Southwestern Journal of International Law

Volume XXXI 2025 Number 2

Southwestern Law School

Published Two Times Annually by the Students of
Southwestern Law School
3050 Wilshire Boulevard
Los Angeles, CA 90010-1106
(213) 738-6857
lawjournal@swlaw.edu

Subscription Rates Commencing Volume Thirty-One

$34.00 per year (domestic)
$38.00 per year (foreign)
Single Copies: $17.00 (plus $5.00 for foreign mailing)

The Southwestern Journal of International Law publishes scholarly articles and notes contributed by members of the legal community and students that it deems worthy of publication. Views expressed in material appearing herein are those of the authors and do not necessarily reflect the policies or opinions of the Law Journal, its editors and staff, or Southwestern Law School.

Manuscripts should be sent to the Editor-in-Chief, Southwestern Journal of International Law, 3050 Wilshire Boulevard, Los Angeles, California 90010.

Address all correspondence regarding subscriptions to the Managing Editor, Southwestern Journal of International Law, 3050 Wilshire Boulevard, Los Angeles, California 90010.

Send changes of address to the Managing Editor, Southwestern Journal of International Law, 3050 Wilshire Boulevard, Los Angeles, California 90010, at least 45 days before the date of the issue for which the change is to take effect. If a notice of termination is not received by the Managing Editor before the expiration of a subscription, the subscription will be automatically renewed. Unless a claim is made for non-receipt of an issue within six months after the mailing date, that issue will not be supplied free of charge. The Post Office will not forward copies unless the subscriber has provided extra postage. Duplicate copies will not be sent.

Southwestern Law School has served the public since 1911 as a non-profit, nonsectarian educational institution. Southwestern Law School is approved by the American Bar Association and is a member of the Association of American Law Schools. Southwestern Law School does not discriminate on the basis of race, sex, age, religion, national or ethnic origin, sexual orientation, handicap, or disability in connection with admission to the school, or in the administration of any of its educational, employment, financial aid, scholarship, or student activity programs. Nondiscrimination has been the policy of Southwestern Law School since its founding and it is reaffirmed here in compliance with federal regulations.

SOUTHWESTERN JOURNAL OF INTERNATIONAL LAW

VOLUME XXXI 2025 NUMBER 2

TABLE OF CONTENTS

SOUTHWESTERN JOURNAL OF INTERNATIONAL LAW

VOLUME XXXI 2025 NUMBER 2

SOUTHWESTERN LAW SCHOOL
2024-2025

BOARD OF TRUSTEES

J. BERNARD ALEXANDER
HAROUT DIMIJIAN (TERM BEGAN DEC. 2024)
CHRISTIAN DOWELL
THOMAS L. DRISCOLL
PETER DUCHESNEAU
ANDREW FIGUERAS (TERM BEGAN DEC. 2024)
MATTHEW FRENCH (TERM ENDED DEC. 2024)
JOHN M. GERRO
ROBERT GLASSMAN
KEN GORVETZIAN
JAHMY S. GRAHAM
NYREE GRAY
HON. J. GARY HASTINGS
THOMAS H. HOBERMAN
DANA HOLLINGER (TERM ENDED SEP. 2024)
JINNA KANG
BETTY P. KELEPECZ
DANIEL KRAMMER (TERM ENDED DEC. 2024)
LAUREN B. LEICHTMAN
MARIA MEHRANIAN
SANFORD MICHELMAN (TERM BEGAN DEC. 2024)
JOE NUÑEZ (TERM BEGAN DEC. 2024)
STEPHANIE PEATMAN
DOUGLAS PRAW
CHERIE S. RAIDY
HARRIET ROLNICK (TERM BEGAN DEC. 2024)
ANDREW ROSEN
MEE H. SEMCKEN
LYNDA SHERIDAN (TERM BEGAN DEC. 2024)
HEIDY VAQUERANO (TERM ENDED SEP. 2024)
GEORGE WOOLVERTON
WALTER M. YOKA
DENNIS P.R. CODON, *Trustee Emeritus*
SHELDON A. GEBB, *Trustee Emeritus*
BRIAN A. SUN, *Trustee Emeritus*

ADMINISTRATION

DARBY DICKERSON, B.A., M.A., J.D., *President and Dean*
ANAHID GHARAKHANIAN, B.A., J.D., *Vice Dean*
JULIE K. WATERSTONE, B.A., J.D., *Vice Dean for Experiential Education and External Engagement*
LUKE BOSO, B.A., J.D., LL.M., *Co-Associate Dean for Research*
ZACHARY BRUNING, B.A., M.A., *Assistant Dean, Student Services*
MARCIE CANAL, B.A., *Chief Operating Officer*
MARISELA CERVANTES, B.A., MPA, Ed.D., *Chief of Staff and Assistant Corporate Secretary*
LISA M. GEAR, B.A., *Associate Dean for Admissions*
JORDAN HALL, *Associate Dean, Student Services*
MARGARET HALL, B.A., M.L.I.S., J.D., *Associate Dean and Law Library Director and Associate Professor of Law*
STEVEN LOPEZ, B.A., *Chief Communication and Marketing Officer*
NYDIA JOHNSON, B.A., J.D., *Associate Dean, Academic Success and DEI Initiatives*
CRISTINA C. KNOLTON, B.A., J.D., *Associate Dean for SCALE®*
DEBRA L. LEATHERS, B.A., *Associate Dean for Institutional Advancement*
AMY MCLELLAN, B.A., J.D., LL.M., *Associate Dean for Online Education*
ROBERT MENA, B.A., M.S., Ed.D, *Associate Dean for Student Affairs*
SEAN MURPHY, MCCES, *Chief Information Officer*
JEFFREY POLTORAK, *Vice President for Institutional Advancement*
LAURA PONDER, B.A., MBA., *Chief Financial Officer*
ORLY RAVID, B.A., J.D., *Associate Dean, Biederman Entertainment and Media Law Institute*
NATALIE RODRIGUEZ, B.A., J.D., *Associate Dean for Academic Innovation and Administration*
CHANTÉ SPANN, B.A., J.D., *Assistant Dean, Online Education*
BYRON G. STIER, B.A., J.D., LL.M., *Associate Dean for Strategic Initiatives*
OSCAR TERAN, B.A., J.D., *Associate Dean for Career Services*
TRACY L. TURNER, B.A., J.D., *Associate Dean for Learning Outcomes*
RACHEL E. VANLANDINGHAM, B.A., M.P.M., J.D., LL.M, *Co-Associate Dean for Research*

JULIE K. XANDERS, B.A., J.D., *General Counsel and Corporate Secretary*
EILEEN ZWIERS, *Registrar*

FULL-TIME FACULTY

RONALD G. ARONOVSKY, A.B., J.D., *Professor of Law*
JESSICA BARCLAY-STROBEL, B.A., J.D., *Visiting Associate Professor of Law for Academic Success and Bar Preparation*
LUKE BOSO, B.A., J.D., LL.M., *Co-Associate Dean for Research and Professor of Law*
MELISSA BRANDMAN, B.A., J.D., *Visiting Associate Professor of Legal Analysis, Writing, and Skills*
JAMES BRITT, B.A., M.S., J.D., *Head of Public Services Librarian*
BETH CALDWELL, B.A., M.S.W., J.D., *Professor of Law and Director of Criminal Law and Advocacy Concentration*
CHRISTOPHER DAVID RUIZ CAMERON, B.A., J.D., *Justice Marshall F. McComb Professor of Law and Director of Labor and Employment Law Concentration*
MARK CAMMACK, B.A., J.D., *Professor of Law*
KATHRYN CAMPBELL, B.A., J.D., *Professor of Legal Analysis, Writing, and Skills*
JAMES CURTIS, B.A., J.D., *Visting Professor of Law*
BRIDGETTE M. DE GYARFAS, B.S., J.D., *Professor of Legal Analysis, Writing, and Skills, Director of the Legal Analysis, Writing, and Skills, and Director of Southwestern's Evening Hybrid Program*
MEERA E. DEO, B.A., J.D., Ph.D., *The Honorable Vaino Spencer Chair and Professor of Law*
DARBY DICKERSON, B.A., M.A., J.D., *President, Dean and Professor of Law*
ALEXANDRA D'ITALIA, B.A., J.D., M.P.W., *Associate Professor of Law, Director of Writing Center and Co-Director of the Moot Court Honors Program*
MICHAEL M. EPSTEIN, B.A., M.A., J.D., Ph.D., *Professor of Law, Director of Entertainment and Media Law Concentration, and Supervising Editor of the Journal of International Media and Entertainment Law*
JOSEPH P. ESPOSITO, B.S., J.D., *Professor of Law and Co-Director of the Trial Advocacy Honors Program*
JAMES M. FISCHER, J.D., *Professor of Law*
ANDREA FREEMAN, B.A., J.D., *Second Century Chair and Professor of Law*
ANAHID GHARAKHANIAN, B.A., J.D., *Vice Dean, Professor of Legal Analysis, Writing, and Skills and Co-Director of the Externship Program*
KARIN GRAVER, B.A., J.D., *Professor of Legal Analysis, Writing, and Skills*
KEVIN J. GREENE, B.A., J.D., *John J. Schumacher Chair and Professor of Law*
WARREN S. GRIMES, B.A., J.D., *Irving D. and Florence Rosenberg Professor of Law*
ISABELLE R. GUNNING, B.A., J.D., *Mayor Tom Bradley Professor of Law and Director of Critical Race, Gender and Sexuality Studies Concentration*
JEFFREY HAAS, B.S., J.D., *Distinguished Visiting Professor of Law*
MARGARET HALL, B.A., M.L.I.S., J.D., *Associate Dean and Law Library Director and Associate Professor of Law*
DANIELLE KIE HART, B.A., J.D., LL.M., *The Honorable Arleigh M. Woods, and William T. Woods Chair and Professor of Law*
JOHN HEILMAN, B.S., J.D., M.P.A., M.R.E.D., *Professor of Law*
ROMAN J. HOYOS, A.B., J.D., M.A., Ph.D., *Professor of Law*
COLLIN HU, B.A., J.D., *Associate Professor of Law for Academic Success and Bar Preparation and Associate Director of Dean's Fellow Program*
JODI JEWELL, B.A., J.D., *Professor of Legal Analysis, Writing, and Skills*
NYDIA L. JOHNSON, B.A., J.D., *Associate Dean, Academic Success and DEI Initiatives and Associate Professor of Law*
RICHARD JOLLY, B.A., M.Sc., J.D., *Associate Professor of Law*
HILA KEREN, LL.B., Ph.D., *Paul E. Treusch Professor of Law*
JOERG W. KNIPPRATH, B.A., J.D., *Professor of Law*
CRISTINA C. KNOLTON, B.A., J.D., *Associate Dean for SCALE® and Professor of Legal Analysis, Writing, and Skills,*
FAISAL KUTTY, J.D., LL.M., Ph.D., *Professor of Legal Analysis, Writing, and Skills*
CHRISTINE L. LOFGREN, B.A., J.D., *Professor of Legal Analysis, Writing, and Skills and Director of Technology Law & Entrepreneurship Concentration*

AMY MCLELLAN, B.A., J.D., LL.M., *Associate Dean for Online Education and Associate Professor of Law*
DAVID MCFADDEN, B.A., M.S.L.S., *Senior Reference Librarian*
MARISA MASTERS, B.A., J.D., *Reference Librarian*
JONATHAN M. MILLER, B.A., J.D., *Professor of Law*
DINAH MINKOFF, B.A., M.S.L.S., J.D., *Head of Collection Services Librarian*
JANET NALBANDYAN, B.A., J.D., *Associate Professor of Law and Co-Director of the Externship Program*
JYOTI NANDA, B.A., J.D., *Professor of Law*
JANET PHILIBOSIAN, B.A., M.A., J.D., *Associate Professor of Law for Academic Success and Bar Preparation*
ANDREA RAMOS, B.A., J.D., *Clinical Professor of Law, Director of Clinical Programs, and Director of the Immigration Law Clinic*
ORLY RAVID, B.A., J.D, *Associate Dean, Biederman Entertainment, Media, and Sports Law Institute, and Associate Professor of Law*
CHRISTOPHER J. ROBINETTE, B.A., J.D., LL.M., *Professor of Law*
NATALIE RODRIGUEZ, B.A., J.D., *Associate Dean for Academic Innovation and Administration and Associate Professor of Law*
JENNY RODRIGUEZ- FEE, B.A., J.D., *Clinical Professor of Law, Director of the Children's Rights Clinic, Co-Director of the Moot Court Honors Program, and Faculty Advisor for the PLEAS/Part-Time Day Programs*
LOUIS ROSEN, B.A., M.A., J.D., *Online Reference Librarian*
SARAH SCHIMMEL, B.A., J.D., *Associate Professor of Law for Academic Success and Bar Preparation, Co-Director of the Negotiation Honors Program, and Associate Director of Bison Bar Pass Program*
BILL H. SEKI, B.A., J.D., *Professor of Law and Co-Director of the Trial Advocacy Honors Program*
IRA L. SHAFIROFF, B.A., J.D., *Professor of Law*
JUDY BECKNER SLOAN, B.A., J.D., *Professor of Law*
BYRON G. STIER, B.A., J.D., LL.M., *Associate Dean for Strategic Initiative, Professor of Law, and Director of Civil Litigation and Advocacy Concentration*
N. KEMBA TAYLOR, B.A., J.D., *Professor of Legal Analysis, Writing, and Skills*
JOHN TEHRANIAN, A.B., J.D., *Paul W. Wildman Chair and Professor of Law*
DELLA THOMPSON-BELL, B.A., J.D., *Professor of Legal Analysis, Writing, and Skills*
TRACY L. TURNER, B.A., J.D., *Associate Dean for Learning Outcomes and Professor of Legal Analysis, Writing, and Skills*
RACHEL E. VANLANDINGHAM, B.A., M.P.M., J.D., LL.M, *Co-Associate Dean for Research and Irwin R. Buchalter Professor of Law*
JULIA VAZQUEZ, B.A., M.A., J.D., *Clinical Professor of Law, Director of Community Lawyering Clinic, and Director of Public Interest Law Concentration*
DOV A. WAISMAN, A.B., M.S., J.D., *Professor of Law*
JULIE K. WATERSTONE, B.A., J.D., *Vice Dean for Experiential Education and External Engagement and Clinical Professor of Law*
WILLIAM WOOD, B.A., M.A., M.S.E.L., M.P.P., J.D., *Professor of Law*
BRYCE WOOLLEY, B.A., J.D., *Associate Professor of Law for Academic Success and Bar Preparation*
PANTEA YASHAR, B.A., J.D., *Associate Professor of Legal Analysis, Writing, and Skills*
DENNIS T. YOKOYAMA, B.A., M.S., J.D., *Professor of Law*

