 197–99 (describing Ronald Coase's view).

149. ECONOMIC THEORY, *supra* note 57, at 375–79; WARSH, *supra* note 64, at 109, 111–15. J.M. Clark's efforts to find a "middle way" between the extremes of the public utilities vision and the antitrust vision, though written in a different style, were also an important predecessor to these ideas. CONTROL OF TRUSTS 1914, *supra* note 80, at vi (advocating a "third course" of "regulating competition").

150. ECONOMIC THEORY, *supra* note 57, at 375–79.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

[Was] to multiply the number of market structures that economics must analyse . . . . Policy prescriptions in a world of monopolistic competition and oligopoly cannot be based merely on the degree to which a particular market structure departs from the norms of perfect competition. Price theory has ever since been more complicated and less satisfying, and it is hardly surprising that some critics should not complain that we are left with little more than ad hoc theorizing. We can never go back to the bold generalities of Marshallian price theory.<sup>155</sup>

Into the vacuum left by the explosion of the Marshallian generalities stepped starkly divergent perspectives about what to do next. From one perspective, the existence of imperfect competition suggested a justification for aggressive government intervention throughout many areas of the economy.<sup>156</sup> Some midcentury economists, for example, favored treating advertising and aesthetic innovation (such as fins on automobiles) as anticompetitive practices that should give rise to antitrust liability. They thought that such practices “artificially” differentiate products that could otherwise be commodities produced under conditions more closely approximating perfect competition.<sup>157</sup> Joan Robinson herself drew even more radical conclusions: she saw her model as another nail in the coffin of *laissez-faire*, and a mandate for the radical reform of society.<sup>158</sup> After publishing her imperfect competition model, she turned to the study of Marx.<sup>159</sup>

But from another point of view—that of economists like Edward Chamberlin, John Maurice Clark, and Joseph Schumpeter—imperfect competition was not a failure to be corrected, but a fact about the world to be accepted, and not necessarily an unhappy one.<sup>160</sup> The new model of competition was only “imperfect” relative to an alternative called “perfect competition,” but that alternative was illusory and would be productively inferior even if it existed. As Schumpeter put it in 1942: “[n]either Marshall . . . nor the classics saw that perfect competition is the exception

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155. *Id.* at 379.

156. *Framing Chicago*, *supra* note 8, at 1878 (citing Joseph A. Schumpeter & A.J. Nichol, *Robinson’s Economics of Imperfect Competition*, 42 J. POL. ECON. 249, 250–51 (1934)).

157. Herbert Hovenkamp, *United States Competition Policy in Crisis: 1890–1955*, 94 MINN. L. REV. 311, 339 (2009) [hereinafter *Competition Policy in Crisis*].

158. ZACHARY D. CARTER, *THE PRICE OF PEACE: MONEY, DEMOCRACY, AND THE LIFE OF JOHN MAYNARD KEYNES* 248–50, 414–16, 454–56 (2020).

159. JOAN ROBINSON, *AN ESSAY ON MARXIAN ECONOMICS* (2d ed. 1966).

160. Don Bellante, *Edward Chamberlin: Monopolistic Competition and Pareto Optimality*, 2 J. BUS. & ECON. RSCH. 17, 17 (2004).

and . . . even if it were the rule there would be much less reason for congratulation than one might think.”<sup>161</sup>

Schumpeter’s own contributions struck a different but related blow at neoclassical competition. Neoclassical models propose to describe how supply and demand determine prices in a static equilibrium, but Schumpeter recognized that “equilibrium” was just a hypothetical thought experiment, and perhaps not a particularly helpful one.<sup>162</sup> The most important kind of competition is not competition *in* a market, but competition *for* new markets—the rivalrous, restless innovation that disrupts equilibrium and drives economic growth.<sup>163</sup> Schumpeter thought that the monopolies (temporarily) captured by entrepreneurial firms had always been a feature of the capitalist system, and had become even more important in the industrial age.<sup>164</sup> The attempt to use government policy to enforce or approximate perfect competition was a fool’s errand, for “firm[s] of the type that [are] compatible with perfect competition” were “in a less favorable position to evolve and to judge new possibilities” than big businesses.<sup>165</sup>

In the postwar era, this tolerant approach to big business proved a good fit for both the evidence and the public mood. Our worst fears about the inexorability of monopoly and all that it entailed for social and political organization had not been realized. Instead, many sectors of the U.S. economy settled into oligopolies similar to the type described by Chamberlin: Coke and Pepsi, UPS and FedEx, Boeing and Airbus, Visa and Mastercard, and so on. We came to see that competition of a certain kind would persist, and we were not on the road to serfdom. As the old Brandeisian economy receded further into historical memory, popular anxiety about big business evaporated.<sup>166</sup>

This revolution had strong implications for the balance of power between antitrust and public utility regulation. In a world of imperfect competition, antitrust persists, albeit as a technocratic tool for fine-tuning economic outcomes, not a revolutionary program for the revitalization of American democracy. Natural monopoly fares less well. It is marooned as a

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161. SCHUMPETER, *supra* note 70, at 78.

162. *Id.*

163. *Id.* at 85.

164. *Id.*

165. *Id.* Schumpeter worked from different antecedents and in a different style from Chamberlin and Robinson, but decades later, Paul Romer’s theoretical work on endogenous growth models would hint at the deep links between dynamic competition and imperfect competition. Charles I. Jones & Paul M. Romer, *The New Kaldor Facts: Ideas, Institutions, Population, and Human Capital*, 2 AM. ECON. J.: MACROECONOMICS 224, 228 (2010) (explaining that endogenous growth models only work under conditions of imperfect competition); WARSH, *supra* note 64, at 215 (providing a historical account of Romer’s insight on the connection between growth and imperfect competition).

166. *See* HOFSTADTER, *supra* note 53, at 313.

mostly moot exception to a general rule (perfect competition) in which we no longer believe. Where neoclassical theory conceptualized natural monopoly as one of two industry structures—competition or monopoly—imperfect competition theory understands it instead as merely an endpoint on a long continuum of structures, running from perfect competition at one end through monopolistic competition and oligopoly to natural monopoly at the other extreme.<sup>167</sup> Even in the rare case in which we find an industry that we think falls bang on that natural monopoly endpoint, the difference in predicted performance between that firm and the “naturally oligopolistic” firms adjacent to it on the continuum is one of degree, not of category. Accordingly, there is little reason to single out a few “natural monopolies” for radically different treatment from the rest of the economy. As John Maurice Clark argued in an influential 1940 paper, we are better off pursuing “workable competition” in all sectors, giving antitrust the jurisdiction to police competitive imperfections as best as it can throughout the whole economy, and perhaps even to tolerate problematic market power in some industries for some time, trusting dynamic competition to erode it.<sup>168</sup>

The Harvard School of Industrial Organization, which dominated antitrust commentary in the middle of the 20th century, worked from this perspective.<sup>169</sup> For the Harvard School, the pursuit of workable competition meant abandoning deductive, categorical, neoclassical analysis in favor of pragmatically weighing the costs and benefits of competition and monopoly, both acknowledged to be imperfect.<sup>170</sup> It thus grappled with a host of diverse empirical phenomena that had been largely abstracted away by the deductive neoclassical approach. For example, in one of the era’s leading texts, Joe Bain defined more than 15 distinct types of market structure, arrayed between the old poles of natural monopoly and perfect competition.<sup>171</sup> The Harvard School manifested a clear preference for antitrust as the regulator of most or all these structures. Bain relegated discussion of public utility regulation to the last few pages of his book and made it clear that he thought the contemporary extent of public utility regulation was riddled with

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167. JOE S. BAIN, *INDUSTRIAL ORGANIZATION* 34 (1959); accord Joseph E. Stiglitz, *Towards a More General Theory of Monopolistic Competition* 3–4 (Oct. 1984) (unpublished manuscript) (available online from Princeton University) (“1. Most firms . . . have some degree of monopoly power. . . . 2. In most industries, there is not a natural monopoly . . . . Firms are thus embedded in a competitive environment.”).

168. J. M. Clark, *Towards a Concept of Workable Competition*, 30 *AM. ECON. REV.* 241 (1940); *Competition Policy in Crisis*, *supra* note 157, at 321–22; Bellante, *supra* note 160, at 20.

169. *Framing Chicago*, *supra* note 8, at 1855.

170. *Id.* at 1854.

171. BAIN, *supra* note 167, at 34.

inconsistencies and deficiencies.<sup>172</sup> He proposed that “public utility regulation should not be extended to presently unregulated industries unless there is a very clear and conclusive demonstration that other regulatory devices [for example, antitrust] will not suffice to preserve or institute a reasonably workable competition in these unregulated industries.”<sup>173</sup>

The old legal theory of public utility regulation suffered a strikingly parallel fate. When the Supreme Court finally yielded to the New Deal political order in the late 1930s,<sup>174</sup> its retreat from the general rule of *Lochner* mooted *Munn*’s exception for enterprises “affected by a public interest,”<sup>175</sup> just as economists’ retreat from the general rule of perfect competition mooted the analogous natural monopoly exception. The path of this retreat was laid out in the famous dissents of Brandeis<sup>176</sup>, Stone<sup>177</sup>, and especially Holmes<sup>178</sup> from the *Munn* line of public utility cases, and adopted as law by *Nebbia* (1934),<sup>179</sup> *West Coast Hotel* (1937),<sup>180</sup> and *Hope Natural Gas* (1944).<sup>181</sup> With these decisions, our law ceased to recognize a “closed class or category of business affected with a public interest.”<sup>182</sup> In the eyes of the Constitution, as in the eyes of economic theory, all businesses were henceforth part of one category.

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172. *Id.* at 543–46.

173. *Id.* at 629.

174. In the first decades of the 20th century, the Supreme Court was a stalwart defender of the classical economic and social order. As one historian put it, “[s]ubstantive due process embalmed classical liberal economics in the appellate reports . . . and thus extended its influence prematurely” for years after its flaws had become obvious to economists. WIECEK, *supra* note 73, at 135.

175. *Munn*, 94 U.S. at 126 (quoting Matthew Hale, *De Portibus Maris*, in A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 45, 78 (Francis Hargrave ed., 1787)).

176. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 302–03 (Brandeis, J., dissenting) (“In my opinion, the true principle is that the state’s power extends to every regulation of any business reasonably required and appropriate for the public protection. I find in the due process clause no other limitation upon the character or the scope of regulation permissible.”).

177. *Tyson & Bro. v. Banton*, 273 U.S. 418, 451 (1927) (Stone, J., dissenting) (“[B]usiness affected with a public interest . . . seems to me to be too vague and illusory to carry us very far on the way to a solution. It tends in use to become only a convenient expression for describing those businesses, regulation of which has been permitted in the past.”).

178. *Id.* at 446 (Holmes, J., dissenting) (“[T]he proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution . . . . [T]he notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers.”).

179. *Nebbia v. New York*, 291 U.S. 502, 536 (1934) (eliminating the “constitutionalized” version of public utilities law by allowing economic regulation of businesses without a finding that they were affected by a public interest).

180. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (eliminating the practice of substantive due process review itself, to which *Munn* had been an exception, thereby doing away with the need for a public interest test).

181. *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944).

182. *Nebbia*, 291 U.S. at 536.

## II. THE STRANGE AND UNHELPFUL AFTERLIFE OF THE NATURAL MONOPOLY CONCEPT, 1950–2025

As of the middle of the 20th century, an observer who had imbibed the insights of the imperfect competition revolution would have been justified in thinking the idea of natural monopoly as traditionally understood was obsolete. Such an observer might have predicted that the concept should either disappear entirely along with the concept of perfect competition to which it was an exception, or be reimagined to better describe the relationship between natural monopoly and the spectrum of imperfectly competitive industry structures.

What happened instead was more nuanced and surprising. We *did* stop applying public utility regulation to new technologies, just as Joe Bain suggested.<sup>183</sup> In fact, we went further: between the 1970s and 1990s, we deregulated many of the industries that we had previously treated as public utilities.<sup>184</sup> But the concept of natural monopoly did not disappear. Nor was it updated to better describe a world of imperfect competition. Instead, for reasons mostly internal to the fascinations of economic science, we came to use a neoclassical vocabulary—including, sometimes, the natural monopoly concept—to describe an imperfectly competitive reality.<sup>185</sup> Thus, a central concern of the deregulatory era was to separate assets that were not natural monopolies (and therefore should be deregulated) from assets that were natural monopolies (and therefore should arguably remain regulated).<sup>186</sup> Unfortunately, our neoclassical natural monopoly concept offered little help in drawing the line between natural monopoly and imperfect competition, which contributed to several deregulatory false starts and costly disasters.<sup>187</sup> Today, the neoclassical notion of natural monopoly remains “on the books,” but almost no one finds it useful for diagnosing or remedying the industrial organization problems of our own time.<sup>188</sup> In this Part II, I recount the intellectual history of how our ideas about natural monopoly took on this strange and unhelpful form.

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183. See BAIN, *supra* note 167, at 629.

184. *Infra* Part II.B.

185. *Infra* Part II.A.

186. *Infra* Part II.B.

187. *Infra* Part II.B.

188. *Infra* Part II.C.

*A. Neoclassical Vocabulary for an Imperfectly Competitive Reality*

The Chicago School was famously founded on hostility to the imperfect competition revolution and is sometimes credited with helping to drive a return to neoclassical models of competition.<sup>189</sup> For the purposes of this Article, it is important to understand exactly in what sense this is true. Chicagoans' antipathy to imperfect competition was fundamentally methodological and rhetorical: they accepted the phenomenon as a fact about the world and derived from that fact the same doubts as the Harvard School about the value of public utility regulation (plus additional, stronger ones). They merely thought the neoclassical system was a better vocabulary and methodology for economic analysis.

This core perspective was evident from the beginning of the movement. In a foundational 1953 paper, Milton Friedman argued that economic models should be judged by their ability to make accurate predictions about economic phenomena (such as prices and interest rates), not by the realism of their assumptions as a description of the world.<sup>190</sup> Friedman thought that imperfect competition models inappropriately privileged realism over predictive power.<sup>191</sup> Imperfect competition theory “was explicitly motivated, and its wide acceptance and approval largely explained, by the belief that the assumptions of ‘perfect competition’ or ‘perfect monopoly’ said to underlie neoclassical economic theory are a false image of reality,” not by any shortcomings in the predictive power of neoclassical models.<sup>192</sup> According to Friedman, those who wanted good predictions about economic phenomena would be better served by the neoclassical price theory set out in Marshall's 1890 *Principles of Economics*, which “seems to me both extremely fruitful and deserving of much confidence for the kind of economic system that characterizes Western nations.”<sup>193</sup> In other words, as we use Newtonian physics to design buildings even after it has been (in some sense) “disproven” by Einstein, so we can use Marshallian perfect competition even after Chamberlin.<sup>194</sup>

The Chicago School's response to imperfect competition—accept it in fact while downplaying it in rhetoric—was in many respects merely a more forthright and pugnacious version of the attitude taken by the 20th-century economics profession at large. This is evident in Paul Samuelson's 1948

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189. *Framing Chicago*, *supra* note 8, at 1846–47.

190. MILTON FRIEDMAN, *ESSAYS IN POSITIVE ECONOMICS* 15 (1953).

191. *Id.* at 15.

192. *Id.*

193. *Id.* at 41–42.

194. *See id.* at 38.

textbook, *Economics*, which came to define the mathematical, center-left mainstream of the discipline. Samuelson acknowledged that economics had gone through an imperfect revolution in the 1930s and disagreed with Friedman's criticisms.<sup>195</sup> Yet Samuelson did not go so far as to abandon perfect competition in favor of monopolistic competition. Instead, his textbook hewed to the same pattern as John Stuart Mill's classical and Marshall's neoclassical textbooks: it put perfect competition and its advantages at the center of microeconomic thought, treating imperfect competition and similar phenomena as "market failures" that deviated from this ideal, but about which there was not a lot to say.<sup>196</sup> As a description of what academic economists did, this was not wrong: much of the progress of economic science during the 20th century continued to elaborate the theory of perfect competition, now treated more as a thought experiment than an accurate description of reality. For example, among the most cherished triumphs of the 20th century was Kenneth Arrow and Gerard Debreu's proof: under assumptions of perfect competition, every competitive equilibrium is "Pareto-efficient," thereby bringing mathematical rigor to the "invisible hand theorem" that had been at the center of both classical and neoclassical economics.<sup>197</sup>

This methodological resurrection of neoclassical thought gave Chicago School thinkers like Robert Bork and Richard Posner a vantage from which to portray the Harvard School antitrust commentary (mostly unfairly) as economically unscientific and (somewhat fairly) ad hoc.<sup>198</sup> Compared to the Harvard School style, the Chicago School's work was simpler, more deductive, and more deterministic.<sup>199</sup> It offered clear recommendations for

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195. Paul A. Samuelson, *The Monopolistic Competition Revolution*, in 3 THE COLLECTED SCIENTIFIC PAPERS OF PAUL A. SAMUELSON 18, 37–51 (Robert C. Merton ed., 1972).

196. PAUL SAMUELSON, *ECONOMICS: AN INTRODUCTORY ANALYSIS* 445–51, 491–507 (1948); see ZACHARY D. CARTER, *THE PRICE OF PEACE: MONEY, DEMOCRACY, AND THE LIFE OF JOHN MAYNARD KEYNES* 378, 415–16 (2020); James K. Galbraith, *Keynes, Einstein, and Scientific Revolution*, AM. PROSPECT, Winter 1994, at 62, 66 ("What Samuelson did . . . was to push the daemon of Keynesian relativity back into its box.")

197. *Fundamental Theorems*, *supra* note 131, at 200. Pareto efficiency is itself a sort of downgrade from earlier efforts to prove the efficiency of competition. A Pareto efficient outcome is merely the best outcome that can be achieved by *voluntary transactions*, which makes it a somewhat tautological metric for assessing the optimality of a system of voluntary market exchange. See DANIEL M. HAUSMAN & MICHAEL S. MCPHERSON, *ECONOMIC ANALYSIS, MORAL PHILOSOPHY, AND PUBLIC POLICY* 87–90 (1996).

198. Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 217–18 (1985) [hereinafter *Antitrust Policy After Chicago*]; see, e.g., Richard A. Posner, *The Chicago School of Antitrust*, 127 U. PA. L. REV. 925, 932–33 (1979).

199. *Antitrust Policy After Chicago*, *supra* note 198, at 225; ROBERT H. BORK, *THE ANTITRUST PARADOX*, at xiii (2d ed. 1993) ("Price theory is not only a powerful tool of analysis, it is also a powerful

the conduct that justified antitrust intervention (cartels, “naked” agreements in restraint of trade, and horizontal mergers between businesses with very large market shares) from the conduct that didn’t (most of the vertical mergers, agreements, and practices that antitrust had previously viewed with suspicion).<sup>200</sup>

Bork and Posner attributed their positions to the application of Marshallian price theory,<sup>201</sup> but much of what is novel in their work is actually derived from their acceptance of the superior productive efficiency of big business—a position that Marshall himself had denied and that the Harvard School had accepted.<sup>202</sup> For example, Bork and Posner argued that monopolies and oligopolies achieved through internal growth should be tolerated because such growth was likely caused by productive efficiencies superior to their competitors.<sup>203</sup> Purely vertical mergers should be tolerated because they are likely inspired by the desire to increase productive efficiency, rather than the desire for market power.<sup>204</sup> The same possibility of productive efficiency through vertical integration justifies “vertical price fixing (resale price maintenance), vertical market division (closed dealer territories), and, indeed, all vertical restraints,” including tying, which “are beneficial to consumers and should for that reason be completely lawful.”<sup>205</sup> Even price fixing and market division arrangements may be tolerated if they are ancillary to a cooperative arrangement plausibly capable of creating productive efficiency.<sup>206</sup>

Frank Easterbrook was more candid than his Chicago School colleagues that the school worked within the paradigm of accommodationism to an imperfectly competitive world.<sup>207</sup> Referencing John Maurice Clark, Easterbrook thought the Chicago School should be called the “Workable Antitrust Policy School,” insofar as its main program was to cleanse antitrust of the outdated tendency to “condemn every practice that did not look like hearty yeomen competing from moment to moment” and of its continued fealty to “the model of atomistic competition.”<sup>208</sup> Easterbrook held that the Chicago School’s first fundamental insight was that “[n]o antitrust policy

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form of rhetoric. . . . [T]he simplest ideas are also the most powerful and entirely adequate to the tasks of the law. . . . It was possible to win arguments and do so decisively.”)

200. RICHARD A. POSNER, *ANTITRUST LAW* 52, 132, 224, 195, 236, 242 (2d ed. 2002).

201. BORK, *supra* note 199, at 67–68; POSNER, *supra* note 200, at 932.

202. BAIN, *supra* note 167, at 155.

203. *Id.* at 196–97.

204. *Id.* at 245.

205. BORK, *supra* note 199, at 297–98.

206. *Id.* at 279.

207. Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1702–06 (1986).

208. *Id.* at 1707.

should be based on a belief that atomistic competition is better than some blend of cooperation and competition” and that “[t]he right blend varies from market to market”<sup>209</sup>—a proposition Joe Bain might have agreed with.

Richard A. Posner’s 1968 article, *Natural Monopoly and Its Regulation*—still the most thorough legal academic article about natural monopoly ever written—was similarly alert to the implications of imperfect competition.<sup>210</sup> Posner defined his subject in simple neoclassical terms: “[i]f the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more, the market is a natural monopoly . . . .”<sup>211</sup> His analysis of what should be done about natural monopoly, however, acknowledged and engaged the much more nuanced reality of imperfect competition. Posner observed that there is less to fear from monopoly than neoclassical models previously predicted because the real-world alternative to monopoly pricing in our economy is generally oligopolistic pricing, not perfect competition pricing.<sup>212</sup> Moreover, fear of dynamic competition from entrepreneurs who “devise ingenious methods of challenging or supplanting the monopolist” may limit the monopoly’s ability to charge prices significantly in excess of the oligopolistic level.<sup>213</sup> Posner proposed on that basis, like Schumpeter before him, that we simply tolerate the imperfections of the competitive process, even if they lead naturally, in some cases for some periods of time, to monopoly.<sup>214</sup> Posner acknowledged, however, that this outcome was politically unlikely.<sup>215</sup> As a second choice, therefore, he advocated the “somewhat more realistic objective” of “deregulation of those industries that are not natural monopolies, such as natural gas production, aviation, and trucking.”<sup>216</sup>

Therefore, if we abstract away the Chicago School’s methodological and rhetorical preferences, what remains is a perspective on natural monopoly that is fundamentally consistent with the Harvard School’s: natural monopoly regulation is often misguided and should be disfavored relative to antitrust enforcement. Chicago’s innovation was to show us how to describe imperfectly competitive reality in a neoclassical vocabulary, and natural monopoly was a feature of that vocabulary—even if Chicagoans deployed

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209. *Id.* at 1700 (noting that by “cooperation,” Easterbrook meant something like “vertical integration”).