EMERITI FACULTY

DEBRA LYN BASSETT, B.A., M.S., J.D, *John J. Schumacher Chair Emerita*
PAUL A. BATEMAN, B.A., M.A., Ph.D., *Professor of Legal Analysis, Writing, and Skills Emeritus*
MICHAEL J. BERGER, B.A., M.A., J.D., *Associate Professor of Law Emeritus*
CATHERINE L. CARPENTER, B.A., J.D., *The Honorable Arleigh M. Woods, and William T. Woods Chair, Emerita and Professor of Law*
CRAIG CHRISTENSEN, B.S., J.D., *Professor of Law Emeritus*
MICHAEL B. DORFF, A.B., J.D., *Professor of Law Emeritus*
MICHAEL H. FROST, B.A., M.A., Ph.D., *Professor of Legal Analysis, Writing, and Skills Emeritus*
NORMAN M. GARLAND, B.S., B.A., J.D., LL.M., *Second Century Chair in Law and Professor of Law Emeritus*
BRYANT G. GARTH, B.A., J.D., Ph.D., *Dean Emeritus*

JAY W. GENDRON, B.A., J.D., *Associate Professor of Law Emeritus*
HERBERT T. KRIMMEL, B.S., M.Acc., J.D., *Professor of Law Emeritus*
JAMES A. KUSHNER, *B.B.A., J.D., Professor of Law Emeritus*
ROBERT C. LIND, B.E.S., J.D., LL.M., *Paul E. Treusch Professor of Law Emeritus*
CHRISTINE METTEER LORILLARD, B.A., M.A., Ph.D., *Professor of Legal Analysis, Writing, and Skills Emerita*
ROBERT E. LUTZ, B.A., J.D., *Paul E. Treusch Professor of Law Emeritus*
SUSAN J. MARTIN, B.A., J.D., *Professor of Law Emerita*
ROBERT POPOVICH, B.S., MBT, J.D., *Professor of Law Emeritus*
SUSAN WESTERBERG PRAGER, A.B., M.A., J.D., *Dean Emerita and Professor of Law Emerita*
ROBERT A. PUGSLEY, B.A., J.D., LL.M., *Professor of Law Emeritus*
HARRIET M. ROLNICK, B.A., J.D., *Associate Dean for SCALE® Emerita*
KATHERINE C. SHEEHAN, B.A., M.A., J.D., *Professor of Law Emerita*
J. KELLY STRADER, B.A., M.I.A., J.D., *Irwin R. Buchalter Professor of Law Emeritus*
LEIGH H. TAYLOR, B.A., J.D., LL.M., *Dean Emeritus and Professor of Law Emeritus*
LINDA A. WHISMAN, B.A., M.L.S., J.D., *Associate Dean for Library Services and Professor of Law Emerita*

ADJUNCT FACULTY

RYAN ABELMAN
RAHUL AGRAWAL
MICHAEL ASHJIAN
ANNA ARAN
DE'ANDRE AUBRY
ARMAN AVAGYAN
LINCOLN BANDLOW
VANESSA BARNETT
JOHN BEGAKIS
DAVID BELL
NICHOLAS BOND
MICHAEL BORENSTEIN
SAMANTHA BORGHI
HON. KELLY BOYER
ABRAHAM BRAN
MACKENZIE BROWN
VICTORIA BURKE
LORENZON CALLENDER
ROBYN LEE CHEW
SUSAN CLEARY
LEAH COHEN-MAYS
CAROL CONTES
HON. ANNABELLE CORTEZ
HON. PHILIP COSTA
LINDA DAKIN-GRIMM
HON. ANGELA DAVIS
NANNETTE DIACOVO
HAROUT DIMIJIAN
ADAM DOMBCHIK
LAKESHIA DORSEY
MITCHELL FEDERER
TESS FELDMAN
GARY P. FINE
KELSEY FINN
REBECCA FISCHER
SHAUGHNESSY FLINT
RICARDO GARCIA
SIMON GARDINER
ALICE J. GARFIELD
CRAIG GELFOUND
CHRISTOPHER GHAZARIAN
ROBERT GLASSMAN
KARINA GODOY
ADAM GRANT
MEHRNAZ HADIAN
NAZGOLE HASHEMI
RHONDA HAYMON
DAVID HELFANT
HOWARD JACOBS
ERICA JANSSON
VERONICA JEFFERS
ALLAN JOHNSON
DOUGLAS JOHNSON
NEVILLE JOHNSON
SCOTT JOHNSON
RONNELL A. JONES
JULI JORDAN
HON. MARK A. JUHAS
JARED JUSSIM
ROBERT KAYNE
ANDREW KNAPP
DANIEL KRAMER
MIN-JAE LEE
DANIEL LIFSCHITZ
KATHY M. LOMBARD
VINCENT LOOK
HENRY LYDIATE
APRIL MACARAEG
JONATHAN MARCUS
KYLE MARKS
RICHARD D. MARKS
HON. DARRELL S. MAVIS
TIMOTHY B. MCCAFFREY, JR.
MICHAEL MORSE
NEGIN MOSTADIM
ANASHEH NALBANDIAN
KARA O'BRIEN
TIGRAN PALYAN
MICHAEL PETERS
TISH PICKETT
STEPHEN PIDCOCK
KATHRYN PODSIADLO
PERRY POUSSARD
ROMY RAHMANIAN
JUAN A. RAMOS
EMILY REHM
JACQUELYN ROGERS
GEORGE RUIZ
ANASTASIA SAGORSKY
CARLY SANCHEZ
MATTHEW SEROR
VANESSA SHAKIB
JEFFREY SHANE
JAY J. SHIN
ZEPUR SIMONIAN
ALYSSA SKOLNICK
ALEXANDRA SMYSER
EDWARD STARK
MARK TALISE
JOSEPH TRIGILIO
ETHAN TYER
DANIELLE VAN LIER
EMMANUEL VERGARA
BRYAN WEISER
ALLYSON WELDEN
KAIMIPONO WENGER
LAURA WESLEY
SCOTT WHITELEATHER
IRYNA ZAVERUKHA

EUROPEAN UNION MEDIA AND PLATFORM REGULATIONS, THE AUTONOMY OF MEMBER STATES AND THE BRUSSELS EFFECT

András Koltay*

Abstract

The Member States of the European Union have necessarily given up part of their autonomy and sovereignty. This was done within the limits set by the Treaties establishing the Union, of the free will of the Member States that signed the Treaties. The European Commission and the European Parliament has in recent years constantly sought to extend its powers, to the detriment of the Member States. This is also true in the area of media and platform regulation. These bodies have argued that further and further legislative steps can be considered as derivable from the Treaties. Thus, over the last few years, fundamental changes have taken place in these areas, with the adoption of the Digital Services Act (DSA), Digital Markets Act (DMA) and European Media Freedom Act EMFA) regulations, the future impact of which cannot yet be measured. The article examines the question of whether the EU had the power to adopt these regulations in all cases, what room for maneuver was left to the Member States after the adoption of these regulations, and whether the regulations are capable of indirectly influencing the legislation of other non-EU states (the so-called 'Brussels effect'). First, the adoption, legal basis and effects of the new European media regulation (EMFA), are examined. Then the central element of the new platform regulation (DSA), will be examined from the perspective of how far it excludes national legislation outside EU law. Later, the article considers the potential Brussels effect of the DSA and the

* András Koltay, Research Professor, University of Public Service, and Professor of Law, Pázmány Péter Catholic University (both Budapest, Hungary). The author would like to thank the organizers of the 'Speech, Globalism, and Sovereignty" symposium, held at the Southwestern Law School Los Angeles on February 15, 2025, especially Professor Michael Epstein, for the invitation and the opportunity to publish. Special thanks should go to the Analysis Directorate of the Hungarian National Media and Infocommunications Authority, for their assistance in the research on which this article is based.

DMA, the latter being a competition regulation also in the field of platform regulation. This is also a key issue for US-based platforms. On the Brussels effect, there is already experience with the previously adopted General Data Protection Regulation, the global impact of which is also reviewed.

I. INTRODUCTION

The Member States of the European Union (EU) have necessarily given up part of their autonomy and sovereignty. This was done within the limits set by the Treaties establishing the Union, and with the free will of the Member States that signed the Treaties. But these treaties are necessarily general in their wording. In line with the EU aim that is enshrined in the Treaties,[1] the European Commission and the European Parliament has constantly sought to extend its powers in the recent years, to the detriment of the Member States. This is also true in the area of media and platform regulation. These bodies have argued that further and further legislative steps can be considered as derivable from the Treaties. Thus, over the last few years, fundamental changes have taken place in these areas, with the adoption of the Digital Services Act[2] (DSA), Digital Markets Act[3] (DMA) and European Media Freedom Act[4] (EMFA) regulations, the future impact of which cannot yet be measured.

This paper examines the question of whether the EU had the power to adopt these regulations in all cases, what room for maneuver was left to the Member States after the adoption of these regulations, and whether the regulations are capable of indirectly influencing the legislation of other non-EU states (the so-called 'Brussels effect'). In section II, the adoption, legal basis and effects of the new European media regulation, the EMFA Regulation, are examined. In section III, the new element of platform regulation, the DSA Regulation, will be examined from the perspective of

1. *See Consolidated Version of the Treaty on European Union*, art. 5, 2012 O.J. (C 326/13) 1 (EU) [hereinafter TEU] (stating in the preamble that the "Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen").

2. Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277) 1 (EU) [hereinafter DSA].

3. Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 2022 O.J. (L 265) 1 (EU) [hereinafter DMA].

4. Regulation 2024/1083 of the European Parliament and of the Council of 11 April 2024 Establishing a Common Framework for Media Services in the Internal Market and Amending Directive 2010/13/EU (European Media Freedom Act), 2024 O.J. (L 202) 1 (EU) [hereinafter EMFA].

how far it excludes national legislation outside EU law. In Section IV, we consider the potential Brussels effect of the DSA and the DMA regulations, which is a competition regulation also in the field of platform regulation. This is also a key issue for US-based platforms. On the issue of the Brussels effect, there is already experience with the previously adopted General Data Protection Regulation[5] (GDPR) on data protection, the global impact of which is also reviewed in this section.

II. THE EUROPEAN UNION'S COMPETENCE TO CREATE COMPREHENSIVE EUROPEAN MEDIA REGULATIONS

The EMFA is a milestone in the history of media regulations in the EU. The law, promulgated in April 2024, aims to strengthen media freedom and pluralism at the EU level, and to provide a unified framework for Member States to protect these principles, creating a comprehensive regulatory system within the EU.[6] The EMFA represents a significant change from the EU's previous system of media regulations, which had created legislation through various directives and which focused almost exclusively on the audiovisual sector.[7] The EMFA is thus not merely the next logical step in the EU's media policy, in line with previous measures, but instead it will transform the relationship between EU and Member State media regulations by applying a completely new regulatory tool in the field.

Given the significance of this development, this article will consider whether the EU had the authorization and legislative competence to adopt the EMFA. Answering this also necessitates examining issues that are only partly or only indirectly related to the confusion arising in connection with the division of competences.

A. Reasons For and Overview of the Adoption of the EMFA

The independence, diversity and freedom of the media are among the main indicators of democracy, and their state-guaranteed protection is a legitimate expectation. The creation of the EMFA aimed to meet this need, and from a socio-political perspective there are logical explanations as to why

5. Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119), 59, 1 (EU) [hereinafter GDPR].

6. *See* Elda Brogi et al., *The European Media Freedom Act: Media Freedom, Freedom of Expression and Pluralism*, EUR. PARLIAMENT 9 (July 2023), https://cadmus.eui.eu/bitstream/handle/1814/75938/IPOL_STU%282023%29747930_EN.pdf.

7. *See id.* at 37.

a democratically committed international organization with legislative competence would undertake such a task.

Journalists in several European countries face threats and harassment, and some have even been murdered.[8] Journalists play a vital role in ensuring transparency in democratic states and therefore need protection. The independence of media outlets is also a vital issue; they cannot be viewed merely as commercial enterprises.[9] In this context, a study commissioned by the European Parliament in July 2023 highlighted that media market concentration poses a risk to democratic debate by potentially limiting the plurality of opinions offered by the market.[10] The transparency of media ownership is crucial for assessing market concentration and uncovering the interests of media owners and potential biases in the editorial direction of media outlets.[11]

Another justification for the creation of the EMFA may also lie in the fact that various EU legislative measures indirectly affecting media pluralism—such as regulations on digital platforms, transparency requirements for online platforms and initiatives to combat online disinformation—did not adequately address the fundamental challenges related to media diversity and independence.[12]

The EU aims to strengthen the protection of media freedom and pluralism by supporting the internal market of the media sector, particularly by emphasizing that the production, distribution, and consumption of media content are increasingly digital and cross-border in nature. Therefore, the creation of the EMFA allows for internal market considerations, such as that EMFA aims to eliminate barriers to the cross-border provision of media services. In other words, the regulatory goal is to support the internal market of the media sector, and the regulatory consequence of this is the protection of media freedom and pluralism.

The EU discussed the proposed legislation under the ordinary legislative procedure, and it was finally adopted on April 11, 2024.[13] The EMFA covers the following areas in the field of media regulation:

1) the rights of the audience and the rights and duties of media service providers;[14]

---

8. *See* Ursula Von Der Leyen, *State of the Union 2021*, EUR. COMM'N 19 (Sept. 15, 2021), https://state-of-the-union.ec.europa.eu/document/download/4a3da7a3-477d-4948-b1c2-c0ca58cdf909_en?filename=2021_soteu_brochure_en.pdf.

9. *See id.*

10. *See* Brogi et al., *supra* note 6, at 11–12.

11. *See id.* at 12.

12. *See id.* at 9–10.

13. *See* EMFA, *supra* note 4, at 1.

14. *See id.* at 23–25.

2) safeguards for the independent functioning of public service media providers;[15]

3) renewing the framework for the collaboration and operation of national regulatory authorities and the EU organizational system;[16]

4) ensuring the provision of and access to media services in the digital environment;[17]

5) provisions on the transparency of media ownership and in the concentration of media ownership;[18] and

6) transparency of audience measurement and the allocation of state advertising.[19]

B. Theoretical Concerns Raised Regarding the Regulations

Despite the fact that the EMFA was ultimately adopted with the objective of strengthening the rule of law, it raises several rule of law-related issues, particularly in terms of legal certainty, clarity of norms, and enforceability. The concurrently applicable regulatory rules and the European Commission's power of interpretation and recommendation related to these rules can override national regulations which were adopted based on the Audiovisual Media Services Directive (AVMS Directive)[20]—a situation which can also create legal uncertainty.

The European Parliament itself criticized the clarity of norms of the proposed regulation.[21] The main thrust of this criticism was that, despite one of the regulation's goals being the promotion of pluralism, there is no consensus on what is actually meant by pluralism.[22] Media pluralism can have many different meanings, involving such considerations as the diversity of sources, content, consumption, or viewpoints. It is indeed a multifaceted and complex concept, the interpretation of which can vary by research field. Thus, strengthening and protecting media pluralism in practice can be achieved through various approaches, but it remains unclear what type and

15. *See id.* at 24–25.

16. *See id.* at 25–30.

17. *See id.* at 30–32.

18. *See id.* at 25, 32–34.

19. *See id.* at 34–35.

20. Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services (Audiovisual Media Services Directive), 2010 O.J. (L 95), 53, 1.

21. *See* Brogi et al., *supra* note 6, at 73.

22. *See id.* at 12–13.

degree of diversity would be sufficient to preserve media pluralism in a normative sense.[23]

Several Member States have expressed critical views on the EMFA.[24] France, Belgium, and Denmark argued that the regulation violated the principle of subsidiarity[25] and did not meet the legislative obligation to respect the competences of Member States (particularly the requirements for press regulation and public service media financing).[26] Nevertheless, all three Member States emphasized that they fundamentally support stronger EU action in the field of the media.[27] Alongside other Member States,[28] Germany also criticized the draft legal act, particularly citing concerns related to subsidiarity.[29] It argued that regional authorities are better suited to regulating media systems than EU institutions.[30] Germany agreed that Europe must ensure and maintain media independence and pluralism, but added that a legitimate goal alone does not provide sufficient authorization for such a far-reaching intervention by the EU.[31]

The market also criticized the draft. Around 400 EU publishers, newspapers, magazines and associations—including the German Newspaper

23. *See id.*

24. *See generally* French National Assembly, *European Resolution on the Proposal for a European Media Freedom Act*, Adopted Text No. 62 (Jan. 17, 2023), https://secure.ipex.eu/IPEXL-WEB/document/COM-2022-0457/frass (stating French comments to the resolution); Kim Valentin (Chair of the European Affairs Committee of Folketinget), *Reasoned opinion concerning the Commission proposal concerning a media freedom act – COM (2022) 457* (Dec. 9, 2022), https://secure.ipex.eu/IPEXL-WEB/document/COM-2022-0457/dkfol (stating Danish comments to the resolution).

25. *See Reasoned opinion concerning the Commission proposal concerning a media freedom act – COM (2022) 457*, *supra* note 24 (stating Danish comments to the resolution).

26. *See European Resolution on the Proposal for a European Media Freedom Act*, *supra* note 24 (stating French comments to the resolution); *see also* Lennart Lunemann, *Why EU Member States with Low Risks to Media Pluralism are so Reluctant to Support the European Media Freedom Act*, CENTRE FOR MEDIA PLURALISM & MEDIA FREEDOM (Sept. 8, 2023), https://cmpf.eui.eu/why-eu-member-states-with-low-risks-to-media-pluralism-are-so-reluctant-to-support-the-european-media-freedom-act.

27. *See* Lunemann, *supra* note 26.

28. *See* László Kövér (Member of the National Assembly of Hungary), *Reasoned Opinion of the Hungarian National Assembly* (Dec. 7, 2022); https://secure.ipex.eu/IPEXL-WEB/document/COM-2022-0457/huors (stating that the proposed Act "does not comply with the principle of subsidiarity"); Ondřej Benešík (Chairman, Committee on European Affairs, Parliament of the Czech Republic), Resolution No. 121 (Dec. 12, 2022); https://secure.ipex.eu/IPEXL-WEB/document/COM-2022-0457/czpos (stating opinon from Committee on European Affairs of the Chamber of Deputies of the Parliament of the Czech Republic).

29. *See* Beschluss [Decision], Deutscher Bundesrat: Drucksachen [BR] 514/22 (Ger.), https://www.bundesrat.de/SharedDocs/downloads/DE/uebersetzungen/514-22-beschluss-de.pdf?__blob=publicationFile&v=2.

30. *See id*.

31. *See id*.

Publishers and Digital Publishers Association (BDZV) and the German Free Press Media Association (MVFP)—expressed their concerns about the EMFA in an open letter to the EU legislator, arguing that it is counterproductive to the protection of media freedom.[32] They claimed that the legislator has ignored established national frameworks and constitutionally protected procedures, arguing that media freedom and pluralism cannot be achieved by harmonizing media regulations across Europe.[33]

Some non-governmental organizations and journalists have expressed optimism about the EMFA.[34] For example, the international human rights NGO Article 19 fundamentally supported the adoption of the legal act, while also pointing out that the regulation lays down only the most basic norms for the protection of pluralistic media and journalists' rights, hence stricter safeguards need to be introduced by the Member States.[35]

C. Assessment of the Legal Basis of the EMFA from the Perspective of the Allocation of Competences

The legislative debate on media freedom and pluralism undoubtedly centers on the allocation of competences and responsibilities between the EU and the Member States.[36] The following section examines the extent to which the adoption of the EMFA aligns with the legislative provisions and practices of EU law.

1. General Issues Concerning the EU Legal Basis for Audiovisual and Media Policy

The EU's legislative possibilities are fundamentally determined by the exclusive, shared, or supporting competences established in the Treaty on the

32. *See* Michael Hanfeld, *400 Verlage und Verbände begehren gegen neues EU- Gesetz auf* [*400 publishers & associations protest against new EU law*], FRANKFURTER ALLGEMEINE ZEITUNG (June 27, 2023), https://www.faz.net/aktuell/feuilleton/medien/400-verlage-und-verbaende-kritisieren-medienfreiheitsgesetz-18994078.html.

33. *See id.*

34. *See European Media Freedom Act: Striking the Right Balance*, EUR. BROAD. UNION (Sept. 16, 2022), https://www.ebu.ch/news/2022/09/european-media-freedom-act; *see also* Damian Tambini, *The Democratic Fightback has Begun: The European Commission's New European Media Freedom Act*, INFORRM'S BLOG (Oct. 2, 2022), https://inforrm.org/2022/10/02/the-democratic-fightback-has-begun-the-european-commissions-new-european-media-freedom-act-damian-tambini.

35. *See Coalition Calls for Effective Implementation as the Parliament Adopts the European Media Freedom Act*, ARTICLE 19 (Mar. 13, 2024), https://www.article19.org/wp-content/uploads/2024/03/EMFA-coalition-statement.pdf.

36. *See* Brogi et al., *supra* note 6, at 17.

Functioning of the European Union (TFEU)[37] and the three principles enshrined in Article 5 of the Treaty on European Union (TEU)—the principles of conferral, subsidiarity and proportionality.[38] Although the free operation of the media is a fundamental value of the Union,[39] and hence the EU has already adopted a considerable number of legal acts for its regulation,[40] it is important to recognize that the treaties do not provide direct competence for the Union in the field of audiovisual and media policy, nor do they name the media among the EU policy areas, thus the EU's legal instruments in this area are limited. The competence for audiovisual and media policy can be derived, rather, from various articles of the TFEU.[41]

According to the case law of the Court of Justice of the European Union (CJEU), the legal basis of a legal act must be chosen in light of its main regulatory objective.[42] The EMFA was adopted by the EU legislators based on the regulatory legal basis ensuring the harmonization of the internal market.[43] Article 114 of the TFEU states that "the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."[44]

The legal basis cited above is explained in Recital (2) of the EMFA, stating that media freedom and pluralism are two main pillars of democracy and the rule of law, and their protection is an essential feature of a well-functioning internal market for media services.[45] Recital (4) highlights that divergent national regulations, particularly concerning media pluralism and editorial independence, insufficient cooperation between national regulatory authorities, and the opaque and unfair allocation of public and private economic resources restrict free movement within the internal market and create an uneven playing field.[46] Recital (5) is even more specific, stating that

37. *See id*. at 17–18.

38. TEU*, supra* note 1, art. 5.

39. *See* Brogi et al., *supra* note 6, at 16 (citing OOO Regnum v. Russia, App. No. 22649/08, ¶ 67 (Sept. 8, 2020), https://hudoc.echr.coe.int/eng?i=001-204319).

40. *See id.* at 18–19.

41. *See* Agni Vourtsi & Lina Sasse, *Audiovisual and Media Policy*, EUR. PARLIAMENT 1 (Apr. 2024), https://www.europarl.europa.eu/erpl-app-public/factsheets/pdf/en/FTU_3.6.2.pdf.

42. *See* Case C-155/91, Comm'n of the Eur. Communities v. Council of the Eur. Cntys., ECLI:EU:C:1993:98, ¶¶ 19–21 (Mar. 17, 1993).

43. *See* Brogi et al., *supra* note 6, at 38.

44. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 114, Oct. 26, 2012, 2012 O.J. (C 326) 1, 47 [hereinafter TFEU].

45. EMFA, *supra* note 4, at ¶ 2.

46. *See id*. at 2.

the divergent nature of national provisions and procedures of the Member States and the lack of coordination between them can lead to legal uncertainty and entail additional costs for media enterprises wishing to enter new markets.[47] Discriminatory or protectionist measures by Member State affecting the operation of media undertakings disincentivize cross-border investment in the media sector and, in some cases, could even force media undertakings that are already operating in a given market to exit it.[48]

2. Assessment of the Internal Market Legal Basis

Several concerns of a legal or professional nature, which go beyond political and theoretical criticisms, have arisen regarding the legal basis of the EMFA, questioning whether Article 114 of the TFEU, aimed at achieving the internal market, is sufficient on its own to provide a sufficient legal basis for the adoption of the EMFA. The legislative basis provided in the article can generally be described as granting the EU legislator a functionally limited scope of action.[49] The framework for its application has been shaped by the case law of the CJEU, which encourages the effective realization of market integration.[50]

This in turn raises the question of whether the EMFA supports the effective realization of market integration, and whether the adoption of the regulation is truly necessary for the proper functioning of the internal market, or if the reference to Article 114 of the TFEU merely serves as a pretext for extensive EU-level regulation of the media. To answer this question, it is essential to examine the scope of the legal act. According to Article 1 of the EMFA, the material scope of the EMFA extends to media services, which—without a restrictive provision to this effect—include not only cross-border media services but also services operating at the local or regional levels, such as local radio stations and local and regional press, and which are thus not particularly relevant to the internal market.[51] The EMFA does not clarify why divergent national legal regulations would create legal uncertainty for media service providers which operate exclusively within national market

47. *See id*.

48. *See id*.

49. *See* TFEU, *supra* note 44, art. 114.

50. *See* William J. Davey, *European Integration: Reflections on its Limits and Effects*, 1 IND. J. GLOB. LEGAL STUD. 185, 189 (1993) (citing Case 26/62, N.V. Algemene Transport— en Expeditie Onderneming van Gend & loos and Neth. Inland Revenue Admin., 1963 EC.R. 1, 2).

51. EMFA, *supra* note 4, art. 1, para. 1.

frameworks. In this regard, Article 114 of the TFEU certainly cannot be applied as a legal basis.[52]

A related issue is the fact that media services include social media platforms classified as online platforms, audiovisual media, video-sharing platform services, radio broadcasting and the press.[53] The EMFA would impose the definition of a "common internal media market" on all these media, regardless of the fact that these services do not compete in the same market at either the EU or at the national level,[54] while their economic characteristics—primarily depending on their type and audience—differ significantly. Consequently, it is not possible to regulate such a wide range of media simultaneously at the general EU level beyond ensuring constitutional fundamental rights.

Nevertheless, the market regulation of a narrower range of media services could, in principle, be justified as a measure taken to protect the internal market. However, taking an approach whereby any economic aspect could serve as a sufficient reason for adopting a legal act solely based on Article 114 of the TFEU would essentially nullify the principle of exclusive powers. From this perspective, any legal act regulating enterprises as market participants could extend to many other related areas, including those where the EU does not actually have legislative competence.[55]

The fact that the production, distribution, and consumption of media content has become increasingly digital and cross-border is insufficient to explain why the problems raised in the justification of the EMFA—such as the decline in editorial independence, difficulties in protecting journalistic sources and unfair market operators[56]—could not be addressed at the national level. Furthermore, according to the case law of the CJEU, the mere fact that there are different rules in the various Member States does not hinder the internal market.[57] There are thus, apparently, no obstacles to the functioning

52. *See* Rupprecht Podszun, *News Ecosystems: Tackling Unfinished Business*, 12 J. ANTITRUST ENF'T 314, 317–18 (2024).

53. *See* Gregor Schmid, *The European Media Freedom Act: a Pan-European Media Law?*, TaylorWessing (June 12, 2023), https://www.taylorwessing.com/en/interface/2023/media-update-2023/the-european-media-freedom-act-a-pan-european-media-law; EMFA, *supra* note 4, art. 2.

54. *See* EMFA, *supra* note 4, art. 2.

55. *See generally* MARK D. COLE & CHRISTINA ETTELDORF, RESEARCH FOR CULT COMMITTEE – EUROPEAN MEDIA FREEDOM ACT – BACKGROUND ANALYSIS (2023).

56. *See id*. at 14–15, 27 (citing DIRK VOORHOOF, THE EUROPEAN MEDIA FREEDOM ACT AND THE PROTECTION OF JOURNALISTIC SOURCES: STILL SOME WAY TO GO (2022), http://hdl.handle.net/1854/LU-01GQ8T76A1KMC1P57A2NMBR2QK).

57. *See* Case 6/64. Flamino Costa v. ENEL, 1964 E.C.R. 587 (ruling by CJEU for the first time on principle of primacy); TFEU, *supra* note 44, art. 56 (stating that "restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended");

of the internal market that could justify legislation under Article 114 of the TFEU.

The unlimited application of legal harmonization provided by Article 114 would also be contrary to the limited political nature of the EU, which essentially means that it can only contribute to the common economic, social and political objectives assigned to it by the Member States within the designated policy areas and within the limits of the competences conferred on it. In response to this, a legal interpretation has emerged in judicial practice that prohibits the EU legislator from adopting general (economic) regulatory acts based on Article 114.[58]

3. Assessment of the Cultural Legal Basis

When regulating the media sector, it is essential to consider not only economic but also cultural aspects.[59] This is particularly true in the regulation of public service media. Organizations that produce, create and simultaneously disseminate content protected by copyright can generally be regarded as representatives of culture and cultural values. Consequently, a question arises whether Article 114 of the TFEU—which does not explicitly recognize a cultural exception—can provide the authority to create culturally relevant harmonization measures.

The EMFA explicitly refers to culture in several places, for example, Recital (8) describes media services as carriers of cultural expression.[60] Article 6 of the TFEU states that the "Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States" including actions in the field of culture at the European level.[61] Article 167 of the TFEU practically confirms that the Union is entitled to support and supplement the action of Member States, and promote cooperation between them in the field of culture.[62] Given that the article also includes the audiovisual sector within the scope of culture,[63] the EU is entitled to support and supplement the actions of the Member States also in this area.

---

see also Case 11/70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 1126; Case 106/77, Amministrazione delle Finanze dello Stato v Simmenthal SpA., 1978 E.C.R. 630; Case C-106/89, Marleasing SA v. La Comercial Internatcional de Alimentacion SA, 1990 E.C.R. I-4156.

58. *See* Case C-376/98, Federal Republic of Germany v. Eur. Parliament, 2000 E.C.R. I-8498, ¶ 82.

59. *See* COLE & ETTELDORF, *supra* note 55, at 7.

60. EMFA, *supra* note 4, at 2.

61. TFEU, *supra* note 44, art. 6.

62. *See id*. art. 167.