210. *Natural Monopoly and Its Regulation*, *supra* note 1, at 573; see MILTON FRIEDMAN, CAPITALISM AND FREEDOM 128 (1962) [hereinafter CAPITALISM AND FREEDOM].

211. *Natural Monopoly and Its Regulation*, *supra* note 1, at 548.

212. *Id.* at 560.

213. *Id.* at 558.

214. *Id.* at 561.

215. *Id.* at 638–39.

216. *Id.* at 639.

the concept mostly to argue that a particular industry didn't qualify as a natural monopoly, or that its regulation was unnecessary.

### B. The Deregulatory Era

Between the 1970s and the 1990s, U.S. policymakers implemented Posner's second choice idea: prune away regulation from functions that were no longer perceived to be natural monopolies while continuing to apply it (in some form) to functions that *were* still thought to be natural monopolies.<sup>217</sup> This was doubly ironic. One irony was that the motivation for deregulation was born out of the insights of the imperfect competition revolution, but the movement's scope and tactics were guided by the thoroughly neoclassical concept of natural monopoly. Another irony was that the deregulatory era became the heyday of natural monopoly as a practical guide to regulation. The public utility regulatory edifice was assembled by lawyers before the concept of natural monopoly was widely understood; now, at least, the concept was available to attend to the edifice's disassembly.

Deregulation had both successes and failures. Transportation deregulation was a success story. By the 1970s, most observers had concluded that airlines, trucking, and railroads were no longer natural monopolies, in part because of the possibility of "multimodal" competition amongst the various sectors.<sup>218</sup> Regulators thus extricated themselves from the business of setting cost-of-service rates in these sectors, allowing competition to establish prices instead.<sup>219</sup> The airline's price regulator (the Civil Aeronautics Board) was shuttered entirely.<sup>220</sup> The results were striking: in the air travel sector, the U.S. Government Accountability Office estimated a 40% reduction in prices between 1980 and 2006, and a corresponding expansion in traffic.<sup>221</sup>

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217. Kearney & Merrill, *supra* note 4, at 1323, 1328–29 (describing the replacement of a paradigm focused on regulatory oversight of particular industries irrespective of "whether the regulated industry was naturally competitive or a natural monopoly" with a new paradigm focused on regulating "bottleneck" monopolies"). Some of the early rhetoric that surrounded the envisioned movement was more nakedly deregulatory. *See, e.g.*, Ronald Reagan, First Inaugural Address (Jan. 20, 1981) ("In this present crisis, government is not the solution to our problem; government is the problem."); CAPITALISM AND FREEDOM, *supra* note 210, at 128–29 (making an influential case for deregulation). But as it grappled with the complex technical realities of the regulated industries, the movement morphed into something more nuanced.

218. *See, e.g.*, *Natural Monopoly and Its Regulation*, *supra* note 1, at 639.

219. Kearney & Merrill, *supra* note 4, at 1336–37.

220. *Id.* at 1335.

221. U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-630, AIRLINE DEREGULATION, REGULATING THE AIRLINE INDUSTRY WOULD LIKELY REVERSE CONSUMER BENEFITS AND NOT SAVE AIRLINE PENSIONS 19 (2006). For a more nuanced analysis of the success of airline deregulation, *see* Severin Borenstein & Nancy L. Rose, *How Airline Markets Work . . . or Do They? Regulatory Reform in*

The earliest phase of telecommunications deregulation was also a success story. Reformers recognized local telephone poles and wires infrastructure as a natural monopoly but postulated that other functions that had traditionally been vertically integrated into the great AT&T monopoly were potentially competitive, including long-distance lines and telephone equipment. After more than a decade of resisting efforts by the Federal Communications Commission (FCC) and Department of Justice (DOJ) to force competition into these markets,<sup>222</sup> AT&T entered into a consent decree in 1982 with the DOJ under which it spun off its local phone networks into seven regional “Baby Bells,” which were forced to interconnect not only with AT&T’s remaining long-distance business, but also with new long-distance competitors.<sup>223</sup> For some observers, this approach announced a “Bell Doctrine” or “Baxter Doctrine,” which held that regulators should “‘quarantine’ the regulated monopoly segment of the industry by separating its ownership and control from that of the firms in potentially competitive segments of the industry.”<sup>224</sup> Competition in the long distance market drove significant cost decreases in long-distance telephone service.<sup>225</sup> More indirectly, the consent decree is often credited with replacing AT&T’s sclerotic monopoly with the Schumpeterian competitive landscape that gave us cost-effective cellular phone service, and perhaps even the rise of widespread internet service.<sup>226</sup>

Subsequent attempts to bring competition to local telephone service, however, were less successful. These further reforms were initiated by the FCC and state public utility commission,<sup>227</sup> and culminated in the 1996 Telecommunications Act. The Act mandated that the Baby Bells offer competing local phone service retailers access to their physical infrastructure.<sup>228</sup> The idea was to allow new entrants to essentially “resell”

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*the Airline Industry*, in *ECONOMIC REGULATION AND ITS REFORM: WHAT HAVE WE LEARNED?* 63, 129 (Nancy L. Rose ed., 2014).

222. TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* 202–03 (2010) [hereinafter *THE MASTER SWITCH*].

223. Howard A. Shelanski, *Adjusting Regulation to Competition: Toward a New Model for U.S. Telecommunications Policy*, 24 *YALE J. ON REG.* 55, 62 (2007).

224. Paul L. Joskow & Roger G. Noll, *The Bell Doctrine: Applications in Telecommunications, Electricity, and Other Network Industries*, 51 *STAN. L. REV.* 1249, 1249–50 (1999).

225. Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases* 70, 71, 83 (AEI-Brookings Joint Ctr., Working Paper No. 01-05, 2001) (arguing that restructuring of the telephone system reduced rates, though similar reductions could have been achieved through an interoperability rule without the breakup of AT&T).

226. *THE MASTER SWITCH*, *supra* note 222, at 54, 190.

227. *Id.* at 110, 194 (including the deregulation of wireless service).

228. *Id.* at 194; WILLIAM J. BAUMOL & J. GREGORY SIDAK, *TOWARD COMPETITION IN LOCAL TELEPHONY* 7, 9 (1994); James B. Speta, *Deregulating Telecommunications in Internet Time*, 61 *WASH.*

local phone service delivered by the incumbents' infrastructure.<sup>229</sup> However, this idea did not seem to generate many practical benefits.<sup>230</sup> Its most famous outcome was a great deal of complex, acrimonious regulatory proceedings.<sup>231</sup> Unbundling required regulators to make controversial decisions about how the unbundled services should be priced.<sup>232</sup> The vertically integrated incumbents had a strong incentive to overprice the services in order to preserve their monopoly against competition.<sup>233</sup> But if regulators set prices of unbundled services too low, the new entrants would free-ride on the incumbent's backbone investments, leading to an unsustainable system.<sup>234</sup>

Electricity deregulation was even more complicated and less successful. Traditionally, vertically integrated electric utilities generated, distributed, and sold electricity.<sup>235</sup> Analogies to telecommunications restructuring now suggest that electricity distribution over poles and wires might be the only true natural monopoly function, with generation and retailing seen as potentially competitive.<sup>236</sup> In the 1990s, the Federal Energy Regulatory Commission (FERC) pushed to restructure the industry along these lines, though for complicated reasons, FERC could only implement some aspects of this vision while others required state action.<sup>237</sup> When the dust settled, California, Texas, and states in the Northeast and Midwest had substantially restructured their systems.<sup>238</sup> The rest of the country mostly stuck to the traditional, vertically integrated, regulated utility model.

The earliest attempts to duplicate the AT&T breakup sought to enable "wheeling" of electricity from competitive generators to competitive users

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& LEE L. REV. 1063, 1094–95 (2004) (explaining the influence of Baumol & Sidak's position on the shape of the 1996 Telecommunications Act).

229. BAUMOL & SIDAK, *supra* note 228, at 12.

230. Jerry Hausman & Gregory Sidak, *Did Mandatory Unbundling Achieve its Purpose? Empirical Evidence from Five Countries* 70–71 (MIT Dep't of Econs., Working Paper No. 04-40, 2004).

231. Yoo, *supra* note 4, at 857.

232. See ALFRED KAHN, WHOM THE GODS WOULD DESTROY, OR HOW NOT TO DEREGULATE 3–11 (2001) [hereinafter HOW NOT TO DEREGULATE] (describing complex controversies in the unbundling of telephone service); Tyler McNish, *Reform Incentives, Transform the Grid: Making Good on Hawai'i's Renewable Energy Ambitions*, 45 ECOLOGY L.Q. 583, 628 (2019).

233. HOW NOT TO DEREGULATE, *supra* note 232, at 17.

234. *See id.* at 15.

235. McNish, *supra* note 232, at 624–29 (2019).

236. Kearney & Merrill, *Great Transformation*, *supra* note 4, at 1385 (describing the idea of electricity restructuring and noting that "[i]t is too early to assess the efficiency effects of these reforms, but the expectation is that lower average prices and net welfare gains will be substantial"); THE END OF A NATURAL MONOPOLY: DEREGULATION AND COMPETITION IN THE ELECTRIC POWER INDUSTRY 1–3 (Peter Z. Grossman & Daniel H. Cole eds., 2003); SALLY HUNT, MAKING COMPETITION WORK IN ELECTRICITY 2, 3, 6 (2002).

237. Kearney & Merrill, *supra* note 4, at 1354.

238. Severin Borenstein & James Bushnell, *The U.S. Electricity Industry after 20 Years of Restructuring* 7 (MIT Dep't of Econs., Working Paper No. 252, 2015).

via a natural monopoly “poles and wires” utility.<sup>239</sup> These attempts generated acrimonious access pricing disputes similar to the local telephone unbundling controversies.<sup>240</sup> Even worse, the wheeling concept turned out to be fundamentally at odds with the fact that the electricity network did not work like a switched telecommunications network.<sup>241</sup> The better analogy for electricity is hydraulic: the electricity pumped into the overall system needs to match electricity outflows on an instant-by-instant basis; otherwise, the mismatch creates voltage and frequency excursions with devastating consequences for the overall system.<sup>242</sup> Vertically integrated electric utilities had traditionally solved this problem by planning and controlling a portfolio of vertically integrated power plants sufficient to cover all anticipated demand scenarios.<sup>243</sup> This function could not simply be turned over to a competitive market because markets do not instantaneously equilibrate supply and demand: price signals take time to do their work, and that work often requires painful bouts of gluts and scarcity.<sup>244</sup> Instead, the states that restructured were forced to acknowledge that system control was a natural monopoly and turn it over to a quasi-public independent system operator.<sup>245</sup> The independent system operator might run a reverse auction system into which competitive generation companies sell their electricity, but it also retains the power to dispatch plants as needed to meet system demands.<sup>246</sup>

The result of this restructuring was a more complicated system than the traditional vertically integrated system that only partially resembled a competitive market. The benefits of this system are not obvious. The states that preserved the old, vertically integrated utility model have lower prices than the restructured states.<sup>247</sup> Moreover, the systems set up by the restructured states to balance electricity demand have failed twice—

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239. Kearny & Merrill, *supra* note 4, at 1354.

240. McNish, *supra* note 232, at 628 (2019); Timothy P. Duane, *Regulation's Rationale: Learning from the California Energy Crisis*, 19 YALE J. ON REG. 471, 486 (2002); RICHARD F. HIRSH, POWER LOSS: THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN ELECTRIC UTILITY SYSTEM 125–31 (1999); Richard D. Cudahy, *PURPA: The Intersection of Competition and Regulatory Policy*, 16 ENERGY L.J. 419, 423–24, 431–33 (1995).

241. HUNT, *supra* note 236, at V; WILLIAM HOGAN, MARKET DESIGN AND ELECTRICITY RESTRUCTURING 16 (2005).

242. HUNT, *supra* note 236, at 20.

243. *Id.* at 20, 24.

244. *See id.* at 33–34 (“Electricity really is different from other commodities in its need for short term coordination.”); McNish, *supra* note 232, at 633 (2019).

245. HUNT, *supra* note 236, at 37.

246. HUNT, *supra* note 236, at 37–38, 41, 46, 58 (describing the “standard prescription” for ISO-based restructuring); Borenstein & Bushnell, *supra* note 238, at 4.

247. Borenstein & Bushnell, *supra* note 238, at 1, 17, 18.

California in 2001 and Texas in 2021—with high and avoidable political, social, and economic costs.<sup>248</sup>

Taken as a whole, the experience of the deregulatory era supports three propositions. First, it validated the general insight that imperfect competition *usually* outperforms regulated monopoly.<sup>249</sup> Airline service, trucking, and long-distance telephony, for example, perform better as imperfectly competitive markets than regulated utilities. Second, natural monopoly is a real phenomenon, even if it may be rarer and more difficult to regulate than we once thought. As reformers advanced from their early wins (transportation) to trickier attempts to unbundle local telephony and electricity distribution, they bumped into functions or assets that really did seem to work better as monopolies than as competitive markets<sup>250</sup> or that could not be efficiently unbundled from related non-natural monopoly assets.<sup>251</sup> Third, and most importantly, we are not particularly good at identifying these natural monopolies. In some industries (for example, transportation), we correctly concluded that no natural monopoly was at stake, but in others (for example, telecommunications and electricity), our hypotheses were not correct about which functions could be made competitive and which were natural monopolies.

### C. *The Contemporary Irrelevance of Natural Monopoly*

The deregulatory era was the natural monopoly concept's last gasp of relevance. In the quarter century since, the concept's popularity and credibility have descended to a nadir. Natural monopoly remains “on the books” as a feature of our neoclassical economic vocabulary, and it is not

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248. Severin Borenstein, *The Trouble with Electricity Markets: Understanding California's Restructuring Disaster*, 16 J. ECON. PERSP. 191, 191 (2002); Dean Jepsen, *Examining the 2021 Texas Power Grid Crisis*, 27 PUB. INT. L. REP. 23, 23–25 (2021).

249. See, e.g., Howard A. Shelanski, *Adjusting Regulation to Competition: Toward a New Model for U.S. Telecommunications Policy*, 24 YALE J. ON REG. 55, 56 (2007) (“[E]x ante regulation that depends for its rationale on monopoly market structure should give way to ex post intervention against specific, anti-competitive acts on the model of conventional antitrust . . . [H]owever . . . interconnection [regulation] still [has] a role to play in advancing telecommunications policy objectives.”); Yoo, *supra* note 4, at 867 (articulating “a choice between two regulatory paradigms, one that focuses on breaking down the monopoly by stimulating competitive entry and another that surrenders to the monopoly and simply seeks to allocate [access to it],” and arguing that policymakers should choose the first course except in rare instances where competition is infeasible).

250. See HOW NOT TO DEREGULATE, *supra* note 232, at 1.

251. HUNT, *supra* note 236, at 25; Paul L. Joskow, *The Role of Transaction Cost Economics in Antitrust and Public Utility Regulatory Policies*, 7 J.L. ECON. & ORG. 53, 66–67 (1991); PAUL L. JOSKOW & RICHARD SCHMALENSEE, *MARKETS FOR POWER: AN ANALYSIS OF ELECTRICAL UTILITY DEREGULATION* 120 (1983); HOW NOT TO DEREGULATE, *supra* note 232, at 8.

uncommon for scholars to gesture at its existence in passing—but it almost never forms a part of their core analysis or program of reform.<sup>252</sup>

Indeed, the novel vocabularies that 21st-century scholars use to describe problems that might once have been seen through the lens of natural monopoly are a clue to just how irrelevant the concept of natural monopoly has become. In the controversy over what to do about potential discrimination by broadband internet service providers—the first major industrial organization problem of the internet era—no one wanted to talk about natural monopoly.<sup>253</sup> As Tim Wu pointed out, the main participants in this debate shared a common “Schumpeterian” perspective.<sup>254</sup> By that, he meant that neither side cared much for correcting imperfections in the mechanism of price competition (the traditional justification for natural monopoly).<sup>255</sup> Thinkers like Wu preferred some form of intervention, because they worried the cable companies that controlled the “middle” part of the internet’s architecture might vertically integrate with the “ends” of that architecture, favoring and disfavoring content based on the cable companies’ economic interests, thereby stifling dynamic innovation.<sup>256</sup> These interventionist thinkers, however, avoided the “natural monopoly” vocabulary that previous generations had used to explain similar bottleneck phenomena in the railroad, electricity, and telecommunications sectors in favor of industry-specific neologisms like “end to end,” “network neutrality,” and “generative.”<sup>257</sup> Those who opposed intervention also found little use for natural monopoly—instead, they argued that the new internet sector, like the rest of our dynamically competitive economy, was best regulated by antitrust alone.<sup>258</sup> The debate between these two sides thus reflected a consensus judgment that whether or not broadband internet service was a natural monopoly was mostly beside the point.

When the plucky “edge providers” (such as Google and Facebook) that the net neutrality advocates had been concerned to protect in the 2000s grew

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252. *Supra* notes 18–20.

253. Tim Wu, *The Broadband Debate, A User’s Guide*, 3 *J. On Telecomm. & High Tech. L.* 69, 76 (2004) (mentioning “natural monopoly” only once in a comprehensive summary of the debate).

254. *Id.* at 70, 80.

255. *Id.*

256. *Id.* at 73–74, 79.

257. See Tim Wu & Christopher S. Yoo, *Keeping the Internet Neutral?: Tim Wu and Christopher Yoo Debate*, 59 *FED. COMM. L.J.* 575, 585 (2007) (stating that the application of natural monopoly is “a big debate that I don’t want to get into”); Bruce M. Owen, *Antecedents to Net Neutrality*, 30 *REGUL.* 14, 15–16 (2007) (noting that net neutrality advocates “invent new language to describe both a familiar economic problem and a familiar legal and regulatory solution to that problem.”).

258. Owen, *supra* note 257, at 17 (2007); Christopher S. Yoo, *Would Mandating Broadband Network Neutrality Help or Hurt Competition? A Comment on the End-to-End Debate*, 3 *J. ON TELECOMM. & HIGH TECH. L.* 23, 61–62 (2004).

into the sprawling “Big Tech” enterprises of the 2010s and 2020s, the main participants in the discourse on what to do—with the important exception of Herbert Hovenkamp<sup>259</sup>—have again found little use for the natural monopoly vocabulary. Instead, the novel coinages that earlier characterized the net-neutrality debate have continued to proliferate, with the interventionist vanguard speaking of “dominant digital platforms,” “social infrastructures,” “winner-take-all markets,” “the separation of platforms and commerce,” “material preferencing,” “firewalling,” and “the critical and competitive significance of data.”<sup>260</sup> Some writers allude to the existence of the natural monopoly concept, but they tend to treat it as passé and almost never apply it to the facts at hand.<sup>261</sup>

The dominant trend is to see competition, not regulated monopoly, as the solution for problems of industrial organization. The influential New Brandeis movement, and the broader antimonopoly left of which it is part, exemplify this phenomenon. New Brandeisians advocate the revitalization of antitrust enforcement to break up monopoly and reinvigorate competition.<sup>262</sup> They appropriately reject the deregulatory bias that the Chicago School infused into contemporary antitrust doctrine,<sup>263</sup> yet follow Chicago in its use of an unrepentantly neoclassical economic vocabulary that romanticizes competition, and exceed Chicago in their insensitivity to the insights of the imperfect competition revolution.<sup>264</sup> Specifically, the movement’s emphasis on what Brandeis called the “Curse of Bigness” leaves little room for the “Blessings of Bigness” perceived by thinkers like Edward Chamberlin, Joseph Schumpeter, John Maurice Clark, and Joe Bain. In a discourse so committed to the virtue of competition, it is difficult for the concept of natural monopoly—good monopoly—to gain any purchase.

Neglect of natural monopoly is not limited to the problems of internet regulation. Consider the burgeoning “grid governance” literature, which analyzes the potential of institutional reform to accelerate decarbonization of

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259. *Antitrust and Platform Monopoly*, *supra* note 8, at 1971–72.

260. *Supra* notes 12–18.

261. *Amazon’s Antitrust Paradox*, *supra* note 7, at 800 (arguing that Big Tech problems are not likely to be addressed by natural monopoly regulation because “critics challenged the theory of natural monopoly as an ongoing rationale for regulation”); K. Sabeel Rahman, *Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities*, 2 GEO. L. TECH. REV. 234, 236 (2018) [hereinafter *Regulating Informational Infrastructure*] (arguing that “infrastructure can be conceptualized in much broader terms” than “natural monopoly”).

262. *The New Brandeis Movement*, *supra* note 20.

263. *Id.*; Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1661–62, 1676–77 (2020); *Separation of Platforms and Commerce*, *supra* note 7, at 1022; *Antitrust’s Unconventional Politics*, *supra* note 8, at 123; *Framing Chicago*, *supra* note 8, at 1878.

264. ANTITRUST IN THE NEW GILDED AGE, *supra* note 7, at 70.

the electricity grid.<sup>265</sup> Like the literature on Big Tech, this literature brims with industry-specific jargon and fact-intensive analyses. Perspectives on what is to be done range from incrementalist, market-oriented proposals<sup>266</sup> to more radical “rebuilding” proposals,<sup>267</sup> to proposals for the decommodification of electricity, possibly through revitalization of public utility regulation.<sup>268</sup> Absent from this debate, however, is the kind of work that a time traveler from the 20th century might have most expected: an effort to identify the natural monopoly features of the industry, and analyze whether monopoly might be delaying progress on decarbonization or increasing its cost.