63. *Id*.

Based on the treaties, the regulation of culture—which includes the audiovisual sector—can be classified under supporting competences. However, essentially this only ensures that the EU coordinates and supplements the actions of the Member States without replacing their authority and does not allow for the harmonization of national measures (national media laws and regulations).[64]

Article 167 of the TFEU does not provide the EU with independent competence in the field of culture, which can be inferred from the wording of the article, as it focuses on the culture of the Member States, and does not suggest creating a unified cultural community.[65] The legal text explicitly states that the EU shall contribute to the flowering of the cultures of the Member States while respecting their national and regional diversity,[66] and Paragraph (5) of the article clearly excludes any harmonization of the laws, regulations and administrative provisions of the Member States.[67] Thus, in cultural matters, the EU's competence is also limited by the protection of national and regional diversity and the prohibition of harmonization in this field. Consequently, the article implicitly entrusts the regulation of the cultural sector primarily to the Member States, meaning that the EU can only act to support national initiatives in this area.

However, it should be noted that in the aforementioned German opinion on the EMFA, the Bundesrat emphasized the fundamental importance of the cultural sovereignty of the Member States, which is exercised by the Länder in Germany.[68] According to this opinion, the Commission neither adequately considered cultural sovereignty under Article 167 of the TFEU—including the Member States' competence in media regulation—nor did it strike the correct balance between cultural and economic regulatory aspects.[69] Additionally, it was established at plenary session 1032 that a significant part of the EMFA falls under the cultural sovereignty of the EU Member States.[70]

The adoption of the EMFA in the form of a regulation has also been subject to criticism linked to its cultural legal basis. Article 296 of the TFEU states that if the treaties do not specify the type of legal act to be adopted—as was the case with the EMFA—the institutions shall select the type of act

64. *See* Brogi et al., *supra* note 6, at 17–18.

65. *See* TFEU, *supra* note 44, art. 167.

66. *Id*.

67. *Id*.

68. *See* Beschluss [Decision], Deutscher Bundesrat: Drucksachen [BR] 514/22 (Ger.), https://www.bundesrat.de/SharedDocs/downloads/DE/uebersetzungen/514-22-beschluss-de.pdf?__blob=publicationFile&v=2.

69. *See id*.

70. *See id.*

in accordance with the principle of proportionality.[71] However, Article 5(4) of the TFEU makes it clear that in such cases, it is necessary to choose a legal act that is appropriate in terms of content and form to achieve the objectives set by the legislator.[72] Thus, in certain cases, the adoption of a directive or even a non-binding legal act may be justified instead of a regulation. This is relevant for EU policies where the harmonization of the laws, regulations, or administrative provisions of the Member States is excluded, and where the legal basis in the treaty authorizes the Council to issue recommendations. This includes Article 167(5) of the TFEU which, in the field of culture, explicitly excludes the harmonization of national provisions and only authorizes the EU legislative institutions to adopt incentive measures and recommendations, as noted above.[73]

III. THE DIGITAL SERVICES ACT AND THE REMAINING MARGIN OF APPRECIATION AVAILABLE TO MEMBER STATES

In November 2022, two key regulations came into effect in the EU,[74] significantly transforming and expanding the regulatory framework for digital markets and the service providers that are active in them. Several factors can be identified behind the adoption of the DSA. On the one hand, since the adoption in 2000 of the Directive on Electronic Commerce, which defines the legal framework for services related to the information society, several new types of online services and operational models have emerged, that have become part of the everyday lives of the EU's citizens.[75] On the other hand, the changed service environment prompted individual Member States to adopt their own national legislation, which the EU legislative bodies—considering the cross-border nature of the services in question—regarded as an unfavorable process from the perspective of the single internal market.[76]

71. *See* TFEU, *supra* note 44, art. 296.

72. *See* TEU, *supra* note 1, art. 5.

73. *See* TFEU, *supra* note 44, art. 167.

74. *See Digital Markets Act: Rules for Digital Gatekeepers to Ensure Open Markets Enter Into Force*, EUROPEAN COMM'N (Oct. 30, 2022), https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_22_6423/IP_22_6423_EN.pdf; *Questions and Answers on the Digital Services Act**, EUROPEAN COMM'N (Feb. 23, 2024), https://ec.europa.eu/commission/presscorner/api/files/document/print/en/qanda_20_2348/QANDA_20_2348_EN.pdf.

75. *See* DSA, *supra* note 2, art. 1; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), recitals 3 & 5 [hereinafter Directive on Electronic Commerce].

76. *See* DSA, *supra* note 2.

The regulation raised the question of how much latitude it leaves for national legislators. Below, we will explore this issue by presenting the relevant provisions of the regulation, as well as the relevant practices of the European Commission and the CJEU. The DSA establishes rules for intermediary service providers and, within this framework, sets out the conditions for exemption from liability for these service providers, as well as the due diligence obligations for certain categories of intermediary service providers.[77]

A. Brief Overview of the Regulation

Intermediary services encompass a wide range of services related to the information society, including providers of information transmission, caching and hosting services.[78] In practice, this category includes, but is not limited to, internet access providers, domain name registrars, cloud and other internet hosting services, application stores, social media and other content-sharing platforms, as well as various online commercial platforms and marketplaces.[79]

The DSA regulates due diligence obligations in a pyramid-like structure. At the base of the pyramid, the regulation first contains provisions applicable to all intermediary service providers.[80] At the next level it then separately specifies the obligations for intermediary service providers that qualify as hosting service providers, hosting service providers that qualify as online platforms, and finally, very large online platforms and very large online search engines.[81] The section which is applicable to all intermediary service providers contains obligations related to the designation of a contact point and legal representative, terms and conditions (information, application considering fundamental rights), and transparency reporting.[82] The DSA, in relation to hosting service providers, also includes provisions on the mechanisms for reporting and acting on illegal content, the obligation to provide clarifications to users of the services, and the obligation to report in case of suspected crimes.[83]

---

77. *See generally id.*

78. *See id.* at 2.

79. *See id.* at 8.

80. *See id.* at 11; *The Digital Services Act: Ensuring a Safe and Accountable Online Environment*, EUR. COMM'N, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act_en.

81. *See The Digital Services Act: Ensuring a Safe and Accountable Online Environment*, *supra* note 80.

82. *See* DSA, *supra* note 2, art. 11–15.

83. *See id.* art. 16–18.

For online platforms, the DSA sets out requirements to maintain an internal complaint-handling system, the possibilities for out-of-court dispute resolution available to users of the services, provisions related to trusted flaggers, and measures that can be taken against abuses.[84] This section of the DSA also includes the independent transparency reporting obligations of online platforms, the prohibition on manipulative or deceptive design of online interfaces, transparency requirements for online advertisements and recommender systems, and provisions for the protection of minors (appropriate and proportionate measures to ensure a high level of privacy and safety for minors and prohibition of advertisements based on profiling).[85] Within the category of online platforms, specific provisions apply to online marketplaces (traceability of traders, additional requirements related to information to consumers).[86]

The regulation establishes further specific obligations for very large online platforms and very large online search engines (services actively used by at least forty-five million users in the EU on average per month, designated by the Commission), given their particular importance.[87] These include risk assessment and mitigation obligations related to systemic risks arising from the design, operation and use of such services.[88] The legislation identifies actual or foreseeable negative impacts on minors as one of these risks.[89] Besides due diligence obligations, it is also worth noting the provision related to the liability of intermediary service providers, which excludes a general monitoring or active fact-finding obligation on the providers.[90]

B. Jurisdictional Limitations

In terms of the regulation of online services, the main constraint on the discretion of Member States is posed by the jurisdictional rules related to information society services. Article 3 of the Directive on electronic commerce provides guidance on this matter.[91] According to Paragraph (1), "each Member State shall ensure that the services provided by a service provider established in its territory comply with the national provisions applicable in the Member State in question", while Paragraph (2) states that "Member States may not, for reasons falling within the coordinated field,

84. *See id.* art. 20–23.
85. *See id.* art. 23–28.
86. *See id.* art. 19–32.
87. *See id.* § 5.
88. *See id.* art. 34–35.
89. *See id.* art. 34.
90. *See id.* art. 8.
91. *See* Directive on Electronic Commerce, *supra* note 75, art. 3.

restrict the freedom to provide information society services from another Member State."[92] The jurisdiction over established providers and the prohibition on restricting the freedom to provide services together define the country of origin principle. This principle also applies to the regulation of video-sharing platform service providers under the AVMS Directive, as these services form a subcategory of information society services and thus fall within the scope of the Directive on electronic commerce.[93]

With regard to the jurisdictional framework defining the discretion of Member States in platform regulation, the CJEU made significant findings in the case of *Google and Others v KommAustria*.[94] The Court had to decide whether the obligations imposed on domestic and foreign providers by the Austrian federal law on measures to protect users of communication platforms (Kommunikationsplattformen-Gesetz or KoPl-G) constituted measures against "a given information society service" within the meaning of Article 3(4) Directive on electronic commerce.[95]

The significance of the inquiry lies in the fact that the cited paragraph defines the conditions for derogation from the country of origin principle. According to Article 3(4), Member States have the possibility to derogate if it is necessary and proportionate to adopt measures to achieve certain specified objectives (such as the protection of consumers).[96] The Austrian Supreme Administrative Court, which initiated the preliminary ruling, sought guidance on whether this could be interpreted to mean that the general and abstract provisions of the KoPl-G, applicable in the absence of specific and concrete acts, could also be considered to be such measures.[97]

The Court stated that interpreting the concept of measures in such a way that "Member States may adopt measures of a general and abstract nature applying without distinction to any provider of a category of information society services" would undermine the country of origin principle, thereby fundamentally contradicting the objective of the Directive on electronic commerce.[98] Recital (5) of the Directive identifies regulatory differences between Member States and the resulting lack of legal certainty (which

92. *Id.*

93. *See* Directive 2018/1808 of the European Parliament and of the Council of 14 Nov. 2018, Amending Directive 2010/13/EU on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services (Audiovisual Media Services Directive) in View of Changing Market Realities, recital 44 (EU) [hereinafter AMSD].

94. Case C-376/22, Google Ir. v. KommAustria, ECLI:EU:C:2023:835 (Nov. 9, 2023).

95. *See id*. para. 21.

96. *See id*. para. 6 (quoting Directive on Electronic Commerce, *supra* note 75, art. 3).

97. *See id*. paras. 19–23.

98. *See id*. paras. 39, 57–60.

national rules must be complied with) as obstacles to the development of information society services, and derives the legitimacy of the freedom to provide services and the country of origin principle from this.[99] The Court also confirmed its conclusion based on the grammatical interpretation of the conditions set out in Paragraph (4), stating that the Directive on electronic commerce allows for specific, individual measures, rather than establishing more general principles.[100]

Based on this interpretation, Member States cannot rely on Article 3(4) Directive on electronic commerce to justify derogation from the country of origin principle when introducing abstract and general measures, that is, laws. In such cases, it is not even necessary to examine the fulfilment of the conditions of necessity and proportionality.[101] The Commission also drew the attention of Member States to the jurisdictional limitations defined in the Directive on electronic commerce during the notification procedures concerning the legislative proposals of France and Germany.[102] Both Member States attempted to bring under the scope of regulation providers which, although providing services within the territory of the respective state, are not established within that state.[103]

C. The Limitations Arising from the Material Scope of the DSA

When considering the regulatory discretion of Member States in relation to online platforms, the starting point is that the EU achieves legal harmonization in the context of intermediary services through the DSA by means of a regulation, rather than a directive. By definition, and as stipulated in Article 288 of the TFEU, a regulation is a legal act with general applicability that is entirely binding and directly applicable (that is, it does not require implementing measures), leaving little room for national legislation serving the objectives defined therein.[104] As a result, the DSA establishes so-called maximum harmonization. In this regard, Recital (9) states that the DSA "fully harmonizes the rules applicable to intermediary

99. *See id*. para. 3 (quoting Directive on Electronic Commerce, *supra* note 75, art. 5).

100. *See id*. paras. 30–38.

101. *See id*. paras. 60–63.

102. *See* Thierry Breton (Member of the Commission), *Notification 2023/632/FR: Communication of Comments in Accordance with Article 5(2) of Directive (EU) 2015/1535 of 9 September 2015*, EUR. COMM'N (Jan. 17, 2024); Thierry Breton (Member of the Commission), *Notification 2024/188/DE: Communication of Comments in Accordance with Article 5(2) of Directive (EU) 2015/1535 of 9 September 2015*, EUR. COMM'N (July 1, 2024), https://technical-regulation-information-system.ec.europa.eu/en/notification/25746/message/108751/EN.

103. *See Notification 2023/632/FR*, *supra* note 102; *Notification 2024/188/DE*, *supra* note 102.

104. *See* TFEU, *supra* note 44, art. 288.

services in the internal market" and emphasizes, therefore, that "Member States should not adopt or maintain additional national requirements relating to the matters falling within the scope of this Regulation" as this would conflict with the "direct and uniform application" of the rules.[105]

The regulation specifies two general exceptions to these strict requirements.[106] Firstly, an exception applies in cases where the regulation explicitly requires Member States to adopt or maintain national requirements with regard to a specific provision.[107] Examples include decisions or orders concerning the actions of intermediary service providers in relation to illegal content or the provision of information. In this context, the regulation refers to the "harmonization of minimum specific conditions" while allowing national law to prescribe additional conditions.[108] Similarly, provisions on sanctions stipulate that "Member States shall lay down the rules on penalties applicable to infringements of this Regulation by providers of intermediary services within their competence."[109] Secondly, according to the Regulation's Preamble, maximum harmonization "should not preclude the possibility of applying other national legislation applicable to providers of intermediary services," provided it is consistent with EU law—including the country of origin principle mentioned in relation to jurisdiction—which must "pursue other legitimate public interest objectives than those pursued by" the DSA.[110]

The reference to "other legitimate public interest objectives" actually reinforces a strict interpretation for Member States. It implies that they must refrain not only from repeating the specific provisions of the DSA or introducing additional or supplementary rules but, presumably, also from taking any legislative measures aimed at regulatory objectives identified by the DSA concerning intermediary service providers.

The European Commission has interpreted the limits imposed by the material scope of the DSA in several notification procedures related to Member State legislation, including the amendment of the Irish electoral reform law.[111] The Irish legislation sought to impose certain obligations on

105. *See* DSA, *supra* note 2, at 3.

106. *See id.*

107. *See id.* (stating that "Member States should not adopt or maintain additional national requirements relating to the matters falling within the scope of this Regulation, unless explicitly provided for in this Regulation").

108. *Id*. at 9.

109. *Id*. at 9, 82.

110. *Id*. at 3.