Recent new cross-industry syntheses similarly downplay natural monopoly. Brett Frischmann’s *Infrastructure*, for example, aspires to rebuild the rationale for our law’s special treatment of public utility sectors on a “demand side” theory, in contrast to the “supply side” theory of natural monopoly.<sup>269</sup> Another new synthesis reimagines the field of public utility regulation as “Networks, Platforms, and Utilities.”<sup>270</sup> This new field treats natural monopoly as a phenomenon that is continuous with “natural oligopoly,” and is just one of six disjunctive factors that might qualify “NPU firms” for extraordinary legal treatment—a striking (though understandable) demotion for a concept that was once understood to be at the heart of the whole public utility regulatory field.

### III. NATURAL MONOPOLY FOR A WORLD OF IMPERFECT COMPETITION

The contemporary irrelevance of natural monopoly puts us at a fork in the road. Should we disavow natural monopoly as a matter of theory, as we have already (mostly) abandoned it in practice? Or should we attempt to renovate the theory to make it more relevant to contemporary problems of industrial organization? In this Part III, I take the latter path. The deregulatory experience recounted above confirms that natural monopoly is a real phenomenon, even if it may be rarer, harder to identify, and more dangerous to regulate than we once thought. And if natural monopoly is a

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265. Shelley Welton, *Rethinking Grid Governance for the Climate Change Era*, 109 CAL. L. REV. 209 (2021); Alexandra Klass et al., *Grid Reliability Through Clean Energy*, 74 STAN. L. REV. 969, 970 (2022); Joel B. Eisen & Heather E. Payne, *Rebuilding Grid Governance*, 48 BYU L. REV. 1057 (2023); William Boyd, *Decommodifying Electricity*, 97 S. CAL. L. REV. 101 (2024).

266. Welton, *supra* note 265, at 210.

267. Eisen, *supra* note 265, at 1057.

268. Boyd, *supra* note 265, at 947–48.

269. FRISCHMANN, *supra* note 13, at 108; Lawrence Lessig, *Reply, Re-Marking the Progress in Frischmann*, 89 MINN. L. REV. 1031, 1036 (2005) (glossing Frischmann with a useful flow chart).

270. RICKS ET AL., *supra* note 15, at 8–9.

problem, antitrust alone won't solve it, for a natural monopoly won't need anticompetitive conduct (the *sine qua non* of antitrust liability) to secure and perpetuate its advantage. Thus, we need a better test for natural monopoly, one that is more appropriate for a world of imperfect competition. Below, I develop such an updated test for natural monopoly, which I hope will allow it to resume its proper role in guiding the application of public utility regulation to problematic technological assets.

*A. Our Current Natural Monopoly Concept Is Too Neoclassical*

To make natural monopoly theory more relevant, we must first diagnose the reason for its irrelevance. The main reason, I think, is that our understanding of natural monopoly remains "too neoclassical." Consider a few typical definitions of natural monopoly from recent legal academic work:

[1] Natural monopoly occurs when a single firm can serve the entire market more cheaply than can two firms, a condition known as "subadditivity." A sufficient condition for subadditivity is the existence of scale economies throughout the entire range of production, such as occurs when fixed costs are very high.<sup>271</sup>

[2] The structural circumstances in which monopoly is the cheapest way of organizing an industry [is described as natural monopoly]. . . . The reason is that fixed costs are very large in relation to demand. If they can be spread over the market's entire output, a single firm supplying that output may have a lower average cost of production than two equally efficient firms, each of which would incur the same fixed costs but be able to spread them over only one-half the output.<sup>272</sup>

[3] A natural oligopoly exists where the entire demand for a good or service can be satisfied at lowest cost by only a few firms . . . . A natural monopoly exists when the entire demand for a good or service can be satisfied at lowest cost by one firm.<sup>273</sup>

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271. Yoo, *supra* note 4, at 849.

272. Sandeep Vaheesan, *Reviving an Epithet: A New Way Forward for the Essential Facilities Doctrine*, 2010 UTAH L. REV. 911, 911 (2010) (alterations in original) (quoting RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 367 (7th ed. 2007)).

273. RICKS ET AL., *supra* note 15, at 8–9.

There are four ways in which these definitions retain too much of the outdated neoclassical model of competition and take too little from the imperfect competition revolution.

First, the definitions do little to acknowledge the difficulty of drawing a line between the “ordinary” economies of scale enjoyed by many workably competitive firms in our economy and the “extraordinary” economies of scale that are supposed to justify natural monopoly. Firms don’t wear their “U” or “L” shaped cost curves on their foreheads, and never have. In Alfred Marshall’s time, however, it was at least somewhat plausible that a few sectors with exceptional economies of scale would stand out from the large pack of perfectly competitive industries, allowing us to identify them as natural monopolies. In our imperfectly competitive world, by contrast, many firms benefit from significant economies of scale, so the distinction between a natural monopoly and a workably competitive oligopoly is exceedingly subtle and fine-grained in a way the definitions fail to acknowledge.

Second, the definitions propose to identify natural monopoly based on the cost of production alone, but this ignores the insights of Chamberlin, Robinson, and Schumpeter about the possibility of product competition.<sup>274</sup> If we look only at production cost curves alone, we are likely to conclude that many goods and services are most efficiently produced by a single integrated enterprise. Indeed, almost all software meets the definitions of natural monopoly stated above: most of the cost of developing and improving software is fixed, and the marginal cost of making it available to each additional user is often nearly zero, generating powerful economies of scale. But there is more to the story. Product differentiation and dynamic innovation may well allow competition to exist even in the face of inexhaustible economies of scale. One video game, for example, will not conquer the market, in spite of near-infinite economies of scale—we want variety.

Third, the definitions suggest that our goal is to minimize the cost of production, but the imperfect competition revolution taught us that we must inevitably make tradeoffs between the goal of productivity and the goal of efficient allocation of resources through competition. Even when monopoly would minimize production cost, we might nevertheless be better off with oligopolistic competition.

Finally, our concept of natural monopoly does not have enough to say about “new economy” phenomena. When we look at the new technologies of our time, we often conclude that the market power we are most concerned with is not related to costs of production but to network effects (which make a product or service more valuable when more people use it) or first-mover

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274. *Supra* Part I.E.

advantages (such as the lock-in of standards).<sup>275</sup> Further, we understand that the monopolizing force of those phenomena is sometimes defeated by countervailing phenomena like interoperability, multi-homing, and the rapid pace of innovation—all of which create spaces for competition.<sup>276</sup> The definitions of natural monopoly do not tell us what to do with these insights. They remit us to the question of production cost alone.

### B. An Updated Concept of Natural Monopoly

To address these shortcomings, I propose the following definition for natural monopoly. My definition is intentionally pragmatic, not ontological, in that it collapses the question of whether an asset *is* a natural monopoly into the question of what we should *do* (regulate or not). An asset or service should be regulated as a natural monopoly only if all five of the following criteria are met:<sup>277</sup>

- (1) Inexhaustible economies of scale, due to either:
  - (a) declining average cost or
  - (b) network effects without interoperability or multi-homing;
- (2) Low product differentiation;
- (3) Vertical severability from non-natural monopoly assets;
- (4) Sufficient tenure as an apparent natural monopoly; and
- (5) Regulation serves a compelling social purpose.

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275. See, e.g., *Antitrust and Platform Monopoly*, *supra* note 8, at 1962–63.

276. *Antitrust and Platform Monopoly*, *supra* note 8, at 1974–76 (explaining the role of interoperability and multihoming); Adam Thierer, *The Perils of Classifying Social Media Platforms*, 21 *COMMLAW CONCEPTUS* 249, 250–51 (2012) (arguing against regulation of social media platforms on the grounds that innovation will ensure sufficient competition).

277. In *Antitrust and Platform Monopoly*, Herbert Hovenkamp provides “five related factors [that] determine the existence of a natural monopoly,” on which my test is substantially based. *Antitrust and Platform Monopoly*, *supra* note 8, at 1972. Elements 1 and 2 of my test re-state his points 3–5 but reorganize them to recognize that interoperability and multihoming are an “antidote” to network effects and scale. Hovenkamp’s discussion of his points 1 and 2 (“lack of stable competition” and “durability of a dominant position and the ability to accommodate or resist technological change”) suggest they are better understood as effects or indicia of natural monopoly, not a necessary or sufficient element thereof. I replace them with criteria that I think better capture the inquiries needed to designate an *asset* (as distinct from a firm) as a natural monopoly.

This definition, like its neoclassical predecessors, conceptualizes natural monopoly as a peculiar relationship between a technology of supply and the optimal structure of the market for the goods or services produced by the technology. However, it is “thicker” than the neoclassical approach, supplementing the neoclassical definition’s abstract and conclusory notion of “subadditivity” with several institutionalist and historical elements.<sup>278</sup> In the remainder of this section, I explain each of the test’s five elements and apply them to the “Big Tech” landscape.

### 1. Inexhaustible Productive Economies of Scale or Network Effects

Inexhaustible economy of scale remains the foundation of natural monopoly, as it was in the neoclassical system. The updated definition, however, recognizes that economies of scale can come from either of two sources. They may come in the traditional way: a high ratio of fixed costs relative to marginal costs can result in an average cost curve that slopes down throughout the relevant range of potential outputs, without ever turning upwards into a “U” shape. Alternatively, network effects can result in a product whose value to customers increases with the percentage of the market the product serves. For example, a telephone system that serves everyone is more valuable than a telephone system that serves only one of every three people, with the other two using different systems. Network effects are sometimes described as something different from economies of scale, but from a lexical perspective, they are just as well classified as a subtype thereof. Productive economies are a supply-side economy of scale; network effects are a demand-side economy of scale. In both cases, bigger is more economical. In this way, network effects play the same functional role in the natural monopoly inquiry as productive economies: they initiate the analysis by giving us a reason to believe that there is a “Blessing of Bigness” that we need to explore.

Network effects, however, can be defeated by interoperability or multi-homing. For example, in spite of the network effects that favor the existence of just one telephone network, telephone service providers like AT&T, Sprint, Verizon, and T-Mobile are not natural monopolies, because they can interoperate with one another. It is as easy for a Verizon customer to call an

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278. There is, perhaps, some poetic justice in this. The earliest concepts of natural monopoly were created by lawyers and economists inspired by institutionalist and historicist critiques of British Political Economy’s abstractions. Richard Ely, for example, listed five factors (different from mine) in his 1889 summary of Telegraph Monopoly. *Telegraph Monopoly*, *supra* note 117, at 49.

AT&T or Sprint customer as it is to call another Verizon customer.<sup>279</sup> Similarly, a single ride-hailing market that connects every potential driver to every potential rider would be more valuable than a ride-hailing platform that connects only half the drivers to half the riders, as might be the case if the market is split between two providers like Uber and Lyft. But as long as each driver and each rider can multi-home by using both the Uber and Lyft apps, and efficiently switch between them on their phones, ride-hailing will operate substantially as one network and will not qualify as a potential natural monopoly under the first prong of our test.<sup>280</sup>

In sum, the first prong of the natural monopoly test preserves the essence of the original concept (economies of scale) but integrates into it the technological phenomena of greatest relevance to the industrial organization problems of our era, thereby connecting these phenomena to their approximate historical analogues.

## 2. Low Product Differentiation

The low product differentiation criterion embodies one of the key insights of imperfect competition: the possibility that product competition can preserve a place in the market for multiple competitors even in the presence of significant economies of scale. Consider software. Judged by the economy-of-scale criterion alone, virtually every software product would need to be classified as a natural monopoly. The investment to write the code is fixed, and the marginal cost of making it available to an additional user is near zero. Yet no one would argue that every software product is a natural monopoly, because many are highly differentiated from each other. Think of video games or movies: high product differentiation leads to ferocious competition even when economies of scale are very large.

Indeed, it is easy to imagine many internet technology markets with partial product differentiation settling into workable oligopolistic competition of the type that prevailed in the industrial economy of the 20th century: Uber and Lyft, DoorDash and UberEats, Spotify and Apple Music, Netflix and Amazon Prime Video, Facebook and TikTok, Amazon Web Services and Microsoft Azure, Amazon.com and Walmart.com. These oligopolists may engage in anticompetitive conduct—as the Department of Justice (DOJ) has alleged—but such conduct can be addressed by antitrust law without the need for natural monopoly regulation. Thus, the second

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279. Herbert Hovenkamp, *Antitrust Interoperability Remedies*, 123 COLUM. L. REV. 1, 5 (2023) [hereinafter *Interoperability Remedies*].

280. See *Antitrust and Platform Monopoly*, *supra* note 8, at 2035 (explaining the concept of multihoming).

criterion of our test reminds us that when we look for a natural monopoly, we are looking for exceptions to workable competition achieved by product differentiation—a rare combination of highly scalable unit economics and low differentiation.

### 3. Vertical Severability from Non-Natural Monopoly Functions

As described above, one of the most important learnings of the deregulatory era is that the boundaries of a natural monopoly do not necessarily coincide with the boundaries of the business built around it. The innovative firms that first brought electricity service and telephone service to market were highly vertically integrated, but we later came to believe that only some of the functions they provided were natural monopolies. The goal of any natural monopoly test must be to correctly label the *assets or functions* that qualify as natural monopolies, not to label the *firms* that control those assets or functions.

Thus, to apply our natural monopoly test to the GAF A companies (Google, Apple, Facebook, and Amazon) that have been most subject to suspicion in Big Tech literature, we must judge not the enterprises themselves nor their product lines, but rather particular assets and functions they use to create these product services. For example, judged as a service, internet search is probably not a natural monopoly, because it is subject to differentiation: different providers can compete to offer algorithms that return differentiated search results, or better visual presentation of results, or less advertising. By contrast, the web index on which the search must run is a relatively undifferentiated database with very high economies of scale. Google indexes about 45 billion webpages.<sup>281</sup> Microsoft's Bing search engine, the only other English-language search engine that maintains its own web index, indexes only 7 billion webpages—a feat that is said to have required an investment of \$4.5 billion.<sup>282</sup> Moreover, crawling the web to read webpages is costly and disruptive to websites in a way that favors a single crawler. The House Subcommittee Report explains:

Today several major webpage owners block all but a select few crawlers, in part because being constantly crawled by a large number of bots can hike costs for owners and lead their webpages to crash. The one crawler that nearly all webpages

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281. *The Size of the World Wide Web (The Internet)*, WORLDWIDEWEBSIZE.COM, <https://www.worldwidewebsize.com/> (last updated Jan. 15, 2025).

282. SUBCOMM. ON ANTITRUST, COM., & ADMIN. L., HOUSE COMM. ON JUDICIARY, 117TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 147 n.1061 (Comm. Print 2020).

will allow is Google's 'Googlebot,' as disappearing from Google's index would lead most webpages to suffer dramatic drops in traffic and revenue. Any new search engine crawler, by contrast, would likely be blocked by major webpage owners unless that search engine was driving significant traffic to webpages—which a search engine cannot do until it has crawled enough webpages.<sup>283</sup>

This situation is analogous to the technological conditions that make it more efficient for homes to be connected to just one local "poles and wires" infrastructure for electricity than to multiple duplicative physical infrastructures.

Facebook is similar. The front-end features of social networking have a high degree of potential product differentiation: how should content be ranked? How presented? How published? How filtered? However, the database of self-published content, which is an input to the overall social networking service, may turn out to satisfy the first two prongs of the natural monopoly test: it is relatively undifferentiated and has significant economies of scale driven by the network effects of being able to connect the most producers of content with the most users.

If these features can indeed be shown to meet the other prongs of the natural monopoly test, then there *may* be a case for separating the assets from non-natural monopoly functions and making their services accessible to all competitors on reasonable and nondiscriminatory terms.<sup>284</sup> That is, user posts to services like Facebook, Instagram, TikTok, and the like can be communally shared, which maximizes network effects while encouraging competition on the front-end user experience. Obviously, however, the application of such an invasive remedy must be approached with great humility. There may well be sound technological and business justifications for the vertical integration of a natural monopoly asset with related non-natural monopoly assets. This, too, is an essential lesson of the deregulatory era: forced interoperability of the telephone system led to dramatic improvements in service and cost efficiency, but forced interoperability of

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283. *Id.* at 63.

284. We are speaking here of a "reverse Baxter doctrine." Joskow & Noll, *supra* note 224. Facing a regulated natural monopoly, William Baxter disintegrated its true natural monopoly functions (local telephony) from the potentially competitive segments (long distance, telephone equipment) and *removed* public utility regulation from the potentially competitive segments. Facing unregulated Big Tech enterprises, we can disintegrate their natural monopoly functions from their potentially competitive functions, and *impose* public utility regulation on the spun-off natural monopolies, to offer services to a competitive market at nondiscriminatory rates.

the electricity grid led to periodic coordination crises without any noticeable improvement in service or cost efficiency.

The point of the third prong of our natural monopoly test is to insist that before we vertically dismember a business on the theory that part of it is a natural monopoly, we must take account of the potentially valid justifications for integration. For example, if we think Google's web indexer and Facebook's self-published content database may be a natural monopoly, we must ask whether they can be efficiently separated from the "front end" search engine and social media platform, respectively. This is a fact-intensive question that demands technical analysis beyond the scope of this Article, though it has been undertaken to some extent by recent work on interoperability policy.<sup>285</sup>

#### 4. Sufficient Tenure as an Apparent Natural Monopoly

The fourth criterion requires sufficient tenure as an apparent natural monopoly and thereby implements the insights of Schumpeter, Romer, Friedman, and Posner—namely, that the *least bad* alternative may be to tolerate some monopoly for some amount of time, hoping that innovation will erode it, and stepping in with government intervention only when we have watched the industry for some time and are confident in our diagnosis.<sup>286</sup> This criterion, therefore, imposes some additional humility on our analysis of natural monopoly.

Indeed, our worst fears often go unrealized. Microsoft, whose dominance of the computer operating system market seemed so threatening at the time of the DOJ antitrust action in the late 1990s, saw its market share eroded by competition in the decade thereafter.<sup>287</sup> Articles written just a few years ago include companies like Uber and Airbnb on lists of threatening "internet giants," but time has made these businesses seem more conventional.<sup>288</sup> Five years from now, the concerns I express in this article about Google's and Facebook's power may seem similarly passé. Indeed,

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285. See, e.g., *Equitable Interoperability*, *supra* note 29, at 1018 ("We have engaged in conversations with industry participants and technical experts about the difficulty and cost of carrying out interoperability from a technical perspective.").

286. It also follows the approach of some of the earliest theorists of natural monopoly. Richard T. Ely, Henry C. Adams, and Charles Francis Adams, Jr. were all inspired by the German Historicist school of economics and all supported their theories of natural monopoly with decades of observations regarding the history of the railroad and telegraph industries. *First Great Law & Economics Movement*, *supra* note 110, at 997, 1021.

287. Richard Blumenthal & Tim Wu, Opinion, *What the Microsoft Antitrust Case Taught Us*, N.Y. TIMES (May 18, 2018), <https://www.nytimes.com/2018/05/18/opinion/microsoft-antitrust-case.html>.

288. See *The New Utilities*, *supra* note 16, at 1669.

that may have already happened during the year that this article has been in press: the emergence of artificial intelligence products has fundamentally altered the market for internet search.<sup>289</sup> Even in scenarios where problematic market power persists over a significant period of time, patience is an aid to diagnosis of its cause: a few years of delay will often do much to reveal whether a monopoly was gained through anticompetitive conduct (in which case antitrust is the solution) or through low product differentiation and economies of scale (in which case natural monopoly regulation may be in order).

Moreover, as Schumpeter argued, temporary monopoly rents may be a feature of our economic system, not a bug.<sup>290</sup> Such rents may be part of the incentive that encourages innovators to bring useful new products and services into the world. If this seems inherently noxious, consider that our patent system follows a similar theory: we award property rights in ideas as an incentive to innovation. Tolerating monopoly as an incentive to innovate is little different, as long as the duration of the monopoly is, like a patent, temporary.

### 5. Social Purpose

Even when a firm meets the above four factors, the imposition of public utility regulation remains dangerous. We will seldom be sure of our judgment. Perhaps there is enough potential product differentiation to facilitate some degree of competition. Or perhaps the dynamics of innovation will render the function irrelevant within a few years, as cellular technology did to local telephone poles and wires. Moreover, given what we know about the cost of regulation—both direct and in the form of diminished competition—we will be even less confident that the benefits of regulation outweigh its costs, especially since we are talking about reaching inside businesses to regulate particular assets. For that reason, we should stay the hand of regulation unless it is demonstrably justified to advance important social objectives.

This fifth prong, therefore, ensures that invasive public utility regulation is not applied to “ordinarily” oligopolistic or even to all naturally monopolistic markets. If it turns out that the soft drink production sector meets all of the four factors above—in other words, it has massive economies of scale, limited product differentiation, can be cleanly severed from all

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289. See *United States v. Google*, No. 1:20-cv-03010-APM, slip op. at 1 (D.D.C. Sept. 2, 2025) (describing how “the emergence of GenAI changed the course of this case” in the year between the end of the liability opinion and the remedies order)

290. *Supra* Part II. E.

related industrial sectors, and has been controlled by an oligopoly or monopoly for years—but the only proffered objective of regulation would be to marginally reduce beverage prices, it would still not qualify for natural monopoly regulation. Indeed, in my view, economic efficiency alone will almost never be enough to justify such regulation.

By contrast, the cultivation of competition in social networking and internet search has a well-demonstrated social purpose; indeed, it is a cause with world-historical implications. We have all come to understand the importance of Facebook’s and Google’s decisions about how to rank content and about which users and posts to exclude from each platform.<sup>291</sup> Indeed, as Robert Epstein has shown, Google could tip the results of an election simply by changing the ranking of results in its search.<sup>292</sup> Jonathan Zittrain has pointed out that merely changing the “doodle” on Google’s search landing page could have similar effects.<sup>293</sup>

Direct government action to curtail such power is worse than the disease. On foundational First Amendment principles, it is even more problematic for the government to exercise editorial power over the news than for a private monopoly to do so. The government’s jawboning of social media platforms during the pandemic arguably led to the suppression of legitimate points of view about the origins of the COVID-19 virus, vaccine efficacy, and the contents of Hunter Biden’s laptop.<sup>294</sup> Anti-“censorship” statutes passed by Texas and Florida, if allowed by the courts, would only take government further into this field. These statutes would deprive social media of the type of editorial control that newspapers routinely exercise, and inevitably require the government or courts to draw lines between forbidden “censorship” and allowable exclusion of inappropriate conduct, or at the very least, judge the consistency of the platforms’ application of their own editorial standards.<sup>295</sup> In 2025, the federal government enacted a law forcing the Chinese owners of the TikTok platform to divest their U.S. operations.<sup>296</sup> This may reduce the

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291. See Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526, 531 (2022) (describing content moderation as a “vast system of administration that includes a far broader range of decisions and decisionmakers than the standard picture admits”).

292. *Why Google Poses a Serious Threat to Democracy, Testimony Before the U.S. S. Judiciary Subcomm. on the Const.*, 116th Cong. 2 (2019) (testimony of Robert Epstein, Ph.D., Senior Research Psychologist, American Institute for Behavioral Research and Technology).

293. Jonathan Zittrain, *Engineering an Election*, 127 HARV. L. REV. F. 335, 337 (2014).

294. *Murthy v. Missouri*, 144 S. Ct. 7, 8 (2023) (Alito, J., dissenting).

295. See *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2394 (vacating and remanding to the Eighth and Eleventh Circuits for proper analysis of the facial First Amendment challenges to the Florida and Texas laws).

296. David McCabe, *TikTok Flickers Back to Life After Trump Says He Will Stall a Ban*, N.Y. TIMES (Jan. 19, 2025), <https://www.nytimes.com/2025/01/19/technology/trump-tiktok-ban-executive-order.html>.

threat of Chinese interference in U.S. elections, but it raises the specter of other forms of interference: the U.S. government might steer the sale to a favored buyer, in exchange for favorable coverage or other political advantage.

Competition of the type that could be unlocked by the opening of back-end natural monopolies to competing front-ends is a better solution to the problems posed by social media companies' market power. If there were five social media platforms, each with the ability to access all self-published content, their content moderation decisions would be little more problematic than the New York Times' publication of a story that the Wall Street Journal finds unnewsworthy. Similarly, if there were three major search engines, bias by one of them in search results would be relatively easy to detect and avoid by switching to an unbiased competitor.

Therefore, if it can be shown that Google's web indexer or Facebook's database of self-published content meets the other four criteria for natural monopoly regulation, there is a strong case that their regulation as public utilities would be justified by a sufficiently compelling social purpose.

### *C. Application to Contemporary Problems of Industrial Organization*

In the course of illustrating the five factors of my proposed test, I have already substantially described what I think is its most immediate and important application: the problem of Big Tech market power.<sup>297</sup> Put simply, my contention is that the use of existing antitrust doctrine to improve competition in oligopolistic tech markets probably addresses most of the Big Tech Problem—but not all of it. The part of the problem that remains, I think, is more or less coextensive with the old natural monopoly problem: private enterprises control difficult-to-reproduce gateway functions that are important inputs to downstream economic activity. Now, instead of inventing new words or frameworks to describe the problem, contorting antitrust doctrine to include new theories of liability, or imposing ill-targeted interoperability mandates—the problems identified in Part II above—we should update our understanding of natural monopoly and use it to scrutinize the Big Tech landscape for qualifying assets. We should then spin those assets off from the competitive portions of the businesses that control them

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297. My concept of natural monopoly, however, is not targeted at the Big Tech Problem alone. It also has immediate applications, I think, to questions of how to reform “grid governance” in the electricity sector (described above). Additionally, as an industry-agnostic general statement of what we have learned about natural monopoly, it can be applied as a heuristic to test whether any new technology may entail a natural monopoly.

and force them to offer service to all competitors at a reasonable price on nondiscriminatory terms.

The analysis of which, if any, Big Tech assets actually qualify for this treatment is a fact-specific, technical exercise beyond the scope of this Article. However, we know enough of the facts already to exonerate many features of the Big Tech landscape that have been unnecessarily subjected to suspicion. Online marketplaces, social networking “front ends,” app stores, and operating systems are differentiated products, amongst which competition is probably possible and valuable. Other products and services—such as Uber, Lyft, and DoorDash—are also probably too young or too inconsequential from a policy perspective to merit aggressive intervention.

The updated theory of natural monopoly directs our attention instead to further analyses of back-end, undifferentiated “utilities” controlled by Big Tech enterprises, such as Google’s web indexer and Facebook’s database of self-published content. The concept of natural monopoly has the potential to better guide us in determining which of these utilities should be regulated and what the goals of such regulation should be—a prospect that I more deeply explore in the next Part.

Such a reform would *not* be “pro-monopoly.” It is better described as “anti-oligopoly.” Specifically, its goal is to identify natural monopoly assets currently held by oligopolistic competitors, and open access to them at just, reasonable, and nondiscriminatory prices, thereby enabling competition in the downstream product markets that rely on the assets—including information gateways important to the health of our democracy.

#### *D. Natural Monopoly as the Criterion for Interoperability Mandates*

One of the most promising lines of thinking on the contemporary problems of Big Tech suggests that we use interoperability mandates, implemented by regulation or antitrust remedies, to force dominant firms to make certain assets or services available to their rivals for incorporation into competitive offerings.<sup>298</sup> The various flavors of this reform include “network neutrality,” “open access,” “anti-discrimination rules,” prohibitions on self-preferencing, mandatory licensing at Fair, Reasonable, and Non-Discriminatory (FRAND) rates, “equitable interoperability,” and “joint

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298. See, e.g., *Equitable Interoperability*, *supra* note 29, at 1016; *Interoperability Remedies*, *supra* note 279, at 1; Tim Wu, *Why Have a Telecommunications Law? Anti-Discrimination Norms in Communications*, 5 J. ON TELECOMM. & HIGH TECH. L. 15, 28 (2006) [hereinafter *Anti-Discrimination Norms*].

management of unified productive assets.”<sup>299</sup> The District Court for the District of Columbia recently gave these ideas additional importance by ordering an interoperability mandate in the remedies phase of the Google Search antitrust proceeding. Specifically, the Court ordered Google to make certain web indexing data available to competitive search providers.<sup>300</sup>

These ideas, I think, are on the right track. The literature on interoperability, unlike that on the revitalization of antitrust, is alert to the relationship between the internet’s special characteristics as a technology of supply and the problematically concentrated outcomes in the industrial sectors currently controlled by Big Tech enterprises.<sup>301</sup> It correctly focuses attention on particular assets or functions, rather than on a broad range of unsensational conduct. And it recognizes that forcing dominant firms to give their competitors access to these assets or functions on a nondiscriminatory basis can unlock competition of the kind we most want. For example, it envisions competitive search engines built on a shared back-end “web indexer” service, each vying to create the best search algorithms and front-end presentation. Similarly, it envisions competitive social networks that share self-published content via back-end APIs whilst competing to offer their users the best “front end” by which to access that content.<sup>302</sup> The potential salutary effects of such competition include diversification of approaches to content moderation and ranking of results, diversification of business models (ad-supported, subscription, and hybrids thereof), and reduction in the “attentional price tag” charged by the ad-supported services. This type of competition is more compelling than what would likely arise from the dismemberment of these enterprises into smaller but functionally identical “Micro Googles” or “Baby Books,” or the separation of business units like Amazon’s marketplace from its web store—interventions that reduce efficiency and dampen valuable network effects without an obvious corresponding advantage.<sup>303</sup>

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299. Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 141–42 (2003) (describing network neutrality and open access); *Anti-Discrimination Norms*, *supra* note 298, at 28 (anti-discrimination rules); American Innovation and Choice Online Act, S. 2992, 117th Cong. (as reported by S. Comm. on the Judiciary, Mar. 2, 2022) (prohibiting self-preferencing that materially harms competition); *Equitable Interoperability*, *supra* note 29, at 1016 (equitable interoperability); Paul Heidhues et al., *More Competitive Search Through Regulation*, 40 YALE J. ON REGUL. 915, 945 (2023) (mandatory licensing at FRAND rates); Hovenkamp, *Antitrust and Platform Monopoly*, *supra* note 8, at 2022 (joint management of unified productive assets).

300. *United States v. Google*, No. 1:20-cv-03010-APM, slip op. at 146–47 (D.D.C. Sept. 2, 2025).

301. *Separation of Platforms and Commerce*, *supra* note 7, at 1076–77; *Equitable Interoperability*, *supra* note 29, at 1015.

302. *See Equitable Interoperability*, *supra* note 29, at 1016.

303. *Interoperability Remedies*, *supra* note 279, at 1.

The criteria that should trigger interoperability mandates are, however, under-theorized. A typical justification for intervention is the network effects said to be endemic to “large digital platforms.”<sup>304</sup> But no one thinks that *all* assets held by such platforms should be shared. An important recent article, for example, proposes the sharing of self-published content amongst social networks like Facebook, plus prohibitions on discrimination and self-favoritism by Apple’s and Google’s operating systems and app stores, as well as by Amazon’s marketplace.<sup>305</sup> It is difficult to discern the specific criteria that unite this group of regulatory targets, and differentiate it from other technology assets that escape scrutiny. Why Google’s web indexer but not its Gmail server or search algorithms? Why Google’s operating system but not Microsoft’s? For that matter, are we sure that “network effects” alone justify treating Big Tech differently than other industries? If Facebook invests \$1 billion in a social networking platform and Tesla invests the same amount in a new electric vehicle chassis design, why should Facebook be compelled to open its platform to competitors while Tesla is not? Both scenarios implicate the same trade-off between incentivizing innovation and facilitating competition, so the fact that only one investment (Facebook’s) is said to have network effects is not a satisfying rationale for their differential treatment. In short, the principle that qualifies specific assets and services for interoperability mandates and disqualifies others remains fuzzy.

These same questions haunt the extensive commentary on the “antitrust version” of interoperability: the controversial theory that a “unilateral refusal to deal” or denial of access to an “essential facility” might constitute anticompetitive conduct.<sup>306</sup> This theory of liability was recognized (equivocally) by the Supreme Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,<sup>307</sup> condemned by antitrust scholars for its tendency to encourage free riding on competitors’ investments,<sup>308</sup> and then narrowed by

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304. *Id.* at 33. In keeping with this view, the American Innovation and Choice Online Act would apply non-discrimination rules to all “online platforms” of a certain size. *See* American Innovation and Choice Online Act, S. 2992, 117th Cong. § 2(a)(9), 3(a) (as reported by S. Comm. on the Judiciary, Mar. 2, 2022).

305. *Equitable Interoperability*, *supra* note 29.

306. Robert Pitofsky et al., *The Essential Facilities Doctrine under U.S. Law*, 70 ANTITRUST L.J. 443, 445 (2002) (describing the history of the doctrine and debates about its proper scope).

307. *See* 472 U.S. 585, 600–11 (1985) (recognizing in a narrow set of circumstances that a monopolist’s unilateral refusal to continue a prior course of dealing with a rival, undertaken without efficiency justification and at the expense of short-term profits, can support Section 2 liability). The doctrine also has roots in *United States v. Terminal R.R. Ass’n*, 224 U.S. 383, 411 (1912).

308. *See, e.g.*, Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 849–50 (1990) (expressing concerns about the potential over broadness of the essential facilities doctrine).

*Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*<sup>309</sup> to the circumstance in which a monopolist inexplicably breaks off a previous course of dealing. Recently, it has been the subject of dozens of academic papers that see in the doctrine a potential solution to the Big Tech Problem.<sup>310</sup> This commentary, however, has not hit on anything approaching a consensus regarding which unilateral refusals to deal constitute anticompetitive conduct, or which facilities are so “essential” that they must be licensed to competitors on demand. In fact, the doctrine has been described as “a good way to elicit eyerolling within antitrust circles.”<sup>311</sup> Without a sound limiting principle, we find ourselves stuck between our aversion to forcing firms generally to give their competitors access to the proprietary fruits of their investments and the sense that there is nevertheless *something* in the essential facilities doctrine that gets closer to the heart of the Big Tech problem than anything else antitrust has to offer.

The biggest difficulty in determining which assets should be subject to interoperability mandates is often said to be the need to make trade-offs between competition *on* a platform and competition *between* platforms.<sup>312</sup> For example, do we want to force computer operating systems to offer equal access to all apps in order to maximize app competition on the platform? Or do we want to allow each operating system to curate and influence the apps with which it partners in order to encourage more diversity and competition between operating systems? Do we want to force a bridge over the Mississippi to interconnect with all railroad lines in order to maximize competition on the bridge? Or do we want to instead encourage each railroad to build its own bridge, in hopes that inter-bridge competition will lead to better bridges?

Natural monopoly is the missing principle that justifies the application of interoperability to the relatively easy subset of these cases. When we judge

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309. 540 U.S. 398, 408–09 (2004).

310. Thomas Nachbar, *Essential Facilities and the Law of the Hammer*, ANTITRUST CHRON., Apr. 2023, at 1, 14 (“[T]here are many, many law review articles offering to ‘revitalize,’ ‘revive,’ ‘renew[]’ or otherwise resurrect the essential facilities doctrine to solve any range of competitive ills, from self-dealing by internet shopping platforms to social media platform refusals to allow application interfaces.”); *The Antitrust Duty to Deal in the Age of Big Tech*, *supra* note 18, at 1385–86 (“[T]he rise of dominant platforms like Google, Facebook, and Amazon has provoked intense debate over whether the antitrust duty to deal needs a revival.”).

311. Erik Hovenkamp, *Trinko Meets Microsoft: Leverage and Foreclosure in Platform Refusals to Deal*, ANTITRUST CHRON., Spring 2023, at 1, 22, 27.

312. See, e.g., *Equitable Interoperability*, *supra* note 29, at 1023 (noting that interoperability can shift competition from being *for* the market to being *in* the market); *Interoperability Remedies*, *supra* note 279, at 36 (“Interoperability is a two-sided coin. One of the great values of competition, and of digital competition in particular, is its diversity. Excessive interoperability covering too many of the features of individual firms may simply serve to homogenize the market, destroying competitive incentives and inviting free riding.”).

an asset to be a natural monopoly, we are saying that its duplication by competitors has virtually no value. We don't want the competing railroad companies in *United States v. Terminal Railroad Ass'n*<sup>313</sup> to each build their own bridge over the Mississippi or (perhaps more controversially) competing search engines to each build their own web indexer. We don't want each telephone company to invent its own network protocols; we want them to share the same protocols to function as one telephone network. In short, in the natural monopoly scenario, we are completely committed to competition *on* the platform because we perceive little value in competition *between* alternative versions of the platform.

The harder cases, which have generated so much scholarly fear, arise from the forced sharing of non-natural monopoly assets. Mandating that operating systems provide equal access to all the apps that want to compete on their platform while also encouraging some competition between operating systems is an example of a harder case. This intervention, unlike the natural monopoly cases above, entails significant potential costs as well as potential benefits: our efforts to increase app competition may end up decreasing operating system competition by constraining differentiation. The same is true for forced access to competitive marketplaces.

My proposal is that we avoid these difficult questions for now by first applying interoperability mandates only to natural monopoly assets—a category that, for the reasons described above, likely does not include operating systems, search engines, or social media platforms, but only certain special back-end assets under their control. My intuition is that solving the natural monopoly problems may be enough: we may find that our efforts have already encouraged enough downstream competition amongst the Big Tech products and services built on top of the newly opened natural monopolies to leave the non-natural monopoly assets well enough alone.

The idea that natural monopoly might serve as the limiting principle for essential facilities sharing and interoperability mandates is not new.<sup>314</sup> The reason it has not been more widely accepted, I think, is the sorry state of our natural monopoly concept. The scholars who see potential in the essential facilities doctrine are more interested in network effects and related “new economy” phenomena than in the “L”-shaped production cost curves described by the neoclassical definition of natural monopoly.<sup>315</sup> Given that

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313. 224 U.S. 383 (1912).

314. Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition* § 7.7a, at 402 (6th ed. 2020) (“most of the things found by courts to be essential facilities have [been] . . . natural monopolies” or assets regulated or provided by the government).

315. See, e.g., Nicholas Guggenberger, *Essential Platforms*, 24 STAN. TECH L. REV. 237, 276–85 (2021) (providing a number of such justifications for essential facilities sharing without mentioning

they see natural monopoly as a confused and inapposite phenomenon, it stands to reason that they think the concept does not define circumstances in which interoperability should be applied. My hope is that the updated test for natural monopoly I presented above can better explain the true nature and scope of the natural monopoly problem and thereby reveal its potential to serve as the guiding principle for interoperability mandates.

*E. But Do We Really Need Public Utility Regulation?*

In this final Part, I address an important objection. Assuming we agree that natural monopoly is the problem, do we need to apply public utility regulation as traditionally understood, with all the known downsides it entails? Is there a less invasive means of achieving our goals, such as by the application of a minimalistic nondiscrimination rule or lightweight interoperability mandate?

These questions reflect deep suspicions about public utility regulation that first emerged in the 1960s on both the left<sup>316</sup> and right,<sup>317</sup> and have now assumed the status of conventional wisdom. The “left” version presented itself as a revisionist history of the Progressive Era, critiquing the extent to which institutions, like public utility regulation, were “captured” by big business.<sup>318</sup> The “right” version presented as a generalized positive theory of government action, often referred to as “public choice” theory.<sup>319</sup> The idea is that the facts of economic regulation do not fit the theory that publicly interested government actors impose regulation in order to correct market failure. The benefits of such a correction are diffuse, making it difficult for dispersed potential beneficiaries to organize themselves to promote political action. Instead, the theory goes, economic regulation is sought out by companies that seek the “quiet life of a monopolist” and use a smokescreen of public interest rhetoric to disguise their agenda.<sup>320</sup> The regulation that results is “worse than ineffective”; it not only fails to protect the public from monopolistic prices but also dampens innovation and investment because the

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natural monopoly); *The Antitrust Duty to Deal in the Age of Big Tech*, *supra* note 18, at 1491 n.31 (recognizing that essential facilities sharing is appropriate for “exceptional” natural monopoly scenarios but treating that as an exceptional circumstance, not the core essential facilities scenario); Vaheesan, *supra* note 272, at 912–13 (arguing that open access regimes ordered by public utility regulators adequately cover tangible natural monopoly assets, so the essential facilities doctrine should focus on intangible essential facilities, which may or may not be natural monopolies).

316. GABRIEL KOLKO, *RAILROADS AND REGULATION, 1877–1916* (1970).

317. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

318. KOLKO, *supra* note 316, at 233–34.

319. OLSON, *supra* note 317.

320. *Id.*

natural monopolist finds ways to enroll regulators in its efforts to exclude upstart technologies.<sup>321</sup>

One consequence of these views has been a generalized reluctance to extend regulation to new technology. The quest for a minimalistic alternative to regulation is a hallmark of internet policy over the thirty or so years of its existence. “Net neutrality,” for example, was conceived by its architects as “a light form of behavioral regulation that narrowly targets the behavior identified as problematic and is far less intrusive than other forms of regulation.”<sup>322</sup> In the subsequent Big Tech debate, the weight of academic opinion tends to lean instead towards nondiscrimination or interoperability remedies similar to the net neutrality concept, again conceived as less invasive than traditional regulation and hopefully implemented via antitrust-style adjudication, not regulation.<sup>323</sup> More radical positions have emerged, but these have mostly centered on the idea of horizontal breakups or vertical line-of-business restrictions, without traditional regulation of the unbundled lines of business that would result from such reforms.<sup>324</sup> Indeed, even the writers who draw on the public utility tradition tend to advocate only for reclaiming the Progressive “ethos” of public utility thinking, disclaiming any support for the institutions and techniques of public utility regulation.<sup>325</sup>

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321. See, e.g., THE MASTER SWITCH, *supra* note 222, at 55; Amazon’s Antitrust Paradox, *supra* note 7, at 800; Natural Monopoly and Its Regulation, *supra* note 1, at 622.

322. Barbara van Schewick, *Towards an Economic Framework for Network Neutrality Regulation*, 5 J. ON TELECOMM. & HIGH TECH. L. 329, 333–34 (2007); Wu, *Network Neutrality*, *supra* note 299, at 142; *Broadband Debate: A User’s Guide*, *supra* note 253, at 73; *Why Have a Telecommunications Law?*, *supra* note 298, at 17–18 (reimagining the whole of telecommunications policy around the principle of non-discrimination, applied as an “ex ante rule with ex post remedies”).

323. Amazon’s Antitrust Paradox, *supra* note 7, at 800–01 (describing application of the essential facilities doctrine to Amazon’s marketplace as a “lighter version” alternative to public utility regulation); *The New Utilities*, *supra* note 16, at 1654–55 (arguing against “full imposition of traditional public utility regulation” on the grounds that it “might ratify high-priced monopolies, insulating them from competition”); *Equitable Interoperability*, *supra* note 29, at 1015, 1017 (praising interoperability as a “minimal regulation” and “a light-touch regulatory governance scheme”); *Antitrust and Platform Monopoly*, *supra* note 8, at 1971, 2050 (arguing that “[r]egulation . . . entrenches existing technologies and, in doing so, bolsters existing incumbents” and advocating shared ownership to achieve interoperability of key assets); Adam Thierer, *The Perils of Classifying Social Media Platforms*, 21 COMM. L. CONCEPTUS 249, 250–51 (2012) (“Treating these nascent digital services as regulated utilities would harm consumer welfare because public utility regulation has traditionally been the archenemy of innovation and competition.”).

324. *Separation of Platforms from Commerce*, *supra* note 7, at 1078, 1083; Amazon’s Antitrust Paradox, *supra* note 7, at 798–99.