111. *See* Margrethe Vestager (Executive Vice-President), *Notification 2024/0374/IE: Delivery of Comments Pursuant to Article 6(2) of Directive (EU_ 2015/1535 of 9 September 2015*, EUR.

platforms regarding misinformation.[112] However, during the notification procedure, the Commission drew the attention of the Member State in question to Recital (9) of the DSA Preamble.[113] According to this recital, the regulation addresses "the dissemination of illegal content online and the societal risks that the dissemination of disinformation or other content may generate, and within which fundamental rights enshrined in the Charter are effectively protected."[114] The Commission reiterated its position that the DSA, as a regulation, does not permit the introduction of additional national requirements unless explicitly provided for within the regulation itself.[115]

When attempting to define the material scope of the DSA and the compatibility of national legislation, the issue of age verification implemented for child protection purposes is particularly noteworthy, as the European Commission appears to have adopted a seemingly more permissive stance on this specific matter than might be expected under the principles outlined above.[116] Several EU Member States, including France and Germany, have introduced legislation on age verification, for which the Commission issued detailed opinions at the conclusion of the notification procedures. From the detailed opinion issued by the Commission in January 2024 concerning the French proposal, it became apparent that Article 28 of the DSA, addressing the obligations of online platforms concerning the protection of minors, should be interpreted to include the implementation of age verification tools as part of "appropriate and proportionate measures by providers."[117] Furthermore, in both the French and German notification procedures, the Commission referred to Articles 34 and 35 of the DSA, which require service providers operating very large online platforms and very large online search engines to conduct risk assessments and management.[118] Notably, Article 35(j) explicitly includes age verification tools among the specific measures for protecting children's rights.[119]

In the detailed opinion it provided in January 2024, the Commission objected to a provision in the French bill stipulating that "influencers" may not upload pornographic content to platforms lacking age verification

---

COMM'N (Oct. 1, 2024), https://technical-regulation-information-system.ec.europa.eu/en/notification/26037/message/109650/EN.

112. *See id*.

113. *See id*.

114. *Id*. (citing DSA, *supra* note 2, at 3).

115. *See id.*

116. *See id*.

117. *See Notification 2023/632/FR*, *supra* note 102; DSA, *supra* note 2, art. 28.

118. *See Notification 2023/632/FR*, *supra* note 102; *Notification 2024/188/DE*, *supra* note 102.

119. *See* DSA, *supra* note 2, art. 35; *Notification 2024/188/DE*, *supra* note 102; *Notification 2023/632/FR*, *supra* note 102.

tools.[120] The Commission determined that this indirectly imposes obligations on online platforms, as the requirement would compel them to utilize such tools.[121] The Commission highlighted that, given that the aforementioned provisions of the DSA encompass the obligation for online platforms to introduce age verification tools, such national requirements merely duplicate the provisions of the regulation.[122] This opinion of the Commission is significant because it demonstrates that national legislation which establishes obligations indirectly affecting entities outside the direct scope of the DSA may also be incompatible with the Regulation.[123]

Conversely, in the opinion it issued in October 2023 regarding the German and French proposals, the Commission supported the temporary imposition of age verification obligations by Member States on video-sharing platforms and publishers of online public communication services under editorial responsibility within their jurisdiction.[124] In these cases, the national legislator is permitted to introduce such measures temporarily because the Commission recognized that no EU-wide solution for verifying users' age currently exists.[125] However, the Commission emphasized that legislators must adopt regulations allowing for the repeal of these national measures once a unified technical solution is implemented at the European level.[126]

Although the Commission has not resolved the apparent contradiction in its views on the implementation of age verification tools, it is conceivable that the differing approaches identified above stem from the fact that the proposals sought to impose the obligation on distinct entities (online platforms *versus* video-sharing platforms and publishers of editorially responsible online public communication services). Nevertheless, the Commission's reliance on Articles 28 and 35 of the DSA in both procedures[127] adds to the confusion, as Article 28 applies to online

120. *See Notification 2023/632/FR*, *supra* note 102.

121. *See id*.

122. *See id*.

123. *See id*.

124. *See Notification 2023/632/FR*, *supra* note 102; *Notification 2024/188/DE*, *supra* note 102.

125. *See id.*

126. *See Notification 2023/632/FR*, *supra* note 102; Loi n° 2024-449 du 21 mai 2024 visant à sécuriser et à réguler l'espace numérique [Law No. 2024-449 of May 21, 2024 aimed at securing and regulating the digital space], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 22, 2024 (Fr.); *Notification 2024/188/DE*, *supra* note 102; Medienstaatsvertrag (MStV) [State Treaty on Media], repromulgated from Nov. 7, 2020, STAATSVERTRAG GVBL 698 (Berlin) (Ger.).

127. *See Notification 2023/632/FR*, *supra* note 102; *Notification 2024/188/DE*, *supra* note 102.

platforms,[128] while Article 35 establishes obligations for very large online platforms.[129]

As previously noted, video-sharing platforms are classified as intermediary services and are thus subject to the rules of the DSA in addition to the AVMS Directive.[130] The relationship between the Regulation and the Directive is explicitly addressed within the DSA, which states that it shall be without prejudice to "Directive 2010/13/EU of the European Parliament and of the Council, including the provisions thereof regarding video-sharing platforms".[131] The Member States' regulations for video-sharing platforms, referring to the AVMS Directive, include both what can be regarded as successful and unsuccessful attempts to conform with this.

In the case of the German proposal referring to the AVMS Directive, which also mandated self-monitoring by platforms, the Commission concluded that its provisions were incompatible with the DSA.[132] This was because, despite the aforementioned provision, the regulation fully harmonized certain obligations for online intermediary services, including prescribing investigative duties for video-sharing platforms.[133] By contrast, in October 2024, the Commission raised no concerns about the violation of maximum harmonization in the Online Safety Code issued by the Irish media authority (Coimisiún na Meán), which also referred to the AVMS Directive.[134] The Code mandates—among other obligations—the implementation of age verification and parental control tools for video-sharing platforms under Irish jurisdiction, as designated by the media authority. Due to Ireland's unique circumstances, these platforms include Facebook, Instagram and YouTube.

IV. THE POTENTIAL GLOBAL IMPACT OF THE GDPR, THE DSA AND THE DMA

The issues that EU platform regulation aims to address—such as disinformation, the protection of freedom of speech, action against harmful content, and the market dominance of large platform providers[135]—are not, of course, limited to the EU. This is one of the reasons why questions may arise regarding the international impact of the two pieces of legislation.

128. *See* DSA, *supra* note 2, art. 28.
129. *See id.* art. 35.
130. *See id.* at 3.
131. *See id.*
132. *See Notification 2024/188/DE*, *supra* note 102.
133. *See id*.
134. *See Notification 2024/0374/IE*, *supra* note 111.
135. *See* DSA, *supra* note 2; GDPR, *supra* note 5; DMA, *supra* note 3.

Globally identifiable models of internet regulation—for instance, stricter content moderation in China or Russia,[136] and more lenient principles in the United States (US)[137]—make the EU law a realistic reference point for other countries, potentially leading to the emergence of a "Brussels Effect"[138] in these areas.

A. Approaches to the Brussels Effect in the Literature

The Brussels Effect phenomenon was described by Finnish-American law professor Anu Bradford in a 2012 study,[139] building on the California Effect[140] developed earlier by David Vogel. Bradford's 2020 book *The Brussels Effect* illustrates the theory with examples, demonstrating the international reach of EU legislation.[141] The theory concerns the EU's global regulatory role, whereby, through the Brussels Effect, the EU exerts unilateral, one-sided global market regulatory influence: it creates legislation that can influence the manufacturing of products, the provision of services, or the general operations of businesses worldwide.[142] No international institutional framework is required for this, nor does the EU need to apply any coercion, as in many cases market forces turn its regulations into global standards.[143]

An EU regulation can have a global impact in two ways: either its provisions are adopted by the legislators of other countries (*de jure* Brussels Effect), or private companies adjust their products or services to the stricter EU requirements, even outside markets on EU territory (*de facto* Brussels Effect).[144] Bradford emphasizes that the Brussels Effect could also be called the Washington or Beijing Effect, as under certain conditions, the legal provisions of other countries or political entities could also trigger similar global responses.[145] Five conditions must be met for a jurisdiction's legislation to exert a *de facto* Brussels Effect:

1) The jurisdiction's market must be of significant size;

---

136. *See* ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD. 189 (Oxford Univ. Press ed., 2020).

137. *See id*.

138. *See id*.

139. Anu Bradford, *The Brussels Effect*, 107 Nw. U. L. REV. 1, 3 (2012).

140. *See,* David Vogel, *Environmental Regulation and Economic Integration*, INST. FOR AGRIC. & TRADE POL'Y 10–13 (1999), https://www.iatp.org/sites/default/files/Environmental_Regulation_and_Economic_Integrat.pdf.

141. *See* BRADFORD, *supra* note 136.

142. *See generally id*.

143. *See generally id*.

144. *See id*. at xv, xviii.

145. *See id*. at 64.

2) There must be significant regulatory capacity;
3) The regulations must be stricter compared to those of other countries;
4) The regulated market must be inflexible; and
5) The production of the product or the operation of the company must be indivisible.[146]

Joanne Scott points out that the EU often provides incentives to ensure that compliance with its legislation extends as broadly as possible, to cover entire countries rather than just individual transactions or companies.[147] A key benefit of the nationwide application of legislation is that compliance makes trade smoother, incentivizing broad compliance as EU institutions place fewer demands on companies from third countries during individual transactions.[148] Scott highlights that the EU's style of unilateral law-making differs from similar activities in the US, as the EU is able to offer more flexibility in enforcing its legislation.[149] EU institutions are more willing to compromise with third countries, often establishing equivalence, meaning that third countries can enter the internal market successfully by aligning their own laws with relevant aspects rather than fully adopting EU legislation.[150] According to Scott, EU regulation is characterized by respect for international standards: European legislation adopts these standards in several areas and, in the event that international treaties are concluded, the EU may amend or suspend European requirements.[151]

Bradford's five conditions are primarily necessary to achieve the *de facto* Brussels Effect, whereby companies worldwide adapt to legislation—in our case, to EU legislation.[152] In contrast, Bradford primarily accounts for the *de jure* Brussels Effect by referring to the quality of EU law, its ease of transposition, and its translation into multiple languages.[153] Bradford, also emphasizes, however, that a transposed piece of legislation, or one that is inspired by EU legislation does not necessarily produce an effect similar to that of EU law[154]. The Brussels Effect can only emerge in areas where access to the market can be restricted or conditioned by the relevant country, or in this case, by the EU.[155]

146. *See id*. at 25.
147. *See* Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 AM. J. COMP. L. 87, 109 (2014).
148. *See id.* at 109-110.
149. *See id.* at 118.
150. *See id.* at 110.
151. *See id.* at 112.
152. *See* BRADFORD, *supra* note 136, at 25.
153. *See id.* at 79–80.
154. *See id.* at 95.
155. *See id.* at 30.

B. The Brussels Effect Illustrated through the Example of the GDPR

The Brussels Effect is well illustrated by the international implementation of EU data protection regulations, more specifically the GDPR. In this context, European Commissioner Vera Jourova stated in 2018, "[i]f we can export [the GDPR] to the world, I will be happy."[156]

The Regulation aims to protect the personal data of individuals within the European Economic Area and to unify the fragmented European data protection regulation landscape.[157] However, its practical impact goes far beyond the EEA. The legislative proposal was adopted by the European Parliament and the Council in 2016, and it became mandatory for Member States to implement from 2018.[158] The GDPR places significant responsibility on companies that handle the personal data of individuals, in the interest of data security.[159] This responsibility falls especially on digital and media companies, as these often come into possession of personal data during individuals' online activities. The global impact of the GDPR is particularly evident in these sectors—it applies to companies that provide websites or services to citizens within the EEA, even if they are registered in countries outside this region.[160] Two areas can be identified in which the GDPR has had a global impact. One field that can be examined is the laws of third countries, while another area covers the activities of companies outside the EU. The impacts of the GDPR on both of these areas are discussed below.

1. The Adaptation of Third-Country Laws: *de jure* Brussels Effect

The European Commission determines which third-country data protection laws provide adequate protection for consumers through its so-called adequacy decisions.[161] These laws are therefore considered, at least partially, to be equivalent to the GDPR.[162] The Commission periodically

156. *See* Adam Satariano, *New Privacy Law Makes Europe World's Leading Tech Watchdog*, N.Y. TIMES, May 25, 2018, at A1.

157. *See id*.

158. *See The History of the General Data Protection Regulation*, EUR. DATA PROT. SUPERVISOR, https://www.edps.europa.eu/data-protection/data-protection/legislation/history-general-data-protection-regulation_en (last visited May 10, 2025).

159. *See Everything You Need to Know About GDPR Compliance*, GDPR.EU, https://gdpr.eu/compliance (last visited May 10, 2025).

160. *See id*.

161. *See Adequacy Decisions*, EUR. COMM'N, https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en (last visited May 10, 2025).

162. *See id*.

reviews these decisions, and in parallel, the respective countries must submit reports to the EU to account for any changes in their data protection laws.[163]

The countries and territories whose laws in this area are currently deemed adequate by the Commission include: Andorra, Argentina, Canada, the Faroe Islands, Guernsey, Israel, the Isle of Man, Japan, Jersey, New Zealand, South Korea, Switzerland, the United Kingdom, the United States and Uruguay.[164] For eleven countries and territories (Andorra, Argentina, Canada, the Faroe Islands, Guernsey, the Isle of Man, Israel, Jersey, Switzerland, Uruguay, New Zealand), the Commission confirmed their compliance with previous EU data protection laws before the entry into force of GDPR regulations, as of January 2024.[165]

From 2000 to 2015, the International Safe Harbor Privacy Principles, then from 2016 to 2020, the EU–US Privacy Shield, and from 2022, the Trans-Atlantic Data Privacy Framework (DPF) set the requirements for transactions involving the flow of personal data between the EU and the US.[166] The Commission's adequacy decision applies to the US companies

163. *See e.g.,* WORLD SERVICES CENTRE: INNOVATION, SCIENCE AND ECONOMIC DEVELOPMENT CANADA, SIXTH UPDATE REPORT ON DEVELOPMENTS IN DATA PROTECTION LAW IN CANADA: REPORT TO THE EUROPEAN COMMISSION DECEMBER 2019 (2020), https://ised-isde.canada.ca/site/plans-reports/en/sixth-update-report-developments-data-protection-law-canada; PRIVACY COMMISSIONER TE MANA MATAPONO MATATPU, PERIODIC UPDATE REPORT ON DEVELOPMENTS IN DATA PROTECTION LAW IN NEW ZEALAND (JANUARY – JUNE 2024) (2024), https://privacy.org.nz/assets/New-order/Resources-/Publications/Reports-to-Parliament-and-Government-/EU-adequacy/070824-19th-Supplementary-Report-to-EC-Jan-June-2024-A994309.pdf.

164. As of June 21, 2024. *See Adequacy Decisions*, *supra* note 161.

165. *See Report from the Commission to the European Parliament and Council on the First Review of the Functioning of the Adequacy Decisions Adopted Pursuant to Article 25(6) of Directive 95/46/EC*, at 1, COM (2024) 7 final (Jan. 15, 2024); *see also* Dan Cooper & Laura Somaini, *European Commission Retains Adequacy Decisions for Data Transfers to Eleven Countries*, COVINGTON (Jan. 17, 2024), https://www.insideprivacy.com/cross-border-transfers/european-commission-retains-adequacy-decisions-for-data-transfers-to-eleven-countries.

166. *See European Commission and United States Joint Statement on Trans-Atlantic Data Privacy Framework,* EUR. COMM'N (Mar. 24, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2087; *see also Update on the U.S.-EU Safe Harbor Framework*, FED. TRADE COMM'N, https://www.ftc.gov/business-guidance/privacy-security/us-eu-safe-harbor-framework (last visited May 11, 2025) (stating that the European commission first decided adequacy of U.S.-EU Safe Harbor Framework in 2000 and later invalidated the same Framework in 2015); *Commercial sector: adequacy decision on the EU-US Data Privacy Framework*, EUR. COMM'N, https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/eu-us-data-transfers_en (last visited May 11, 2025) (stating that the EU-US Umbrella Agreement concluded in 2016 and was in place until 2020); Mary T. Costigan, *Biden Executive Order Supports New EU-U.S. Data Privacy Framework for Trans-Atlantic Transfers of Data*, NAT'L L. REV. (Oct. 17, 2022), https://natlawreview.com/article/biden-executive-order-supports-new-eu-us-data-privacy-framework-trans-atlantic (stating that the EU-U.S. Privacy Shield was invalidated in 2020 and that in 2022 the Trans-Atlantic Data Privacy Framework replaces the EU-U.S. Privacy Shield).

involved in this framework, essentially validating that the organization complies with the requirements set by the DPF.[167]

The Brussels Effect can be observed in several countries. However, a direct causal relationship is not always demonstrable—it remains unclear whether a country deliberately sought to copy European data protection regulations or whether, independently, it enacted laws that happened to be compatible with the GDPR and thus received adequacy status from the Commission. It is worth noting that some adequacy decisions were made in parallel with, or linked to, trade agreements—as the Commission itself highlighted in the case of South Korea: the dismantling of barriers to data flows is an integral part of the EU–South Korea free trade agreement.[168] Such cases, however, may themselves also reinforce the Brussels Effect explanation.

2. The Adaptation of Market and Corporate Actors: *de facto* Brussels Effect

The adequacy decision regarding the US[169] is a clear demonstration that its validity depends on the decisions of individual companies. This illustrates the mechanism by which companies operating outside the EU or which operate globally voluntarily subject themselves to EU legislation. Thus, compliance with the GDPR can be achieved not because the jurisdiction of a given third country imposes requirements on corporate actors similar to those of the EU but because the companies themselves choose to adapt to it, because they wish to remain active in the EU markets without risking any fines or sanctions. The extraterritorial scope of the GDPR can, therefore, be interpreted as both an incentive and a form of coercion, especially when American technology companies are compelled to comply with the GDPR to gain access to European consumers.[170]

The reasons for such decisions are mostly economic in nature. The opportunity to operate on the EU market can provide a strong incentive for a company to voluntarily align its activities with the requirements set by the GDPR. This is particularly true for digital companies, such as websites and

167. *See Data Privacy Framework (DPG) Overview*, DATA PRIV. FRAMEWORK PROGRAM, https://www.dataprivacyframework.gov/Program-Overview (last visited May 10, 2025).

168. *See Data Protection: European Commission Launches the Process Towards Adoption of the Adequacy Decision for the Republic of Korea*, EUR. COMM'N (June 16, 2021), https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_21_2964/IP_21_2964_EN.pdf.

169. *See* Commission Implementing Decision EU 2023/1795 of 10 July 2023 Pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the Adequate Level of Protection of Personal Data Under the EU-US Data Privacy Framework, 2023 O.J. (L 231) 118.

170. *See* Satariano, *supra* note 156.

social media platforms, as their services can fundamentally be accessed from any country. Such companies can either decide to comply with the GDPR or be compelled to actively exclude consumers from those countries where the GDPR provisions apply. Adaptation to the GDPR can also be explained by the desire of a globally operating company to standardize its data processing workflows. By doing so, it can reduce its own administrative burdens by ensuring compliance with the strictest regulations across all the countries or regions it operates in—just as one of the legislative goals behind the creation of the GDPR was to unify divergent European regulations.[171]

A global IT technology company, IBM, for instance, provides a detailed account of how the implementation of GDPR-compliant data protection protocols within the company is designed to mitigate the risk associated with potential non-compliance with varying data protection requirements imposed by different jurisdictions around the world.[172] To address this challenge, it may be beneficial for a company to align its global operations with the strictest—in this case, GDPR[173]—requirements. Similarly, since May 28, 2018, Microsoft has extended to all its customers worldwide the rights that are applicable to European residents under the GDPR.[174]

In terms of global reach, it is also worth noting that the GDPR has also had a significant impact in economic terms, as it strictly regulates the collection of consumer data, influencing numerous economic mechanisms, such as the effectiveness of online advertising and e-commerce.[175] A recent study found a statistically significant negative impact on the revenue and profit-generating capacity of companies affected by the GDPR—identifying an average decline of 2.2% in revenue and 8.1% in profit-generating

171. *See* GDPR, *supra* note 5, at 2 ("In order to ensure a consistent and high level of protection of natural persons and to remove the obstacles to flows of personal data within the Union, the level of protection of the rights and freedoms of natural persons with regard to the processing of such data should be equivalent in all Member States.").

172. *See* Mukta Singh, *How IBM Transformed Its Global Data Privacy Framework*, I.B.M. (Oct. 25, 2021), https://www.ibm.com/think/insights/how-to-establish-a-global-data-privacy-framework-2.

173. *See What is GDPR, the EU's New Data Protection Law?*, GDPR.EU, https://gdpr.eu/what-is-gdpr/ (last visited May 10, 2025) ("The General Data Protection Regulation (GDPR) is the toughest privacy and security law in the world.").

174. *See Microsoft's GDPR Commitments to Customers of our Generally Available Enterprise Software Products, Learn*, MICROSOFT, https://learn.microsoft.com/en-us/legal/gdpr (last visited May 10, 2025).

175. *See* Giorgio Presidente & Carl Benedikt Frey, *The GDPR Effect: How Data Privacy Regulation Shaped Firm Performance Globally*, CTR. FOR ECON. POL'Y RSCH. (Mar. 10, 2022), https://cepr.org/voxeu/columns/gdpr-effect-how-data-privacy-regulation-shaped-firm-performance-globally.

ability.[176] Therefore, the potential effects of the GDPR also have serious competitive implications.

C. *The DSA and the Brussels Effect*

The potential *de facto* Brussels Effect of the DSA as a legislative measure can be analyzed by considering the five aspects mentioned above. An analysis of the regulation along these lines has already been conducted by Markéta Šonková.[177] At the conclusion of the present analysis, we will present the findings drawn by her and other contributors.

1. The Criteria for the *de facto* Brussels Effect in the Context of the DSA

The first two criteria pertain to the legislator, which in this case is the EU. The first requirement is that the jurisdiction's market must be of significant size.[178] As multiple studies have highlighted, the opportunity to access the European single market is a crucial factor for non-EU entities when adopting European standards.[179] Bradford emphasizes that the EU's market constitutes the most significant export market for major US tech companies, many of which are subject to the DSA's regulations within the EU.[180]

Since the DSA clearly delineates the providers of very large online platforms and very large online search engines, subjecting them to stricter regulations,[181] it is worth examining the proportion of users in the single market for the respective platforms and services. For instance, in 2023, Meta generated $31.2 billion, accounting for 23.1% of its total revenue, from the European continent.[182] In December 2023, its platforms had 408 million active users in Europe, representing 13.3% of all active users globally.[183] This

176. *See id*.

177. *See* MARKÉTA ŠONKOVÁ, *BRUSSELS* EFFECT RELOADED? THE EUROPEAN UNION'S DIGITAL SERVICES ACT AND THE ARTIFICIAL INTELLIGENCE ACT (2024), https://www.coleurope.eu/sites/default/files/research-paper/EDP_4_24 Sonkova_0.pdf.

178. *See* BRADFORD, *supra* note 136, at 25.

179. *See e.g.*, *id*.; Scott, *supra* note 147; Daniel W. Drezner, *Globalization, Harmonization, and Competition: the Different Pathways to Policy Convergence*, 12 J. EUR. PUB. POL'Y 841 (2005); Anke Kennis & Xiyin Liu, *The European Union's Regulatory Power: Refining and Illustrating the Concept with the Case of the Transfer of EU Geographical Indication Rules to Japan*, 62 J. COMMON MKT. STUD. 1578 (2024).

180. *See* BRADFORD, *supra* note 136, at 29.

181. *See* DSA, *supra* note 2, at 11.

182. *See* META PLATFORMS, INC., ANNUAL REPORT (FORM 10-K) 103 (Feb. 1, 2024).

183. *See id*. at 68.

demonstrates that EU users contribute more revenue to these platforms than the global average.[184]

The second criterion for the Brussels Effect on jurisdiction is regulatory capacity: it is not enough for states to adopt the legislation; its successful implementation is also necessary for international dissemination.[185] To facilitate this, the EU has established competences for both the European Commission and the competent authorities of Member States.[186] In the area of judicial sanctions, amounts have been established that rise in line with the total global turnover of the affected company, which can help incentivize compliance with the legislation.[187] For example, Meta, in its 2023 annual report, characterized the potential fines for non-compliance with the DSA as significant.[188] However, blocking the platforms' access to European users as a potential sanction—which would be equivalent to complete exclusion from the market—is not included in the legislation.[189]

The next three criteria pertain to the specific legislation itself. If we interpret the stringency criterion necessary for the emergence of the *de facto* Brussels Effect narrowly—that is, by asserting that the examined regulation must be the strictest in existence—problems arise. For instance, the United Kingdom's (UK) Online Safety Act (OSA), imposes content moderation requirements on regulated online platforms that are at least as strict, if not stricter in certain cases, than the EU's regulations.[190] While the DSA mandates the removal of content deemed illegal under Member State or European law (Article 9),[191] the OSA not only imposes similar requirements but also sets forth provisions concerning harmful yet non-illegal content for children.[192]

The DSA establishes that providers are not obliged to actively detect evidence indicating illegal activities in the transmitted and stored information, but are only expected to remove such content upon notification.[193] In contrast, the OSA formulates a duty of care and mandates

184. *See id.* at 68, 103. Alphabet, Google's parent company, does not disclose separate economic data for Europe, instead aggregating it with figures from the Middle East and Africa (EMEA region), and X, being a private company since 2022, is not obligated to disclose economic data.

185. *See* BRADFORD, *supra* note 136, at 25.

186. *See id.* at 31.

187. *See id.* at 34.

188. *See* META PLATFORMS INC., *supra* note 182, at 11.

189. *See generally* DSA, *supra* note 2.

190. *See* Online Safety Act 2023, c. 50 (Eng.).

191. *See generally* DSA, *supra* note 2, art. 9.

192. *See* Online Safety Act, *supra* note 190.

193. *See* DSA, *supra* note 2, arts. 8–9.

that platforms remove any content that may be deemed illegal based on the information available to them.[194] Furthermore, the UK's media authority, Ofcom, can demand, in certain cases, automated content moderation and even algorithmic removal of illegal content (for example, child pornography) by platform providers.[195]

The scope of the DSA extends to providers offering services to users located in the EU, regardless of where the providers are established.[196] Accordingly, the inflexibility requirement is met, as platforms cannot escape the regulation's scope without losing access to the EU market.

In the case of internet services, the issue of indivisibility should be examined as it relates to several areas. The question of legal indivisibility arises, for example, when modifications to a platform's terms of use are the result of compliance with the DSA. If the platform also makes these modifications for users outside the EU, then this can be regarded as an instance of the Brussels Effect.

As Bradford points out,[197] in the case of the introduction of the GDPR, Facebook, despite extending its new, stricter data protection procedures worldwide, transferred a large portion of its users from several continents from its company registered in Ireland to the legal structure of its US company, as a result of which only European users can exercise the complaint options provided by the GDPR.[198]

Similar measures could be taken in connection to the DSA's requirements, so legal indivisibility is not always an obstacle in the digital space. If the DSA persuades platforms to modify their global terms of use, this could be considered a *de facto* Brussels Effect. In the case of legal obligations to remove illegal content, the scope may become questionable: Do platforms make such content inaccessible only to users in the regulated market, or to everyone?

Technical indivisibility could also lead to the Brussels Effect. This may occur if the DSA were to impose requirements on tech companies that, for technical reasons, could not be tailored exclusively to European users in the operation of the platforms. In practice, however, it appears that large social media platforms are capable of separating their services.[199] Such

194. *See* Online Safety Act, *supra* note 190, § 124(2)(g).

195. *See id.* at §§ 1(2)(b), 124(2)(g).

196. *See* DSA, *supra* note 2, art. 2.

197. *See* BRADFORD, *supra* note 136, at 57.

198. *See id*.

199. *See* Claire Pershan et al., *Euroviews: EU's Platform Accountability Rules are not Having a 'Brussels effect' – Should They?*, EURONEWS (Jan. 31, 2024), https://www.euronews.com/my-europe/2024/01/31/eus-platform-accountability-rules-are-not-having-a-brussels-effect-should-they.

modifications have been made by Meta, which, due to the regulations on targeted advertising in the DMA, altered the legal basis for profiling-based advertising in the EU, EEA countries, and Switzerland, as well as introducing an ad-free subscription option in these countries.[200]

Besides the effortless feasibility of differentiation, the DSA's transparency rules, such as the expectation of platforms to share information about the functioning of their algorithms,[201] may even better incentivize companies to develop separate EU-specific algorithms. At the same time, it could also be argued that if the DSA creates new user demands through certain provisions, such as the ability to switch between recommendation algorithms, companies may subsequently extend EU solutions to new markets.

Economic indivisibility, as the most common cause of the *de facto* Brussels Effect, refers to the situation where it is more cost-effective for companies to apply a standard across broader regions rather than maintaining different services or products for different markets.[202] Economic indivisibility may arise in the case of platforms if such broader adaptation saves costs or does not incur significant additional costs or revenue loss.

In its 2023 report, Meta highlighted that regulations such as the DSA and the DMA entail additional adaptation costs.[203] Moreover, several regulations, particularly those affecting advertisements, could negatively impact the company's financial performance and revenues.[204] Accordingly, it is likely that companies acting rationally will, when possible, choose to differentiate their services rather than adopting the regulations globally.

2. Can the DSA Become a Global Regulation?

It can be stated that when the *de facto* Brussels Effect occurs, the extent of the regulated market reaches the necessary level, and the EU has sufficient regulatory capacity to enforce compliance with the DSA. In contrast, the criteria for the legislation present a mixed picture: in many cases, the British OSA sets stricter expectations for platforms than the DSA.[205] Nevertheless, it is conceivable that the DSA could become a global regulation if digital platform providers find the OSA's provisions to be too strict, or if the UK market and regulatory capacity prove to be inadequate, while the EU and the DSA succeed in meeting similar criteria.