325. William Boyd, *Public Utility and the Low Carbon Future*, 61 UCLA L. REV. 1614, 1708–10 (2014) (arguing for a “revitalized concept of public utility” that “cannot simply adopt the older concept of public utility” but needs “new ideas and conceptual innovations”); *The New Utilities*, *supra* note 16, at 1687–88 (noting that “this Article does not suggest, and is not meant to suggest, that we should mechanically copy and reinstate old models of public utility regulation” such as the “tired, old top-down institutional forms we might associate with early twentieth century rate regulation”); *Infrastructural*

This hope of replacing public utility regulation with a more minimalistic alternative is, however, a mirage. But for a few remarkable exceptions that can be solved through protocols alone, any interoperability system that works will be practically indistinguishable from traditional natural monopoly regulation. In fact, properly understood, interoperability mandates, essential facilities sharing, and public utility regulation are all the same thing—a requirement that the goods or services produced by a natural monopoly asset be made available to all interested parties at a just, reasonable, and non-discriminatory price. To support this contention, I will analyze three common flavors of “minimalistic interoperability,” and then compare them to traditional public utility regulation.

### 1. Nondiscrimination Rules

The first variety of interoperability regime is a nondiscrimination or non-self-preferencing rule, such as net neutrality. This variety is the purest embodiment of the “lightweight regulation” dream, in that it requires subject firms to do no more than they have already done for someone else. If a firm has licensed its technology to one entity, nondiscrimination requires only that it license it to others on similar terms. The reach of these regimes, however, is correspondingly limited. They only touch assets that have already been at least partially opened to competitors (such as Amazon’s web store or Apple’s App Store). Thus, they leave untouched some of the most interesting potential targets of interoperability regimes, including those identified above (Google’s web indexer or Facebook’s database of self-published content). They also have the strange consequence of forcing a business that has once adopted an open business model to persist in that business model forever, while allowing businesses that are more consistent and scrupulous in “walling their garden” to evade scrutiny. Thus, if Amazon had remained a web retailer without ever opening its marketplace to third-party sellers, it would be above suspicion, but because it *did* allow third party sellers, it is potentially subject to a mandate that forces it to extend and perpetuate that business model. It is difficult to articulate a principled justification for punishing experimentation in this way, or for tolerating “fully closed” natural monopolies but not “partially open” ones.

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*Regulation*, *supra* note 16, at 938 (describing the need for the ideas of public utility regulation to be “adapted and updated”); *Regulating Informational Infrastructure*, *supra* note 261, at 247 (explaining how the “familiar problems of regulatory capacity and capture” undermine public utility regulation).

## 2. Interoperability Mandates

More full-fledged interoperability regimes, such as “open access” or “must interconnect” policies, have the power to impose affirmative obligations on assets that have never been previously “opened.” A good example is the court’s recent order during the remedies phase of the Google search monopolization trial, which may force Google to offer access to its search index data at marginal cost rates.<sup>326</sup>

Interoperability can sometimes be achieved merely through mandatory protocols or interconnection requirements—a happy but relatively rare scenario that I think is consistently overemphasized in the literature. The canonical example is the telephone network, which consists of multiple competitors (AT&T, Verizon, Sprint, etc.) that route calls amongst their linked networks according to established protocols. In this case, the “natural monopoly asset” at issue is limited to an intangible set of protocols for transferring calls amongst different providers, together with some relatively trivial physical connection facilities. As there is no tangible or productive asset at issue, there is no issue of how to price the shared output. Accordingly, simple interconnection rules without traditional public utility regulation are enough.<sup>327</sup> In my preferred vocabulary, this situation is merely a special case of regulated natural monopoly, in which the just, reasonable, and non-discriminatory price of the asset in question is zero.

In most cases, however, there *is* a productive asset at issue—a bridge, an electricity dispatch system, a web indexer—that was created at non-zero cost to its owner and must continue to be operated, maintained, and updated from time to time.<sup>328</sup> This raises the question of the price and terms on which service from the asset will be made available. Consider the Google search example. The District Court for the District of Columbia ordered Google to make its data available at “marginal cost,” and set up a technical committee to help implement this data sharing (among other remedies).<sup>329</sup> How is marginal cost to be measured? What data must be shared, specifically? And

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326. *United States v. Google*, No. 1:20-cv-03010-APM, slip op. at 147 (D.D.C. Sept. 2, 2025). Similar proposals have been described in regulatory toolkits developed by coalitions of academics. Heidhues et al., *supra* note 299, at 945 (noting mandatory licensing at FRAND rates).

327. However, this interoperability regime was in fact constructed by a public utility regulator (the FCC) as part of the process of restructuring communications regulation, which may not be mere coincidence.

328. *See Interoperability Remedies*, *supra* note 279 (explaining that a survey of interoperability situations shows that most involve assets of the type mentioned).

329. *United States v. Google*, No. 1:20-cv-03010-APM, slip op. at 6, 146–70 (D.D.C. Sept. 2, 2025).

what other technical requirements may Google impose as prerequisites to interconnection with its indexer?

Anyone with experience in the major public utility regulatory controversies of the last fifty years will immediately grasp the difficulties in administering such a forced data-sharing regime.<sup>330</sup> As long as Google continues to own the asset, it will have strong incentives to inflate marginal cost and exaggerate the technical dangers of interconnection, in order to retain its advantage over its competitors. Thus, Google will offer plausible accounts of why the marginal cost of web indexing is quite high, and of the dangers that will result if interconnection with the indexer is not carefully controlled by Google via lengthy procedures and interconnection requirements. Its new competitors will offer similarly persuasive accounts for why access to the asset ought to be quite cheap and easy. Resolving these controversies will not be a “lightweight” affair. We will need a regulator—whether we assign that role to a court, agency, regulatory commission, or industry council. And we will be sending that regulator into battle with severe information asymmetry. The annals of public utility history contain similar “regulatory suicide missions,” among them the above-described price-setting controversies that attended attempts to unbundle local telephone service and electricity transmission.<sup>331</sup>

### 3. Shared Governance

A third, more novel approach to interoperability is the pooling or shared ownership regimes that have recently attracted significant attention from scholars.<sup>332</sup> The preeminent example of this remedy is in *United States v. Terminal Railroad Ass’n*, in which a group of 14 railroads jointly owned a corporation that owned a key bridge over the Mississippi River.<sup>333</sup> The corporation’s exclusion of other railroads from the bridge was challenged as an antitrust violation.<sup>334</sup> The Supreme Court ordered the reorganization of the corporation to allow the admission of other competing railroads as joint owners, essentially recognizing that the asset in question was a natural

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330. See, e.g., Yoo, *supra* note 4, at 851–52; Owen, *supra* note 257, at 17.

331. Owen, *supra* note 257, at 17; McNish, *supra* note 232, at 628; HOW NOT TO DEREGULATE, *supra* note 232, at 6; but see *Why Have a Telecommunications Law?*, *supra* note 298, at 43–44 (disputing “[t]he long-standing assumption . . . that any such interconnection remedy will require a complex, government administered rate-setting scheme” on the grounds that the government can “rely on the setting of prices at zero”).

332. See, e.g., *Antitrust and Platform Monopoly*, *supra* note 8, at 1952; *Interoperability Remedies*, *supra* note 279, at 4.

333. 224 U.S. 383, 391–94 (1912).

334. *Id.* at 394–95.

monopoly, and using shared corporate governance to make it interoperable.<sup>335</sup> Similar industrial structures exist in the present day and are well-known curiosities for antitrust law, including the Chicago Board of Trade (independent trading firms that compete with each other but jointly share the trading platform) and the Associated Press (a cooperative whose international news bureaus provides shared content to local newspapers).<sup>336</sup> Analogously, Google's web indexer or Facebook's content database might be placed under the joint control of multiple competitive search engines or social media companies. For some contemporary commentators, this approach holds out the possibility of achieving by means of private governance the same result that other interoperability regimes would obtain by government mandate, thereby avoiding the need for regulation.<sup>337</sup>

On closer examination, however, this approach is not so different from the other approaches, and its advantages relative to public utility regulation are not obvious. If ownership of the asset is made available to all potential competitors, including new entrants, there must be a means of determining the price and terms on which shares in the asset are sold. Accordingly, the tricky debates described above may not be avoided, but merely re-cast from questions about the terms of contractual access to an asset into questions about the terms of sale of an intangible property right (in other words, a stake in the entity that owns the asset).

Additionally, unregulated ownership of a natural monopoly asset by a small group of oligarchic competitors is not necessarily a desirable outcome. As Herbert Hovenkamp has observed, similar associations of real estate agents, dentists, and even the National Collegiate Athletic Association have tended to collude in ways that disfavor the public interest.<sup>338</sup> Hovenkamp suggests that this problem might be solved by placing Google Search under the governance of a group with more diversity of interest, such as a board composed of "searchers, advertisers, and other market participants who have an independent interest in search quality and product pricing."<sup>339</sup> It is not obvious, however, in what ways regulation by such an outside board would be different from the more traditional remedy of regulation by a specialist public utility regulatory commission, or why it would be better.

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335. *Id.* at 410–12.

336. *Associated Press v. United States*, 326 U.S. 1, 4–18 (1945).

337. *Interoperability Remedies*, *supra* note 279, at 19–20.

338. Herbert Hovenkamp, *Fixing Platform Monopoly in the Google Search Case*, PROMARKET (Oct. 6, 2023), <https://www.promarket.org/2023/10/06/fixing-platform-monopoly-in-the-google-search-case/>.

339. *Id.*

#### 4. Public Utility Regulation

Public utility regulation offers a simpler, more proven approach than the untested proposals described above. The natural monopoly asset can be spun out from its existing owner to a separately-controlled public utility, thus eliminating the incumbent's incentive and ability to favor its own access to the asset over that of competitors.<sup>340</sup> A regulatory commission can ensure that the utility provides nondiscriminatory service, using longstanding "cost-of-service principles" to set rates that compensate the utility for the cost of doing business plus a reasonable rate of return on the utility's investment.<sup>341</sup> The utility may obtain changes to the rate by initiating a rate case before the commission, and may also request pre-approval by the commission of major investment decisions to ensure that the commission will allow the utility to recover the cost of those investments in future rates.<sup>342</sup>

If this approach seems "heavy-handed,"<sup>343</sup> that is because we are comparing it to an illusory "light touch" alternative that, for the reasons explained above, will not work. Any successful interoperability regime is likely to end up looking quite similar to the traditional institution of public utility regulation, which was shaped over decades by the practical realities of mandating nondiscriminatory access to infrastructural goods and services.

I do not mean to deny the well-documented downsides of public utility regulation. But if the scope of this regulation is guided by the updated principles of natural monopoly set out in this Article, we may have less to fear from it than we may imagine, for three reasons. First, critics of public utility regulation often speak from disappointed idealism: they lament that regulation is not effective at reducing price to marginal cost, and therefore not a good approximation of perfect competition. But as we saw in Part I of this Article, perfect competition is neither real nor desirable in most segments of our economy. My proposal is that we reserve public utility regulation for more compelling social purposes. In the Big Tech case, our goal is to prevent private oligopolies and monopolies from exerting too much control over our republic's information ecosystem. As a tool for opening access to the natural

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340. In this sense, the updated test for natural monopoly I offer in this Article can define the situations in which we should apply vertical separations remedies. Big Tech has extensively discussed these remedies, like interoperability remedies, in the Big Tech Problem literature, but without clarity as to the principles that should guide their application. *See, e.g., Separation of Platforms and Commerce*, *supra* note 7, at 1081 (noting "the challenge of offering a bounded definition of 'dominant platform[s]'" to which separation remedies should be applied).

341. *See* McNish, *supra* note 232, at 628 (collecting citations describing the cost-of-service rate setting process).

342. *Id.*

343. *See, e.g., Equitable Interoperability*, *supra* note 29, at 1015.

monopoly assets from which those oligopolies derive their power, public utility regulation *is* well-suited to its purpose.

Second, the danger that public utility regulation may be “captured” by the regulated entities is real but sometimes overstated. Are public utilities, such as electric companies, truly more politically influential than other unregulated big businesses, such as auto manufacturers or Big Tech companies? The evidence of the last half century or so tends to point in the opposite direction: as Robert Horowitz observed in *The Irony of Regulatory Reform*, during the deregulatory movement, regulators and other publicly interested reformers acted against the will of regulated public utilities, which could not have happened if those firms had truly “captured” the regulatory process.<sup>344</sup>

Third, the impact of regulation on dynamic competition is also real but overstated, particularly when natural monopoly regulation is well-targeted. To repeat: I am not advocating a regulated “search utility” or “social media utility,” but only, perhaps, a “web indexing utility” or “content database utility.” The potential for innovation and dynamic competition in the provision of these basic, low-differentiation services is less than in consumer-facing product markets, so the opportunity we lose if regulation turns out to inhibit such innovation is correspondingly limited. The innovation we most want is in the downstream markets that depend on access to the natural monopoly asset. Electricity has been provided under a natural monopoly regulatory regime for more than a century, and over that time period, we have seen enormous downstream innovation and competition in the companies and industries that use electricity as an input.<sup>345</sup> Similarly, though its scope may have been overbroad, the AT&T monopoly successfully extended access to high-quality telephone service across the continent, brought numerous valuable inventions into the world, and was regarded for many decades as a symbol of engineering excellence.<sup>346</sup>

#### CONCLUSION

My goal in this Article has been to offer a regulatory approach for Big Tech that is both more ambitious and better targeted than some of the approaches that have been popular to date. It is more ambitious because I

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344. ROBERT BRITT HORWITZ, *THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF AMERICAN TELECOMMUNICATIONS* 264 (1989).

345. Ironically, the generativity of our natural monopoly electricity system is sometimes celebrated even by writers who argue against the application of similar principles to the internet. *Broadband Debate: A User's Guide*, *supra* note 253, at 74.

346. *THE MASTER SWITCH*, *supra* note 222, at 59.

contemplate reaching into major tech enterprises and forcing the structural disintegration of functions (such as web indexing and self-published content databasing) that have to date been an integrated, internal, proprietary component of their overall enterprise. Moreover, I would apply traditional “price and entry” regulation to those disintegrated assets, with all the invasiveness and problematic incentives that entails. But it is better targeted, because I propose to choose the assets subject to this intervention with extreme care and humility, based on a century and a half of theory and experience with natural monopoly. Perhaps counterintuitively, I contend that such natural monopoly regulation can increase competition by providing a principled basis by which new competitors can access critical inputs to downstream innovation. This policy is worth the risk, I think, not for minor efficiency gains, but to solve a compelling social problem: namely, to protect our economy, society, and republic from the dangers of the concentration of power over information in a small number of large firms.

**NO RIGHTS ON PAPER: THE ERRONEOUS DECISION OF  
STATE V. POWERS AND A RESTORATIVE SOLUTION TO  
SUPERVISED RELEASE VIOLATIONS IN VERMONT**

Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that “illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.” The privilege was elevated to constitutional status and has always been “as broad as the mischief against which it seeks to guard.” We cannot depart from this noble heritage.

–*Miranda v. Arizona*<sup>1</sup>

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1. *Miranda v. Arizona*, 384 U.S. 436, 459–60 (1966) (citations omitted) (first quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886); and then quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)).

## INTRODUCTION

In the United States, 3.7 million people are on community supervision.<sup>2</sup> Community supervision is a term of art that encompasses all instances when people who have been convicted are monitored outside of a prison setting, including parole and probation.<sup>3</sup> The terms parole and probation, although different, are used throughout this article interchangeably when discussing community supervision programs. Despite this massive number, people on supervised release are frequently ignored by policymakers.<sup>4</sup> The terms supervised release and community supervision are used interchangeably throughout this article. Although often described as a more lenient punishment, supervised release is closely linked to incarceration.<sup>5</sup> Individuals face a wide range of sanctions, including incarceration, if found to violate one of the many stringent conditions of supervised release.<sup>6</sup> This creates a cyclical relationship where people on community supervision violate their conditions and are then reincarcerated.<sup>7</sup>

Further, supervised release disproportionately impacts marginalized communities. Individuals on supervised release report higher levels of health concerns, disabilities, mental health issues, and substance abuse.<sup>8</sup> Black Americans comprise around 30% of people on supervised release<sup>9</sup> despite only making up 12% of the national population.<sup>10</sup> Women face unique issues

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2. Leah Wang, *Punishment Beyond Prisons 2023: Incarceration and Supervision by State*, PRISON POL'Y INITIATIVE (May 2023), <https://www.prisonpolicy.org/reports/correctionalcontrol2023.html> (community supervision includes parole, probation, and furlough).

3. *Community Corrections (Probation and Parole)*, BUREAU OF JUST. STATS., <https://bjs.ojp.gov/topics/corrections/community-corrections#> (last visited Dec. 14, 2025).

4. Wang, *supra* note 2.

5. *Id.*; Tonja Jacobi et al., *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887, 899 (2014) (“Any violation of a release condition subjects the parolee to arrest and revocation of community supervision.”).

6. Jacobi et al., *supra* note 5, at 899.

7. *Id.* at 902.

8. Wang, *supra* note 2 (citing Emily Widra & Alexi Jones, *Mortality, Health, and Poverty: The Unmet Needs of People on Probation and Parole*, PRISON POL'Y INITIATIVE (Apr. 3, 2023), [https://www.prisonpolicy.org/blog/2023/04/03/nsduh\\_probation\\_parole/](https://www.prisonpolicy.org/blog/2023/04/03/nsduh_probation_parole/)).

9. E. ANN CARSON & RICH KLUCKOW, U.S. DEP'T. OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2021 – STATISTICAL TABLES 10 tbl.7 (2023) (reporting that Black Americans comprise 1,136,000 of the 3,745,000 total population on supervised release as of 2021).

10. See Wang, *supra* note 2; *Race and Ethnicity in the United States: 2010 Census and 2020 Census*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html>.

complying with their release conditions due to child and family care obligations.<sup>11</sup>

When looking at mass punishment rates by state, Vermont ranks 49th in mass punishment, which includes both supervised release and incarceration.<sup>12</sup> Vermont subjects 763 per 100,000 of its citizens to incarceration or community supervision.<sup>13</sup> 69% of the 4,900 Vermonters experiencing correctional control are under community supervision, rather than in prison.<sup>14</sup> Correctional control refers to the governmental systems that oversee individuals convicted of crimes. This means that the majority of Vermonters in the criminal justice system are subjected to stringent conditions that control their supervised release. The rights of those on supervised release are a human rights issue that must be addressed.

In *State v. Powers*, parole officers questioned John Powers about a suspected violation of his conditional release.<sup>15</sup> The parole officers began to interrogate him without reminding him of his constitutional right against self-incrimination. After the initial confession, the probation officers made him complete a videotaped confession.<sup>16</sup> Only after did the officers inform him that he was under arrest.<sup>17</sup> The Superior Court held that Powers's statements made before the Miranda warning were inadmissible.<sup>18</sup> The Vermont Supreme Court reversed and held that Powers had no right to the protections afforded by the Fifth Amendment.<sup>19</sup> The Court reasoned that extending Miranda protections to interrogations related to parole violations would disturb the "atmosphere of trust and communication" between the parolee and their officer.<sup>20</sup> This holding means people on parole are not afforded the essential constitutional right against self-incrimination.

The Vermont Supreme Court incorrectly decided *Powers* because the decision violates the Fifth Amendment. Even if this decision did not violate the Fifth Amendment, the *Powers* decision goes against public policy. Part I of this Article reviews relevant United States Supreme Court and Vermont Supreme Court precedents pertaining to Miranda rights. Earlier Vermont Supreme Court decisions provided broad protection against self-

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11. Wang, *supra* note 2.

12. *Id.* (results are out of 51, including D.C.).

13. *Id.*

14. *Id.*

15. *State v. Powers*, 2016 Vt. 110, ¶ 4, 203 Vt. 388, 392, 157 A.3d 39, 41.

16. *Id.*

17. *Id.* ¶ 4 n.1 (the Court noted that at this point, the parole officer told the police they had placed Powers in custody, and all the statements Powers made after this point, but before Mirandizing Powers, were suppressed by the trial court).

18. *Id.* ¶ 1.

19. *Id.*

20. *Id.* ¶ 39.

incrimination, like the protections found at the national level. However, the Vermont Supreme Court has slowly stripped away defendants' protections against self-incrimination. Meanwhile, the protections for those on parole are far fewer, as the Court systematically dismantled Miranda rights for people post-conviction. Part II of this Note dissects the Vermont Supreme Court's faulty analysis of the law and the counterproductive policy analysis expressed in the holding. Under a clear Miranda test, Powers was in custody and entitled to protection against self-incrimination. The ruling of *Powers* fails to achieve the purported goal of fostering an atmosphere of trust and communication between a parole officer and the parolee. Finally, Part III offers the solution of a restorative circle following a potential parole or furlough violation. This solution would improve the goal of open and honest communication between the parolee and their officer.

### I. BACKGROUND

Most of us were first exposed to Miranda rights through TV shows and movies.<sup>21</sup> Depictions of Miranda rights in popular culture were so prominent that some theorists believed they were cemented into the minds of all Americans.<sup>22</sup> However, research shows that popular culture today includes fewer examples of Miranda rights.<sup>23</sup> Additionally, when Miranda rights are shown, they are often dramatized and distorted.<sup>24</sup> Research looking at the popular show *Law & Order: SVU* showed "an average of 1.12 civil rights violations per episode."<sup>25</sup> Along with excessive use of force, the fictional violations portrayed on TV most frequently involve failure to read Miranda warnings.<sup>26</sup> Police characters on shows like SVU will praise each other for ignoring *Miranda* and managing to catch "the bad guy."<sup>27</sup> Audiences finish their binge watch thinking that reading *Miranda* only protects criminals, rather than all citizens' public rights.<sup>28</sup> Relying on popular culture to inform

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21. See Ronald Steiner et al., *The Rise and Fall of the Miranda Warnings in Popular Culture*, 59 CLEV. ST. L. REV. 219, 220 (2011) (mentioning Chief Justice Rehnquist's claim that the majority of Americans know their Miranda rights through TV).

22. See *id.* at 221 (continuing the discussion of how the prominence of Miranda warnings in popular culture resulted in the assumption that everyone knew them).

23. *Id.*

24. *Id.* at 220. For example, the infamous 21 Jump Street opening scene where the main character, Jenko, included profanities when Mirandizing his suspect. Clip, *Rookies First Arrest Scene - 21 Jump Street (2012)* YOUTUBE (Oct. 22, 2023), <https://www.youtube.com/watch?v=Xxx7xJopaho>.