200. *See* META PLATFORMS INC., *supra* note 182, at 41.
201. *See* DSA, *supra* note 2, art. 40(3).
202. *See* BRADFORD, *supra* note 136, at 58.
203. *See* META PLATFORMS INC., *supra* note 182, at 11.
204. *See id*.
205. *See* Online Safety Act, *supra* note 190.

The regulation clearly affects an inflexible market, as the DSA explicitly aims to regulate services offered to EU users, regardless of the providers' place of establishment. It is sufficient for one of the three criteria of indivisibility to be met for the DSA regulations to also affect the operations of companies outside the EU.

Based on the experience with the adoption of previous EU regulations, it can be concluded that legal indivisibility does not exist: in the case of the GDPR, users outside EU were removed from under Facebook's Irish subsidiary, which means that they have no recourse to its complaint mechanisms.[206] Meta has only adapted to the advertising-related legal changes in the EU and EEA member states, as well as in Switzerland.[207]

In regards technical indivisibility, it appears that larger platforms, when faced with situations where compliance with stricter regulations would entail higher costs or revenue losses, strive to differentiate their services to comply with the requirements of varying jurisdictions. In this respect, Meta's response to the EU's regulation of profiling-based advertising, by introducing an ad-free, paid option exclusively for users under the DSA's scope, seems to be a successful experiment.[208]

In terms of economic indivisibility, it seems that in most cases, large platforms are interested in differentiating their operations in the more strictly regulated markets, as they consider the revenue loss and adaptation costs in those territories to be greater than the potential benefits of standardizing services.

Accordingly, it is likely that the DSA will find it more challenging to generate a widespread *de facto* Brussels Effect. Additional reasons for this may include that while the successful GDPR was created in a regulatory "vacuum;" by the time the DSA was developed, several countries had already created or were working on their own regulations affecting online platforms. These include, for example, the German Network Enforcement Act (Netzwerkdurchsetzungsgesetz) and the UK's OSA.[209] In other words, with the development of the DSA, the EU entered a regulatory "competition."

In relation to the DSA, it would be most appropriate to primarily speak of a corporate-level Brussels Effect if it prompted service providers to change their globally applicable terms of use. In several cases, companies have

206. *See* BRADFORD, *supra* note 136, at 57.

207. *See* META PLATFORMS INC., *supra* note 182, at 11

208. *See id*.

209. *See* Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz) [NetzDG] [Law to Improve Law Enforcement in Social Networks (Network Enforcement Act)], Sept. 1, 2017, BGBl. I at 3352 [hereinafter Network Enforcement Act] (Ger.); Online Safety Act, *supra* note 190.

already met some of its criteria, so it is not possible to detect a significant impact. However, in previous cases, there has clearly been a *de facto* Brussels Effect concerning content moderation: in 2016, the EU adopted a voluntary code of conduct on countering illegal online hate speech, which was first joined by Facebook (owned by Meta), Microsoft, X (formerly known as Twitter) and Google.[210] These companies adopted community guidelines on hate speech in line with the code and also enforced them in their content moderation practices outside the EU.[211]

There have been several examples of platforms differentiating their services between the EU and other countries. With the entry into force of the DSA, for example, Meta began archiving ads targeting EU users in its advertising database and introduced chronological content recommendation options for EU Facebook and Instagram users.[212] TikTok and Snapchat also made the use of their algorithms optional for European users.[213] The X platform (formerly Twitter), on the other hand, renders some of its features unavailable in the EU.[214]

The *de jure* Brussels Effect, that is, whether the DSA's rules will be adopted by legislators in other countries, can primarily be analyzed through examining practical examples. Since the DSA was created in a global regulatory competition, several other alternative regulatory solutions have also emerged,[215] and the DSA can no longer be deemed as the strictest among them. Therefore, it may prove to be a less obvious choice for other countries preparing for legislation than was the case with the GDPR.

Several authors and sources emphasize that there was an exchange of views between British and EU stakeholders during the development of the OSA.[216] This also raises the possibility that in the future, instead of a purely

210. *See The EU Code of Conduct on Countering Illegal Hate Speech Online*, EUR. COMM'N, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en#theeucodeofconduct (last visited Mar. 29, 2025).

211. *See* Dawn Carla Nunziato, *The Digital Services Act and the Brussels Effect on Platform Content Moderation*, 24 CHI. J. INT'L LAW 115, 121–22 (2023).

212. *See* Emma Roth, *The EU's Digital Services Act goes into Effect Today: Here's What That Means*, VERGE (Aug. 25, 2023), https://www.theverge.com/23845672/eu-digital-services-act-explained.

213. *See id.*

214. *See Trends Recommendations,* X: HELP CENTER, https://help.x.com/en/resources/recommender-systems/trends-recommendations (last visited May 10, 2025); *Accounts Recommendations,* X: HELP CENTER, https://help.x.com/en/resources/recommender-systems/account-recommendations (last visited May 10, 2025).

215. *See e.g.*, Online Safety Act, *supra* note 190; Network Enforcement Act, *supra* note 209.

216. *See* ANU BRADFORD, DIGITAL EMPIRES: THE GLOBAL BATTLE TO REGULATE TECHNOLOGY 342 (2023); ŠONKOVÁ, *supra* note 177, at 20.

de jure effect, regulations in other countries may draw inspiration from the DSA or adopt some of its tools.

3. Academic Views on the Global Impact of the DSA

Several researchers have examined whether the DSA could trigger a Brussels Effect.[217] These authors mostly claim that a moderate Brussels Effect can be expected, which will not reach the level observed with the GDPR.[218] Moreover, most of these claims were made with knowledge of the rules but without experience of their application in practice. Šonková examined the likelihood of certain EU regulations, specifically the Artificial Intelligence Act[219] and the DSA, exerting a Brussels Effect within the framework laid out by Bradford.[220] According to her, an impact similar to that of the GDPR cannot be expected, but while the DSA may not necessarily be the strictest regulation, it represents a new level of transparency for platforms.[221] She believes that companies around the world may take steps to promote transparency and data collection in their activities in anticipation of similar requests from other jurisdictions.[222] Šonková highlights that the strength of the DSA is that it is founded on over twenty years of member state and EU experience and drawing on feedback from multiple stakeholders, making it an inspiration for other legislators, particularly in terms of risk assessments and the imposition of systemic obligations.[223] She suggests that the *de facto* Brussels Effect of the DSA could even cause conflicts in other legal systems, such as the US.[224] In terms of the *de jure* impact, an important point is that the EU engaged in bi- and multilateral coordination with legislators from other countries, including the UK and Australia.[225]

217. *See generally* BRADFORD, *supra* note 216; ŠONKOVÁ, *supra* note 177.

218. *See* ŠONKOVÁ, *supra* note 177, at 4.

219. *See id*.; Regulation 2024/1689 of the European Parliament ad of the Council of 13 June, 2024, Laying Down Harmonised Rules on Artificial Intelligence and Amending Regulations (EC) No 300/2008, (EU) No. 167/2013, (EU) No. 168/2013, (EU) 2018/585, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), 2024 O.J. (EU) [hereinafter AI Act].

220. *See generally,* ŠONKOVÁ, *supra* note 177.

221. *See id*. at 18.

222. *See id*.

223. *See id*. at 21.

224. *See id*. at 19.

225. *See id*. at 20, 26–29.

Martin Husovec and Jennifer Urban argue that the most ambitious provisions of the DSA are unlikely to have an international impact.[226] They believe that perhaps the content moderation rules and the data access system could be its most successful elements, but for numerous reasons, the international effects of the regulation cannot be assessed in the short term.[227] Dawn Nunziato suggests that the significant fines that can be imposed to enforce the DSA may encourage platforms to align their content moderation practices with EU guidelines, indicating the presence of a substantial Brussels Effect.[228] She points out that in the case of the code of conduct on countering illegal online hate speech, platforms chose global implementation, and the DSA's notice and take down system could achieve similar results.[229]

In her 2023 book *Digital Empires*, Bradford reflects on the DSA regulation.[230] She emphasizes that it will be more challenging for major platforms to maintain services that grant greater rights exclusively to EU users, even if differentiation based on DSA rules becomes technically and economically feasible.[231] The transparency-focused rules of the DSA may encourage companies to standardize their activities globally, while the norms aimed at preparing for systemic risks could influence the global compliance and risk management strategies of the affected companies.[232] According to Bradford, in the case of the *de jure* Brussels Effect, the DSA could serve as a template for other governments.[233]

D. The DMA and the Brussels Effect

The DMA does not directly target the regulation of user content; its aim instead is to ensure freer competition in EU digital markets by preventing large platforms from abusing their market power and enabling new entrants to enter the market.[234]

226. *See* Martin Husovec & Jennifer Urban, *Will the DSA have the Brussels Effect?*, Verfassungsblog (Feb. 21, 2024), https://verfassungsblog.de/will-the-dsa-have-the-brussels-effect.

227. *See id*.

228. *See* Nunziato, *supra* note 211, at 117.

229. *See id*. at 122.

230. *See* BRADFORD, *supra* note 216.

231. *See id*.

232. *See id*.

233. *See id*. at 340.

234. *See* DMA, *supra* note 3, at 2.

1. Brief Overview of the DMA

The DMA allows the Commission to designate a company as a gatekeeper if it meets certain objective criteria.[235] Three linked conditions must be met: the company must have a significant impact on the internal market, provide a core platform service that serves as a gateway for business users to reach end users, and enjoy an entrenched and durable position, or it must be expected to obtain such a position in the near future.[236]

The DMA provisions also provide specific content to flesh out these criteria. A company is considered to have significant market power if its annual turnover reached €7.5 billion in each of the last three years, or its average market capitalization or fair market value was at least €75 billion in the last financial year, and it provides the same core platform service in at least three Member States.[237] A company provides a core platform service if it had at least forty-five million active end users per month in the EU in the last financial year, and at least 10,000 active business users established in the EU per year.[238] A company has an entrenched and durable market position if these user number requirements were met in each of the last three financial years.[239]

Since the DMA came into force, the Commission has designated six companies (Amazon, Apple, Booking, ByteDance, Meta and Microsoft) as gatekeepers, operating twenty-four different core platform services (such as TikTok, Facebook, Instagram, YouTube and Google Play).[240] The gatekeeper designation imposes several additional obligations on the designated platforms and the core platform services mentioned in the designation decision.[241] For example, the gatekeeper must allow its users to easily remove software applications from their devices and change certain default settings of the service.[242] Additionally, the gatekeeper must also ensure that users are allowed and able to use third-party applications and app stores.[243]

The Commission has exclusive competence to enforce the rules laid down in the Regulation, but it closely cooperates with Member States in

235. *See id*.
236. *See id*. art. 3.
237. *See id*.
238. *See id*.
239. *See id*.
240. *See Digital Markets Act: Gatekeepers,* EUR. COMM'N, https://digital-markets-act.ec.europa.eu/gatekeepers_en (last visited May 12, 2025).
241. *See id.* art. 5.
242. *See id.* art. 19.
243. *See id*. art. 6.

enforcing its provisions.[244] As such, Member States may authorize their national competition authorities to investigate certain breaches of obligations under the DMA.[245]

2. The Criteria for the *de facto* Brussels Effect in the Context of the DMA

In relation to the first two criteria, it can also be stated in the case of the DMA that, due to the EU's large consumer base with significant purchasing power, it represents a substantial market for multinational companies. For the five American (Alphabet, Amazon, Apple, Meta and Microsoft) and one Chinese (ByteDance) technology companies that are designated as gatekeepers by the Commission, the importance of the EU's market size becomes evident if one considers their revenues. As mentioned above in connection with the DSA, nearly a quarter of Meta's 2023 revenue came from the EU, despite EU citizens making up just over 10% of its service users.[246] Of Apple's $391 billion net revenue in 2024, $101 billion came from the EU, making it the second most profitable region for the corporation after America.[247]

In terms of jurisdiction, competition regulation is one of the most well-established areas of EU-level competences. The legislation grants significant enforcement powers to the European Commission, allowing it to act even without involving other institutions.[248] Similar to those provided for in the DSA, the sanctions in the DMA are aligned with the global revenues of companies, encouraging them to cooperate with regulatory authorities.[249]

Meta's 2023 annual report emphasized that the DMA has caused and may continue to cause significant compliance costs for the firm, potentially leading to modifications in both their products and business practices.[250] Microsoft's report for the 2024 fiscal year also highlighted that the engineering developments required to comply with the DMA, among other regulations, will entail substantial costs and resource reallocations.[251]

In her books, Bradford also asserts that the EU's competition regulation is considered to be the strictest globally.[252] The DMA prescribes significant

244. *See generally id.*
245. *See id*. art. 37.
246. *See* META PLATFORMS INC., *supra* note 182, at 68, 103.
247. *See* APPLE INC., ANNUAL REPORT (FORM 10-K) 22 (Nov. 1, 2024).
248. *See* DMA, *supra* note 3, art. 37.
249. *See id*. art. 30.
250. *See* META PLATFORMS INC., *supra* note 182, at 11.
251. *See* MICROSOFT CORP., ANNUAL REPORT (FORM 10-K) 29 (July 30, 2024).
252. *See* BRADFORD, *supra* note 216.

sanctions for gatekeeper companies that fail to comply with or which violate the provisions of the legislation.[253] If a company repeatedly—at least three times in eight years—fails to meet the DMA's rules, the European Commission may impose even more severe sanctions.[254]

Apple could be the first gatekeeper company to be fined under the DMA for its practices related to online music streaming services in the App Store. The allegation laid against Apple is that it prohibited developers from informing users about cheaper payment methods available outside the App Store.[255] Based on Apple's 2023 revenue data, the fine for this anti-competitive practice could be as high as $38 billion.[256]

The inflexibility requirement is also met here, similarly to the DSA, as the DMA applies to companies with more than forty-five million active end users and over 10,000 active business users annually in the EU.[257] Due to the inflexibility of the market to be regulated, it is not possible for gatekeeper companies to fall under a more lenient regulatory regime outside the Union's jurisdiction while maintaining their position in the EU.

Regarding the last condition identified by Bradford, it involves criteria of legal, technical and economic indivisibility.[258] For these to be met, the strict rules of the DMA must affect a company's operations and services not only within the EU but also outside it.[259] Legal indivisibility is clearly evident, for example, in the DMA's provisions on structural corrective measures and on the prohibition of corporate acquisitions.[260] These aim to prevent gatekeepers from engaging in practices that could harm competition, consumers and the market itself. For instance, the EU can prohibit a gatekeeper company from selling parts of its business under structural corrective measures, and the prohibition of acquisitions can prevent gatekeeper companies from gaining undue market advantages over their competitors.[261] In both cases, the global nature of control may arise, resulting in a Brussels Effect.

When it comes to technical indivisibility, companies appear to be able to differentiate their services if they make changes that affect only the areas

253. *See* DMA, *supra* note 3, art. 30.