25. Steiner et al., *supra* note 21, at 227.

26. *Id.*

27. *Id.*

28. See *id.* at 227, 230 (noting that when reviewing the 1993 season of *NYPD Blue*, a popular cop program, a total of 68 arrests resulted in only four full Miranda warnings).

citizens about the law results in misleading information. With less exposure to Miranda rights and rampant misinformation spread through TV, people in custody deserve proper reminders of their inherent rights. Miranda rights protect people from coercive interrogations and false confessions while upholding the legal system's legitimacy.

How the public perceives the police directly relates to how society complies with the law.<sup>29</sup> Police legitimacy is fostered through the concept of procedural justice.<sup>30</sup> Procedural justice has four elements: "treating people with dignity and respect; giving individuals 'voice' during encounters; being neutral and transparent in decision-making; and conveying trustworthy motives."<sup>31</sup> Procedural justice serves as a non-adversarial method of crime control.<sup>32</sup> This is fostered through positive relationships, treating people with dignity, and openness.

Current police techniques do not foster police legitimacy, especially during interrogations. The most common interrogation technique is the *Reid Technique*.<sup>33</sup> The Reid Technique prioritizes immediate confessions above all other concerns.<sup>34</sup> Additionally, interrogation techniques attempt to persuade the suspect not to exercise their right to remain silent.<sup>35</sup> Interrogators frequently try to build rapport with the suspect and encourage them to talk by suggesting that answering questions will benefit the suspect.<sup>36</sup> Deceptive interrogation techniques by law enforcement during interrogations are rampant and encouraged.<sup>37</sup> Interrogators are taught to express a clear belief that the suspect is guilty, regardless of the evidence.<sup>38</sup> These deceptive techniques can infiltrate supervised release programs, undermining their rehabilitative roots.

Part I.A. of the background discusses how parole and furlough started as rehabilitation programs but evolved to prioritize punishment over rehabilitation. Part I.B. discusses the constitutional protection against self-incrimination. Part I.C. reviews Vermont's historical emphasis on legislative reform and Vermont's interest in restorative justice. Part I.D. discusses Vermont Supreme Court cases regarding Miranda rights.

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29. Margareth Etienne & Richard McAdams, *Police Deception in Interrogation as a Problem of Procedural Legitimacy*, 51 TEX. TECH L. REV. 21, 23 (2021).

30. *Id.* at 24. (describing how procedural justice lays the framework for how police must act to promote fairness and trust in the institution while also reinforcing positive social values).

31. *Id.* (internal quotation marks omitted).

32. *Id.* at 25.

33. *Id.* at 28.

34. *Id.* at 29.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* (explaining that interrogators exaggerate or fabricate the facts to elicit a confession).

*A. Philosophical Background of Criminal Rehabilitation in America*

Parole and furlough started as a rehabilitative measure in the 1800s. Parole officers served as makeshift social workers to their parolees, emphasizing community reintegration.<sup>39</sup> In the 1970s, parole programs focused on only serving the punitive interests of the legal system.<sup>40</sup> Probation officers began focusing their efforts on enforcing the conditions of the probation instead of rehabilitating the person on probation.<sup>41</sup> This has resulted in impossibly stringent parole programs.<sup>42</sup>

In contrast, restorative justice—an ancient practice of healing and rehabilitation originating from Indigenous U.S. peoples—has retained its rehabilitative nature.<sup>43</sup> Restorative justice does not use punitive measures; it offers a compassionate and community-based method of dealing with crime that reflects the early efforts of parole in America.

The historical origins of community supervision focus on restorative rehabilitation, with parole dating back to the 1800s.<sup>44</sup> Parole programs were developed under the philosophy of community rehabilitation.<sup>45</sup> The United States was heavily influenced by the Irish Convict System, developed in 1854.<sup>46</sup> The Irish system, developed by Sir Walter Crofton, had a staged approach to rehabilitation.<sup>47</sup> This approach started with solitary confinement, followed by increasing levels of work and responsibility, ultimately resulting in conditional release.<sup>48</sup> Motivated by this approach, the United States

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39. See Ryan M. Labrecque, *Probation in the United States: A Historical and Modern Perspective*, in HANDBOOK OF CORRECTIONS IN THE UNITED STATES 155, 157 (O. Hayden Griffin III & Vanessa Woodward eds., 2017) (noting that probation officers worked with offenders, providing resources such as treatment programs and helping them re-integrate into society).

40. See *id.* at 8–9 (explaining that probation officers began prioritizing conformity and control because they believed technical violations were a precursor to further criminal behavior).

41. *Id.*

42. See Emily Widra, *One Size Fits None: How 'Standard Conditions' of Probation Set People up to Fail*, PRISON POL'Y INITIATIVE (Oct. 2024), [https://www.prisonpolicy.org/reports/probation\\_conditions.html](https://www.prisonpolicy.org/reports/probation_conditions.html) (discussing how parole conditions are impossibly stringent because they often restrict the parolee's ability to work, criminalize commonplace behaviors, and are enforced at the discretion of the probation agency).

43. Thomas J. Reed, *A Critical Review of the Native American Tradition of Circle Practices*, in INDIGENOUS RESEARCH OF LAND, SELF, AND SPIRIT 132–35 (2021).

44. See Labrecque, *supra* note 39, at 157 (explaining how rehabilitation is inherently restorative because it aims to improve and repair people's lives).

45. *Id.*

46. Snell Putney & Gladys J. Putney, *Origins of the Reformatory*, 53 J. CRIM. L. & CRIMINOLOGY 437, 440 (1962).

47. *Id.* at 438–40.

48. *Id.*

developed a reformatory movement in the justice system.<sup>49</sup> The rehabilitative focus on parole remained intact for many years.<sup>50</sup>

Starting in the 1970s, a “get tough” on crime approach was adopted.<sup>51</sup> Research conducted by Robert Martinson in 1974 suggested that rehabilitation had minimal effects on reducing recidivism.<sup>52</sup> This gained attention and caused a societal rejection of rehabilitative programs.<sup>53</sup> In turn, this rejection of rehabilitative programs caused a fundamental shift in the function of probationary practices.<sup>54</sup> Parole officers no longer served as makeshift social workers encouraging community engagement and therapy.<sup>55</sup> Instead, they began prioritizing the punitive interests of the legal system over the needs of their parolees.<sup>56</sup>

The current emphasis on enforcing parole conditions has resulted in numerous technical violations.<sup>57</sup> Parole violations account for 30–40% of people admitted to state prisons.<sup>58</sup> Using this “get tough” attitude, states have slowly stripped away the rights of those on supervised release, creating an impossible standard for these individuals to adhere to.<sup>59</sup>

Even Vermont, known as a progressive state, fell prey to this travesty. The American Civil Liberties Union (ACLU) condemned Vermont’s parole and furlough practices as lacking transparency and accountability.<sup>60</sup> Vermont’s parole and furlough practices allow officers vast discretion to

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49. *Id.* at 441.

50. Labrecque, *supra* note 39, at 157.

51. *Id.* at 7–8.

52. *Id.*

53. *See id.* at 8 (“The conclusion that ‘nothing works’ dealt a devastating blow to the rehabilitative ideal.”) (citing FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981)).

54. Labrecque, *supra* note 39, at 157.

55. *Id.*

56. *See id.* at 8–9. Parole officers began heavily enforcing the law enforcement aspects of their job including drug testing, reporting, and requiring parolees to inform their officer of their whereabouts. *Id.* at 8 (citations omitted). This was justified on the premise that violating parole conditions was a precursor to further criminal behavior and the strict enforcement of the parole conditions would serve as a deterrent. *Id.* at 9 (citations omitted).

57. *See id.* at 6. Parole officers are responsible for ensuring that parole conditions are being met. *Id.* When a parolee fails to comply with a condition, the parole officer has the discretion to report the technical violations. *Id.* A technical violation is when a parolee violates one of their conditions of release. *Id.* *See also* Jennifer Miller, *The Endless Trap of American Parole How Can Anyone Rebuild Their Lives When They Keep Getting Sent Back to Jail for the Pettiest of Reasons?*, WASH. POST (May 24, 2021), <https://www.washingtonpost.com/magazine/2021/05/24/moral-outrage-american-parole/> (noting that the average number of conditions a person on parole must comply with is 17).

58. Miller, *supra* note 57.

59. *Id.*

60. *Parole & Probation Reform*, ACLU VT., <https://www.acluvt.org/en/parole-probation-reform> (last visited Dec. 14, 2025).

continue or revoke community supervision.<sup>61</sup> Further demonstrating its lack of transparency, Vermont failed to provide complete data to the Bureau of Justice Statistics regarding its probation and parole program in 2022.<sup>62</sup>

Additionally, Vermont continues to have a sizeable racial disparity in its justice system. Black people are disproportionately represented.<sup>63</sup> Despite only 1.5% of Vermont's population identifying as Black, 11% of the incarcerated population identifies as Black.<sup>64</sup> The overrepresentation of racial minorities in the state demonstrates the systemic flaws in Vermont's justice system.

### *B. The Constitutional Protections Against Self-Incrimination*

The Fifth Amendment reads: "No person . . . shall be compelled in any criminal case to be a witness against himself."<sup>65</sup> This phrase is understood to protect individuals from self-incrimination.<sup>66</sup> The right to not self-incriminate was derived from English common law.<sup>67</sup> Additionally, early renditions of what are now Miranda rights are found in old English law.<sup>68</sup> Not having your words used against you has historical significance and is essential to our concept of justice.

In 1966, the Supreme Court held in *Miranda v. Arizona* that prosecutors could not use statements resulting from a custodial interrogation without clear procedural safeguards.<sup>69</sup> Procedural safeguards, such as Miranda rights, are recognized by the public as an important aspect of legitimizing police

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61. *Id.*; State v. Sylvester, 2007 Vt 125, ¶ 7, 183 Vt 541, 542, 944 A.2d 909, 911 (noting that in taking the evidence as a whole and viewing it in a light most favorable to the state, the Court will uphold a parole revocation if it is supported by credible evidence).

62. DANIELLE KAEBLE, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, NCJ 308575 PROBATION AND PAROLE IN THE UNITED STATES 9 (2022).

63. Madeleine Dardeau & Lorretta Sackey, *Vermont: Monitoring Data Trends After 2020 Justice Reinvestment Initiative Reforms*, THE COUNCIL OF STATE GOV'TS JUST. CTR. (Nov. 2022), <https://csgjusticecenter.org/publications/vermont-monitoring-data-trends-after-2020-justice-reinvestment-initiative-reforms/>.

64. *Vermont's Prison System by the Numbers*, ACLU VT., <https://www.acluvt.org/en/vermonts-prison-system-numbers#> (last visited Dec. 14, 2025).

65. U.S. CONST. amend. V.

66. *Id.*

67. See John H. Langbein, *The Historical Origins of The Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1047 (1994) (tracing the origins of the common law privilege against self-incrimination to the late seventeenth century). The criminal trial was first viewed as an opportunity for the defendant to speak. *Id.* In the eighteenth century, the purpose of a criminal trial became an opportunity for the defense counsel to attack the prosecution's case. *Id.* at 1048.

68. See *id.* at 1061 ("Sir John Jervis' Act of 1848 . . . was [a] provision made to advise the accused that he might decline to answer questions put to him in the pretrial inquiry and to caution him that his answers to pretrial interrogation might be used as evidence against him at trial.").

69. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

authority.<sup>70</sup> Therefore, procedural safeguards not only serve to protect the criminal defendant but also reinforce the positive public perception of police action. The *Miranda* Court held that custodial interrogations include, but are not limited to, situations where the police deprived suspects of their freedom of action in any significant manner.<sup>71</sup> *Miranda* required law enforcement to inform people in custody about their right to remain silent, their right to an attorney, and that any statements made could be used against them.<sup>72</sup>

After *Miranda*, the Supreme Court continued to elaborate on its ruling. In 1985, the Court, although claiming to adhere to precedent, effectively stripped away the strong protections outlined in *Miranda*.<sup>73</sup> The bright-line rule from *Miranda* requires law enforcement to inform suspects before any custodial interrogation of their right to remain silent, their right to an attorney, and that what they say can be used against them.<sup>74</sup> In 1985, the Court held that pre-*Miranda* confessions did not render later Mirandized confessions inadmissible, provided the initial statement was voluntary and not the result of actual coercion.<sup>75</sup> Deliberate question-first tactics that elicit a confession before a *Miranda* warning were held inconsistent with *Miranda*.<sup>76</sup> The Court further elaborated that “custody” does not preclude situations outside of the traditional interrogation room.<sup>77</sup>

### C. Vermont and Restorative Justice

Shining like a beacon of light within the mess that is our punitive justice system is a genuinely rehabilitative practice called restorative justice. Restorative justice is an ancient practice with philosophical underpinnings from Native American cultures.<sup>78</sup> Restorative Circles, typically known as *circle practice*, is a practice where people sit together in a circle and take turns expressing their feelings and experiences while passing a talking piece.<sup>79</sup> Circle practice is profoundly spiritual in Native American culture,

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70. See *supra* Part I.

71. *Miranda*, 384 U.S. at 444.

72. *Id.* at 479.

73. See *Oregon v. Elstad*, 470 U.S. 298, 318 (1985) (holding that a subsequent Mirandized confession made after a prior incriminating statement was admissible).

74. *Miranda*, 384 U.S. at 444.

75. *Elstad*, 470 U.S. at 318.

76. *Missouri v. Siebert*, 542 U.S. 600, 606–07 (2004).

77. *Mathis v. United States*, 391 U.S. 1, 2, 4–5 (1968) (finding the *Miranda* principle applicable to questioning that took place in a prison during the suspect’s term of imprisonment); *Orozco v. Texas*, 394 U.S. 324, 327 (1969) (finding the *Miranda* principle applicable to questioning that took place in the suspect’s home).

78. Reed, *supra* note 43, at 135.

79. *Id.* at 132–36.

fostering community and interconnectedness.<sup>80</sup> Understanding the cultural roots of restorative justice is imperative to avoid sterilizing such a sacred practice. When tailoring restorative justice to fit the colonized justice system in America, we must be cognizant those who created restorative justice.

*Modern* restorative justice developed in the 1970s.<sup>81</sup> Modern restorative justice reflects similar goals and ideologies to traditional restorative justice. Central to restorative justice is the principle that “crime . . . is a violation of people and of interpersonal relationships.”<sup>82</sup> Crime creates obligations, and the central goal is to put right the wrongs caused by the violations.<sup>83</sup> Restorative justice operates on the assumption that when the community comes together to address the harm, everyone will leave stronger.<sup>84</sup> The responsible party must be rehabilitated so that the community can heal from the violation.<sup>85</sup> Howard Zehr suggests that the one word to describe restorative justice is respect.<sup>86</sup> Restorative justice focuses on repairing harm and supporting the rehabilitation of the responsible party. Therefore, it reflects the same rehabilitative aspects that were present in the historical philosophy of parole.<sup>87</sup>

Vermont’s legislature has prioritized restorative justice practices in the criminal justice system since the 1970s. Beginning in the 1970s, Vermont closed the Windsor prison and wanted to transform the space into community corrections.<sup>88</sup> The 1980s saw an influx of treatment programs focused on risk control and crime reduction.<sup>89</sup> Beginning in the 2000s, Vermont created legislation focused on integrating restorative practices.<sup>90</sup> Importantly, the Vermont General Assembly has directed by statute that the State should employ restorative justice approaches “whenever feasible” in response to

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80. *Id.* at 132–37.

81. See HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE: REVISED AND UPDATED* 18–19 (2015) (discussing how during the 1970’s a rise of restorative justice pilot programs emerged and were influenced by indigenous practices).

82. *Id.* at 28 (internal quotation marks omitted).

83. *Id.* at 28–29.

84. *Id.* at 37.

85. *Id.* at 38–39.

86. *Id.* at 47.

87. See *supra* Part I.A.

88. Ping Showalter, *State-Funded Restorative Justice in Vermont: The Future of Structure, Funding, and Flow* 4 (May, 2022) (M.A. dissertation, Vermont Law School) (on file with Vermont State Legislature); Patrick O’Grady, *End of a Long Chapter in Windsor as Prison Closes*, VALLEY NEWS (Nov. 1, 2017), <https://vnews.com/2017/11/01/only-staff-remains-and-windsor-prison-closes-down-208-years-after-the-first-prison-opened-on-state-street-in-1809-13432197/> (reporting that the Vermont Legislature voted to close the prison and convert it into transitional housing).

89. Showalter, *supra* note 88, at 4.

90. *Id.*; VT. STAT. ANN. tit. 28, § 2a (2025).

crimes.<sup>91</sup> Overall, Vermont’s legislative initiative strongly encourages restorative justice within the criminal justice system.

*D. The Vermont Supreme Court’s Interpretation of Miranda Rights  
Negatively Impacts Individuals on Supervised Release*

In contrast to the Vermont legislature, the Vermont Supreme Court continues to weaken Miranda rights. Research on the Court’s treatment of Miranda rights has shown a reduction of protections over the years.<sup>92</sup> The Vermont Supreme Court shifts from a pro-defendant to a pro-prosecution stance once the defendant is in the post-investigation and arrest phase.<sup>93</sup> When given the opportunity, regarding pre-investigation issues such as warrant requirements, the Vermont Supreme Court is willing to extend the Vermont Constitution’s protections beyond those the federal counterpart delineates.<sup>94</sup> However, it is less willing when dealing with issues of post-arrest.<sup>95</sup> The Vermont Supreme Court has remained true to this research. In *State v. Powers*, the Court abrogated the rights of everyone in post-conviction status—people on parole and furlough.<sup>96</sup>

Before the ruling of *Powers*, the Vermont Supreme Court set the stage for denying individuals in state custody their Fifth Amendment rights. The Vermont Constitution protects against self-incrimination.<sup>97</sup> When interpreting the Vermont Constitution, the Court initially remained consistent with the ruling in *Miranda*: Involuntary confessions coerced from a person in custody are not admissible in court.<sup>98</sup> The Vermont Supreme Court stated that whether a statement is involuntary involves analyzing whether the interrogator’s action subverts the defendant’s free will or rational intellect.<sup>99</sup>

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91. VT. STAT. ANN. tit. 28, § 2a(a) (2025) (“It is the policy of this State that principles of restorative justice be included in shaping how the criminal justice system responds to persons charged with or convicted of criminal offenses . . . . The policy goal is a community response to a person’s wrongdoing at its earliest onset . . . .”).

92. Nathan Sabourin, *We’re from Vermont and We Do What We Want: A Re-Examination of the Criminal Jurisprudence of the Vermont Supreme Court*, 71 ALB. L. REV. 1163, 1170 (2008).

93. *Id.* at 1200.

94. *Id.* (explaining how the Vermont Supreme Court has rejected the federal search-incident-to-arrest warrant exception).

95. *Id.*

96. *See State v. Powers*, 2016 Vt. 110, ¶ 45, 203 Vt. 388, 409–10, 157 A.3d 39, 53–54 (holding that incriminating statements made to a probation officer are not entitled to Miranda protections).

97. VT. CONST. ch. I, art. 10.

98. *State v. Badger*, 141 Vt. 430, 439, 450 A.2d 336, 341–42 (1980) (holding that when a second confession is the product of an illegally obtained confession, the confession should be suppressed).

99. *State v. Gilman*, 158 Vt. 210, 213, 608 A.2d 660, 662 (1992) (noting that whether a confession is involuntary is determined by whether police officers’ threats, promises, or coercion were sufficient to overcome the defendant’s free will or rational intellect, causing the defendant to confess).

In 2008, the Vermont Supreme Court decided the case of *State v. Fleurie*.<sup>100</sup> In *Fleurie*, the Court rejected the *fruit of a poisonous tree* doctrine in application to Miranda rights.<sup>101</sup> The fruit of the poisonous tree doctrine dictates that if evidence is obtained illegally, it renders subsequent evidence inadmissible because it is tainted.<sup>102</sup> Traditionally, this doctrine applies to illegal searches under the Fourth Amendment.<sup>103</sup> The Court in *Fleurie* declined to extend the doctrine to confessions under the Fifth Amendment.<sup>104</sup> The Court held that pre-warning statements did not render later statements inadmissible.<sup>105</sup> The decision in *State v. Fleurie* has been heavily criticized as an example of the Vermont Supreme Court's inability to recognize the disparate impacts of allowing question-first tactics.<sup>106</sup> *Fleurie* undermined Vermont citizens' Miranda rights, while adding to what is known as *Miranda's* "schizophrenic" jurisprudence.<sup>107</sup>

When specifically addressing the rights of individuals on parole, the Vermont Supreme Court singled out parolees in the decision of *State v. Steinhour*.<sup>108</sup> In *Steinhour*, the Court held that statements proving a violation of parole were admissible in a revocation hearing.<sup>109</sup> This case is the first example of the Vermont Supreme Court treating parolees differently from the general population. The Vermont Supreme Court has carved away an exception to these steadfast rights regarding the Miranda rights of paroled and furloughed individuals. Individuals on supervised release occupy a facet of case precedent in Vermont that facilitates the degradation of Fifth Amendment rights.<sup>110</sup>

The *coup de grâce* by the Vermont Supreme Court was the case of *Powers*.<sup>111</sup> After serving a sentence for forcible sexual assault on a 13-year-old girl, Powers entered community furlough supervised by the Vermont Department of Corrections.<sup>112</sup> Vermont Department of Corrections placed

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100. *State v. Fleurie*, 2008 Vt. 118, ¶ 24, 185 Vt. 29, 40, 968 A.2d 326, 333 (holding that pre-warning interrogations did not render the later Miranda warnings ineffective).

101. *Id.* ¶ 24 n.5.

102. *Id.*

103. *Id.* ¶ 15 n.3.

104. *Id.* ¶ 24 n.5.

105. *Id.* ¶ 24.

106. See *Missouri v. Siebert*, 542 U.S. 600, 606 (2004); Briana Collier, *Disrespecting Miranda Rights: Vermont's Choice in State v. Fleurie*, 36 VT. B.J. 30, 30 (2010).

107. Collier, *supra* note 106, at 30.

108. *State v. Steinhour*, 158 Vt. 299, 300, 607 A.2d 888, 889 (1992).

109. *Id.* (holding that statements violating parole can be used against the defendant in a revocation hearing).

110. *Id.*

111. *Coup de grâce*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1999) (meaning a "death blow" or "an act or event that puts a definite end to something").

112. *State v. Powers*, 2016 Vt. 110, ¶ 2, 203 Vt. 388, 391, 157 A.3d 39, 41.

Powers on the highest level of supervision.<sup>113</sup> Powers's neighbors told his parole officer that Powers had drilled holes in his bedroom wall to view their teenage daughter.<sup>114</sup> Following this tipoff, Powers's parole officer and a community correctional officer arrived.<sup>115</sup> The officers told Powers they needed to enter the apartment.<sup>116</sup> After entering, the officer told Powers to sit down on the couch.<sup>117</sup> The parole officer kept Powers under surveillance while the community correctional officer investigated the alleged violation.<sup>118</sup> After finding evidence of a parole violation, the officers questioned Powers about whether he had anything to tell them.<sup>119</sup> The parole officer continued to ask this question to Powers, who was "visibly nervous," until Powers eventually confessed to the violation.<sup>120</sup> While still in his apartment, the police made Powers complete a videotaped confession.<sup>121</sup> Following this confession, the officer informed Powers that he was to be taken into custody.<sup>122</sup>

The Court held that Powers's statements to his parole officer were not protected under *Miranda*.<sup>123</sup> As it stands, the broad ruling in *Powers* strips away *Miranda* rights for people on parole and furlough.

## II. THE VERMONT SUPREME COURT INCORRECTLY DECIDED *STATE V. POWERS*

*State v. Powers* is a debilitating Vermont Supreme Court decision. *Powers* failed to achieve *Miranda*'s clear policies and the goals of the Vermont Supreme Court. In *Powers*, the Court had the chance to treat people under state supervision with the same care that is afforded to the general public. Instead, the Court put forth a decision that has far-reaching effects on those in the justice system. As a result, the Court stripped thousands of Vermonters of their Fifth Amendment rights; parole officers are given unfettered power; and Vermont's legal system kowtows to hypocrisy.

On both legal and policy grounds, the Court wrongly decided *Powers*. However, at the onset, it cannot be ignored that the specific facts of this case probably played a large role in influencing the decision. Acts of pedophilia

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113. *Id.*

114. *Id.*

115. *Id.* ¶ 3.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* ¶ 4.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* ¶ 40.

understandably cause visceral reactions in society. However, this does not excuse removing well-established Miranda rights. *Powers* stands as an example of how bad facts can create bad laws.

The Vermont Supreme Court incorrectly decided *Powers*. Part II.A. argues that Powers was in custody because his liberty was restricted by the parole officers. The Vermont Supreme Court incorrectly applied the case of *Minnesota v. Murphy*. *Murphy* is too factually distinct from *Powers* to control. The appropriate controlling case is *Orozco v. Texas* because it is factually similar to *Powers*. Finally, Part II.B. argues that Powers was in an inherently coercive environment when the parole officers began questioning him in his home. Therefore, Powers was entitled to Miranda protections.

The ruling of *Powers* is broad and strips defendants of any protections *Miranda* offers. Prior to *Powers*, any person had a right to be warned about the potential for self-incrimination when they were in custody.<sup>124</sup> Powers was in custody when the officers questioned him in his house because his freedom of movement was restricted.<sup>125</sup> Additionally, the environment at the time of questioning had the same coercive pressures as an interrogation.<sup>126</sup> The precedent set by *Powers* is a barrier to justice that must be acknowledged.

#### *A. Powers Was in Custody Because His Liberty Was Restrained*

Whether a person is in custody requires analysis of the facts.<sup>127</sup> First, the analysis examines whether a reasonable person would have felt free to leave under the specific circumstances.<sup>128</sup> Second, it examines whether the environment presents “the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.”<sup>129</sup> *Miranda* and its subsequent cases stand as landmark decisions that protect one of the most fundamental rights afforded in our Constitution: the right to protection against self-incrimination.

Custody is determined by first inquiring whether the objective circumstances of the interrogation suggest that a reasonable person would have felt they were not at liberty to terminate the interrogation and leave.<sup>130</sup> Factors include: the location of the questioning, its duration, statements made during the interview, the presence of physical restraints, the release of the defendant at the end of the questioning, and whether the environment

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124. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

125. *Powers*, 2016 Vt. 110, ¶ 3.

126. *Id.*

127. *Howes v. Fields*, 565 U.S. 499, 509 (2012).

128. *Id.*

129. *Id.*

130. *Id.*

presents similar coercive pressures associated with police station interrogations.<sup>131</sup> Because determining custody is very fact-dependent, close case comparison is necessary.

At the onset of its decision in *Powers*, the Vermont Supreme Court cited multiple decisions from non-binding courts suggesting that parolees are never in custody when providing incriminating evidence to their parole officer, absent handcuffs or incarceration.<sup>132</sup> The Court then attempted to march through the traditional custody factors.<sup>133</sup>

Part II.A.1 argues that *Minnesota v. Murphy* was the incorrect standard to analyze whether Powers was in custody. *Murphy* is factually distinct from *Powers*. Instead, the Court should have used *Orozco*. Part II.A.2 will lay out the factual similarities and present a better analysis of the facts in *Powers*. *Orozco* is the proper case from which to analogize. Following *Orozco* would have preserved Vermonters' Miranda rights.

#### 1. *Murphy v. Minnesota* Is Too Factually Distinct to Apply as an Analogy for Powers's Relative Liberty

The Vermont Supreme Court argued that *Minnesota v. Murphy* controlled, as it was a close enough case comparison in facts and circumstances.<sup>134</sup> However, *Murphy* does not control because it is factually different from *Powers*. The factual similarity the Court focused on was that *Murphy* was on probation for sexual assault, not the circumstances surrounding his actual interrogation.<sup>135</sup> *Murphy* attended the meeting with his parole officer voluntarily and confirmed with little prompting what the officer had been told.<sup>136</sup> By contrast, *Powers*'s interrogation took place immediately, without the time to volunteer information.<sup>137</sup> The parole officers struggled to get *Powers* to admit anything until they pressed him with repeated questions.<sup>138</sup> The Vermont Supreme Court largely ignored these factual differences.

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131. *Id.*

132. *State v. Powers*, 2016 Vt. 110, ¶ 9, 203 Vt. 388, 394, 157 A.3d 39, 44 (citing multiple non-precedential decisions); see *State v. Hedlund*, No. A08-0266, 2009 WL 1373670 at 2 (Minn. Ct. App. May 19, 2009) (holding that the defendant was not in custody because it was a routine drug test and he was free to leave at any time); *United States v. Muhammad*, 903 F. Supp. 2d 132, 140 (E.D.N.Y. 2012) (holding that a warrantless search of the home of a person on supervised release and subsequent statements made to a probation officer in a pre-planned meeting were constitutional).

133. *Powers*, 2016 Vt. 110, ¶ 10.

134. *Id.* ¶ 11.

135. *Id.* ¶¶ 11, 15.

136. *Minnesota v. Murphy*, 465 U.S. 420, 424 (1984).

137. *Powers*, 2016 Vt. 110, ¶ 3.

138. *Id.* ¶ 4.

In *Murphy*, Murphy was on probation, and as a condition of his probation, he was required to attend counseling.<sup>139</sup> During one of these counseling sessions, Murphy admitted to his counselor that he raped and murdered a victim.<sup>140</sup> The counselor told Murphy's probation officer.<sup>141</sup> The probation officer contacted Murphy, requesting a meeting to discuss a treatment plan for the remainder of his probationary period.<sup>142</sup> Murphy voluntarily set up a meeting.<sup>143</sup> At the meeting, the officer told Murphy about the information received from the counselor.<sup>144</sup> Murphy admitted to the incriminating information but later sought its suppression under *Miranda*.<sup>145</sup> The Supreme Court held that Murphy was not in custody during the meeting with his probation officer and, therefore, not entitled to *Miranda* protections.

*Powers* is factually different from *Murphy* in several distinct ways. Powers did not voluntarily set up a meeting with his parole officers.<sup>146</sup> Instead, the officers showed up at Powers's door due to the neighbor's complaint.<sup>147</sup> In contrast, Murphy voluntarily set up the meeting with his parole officer and had control over when they would meet.<sup>148</sup> Custody has inherently coercive elements.<sup>149</sup> An individual's ability to control the interaction with law enforcement goes against a finding of coercion.<sup>150</sup> The voluntary and anticipated nature of Murphy's meeting suggests that Murphy would not feel restricted in his freedom.<sup>151</sup>

Because Murphy had control over the time of the meeting, the environment was inherently less coercive because there was no element of surprise.<sup>152</sup> On the other hand, Powers had no control over the interrogation given by his parole officers. Powers was ambushed in his home and forced

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139. *Murphy*, 465 U.S. at 423.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 424–25.

146. *State v. Powers*, 2016 Vt. 110, ¶¶ 54–55, 203 Vt. 388, 413, 157 A.3d 39, 56.

147. *Powers*, 2016 Vt. 110, ¶ 3.

148. *Murphy*, 465 U.S. at 423.

149. *See supra* Part I.B.

150. *See supra* Part I.B.

151. *See, e.g., Wong Sun v. United States*, 371 U.S. 471, 491 (1968) (holding that voluntary return to the police to make a statement after an interrogation, particularly several days later, makes the statement admissible).

152. *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 450–51, 457 (describing the conditions of inherently coercive settings where the police use surprise tactics, like unfamiliar surroundings, to coerce defendants into confession).

to stay in one place while answering questions.<sup>153</sup> Therefore, one factor supporting that Powers was in custody is that he had no control over the time of the meeting. This would cause a reasonable person to feel as though their freedom was restrained.

Further supporting the argument that Powers had his freedom restrained more than Murphy, the Court in *Murphy* specifically stated that Murphy was free to leave at any time during the interview.<sup>154</sup> In fact, Murphy left after his confession.<sup>155</sup> On the other hand, Powers was not free to leave.<sup>156</sup> Powers was immediately brought to the Department of Corrections officer for processing following the confession.<sup>157</sup> At trial, the parole officer informed the court that Powers would not have been allowed to leave the apartment if he had tried.<sup>158</sup> This directly speaks to the factor of whether the defendant was released at the end of the questioning.

The Vermont Supreme Court reinforces the importance of free will when deciding if a person is in custody.<sup>159</sup> In *State v. Muntean*, the Court noted that the disclosure to a defendant that they are free to leave is *significant* in determining whether a reasonable person would have felt at liberty to terminate the interview.<sup>160</sup> Powers was never told that he was free to leave, and he was not free to leave.<sup>161</sup> The absence of any disclosure to Powers that he was free to leave means that his freedom was restrained; therefore, he was in custody.

Seemingly ignoring its own advice in *Muntean*, the Vermont Supreme Court cited *Howes v. Fields* instead.<sup>162</sup> Despite being incarcerated at the time of questioning, Howes was not considered to be in custody for *Miranda* purposes.<sup>163</sup> The Vermont Supreme Court applied this logic to Powers's situation.<sup>164</sup> However, when describing *Howes*, the Vermont Supreme Court

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153. *State v. Powers*, 2016 Vt. 110, ¶ 3, 203 Vt. 388, 392, 157 A.3d 39, 41 (describing when the officers arrived at Powers's house following a tipoff and instructed Powers to sit on the couch).

154. *Minnesota v. Murphy*, 465 U.S. 420, 433 (1984).

155. *Id.*

156. *Powers*, 2016 Vt. 110, ¶ 5.

157. *Id.*

158. *Id.* ¶ 31.

159. *State v. Muntean*, 2010 Vt. 88, ¶ 25, 189 Vt. 50, 62, 12 A.3d 518, 526.

160. *Id.*

161. *Powers*, 2016 Vt. 110, ¶ 31.

162. See Sepehr Shahshahani, *When Hard Cases Make Bad Law: A Theory of How Case Facts Affect Judge-Made Law*, 110 CORNELL L. REV. 963, 1001 (2025) (noting that a technique judges use to circumvent precedent is to simply ignore inconvenient cases); *Powers*, 2016 VT 110, ¶ 10 (discussing *Howes*).

163. *Howes v. Fields*, 565 U.S. 499, 502 (2012) (rejecting the idea that an incarcerated person is always in custody for purposes of *Miranda*).

164. *Powers*, 2016 Vt. 110, ¶ 22 (arguing that just because Powers's liberty was restrained by his furlough status does not equate to being in custody for *Miranda* purposes).

conspicuously left out an important factor:<sup>165</sup> the defendant was repeatedly told he could leave at any time.<sup>166</sup> Despite the presence of *Muntean*'s significant factor—the knowledge by the person under interrogation that they are free to leave the interrogation—the Vermont Supreme Court carefully avoided that aspect when applying *Howes* to *Powers*. That is because *Powers* could not fit that determining factor. Unlike the defendant in *Howes*, *Powers* was never informed that he was free to leave.<sup>167</sup>

Taken as a whole, *Powers* had his freedom restrained. He was told to sit in one place—which is consistent with a finding that the defendant's freedom was restrained under *Miranda*. He was not allowed to leave following the confession. Indeed, the officers did not tell him he was free to leave at any point during the interview—the absence of such a statement was deemed significant in *Muntean* when determining whether a defendant felt at liberty to end questioning. There was no way for *Powers* to objectively feel he was not in custody. Therefore, *Powers* should have been given the protection of *Miranda*.

Despite clear evidence that *Powers* was in custody because his freedom was significantly restrained, the majority argued that *Powers* was not in custody because the parole officer's questions were open-ended.<sup>168</sup> This argument ignores logic and precedent. The Vermont Supreme Court stated in *Muntean* that, concerning whether a defendant was in police custody under *Miranda*, “a reasonable person understands that the police ordinarily will not set free a suspect when there is evidence strongly suggesting that the person is guilty of a serious crime.”<sup>169</sup> Relevantly, *Powers* only confessed to the violation following the return of the correctional officer from investigating the alleged violation.<sup>170</sup> *Powers* knew the officer had discovered evidence of his violation at this point.<sup>171</sup> Applying *Muntean*, *Powers* knew he was not going to be set free because the officers had discovered proof of the violation. This fact speaks to the argument that a reasonable person in *Powers*' position would have believed he was in custody when he knew the officers had caught him violating his conditional release.

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165. *Id.*

166. *Howes*, 565 U.S. at 503.

167. *Powers*, 2016 Vt. 110, ¶ 31.

168. *Id.* ¶ 29. The parole officer repeatedly berated *Powers*, asking him if he had anything to report, suggesting to *Powers* that they were aware he had done something wrong. *Id.* ¶ 4.

169. *State v. Muntean*, 2010 Vt. 88, ¶ 28, 189 Vt. 50, 64, 12 A.3d 518, 528 (quoting *State v. Pitts*, 936 So.2d 1111, 1128 (Fla. Dist. Ct. App. 2006)).

170. *Powers*, 2016 Vt. 110, ¶ 4.

171. *Id.*

The Vermont Supreme Court's star case of *Murphy* further supports the argument that the questions posed to Powers were not open-ended. In *Murphy*, the United States Supreme Court stated that:

A State may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution.<sup>172</sup>

*Murphy* made the distinction between routine conversations with parolees and their supervising officers and statements that, by their nature, require the parolee to incriminate themselves in a later criminal prosecution. This distinction has been made in other jurisdictions.<sup>173</sup> Applying this to *Powers*, the questions put to Powers required him to incriminate himself.<sup>174</sup> Powers's statements answering the officer's questions were incriminating and were used against him in a later criminal proceeding.<sup>175</sup> Therefore, the questions asked of Powers were not open-ended; they called for answers that would incriminate him. Powers was not subjected to a simple parole interview; it was a custodial interrogation. It resulted in incriminating statements later used in a criminal proceeding, violating the ruling in *Murphy* and Vermont's precedent.<sup>176</sup>

Overall, the Vermont Supreme Court did not choose cases with similar fact patterns in the issues that mattered when analyzing *Powers*. *Murphy* never experienced the same interrogative atmosphere. *Howes* turned out to be even more distant once the significance of the *Muntean* factor appeared in the fact pattern. Further, the Vermont Supreme Court failed to acknowledge case law clearly stating that incriminating statements made to parole officers

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172. *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984).

173. *Compare* *Commonwealth v. Cooley*, 118 A.3d 370, 379 (Pa. 2015) (noting that because the officers were investigating a new crime unrelated to the crimes for which the defendant was on parole, and subsequently charged the defendant with new crimes stemming from his confessions, this created the functional equivalent to a custodial investigation worthy of Miranda warnings), *with* *State v. Generoso*, 384 A.2d 189, 192 (N.J. Super. Ct. App. Div. 1978) (holding that a defendant's statements used in parole revocation hearings do not implicate the Fifth Amendment because revocation hearings are not a criminal proceeding), *and* *State v. Steinhour*, 158 Vt. 299, 300, 607 A.2d 888, 889 (1992) (holding that incriminating statements made to parole officers cannot be used in a criminal proceeding absent Fifth Amendment protections).

174. *Powers*, 2016 Vt. 110, ¶ 22. Powers only had two options: incriminate himself or lie to his supervising officer. *Id.*

175. *Id.* ¶ 6.

176. *Murphy*, 465 U.S. at 435; *Steinhour*, 158 Vt. at 300, 607 A.2d at 889.

cannot be used in later criminal proceedings. The case that truly acts as a good analog to Powers's situation is *Orozco v. Texas*.

## 2. *Orozco v. Texas* Contains the Appropriately Analogous Facts to Understand Powers's Effective Restraint During Interrogation

The case that should inform the decision of whether Powers felt that he could leave the interaction between him and his parole officer is *Orozco v. Texas*. In *Orozco*, police officers questioned the defendant in his home about his potential association with a murder that happened a few hours before the questioning.<sup>177</sup> The officers testified that Orozco was not allowed to leave even though they did not inform him of this.<sup>178</sup> The officers elicited a confession from Orozco without Mirandizing him.<sup>179</sup> The United States Supreme Court held that Orozco was in custody and should have been Mirandized.<sup>180</sup> Holding true to the ruling set out in *Miranda*, the Court reasoned that Orozco was in custody because he had been significantly deprived of his freedom of action when being questioned in his home.<sup>181</sup>

The factual analysis must match as closely as possible because the environment is essential to whether a person was in "custody" under *Miranda*.<sup>182</sup> The decision in *Orozco* should control the inquiry of whether Powers's freedom was restricted because it is factually similar. Like Orozco, Powers was questioned in his home.<sup>183</sup> The Court in *Powers* argued that being questioned in his home weighed against the finding that Powers was in custody.<sup>184</sup> However, this fails to apply the clear standard outlined in *Orozco*: a person cornered and questioned in their home is in custody because their freedom is significantly restrained.<sup>185</sup>

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177. *Orozco v. Texas*, 394 U.S. 324, 325 (1969).

178. *Id.* at 325–26.

179. *Id.*

180. *Id.* at 327.

181. *Id.* ("The *Miranda* opinion declared that the warnings were required when the person being interrogated was 'in custody at the station or otherwise deprived of his freedom of action in any significant way.'").

182. *See* *Howes v. Fields*, 565 U.S. 499, 509 (2012) (determining whether a defendant is in custody requires examining the environment in which they were being held).

183. *See* *Orozco*, 394 U.S. at 325 (noting that the defendant was questioned by the police in his bedroom); *State v. Powers*, 2016 Vt. 110, ¶¶ 3–4, 203 Vt. 388, 403, 157 A.3d 39, 49 (noting that the defendant was questioned by the police in his living room).

184. *Powers*, 2016 Vt. 110, ¶ 28.

185. *Orozco*, 394 U.S. at 326–27 (finding that when interrogating a suspect in his own bed the police have "'otherwise deprived [the defendant] . . . of his freedom . . . in [a] . . . significant way,'" despite being questioned in the familiar environment of his bedroom (quoting *Miranda v. Arizona*, 384 U.S. 436, 477 (1966))).

Further supporting the argument that *Orozco* controls is that the officers in both *Powers* and *Orozco* testified that the suspects were not allowed to leave. The Supreme Court in *Orozco* mentioned this as additional support that *Orozco*'s liberty was restrained and, therefore, that he was in custody. However, the Vermont Supreme Court dismissed this fact. The Vermont Supreme Court offered little explanation except that “[t]here is nothing in the record to suggest defendant knew the probation officer would not let him leave.”<sup>186</sup> This explanation ignores the reasoning in *Orozco* and subverts common sense. If, like in *Powers*, a parolee is required to sit on their couch while being monitored by a parole officer, who has authority over the parolee, a reasonable person would feel like they could not leave. Therefore, *Powers* had his freedom significantly restrained. This is consistent with *Orozco*. Thus, *Powers* was in custody and should have been Mirandized.

*B. Powers Was in Custody Because the Environment Was Inherently Coercive*

The second inquiry when assessing if a person is in custody is whether the environment presents the same “inherently coercive pressures as the type of station house questioning at issue in *Miranda*.”<sup>187</sup> In *Powers*, the Vermont Supreme Court stated that a person under state supervision knows that the parole officer is acting independently of the law and has no control over whether they are placed back in confinement.<sup>188</sup> This is blatantly wrong.

The United States Supreme Court has held that coercion is likely when there is an “appearance” that the interrogators control the defendant’s fate.<sup>189</sup> Further, the Court has acknowledged that defendants understand that their supervising officers serve the state.<sup>190</sup> Therefore, the officers have immense power regarding their community supervision status.<sup>191</sup> In *Powers*, coercion was present because the parole officer directly controlled *Powers*’s furlough status.

When parole officers question their parolee, there is inherent coercion because of the power imbalance.<sup>192</sup> The Michigan Supreme Court held that a

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186. *Powers*, 2016 Vt. 110, ¶ 31.

187. *Howes v. Fields*, 565 U.S. 499, 509 (2012).

188. *Powers*, 2016 Vt. 110, ¶ 21.

189. *Maryland v. Shatzer*, 559 U.S. 98, 98 (2010).

190. *Fare v. Michael C.*, 442 U.S. 707, 721 (1979).

191. *Id.*; *see, e.g.*, *People v. Elliott*, 833 N.W.2d 284, 297 (Mich. 2013); *State v. Gallagher*, 348 N.E.2d 336, 337–38 (1997) (arguing that the psychological pressure to comply with a parole officer’s interrogation can be greater than the pressure when interrogated by law enforcement because parole officers have the power to return a parolee to prison).

192. *Elliott*, 833 N.W.2d at 297 (“Such inherently compelling pressures exist in the relationship between a parolee and a parole officer.”) (internal quotation marks omitted).

parolee-parole officer relationship is unique in that it fosters heavy psychological pressures to answer questions by their supervision officers.<sup>193</sup> “As a parolee develops trust and begins to confide in a parole officer, the parole officer is more likely to elicit from the parolee incriminating statements that the parolee would likely not make to a police interrogator.”<sup>194</sup> The Michigan Court differentiated between the defendant’s parole officer and a random parole officer.<sup>195</sup> The Court held that the coercive relationship is present when the defendant has formed a bond with the supervising officer through frequent interactions.<sup>196</sup> The officer who questioned Powers in his home had an extensive relationship with Powers.<sup>197</sup> The officer had supervised Powers from 2009 to 2014.<sup>198</sup> During that time, the officer met with Powers twice a week.<sup>199</sup> Powers and his supervising officer had the time to establish a trusting relationship, resulting in inherently coercive pressures.

Therefore, when Powers was questioned by his parole officer, the environment was inherently coercive because of the unique power imbalance created between a parolee and their supervising officer. There was more than just the “appearance” that the officer controlled Powers’s fate. The officer controlled his fate and Powers knew it.

The Court in *Powers* attempted to bolster its holding that the defendant was not in custody by citing *Beckwith v. United States*.<sup>200</sup> Once again, the Court used a factually different case and applied it to Powers. In *Beckwith*, the United States Supreme Court held that an investigative interview in the defendant’s home was not a coercive atmosphere requiring Miranda warnings.<sup>201</sup> The Vermont Supreme Court failed to inform the reader of the full facts in *Beckwith*.<sup>202</sup> In *Beckwith*, Internal Revenue Agents came to the defendant’s door, politely asked him if they could talk with him, excused him to get dressed, and informed him of his Fifth Amendment rights.<sup>203</sup> The Court found that he was not in custody.<sup>204</sup> The Court reasoned that the situation in

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193. *Id.*

194. *Id.* at 297.

195. *Id.*

196. *See id.*

197. *State v. Powers*, 2016 Vt. 110, ¶ 2, 203 Vt. 388, 391, 157 A.3d 39, 41.

198. *Id.*

199. *Id.*

200. *Powers*, 2016 Vt. 110, ¶ 28 (arguing that because the defendant was questioned in his home, the environment was not inherently coercive).

201. *Beckwith v. United States*, 425 U.S. 341, 348 (1976).

202. *See Powers*, 2016 Vt. 110, ¶ 28 (limiting their discussion of the facts of *Beckwith* to “an investigative interview of a defendant in a home where he occasionally stayed . . . .”); Shahshahani, *supra* note 162, at 1004 (noting that a technique judges use to circumvent precedent is to “use[] legally colorable arguments to incrementally reverse or limit defendant-friendly laws”).

203. *Beckwith*, 425 U.S. at 342–43.

204. *Id.* at 344, 348.

*Beckwith* did not present the same coercive environment that *Miranda* aimed to protect against.<sup>205</sup> *Beckwith* was not restrained to one place during the questioning and was informed of his Fifth Amendment rights.<sup>206</sup> Considering these circumstances, the Court held that he was not in custody.<sup>207</sup>

The facts in *Beckwith* were starkly different from those in *Powers*. In *Powers*, the defendant was required to let the officers in, told to sit in one place, and was never informed of his Fifth Amendment rights. The nature of the relationship between the defendants and the investigators was also very different. Coercion is likely when there is an apparent power imbalance.<sup>208</sup> In *Beckwith*, the Internal Revenue Agents did not have direct supervisory control over the defendant. In contrast, the parole officer in *Powers* did. Therefore, the fact that the officers controlled *Powers*' fate distinguishes his situation from *Beckwith*. This supports the argument that *Powers* was in custody because the environment was inherently coercive. Thus, the Vermont Supreme Court incorrectly used *Beckwith*, hoping the reader will not check the substance of its generalized statements.<sup>209</sup>

The ruling in *Powers* fails to achieve the purported policy of fostering an atmosphere of trust and communication between a parole officer and their parolee. When deciding *Powers*, the Vermont Supreme Court painted a rosy picture of rehabilitation and reform. Rehabilitation, it argued, is fostered by the positive relationship between the parolee and their officer.<sup>210</sup> The Vermont Supreme Court failed to realize that its ruling in *Powers* only further pushes parolees into the arms of officers who are trained to—and believe in using—“trust and communication” to build rapport and coerce confessions with that trust.<sup>211</sup> This is a failure that assumes probation still functions the same way it did when it was first invented.<sup>212</sup> The Vermont Supreme Court then incorrectly stated that “[t]reating probation officers as law enforcement officers primarily motivated to secure convictions for crimes and required to give *Miranda* warnings to those they supervise erects a substantial barrier to the development of forthright, open communication between probation officers and those they supervise.”<sup>213</sup>

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205. *Id.* at 347.

206. *Id.* at 343.

207. *Id.* at 344.

208. *Maryland v. Shatzer*, 559 U.S. 98, 98 (2010).

209. Shahshahani, *supra* note 162, at 1004.

210. *State v. Powers*, 2016 Vt. 110, ¶ 37, 203 Vt. 388, 407, 157 A.3d 39, 52.

211. *Etienne & McAdams*, *supra* note 29.

212. *Compare* Labrecque, *supra* note 39, at 157 (noting that probation first started in the United States as a method of rehabilitation), *with* Jacobi et al., *supra* note 5, at 899 (noting that conditions of probation are now strictly enforced and can result in re-incarceration).

213. *Powers*, 2016 Vt. 110, ¶ 38.

The substantial barrier to open communication between a parolee and their officer already exists.<sup>214</sup> A parolee already understands that probation officers serve the state and will report any violations they see.<sup>215</sup> Ignoring this fact and stripping away the protection against self-incrimination only creates a chilling effect.<sup>216</sup> A chilling effect is a phenomenon where a person engages in self-censorship because they fear legal sanction.<sup>217</sup> Parolees will not want to talk openly with their supervising officers if the constant threat of self-incrimination is present.<sup>218</sup> At every stage of state interaction, parolees' rights are drastically diminished.<sup>219</sup> This can hardly leave room for the development of "open communication."

Additionally, to add to the hypocrisy, five years after *Powers*, the Vermont Supreme Court chastised the Department of Corrections (DOC) in *Davey v. Baker*.<sup>220</sup> The Vermont Supreme Court called the DOC's procedural actions for the furlough program "procedural mockery."<sup>221</sup> The Court further admitted that there was clear evidence in existing case law that the DOC had a history of "deficient procedural processes . . . [that do] little to instill confidence in that agency's application of its own rules."<sup>222</sup> Despite this scathing review of the DOC, the Vermont Supreme Court ruled in favor of the Department.<sup>223</sup> *Davey* stands as another example of the Vermont Supreme Court failing to protect its citizens while continuing to depart from federal precedent.<sup>224</sup> The Vermont Supreme Court ended the *Davey* decision

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214. *Fare v. Michael C.*, 442 U.S. 707, 721 (1979) (noting that defendants are aware that their probation officers serve the state and are required to report any violations); *Maryland v. Shatzer*, 559 U.S. 98, 98 (2010) (noting that when the interrogator "appears" to hold influence over the fate of the suspect, the environment is coercive).

215. *Shatzer*, 559 U.S. at 98.

216. Jonathon W. Penney, *Understanding Chilling Effects*, 106 MINN. L. REV. 1451, 1465 (2022).

217. *Id.*

218. *Id.*

219. Jacobi et al., *supra* note 5, at 974.

220. In *Davey*, the Vermont Supreme Court affirmed the dismissal of a habeas corpus appeal. *Davey v. Baker*, 2021 Vt. 94, ¶ 22, 216 Vt. 153, 161 274 A.3d 817, 823.

The petitioner's furlough status was revoked by the DOC because the DOC claimed he violated his conditions. *Id.* ¶ 5. The DOC had attempted to contact him by calling him twice when he was not home. *Id.* ¶ 4. Because Davey failed to answer a simple phone call, the DOC charged the petitioner with escape-from-furlough violation but made no other attempts at locating him. *Id.* Davey was eventually arrested. *Id.* ¶ 5. A hearing was scheduled, but Davey received no communication from the DOC about it. *Id.* ¶ 8. Six months later, after multiple scheduled hearings were canceled without the DOC communicating with Davey about his case, a hearing finally occurred. *Id.* ¶ 9. The Court held that "[w]hile we agree that DOC's procedural errors raise legitimate concerns, petitioner did not avail himself of an appropriate alternative avenue to challenge DOC's decision regarding his furlough status." *Id.* ¶ 1.

221. *Id.* ¶ 22.

222. *Id.*

223. *Id.*

224. Sabourin, *supra* note 92, at 1183.

stating that “DOC must do better for the persons subject to the rules it alone promulgates and administers.”<sup>225</sup> With a clear public policy advocating for trust and communication and clear deficiencies in the DOC procedures, the Court closed the *Powers* opinion with a cry for help, but no solution. Until now.

### III. THE SOLUTION: A RESTORATIVE CIRCLE FOR PAROLE VIOLATIONS

To foster an atmosphere of trust and communication, restorative practices should be implemented following a potential supervised release violation. Research shows that a parolee’s positive relationship with their supervising officer greatly determines parole success.<sup>226</sup> Positive relationships will not be cultivated through the current punitive parole violation system.

Internationally, restorative justice is being used to update community release programs. In Australia, programs that focused on rehabilitation instead of punishment following a parole violation showed reduced recidivism.<sup>227</sup> The Compliance Management or Incarceration in the Territory program (COMMIT) in Australia is an example of a restorative solution to parole violations.<sup>228</sup> The COMMIT program integrates restorative practices to address parole violations in many ways.<sup>229</sup> Firstly, the COMMIT program ensures procedural justice through open communication with the parolee about what their sanctions could be.<sup>230</sup> This is done through a “sanctions matrix” which lays out pre-determined sanctions for certain violations.<sup>231</sup> This promotes fairness and transparency within the system.<sup>232</sup> Secondly, parolees are supported by their officers to engage in therapeutic resources.<sup>233</sup> By focusing on fairness and rehabilitation, restorative models like the COMMIT program offer promising alternatives to the current punitive parole system.<sup>234</sup>

Another example of a successful restorative supervised release program is the *Turn Around Project*. The Turn Around Project is a grassroots

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225. *Id.*

226. Brain DeLude et al., *The Probationer’s Perspective on the Probation Officer-Probationer Relationship and Satisfaction with Probation*, 76 FED. PROB. 35 (2012).

227. Max Henshaw et al., *To Commit Is Just the Beginning: Applying Therapeutic Jurisprudence to Reform Parole in Australia*, 42 U.N.S.W. L.J. 1411, 1423 (2019).

228. *Id.* at 1426.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 1432.

233. *Id.* at 1433.

234. *Id.* at 1437.

organization in Belfast, Northern Ireland.<sup>235</sup> Turn Around aims to provide community-based services to those in the justice system.<sup>236</sup> The organization works to provide employment opportunities and educational resources to formerly incarcerated people.<sup>237</sup> Additionally, they prioritize community understanding and outreach.<sup>238</sup> Turn Around's mission is "to find new solutions to old challenges."<sup>239</sup> Turn Around works to support people transitioning out of the justice system while encouraging wider community engagement.<sup>240</sup> The Turn Around Project has been very successful, providing transitional employment opportunities to over 250 people in its first ten years.<sup>241</sup>

Furthermore, Turn Around is working toward being recognized as an "innovative provider of strength-based personal development opportunities that are trauma, gender and neurodiversity-informed."<sup>242</sup> The Turn Around Project's community-based response when integrating formerly incarcerated individuals back into society is another international example of a restorative alternative to the punitive justice system.

Non-punitive alternatives to parole violations are successful.<sup>243</sup> Taking inspiration from international programs, a formal restorative circle should be the default method of handling a parole or furlough violation to maintain and foster a positive relationship.<sup>244</sup> This can be done through the legislature.

To ensure that restorative circles are used to address parole violations, the Vermont legislature should amend 28 V.S.A. § 552.<sup>245</sup> This statute outlines the current procedures for parole violations.<sup>246</sup> According to current legislation, Vermont should employ restorative alternatives "whenever feasible" in response to crimes.<sup>247</sup> Therefore, amending 28 V.S.A. § 552 would be consistent with the legislature's intent to incorporate restorative justice methods into crime response.<sup>248</sup> Currently, following a suspected violation, a parolee is detained.<sup>249</sup> Then, the parolee is brought before the

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235. THE TURNAROUND PROJECT, STRATEGIC PLAN 2025–2028, at 2, 10 (n.d.).

236. *Id.* at 2.

237. *Id.*

238. *Id.* at 9

239. *Id.* at 2

240. *Id.*

241. *Id.*

242. *Id.* at 4.

243. THE TURNAROUND PROJECT, *supra* note 235, at 4.

244. ZEHR, *supra* note 81, at 64.

245. VT. STAT. ANN. tit. 28, § 552 (2025).

246. *Id.*

247. VT. STAT. ANN. tit. 28, § 2a(b) (2025).

248. *Id.*

249. VT. STAT. ANN. tit. 28, § 551(c) (2025).

Parole Board in a formal legal hearing.<sup>250</sup> If the suspected violation is established by substantial evidence, the Board has discretion to revoke parole or enter any alternative sanction that it deems necessary.<sup>251</sup> This process provides limited opportunity for open communication and transparency between the parolee and their officers. This is because it follows an adversarial model, creating a chilling effect.<sup>252</sup>

To improve open communication and transparency, 28 V.S.A. § 552 should be amended to include a restorative circle. The proposed amendment follows:

§ 552. Notification of Board; hearing

(a) Upon the arrest and detention of a parolee, the parole officer shall notify the Board immediately and shall submit in writing a report describing the alleged violation of a condition or conditions of the inmate's parole.

(b) As a first resort, when a person is alleged to have violated the terms of their conditional release or post-release supervision, they shall, upon their consent to the process, be brought before a restorative circle to resolve the alleged violation. The restorative circle shall comprise the Board, the supervising parole officers, a restorative practitioner, and the responsible party. Any statements said during the circle shall be kept confidential and shall not be used against the parolee during subsequent hearings, trials, or other adversarial proceedings.

(c) Following the restorative circle, if the person on conditional release violates the terms of their conditions again, the Board, at its discretion, may conduct a formal hearing or another restorative circle. At formal hearings of the Parole Board, parole officers may be represented by legal counsel, who shall be provided by the appropriate State's Attorney or the Attorney General upon request.

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250. VT. STAT. ANN. tit. 28, § 552(b) (2025).

251. VT. STAT. ANN. tit. 28, § 552(b)(2) (2025).

252. Penney, *supra* note 216, at 1465 (emphasizing that parolees fearing sanctions would be less inclined to discuss their struggles with parole conformity because their statements could further implicate them).

(1) The formal hearing shall be conducted in accordance with such rules and regulations as the Board may adopt.

(2) If the alleged violation is established by substantial evidence, the Board may continue or revoke the parole, or enter such other order as it determines to be necessary or desirable.

(d) In the event of the withdrawal of any warrant by the authority of the Board, or in the event that the Board at the hearing, or during the restorative circle on the alleged violation, finds that the parolee did not violate any condition of his or her parole, or the law, the parolee shall be credited with any time lost by the interruption of the running of his or her sentence.

A restorative circle should be defined in 28 V.S.A § 402 as “a rehabilitative and structured group discussion about the conflict or issue brought before the Board that aims to understand the experiences of those involved, find solutions, and address the needs of the individuals involved.” This definition aims to tailor the circle to the parolee’s needs and the Board’s purpose.

Courts should interpret the amended statute liberally because of its remedial nature.<sup>253</sup> Remedial statutes aim to provide redress for an existing problem and promote public good.<sup>254</sup> The proposed amendment aims to address many issues with the current adversarial parole system. These issues include a lack of transparency, harsh penalties for technical violations, and the chilling effect.<sup>255</sup>

The proposed amendment would foster an atmosphere of trust and communication. The Court in *Powers* discussed the importance of trust and communication between a parolee and their officer.<sup>256</sup> Through a non-punitive alternative to formal parole hearings, trust and communication would increase because parolees would no longer fear legal repercussions if they speak truthfully about the situation.<sup>257</sup> A restorative circle would replace the adversarial process. If given a safe space to do so, people on supervised

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253. *Wood v. Wallin*, 2024 Vt. 21, ¶9, 219 Vt. 164, 168, 316 A.3d 266, 270; Rudolph H. Heimanson, *Remedial Legislation*, 46 MARQ. L. REV. 216, 221 (1962).

254. Heimanson, *supra* note 253, at 217.

255. Miller, *supra* note 57; Penney, *supra* note 216, at 1465.

256. *State v. Powers*, 2016 Vt. 110, ¶ 37, 203 Vt. 388, 407, 157 A.3d 39, 52.

257. Penney, *supra* note 216, at 1466 (discussing how people undergo a cost-benefit analysis before speaking and self-censor what they say based on a perceived fear of legal sanctions).

release would feel more comfortable expressing their struggles with conformity.<sup>258</sup>

To promote open communication, the proposed language mandates that statements made during the circle must be kept confidential. Any statements made during the circle are not allowed to be used against the parolee in future hearings or cases, thus reducing the chilling effect.<sup>259</sup> The power imbalance and fear of legal harm is removed,<sup>260</sup> thereby encouraging honest communication.

Restorative programs have been found to reduce recidivism.<sup>261</sup> Implementing a restorative circle would reduce the number of parolees who recidivate. If suspected violations are first funneled through a rigorous circle process that encourages accountability and rehabilitation, the Board would be less likely to order formal sanctions. Fewer formal sanctions would result in fewer people going back to prison because of parole violations. Overall, this amendment would drastically improve the current Vermont parole system.

The current parole system in Vermont is archaic. It fails to foster an atmosphere of trust and communication. The opportunity for change is ripe. Vermont's legislature recently overruled Governor Phil Scott's veto and passed an expansive restorative justice bill.<sup>262</sup> The restorative justice bill purports to ensure Vermont citizens have equitable access to restorative justice programs across the state.<sup>263</sup> However, Vermont's parole programs have not changed. In 2019, the Prison Policy Initiative gave Vermont a low grade of D+ for its parole system.<sup>264</sup> Amending 28 V.S.A. § 552 to include a restorative circle following a violation of a supervised release condition would promote the public policy of trust and communication articulated by

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258. Barb Toews & Jackie Katounas, *Have Offender Needs and Perspectives Been Adequately Incorporated into Restorative Justice*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 107, 109 (Howard Zehr ed., 2004).

259. Penney, *supra* note 216, at 1465 (requiring that any statements made during the circle will be kept confidential, thus removing the worry that what a person confesses to or says can be used against them in later proceedings).

260. *Id.*

261. See James Bonta et al., *An Outcome Evaluation of a Restorative Justice Alternative to Incarceration*, 5 CONTEMP. JUST. REV. 319, 329 (2002); Jeff Latimer, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 PRISON J. 127, 137 (finding restorative justice programs, on average, reduce recidivism compared to nonrestorative practices).

262. Shaun Robinson & Sarah Mearhoff, *Vermont Legislature Overrides Six Vetoes in One Day, Setting New Record*, VTDIGGER (June 17, 2024), <https://vtdigger.org/2024/06/17/vermont-legislature-overrides-six-vetoes-in-one-day-setting-new-record/>.

263. *Id.*

264. Jorge Renaud, *Grading the Parole Release Systems of All 50 States*, PRISON POL'Y INITIATIVE (Feb. 26, 2019), [https://www.prisonpolicy.org/reports/grading\\_parole.html](https://www.prisonpolicy.org/reports/grading_parole.html).

the judiciary. Additionally, it would fall perfectly within the Vermont legislature's goals of expanding access to restorative solutions.

#### CONCLUSION

The Vermont Supreme Court's ruling in *State v. Powers* weakened the rights of those on supervised release by making generalized statements and focusing on inapposite case comparisons. The Vermont Court incorrectly concluded that people on supervised release are not afforded the constitutional right against self-incrimination in circumstances of alleged supervised release violations.

When addressing Miranda issues, courts should be careful to protect the purpose of Miranda rights: to prevent self-incrimination and maintain the integrity of the justice system. The Vermont Supreme Court's decision in *Powers* works against these goals by weakening the rights of people on supervised release while giving parole officers unfettered power.<sup>265</sup> This travesty should not be ignored.

To address this problem, this article offers the solution of amending 28 V.S.A. § 552. The proposed amendment replaces the current punitive system with a restorative circle process following a suspected violation of a person's conditional release. Implementing a restorative circle would encourage offender accountability and rehabilitation. This would foster the atmosphere of trust and communication the Vermont Supreme Court discussed in *Powers*.

Protection against self-incrimination is enshrined in the Constitution.<sup>266</sup> Efforts to undermine this protection must be closely scrutinized. Miranda rights were created in recognition that encroachment on individual liberties gains footing from subtle procedural deviations.<sup>267</sup> The ruling in *Powers* is an example of such deviations. Miranda rights were created to protect the people; “[w]e cannot depart from this noble heritage.”<sup>268</sup>

—Lea Riell\*

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265. *State v. Powers*, 2016 Vt. 110, ¶40, 203 Vt. 388, 408, 157 A.3d 39, 52 (holding that statements made to a parole officer were not entitled to Miranda protections).

266. U.S. CONST. amend. V.

267. *See Miranda v. Arizona*, 384 U.S. 436, 459–60 (1966) (describing how we cannot prioritize confessions, thereby deviating from procedural safeguards, over fairness and justice).

268. *Id.*

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