254. *See id*. at 20.

255. *See* Emma Roth, *Apple Reportedly Facing First-Ever EU Fine Over App Store Rules*, THE VERGE, (Nov. 5, 2024), https://www.theverge.com/2024/11/5/24289067/apple-eu-fine-digital-markets-act-app-store.

256. *See id*.

257. *See* DMA, *supra* note 3, art. 3.

258. *See* BRADFORD, *supra* note 216.

259. *See id.* at 53–63.

260. *See* DMA, *supra* note 3.

261. *See id*. at 20-21, 45.

and consumers subject to the DMA's jurisdiction. This is suggested, for example, by Meta's modification of the legal basis for behavioral advertising from the category of "legitimate interest" to "consent" in the Facebook and Instagram services within the EU, EEA countries and Switzerland, as well as the introduction of a subscription for ad-free use for users from November 2023.[262]

Signs of economic indivisibility have not yet emerged, which may be due to the significant costs of complying with the DMA for platforms, which outweigh the benefits of economies of scale that might derive from global changes. Thus, it is highly likely that these will not be introduced to countries or regions outside the territorial scope of the legislation until similar laws are adopted by other countries.

3. Can the DMA Become a Global Regulation?

The DMA clearly meets the requirements of the *de facto* Brussels Effect in terms of the market regulated by it and its regulatory capacity. This means that both the market's size and significance, as well as the established legal and institutional framework, serve to enforce compliance with the regulation. In terms of regulatory strictness, the European Commission is considered one of the strictest competition authorities in the world, thus also fulfilling this requirement. Furthermore, the DMA regulates an inflexible market, aiming to ensure—among other objectives—consumer protection for EU citizens and to regulate the services offered to them.[263] Of the three types of indivisibility, only legal indivisibility can be demonstrated in the case of the DMA, for example, through the regulation of corporate acquisitions and mergers. Regarding the other two types, technical and economic indivisibility, it can be concluded that, so far, differentiating their services has been the rational decision for companies.

Overall, based on the examined aspects, the DMA is more likely to trigger a global *de facto* Brussels Effect than the DSA. It is important to emphasize, however, that the Brussels Effect only exists if, for example, an antitrust remedy imposed on a technology company is enforced not only at the EU level but also globally. The UK's Digital Markets, Competition and Consumers Act, adopted in May 2024, resembles the DMA in some respects.[264] The law would require technology companies with strategic market status to open their data to rival search engines and to restructure their

262. *See* META PLATFORMS INC., *supra* note 182, at 11.

263. *See* DMA, *supra* note 3.

264. *See* Bill Echikson & Maria Hadjicosta, *Europe's DMA Goes Global*, CEPA (Mar. 4, 2024), https://cepa.org/article/europes-dma-goes-global.

app stores.[265] The Act also aims to reduce the dominance of certain tech companies over consumers and businesses.[266]

4. Academic Views on the Global Impact of the DMA

Bradford argues that it is worthwhile for companies to implement the remedies expected or imposed by the EU on a global scale as otherwise competition authorities in other countries may also initiate investigations or demand similar measures.[267] She cites a case related to Google's Android operating system, in which the European Commission imposed a $5 billion fine in 2018, which probably encouraged other jurisdictions, such as Russia, Brazil, Turkey, South Korea and Japan, to initiate similar proceedings.[268] According to Bradford, it may be beneficial for other jurisdictions to harmonies their competition regulations with the DMA, particularly due to the aforementioned imitative litigation, which can save valuable time for authorities and counterbalance their lack of technical expertise and other resources.[269]

Arthur Sadami and his co-authors argue in their study that the Brussels Effect is not suitable for fully describing the regulation of platforms in countries of the global South, such as Brazil.[270] They also point out that China's advancements in regulating technological sectors, the challenges posed by globalization and international multilateral institutions, and economic geo-fragmentation collectively may restrain the Brussels Effect.[271] They suggest that the crisis which the EU trade bloc is undergoing—especially after Brexit—could also be a factor that weakens the Brussels Effect by destabilizing the economic foundations of the block.[272] Nonetheless, Sadami and his colleagues acknowledge that the recent development of EU competition regulatory mechanisms has initiated a new wave of institutional transformations in other legal systems, primarily focusing on the regulation of digital platforms.[273] This culminated in the adoption of the DMA, which has influenced not only the competition policies of EU Member States but has also convinced other legislators worldwide that

265. *See id*.
266. *See id*.
267. *See* BRADFORD, *supra* note 216.
268. *See id*. at 344.
269. *See id.*
270. *See* Arthur Sadami et al., *Is there a Brussels Effect in Brazil? The Case of Digital Platforms Regulation*, 10 NORTH EAST L. REV. 134, 138 (2024).
271. *See id*. at 137.
272. Sadami et al., *supra* note 270, at 137.
273. *See id.*

their existing competition laws are not adequate to address the challenges facing them in this field.[274]

V. CONCLUSION

The article of the EMFA that establishes internal market harmonization has raised several concerns, particularly in connection with its provisions on cultural matters. Additionally, the legislature has not sufficiently justified the legal basis it opted for. Nevertheless, according to academic opinion, there is no significant practical limitation on internal market harmonization. The relevant provisions of the EU treaties and the case law of the CJEU interpreting them indicate that if any issue or regulatory need related to market integration arises during the creation of a legal act, the legislator can legitimately and lawfully invoke Article 114 of the TFEU as its legal basis. However, this may conflict with the limited political role assigned to the EU by the Member States, as it is only entitled to act within the powers conferred upon it.

The case law is consistent in the sense that if a legal act pursues dual objectives or consists of two components, and one of these can be identified as the primary or decisive element, the legal act must be based on a single legal basis required by the primary or decisive objective or component. However, if the objectives of the legislation are inseparably linked and neither is obviously secondary or indirect relative to the other, such a legal act must, exceptionally, be based on the various relevant legal bases. In this light, even if we accept internal market harmonization as one of the objectives designated by the EMFA, an equally important—if not more prominent—objective of the regulation concerns cultural matters, for which Article 114 of the TFEU cannot be invoked under any circumstances.

Another issue is that in most of the disputed provisions, the cross-border nature of the regulation does not arise at all, and regulatory differences that do not concern market integration cannot be addressed through the instrument of internal market harmonization. According to case law, if regulatory objectives must be achieved using other (primary) legal bases provided by the treaties, the legal basis of internal market harmonization cannot be applied. This is precisely the situation in this case, therefore legal harmonization of the market can only arise as a secondary effect in relation to most provisions. Additionally, the creation of the EMFA—particularly due to its key provisions—has opened up the possibility of withdrawing Member State competences. Competence withdrawal can be established based on the treaties and their interpretation, with the CJEU being the final interpreter.

274. *See id*. at 142–43.

When it comes to the regulation of online platforms, despite the creation of the DSA, the principle of the country of origin introduced by the Directive on electronic commerce for information society services continues to limit Member State regulation. This principle restricts the jurisdiction of Member States within the EU to service providers established in their territory. The case law of the CJEU has made it clear that the exceptional measures provided by the Directive on electronic commerce, which can override the country of origin principle, cannot be interpreted to include taking abstract and general measures—that is—passing legislation. At the same time, the principle of the country of origin is not violated in the case of national regulations on online services that apply to entities not covered by the Directive on electronic commerce, such as electronic communications service providers. However, even in such cases, a contrary interpretation by the European Commission or the CJEU cannot be excluded.

Following the creation of the DSA, Member States can only enact national regulations for intermediary service providers within a very narrow scope. This follows from the regulatory nature of the DSA, with the Commission regularly emphasizing that it does not require national legislation to implement it, due to its direct applicability.[275] The maximum harmonization nature emphasized by the Commission excludes not only supplementary or additional regulations related to specific DSA provisions but also national legislation affecting the explicit policy objectives of the DSA.[276] A somewhat contradictory and special issue that allows some leeway for national legislation is that of age verification, where the Commission supported Germany and France in adopting national provisions on a transitional basis.[277] However, the Commission has not exhibited full openness regarding age verification: it did not support the French legislation's provision, which it believed would have indirectly required online platforms to introduce age verification.[278]

Also, on the topic of the DSA, it is worth mentioning the regulation of video-sharing platforms, which, in connection with the specific provisions of the AVMS Directive, still allows for Member State regulation. However, the Commission, depending on the national-level legal requirements, as shown by the example of Germany, may choose an interpretation that demonstrates a violation of the DSA's maximum harmonization.

When attempting to assess the potential global impact of the EU's platform regulation, it is necessary to emphasize that the *de jure* or *de facto*

275. *See generally* DMA, *supra* note 3.
276. *See generally id.*
277. *See generally id.*
278. *See generally id.*

international extension of an EU regulation rarely fully materializes. The jurisdictions of third countries and international companies do not necessarily adopt or start applying 100% of an EU regulation—it should be viewed as a toolkit, and its potential international impacts should be assessed in this light: some elements are more likely to have a global influence than others.

The GDPR is a particularly good example of the Brussels Effect, and as a policy area, it is closely related to the DSA and the DMA. Regarding the *de jure* effect, it is important to note that even in the case of adequacy decisions that are particularly useful for this evaluation, a direct causal relationship can only be supposed. Thus, it is possible to determine the similarity of the laws of other countries to the GDPR—for example, this can be demonstrated through an adequacy decision—but it is more difficult to answer whether the third country has actually shaped its laws in this way under some actual form of influence. There are cases where the EU's impact on third countries' data protection laws is much more certain, such as when a free trade agreement has been concluded, which required the harmonization of data protection rules. Ultimately, this can also be traced back to the EU's potential economic or political dominant role.

While the DSA and the DMA differ in content, their goals and impacts are closely related. Neither the DSA nor the DMA can be definitively said to exert a full Brussels Effect internationally. Both contain elements that are more likely to have a global impact, but in certain regards, companies may be able to operate in a differentiated manner, that is, by limiting compliance with the regulations to a narrow geographical region. For example, platforms have generally implemented stricter measures globally for content moderation, but regarding advertisements, Meta was able to quickly differentiate its services by introducing a payment-based alternative within the EU.

SOVEREIGNTY AND SPEECH IN AN INTERNET ERA

Russell L. Weaver*

Abstract

In a democracy, where the people are deemed to be sovereign, and have the right to control government through the democratic process, it is generally inappropriate for governmental officials to try to control and censor public discussions. Nevertheless, the trial court decision in Misouri v. Biden reveals how the Biden Administration not only encouraged social media platforms to censor speech, but also pressured and threatened them. Obviously, the government can act when the speech involved is illegal (e.g., child pornography), but the Biden Administration targeted public discussions that did not involve illegal speech, and that involved legitimate issues of public concern (e.g., climate change, the Hunter Biden laptop story, Covid, and Covid vaccines).While some of the suppressed discussions arguably involved "disinformation," the Biden Administration also sought to suppress truthful information. The Biden Administration's goal was to enforce its preferred view on the issues in question. The U.S. Supreme Court refused to weigh in on Biden's actions, dismissing the McMurthy case on standing grounds. This article discusses the McMurthy decision, and examines why and how the courts should protect the people's sovereignty and their speech.

* Professor of Law & Distinguished University Scholar, University of Louisville, Brandeis School of Law. Professor Weaver wishes to thank the University of Louisville's Office of Research and Invitation, and in particular its Distinguished University Scholar program, for its continued support of his research efforts. Portions of this article are drawn from Professor Weaver's earlier writings.

When the United States was established as a nation in the late eighteenth century, monarchy was the dominant form of government in Europe.[1] At one point, some believed that kings ruled by "Divine Right."[2] In other words, kings were viewed as having been placed on their thrones by God, as carrying out God's will, and therefore as sovereign in the sense that "the King could do no wrong."[3] Sovereignty was clearly vested in the monarch.

The U.S. Declaration of Independence marked a major divergence. In that document, early Americans implicitly repudiated Divine Right, and affirmed several fundamental propositions: "that all Men are created equal," "that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness," and that "to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed."[4] The Declaration then articulated a proposition that would have been unthinkable to proponents of divine right—that the people have the right to revolt against the King:

> Whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to affect their Safety and Happiness.[5]

The Declaration then sets forth an extensive list of grievances against King George which the signatories viewed as justifying their decision to declare independence.[6]

If the power to govern derives from the consent of the governed, then it places ultimate authority in the hands of the people themselves. James Madison made this very point when he denounced a congressional resolution criticizing "self-created societies" that some believed had "misrepresent[ed] the conduct of the Government."[7] Madison's view was that, in a Republic, "the censorial power is in the people over the Government, and not in the

---

1. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 95–96 (1996) (Stevens, J., dissenting) (citing John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. L. REV. 1121, 1124–25 (1993)).

2. *Id.* (citing Stevens, *supra* note 1, at 1124–25).

3. *Id.* (Stevens, J., dissenting).

4. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

5. *Id.*

6. *See id.* ("Such has been the patient Sufferance of these Colonies; and such is now the Necessity which constrains them to alter their former Systems of Government. The History of the present King of Great Britain is a History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid World.").

7. *See* Houston Cmty. Coll. Sys. v. Wilson, 595 U.S. 468, 480 (2022) (alteration in original) (quoting 4 ANNALS OF CONG. 899 (1794)).

Government over the people."[8] But, in recent years, the U.S. government has taken a very different view of the role and the power of the citizenry. As more and more speech is funneled through social media networks, the Biden Administration pressured and threatened those platforms in an effort to stifle and suppress discussion of public issues.[9] This article examines these governmental efforts.

I. THE U.S. SYSTEM AND FREE EXPRESSION

Another interesting aspect of the U.S. system is that the founding generation was generally distrustful of government. Many who came to the Americas in the seventeenth and eighteenth centuries did so fleeing religious persecution in Europe.[10] In the British colonies, they were met with other forms of governmental harassment. For example, British colonial authorities used Writs of Assistance and general warrants to conduct searches of people and their homes;[11] searches which created high levels of anger and resentment among the colonists.[12]

British colonial officials also tried to suppress and control freedom of expression.[13] In particular, the British created a censorial system with the

8. *Id.* (first quoting 4 ANNALS OF CONG. 934 (1794); and then citing Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. REV. 1525, 1560–66 (2004)).

9. *See* Missouri v. Biden Jr., No. 22-01213, 2023 WL 5841935, at *2 (W.D. La July 4, 2023) *vacated*, 114 F.4th 406 (5th Cir. 2024) (mem.; per curiam).

10. *See* Everson v. Board of Educ., 330 U.S. 1, 8–9 (1947) ("A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy.").

11. *See* Boyd v. United States, 116 U.S. 616, 625 (1886) (noting "the famous debate" in the American colonies about the arbitrary use of these writs of assistance by the English which "was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country . . . . [and was] fresh in the memories of those who achieved our independence and established our form of government").

12. *See id.*

13. *See* RUSSELL L. WEAVER ET AL., THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION AND FREE SPEECH 6–7 (2006) [hereinafter THE RIGHT TO SPEAK ILL] (discussing crime of "seditious libel" which "made it a crime to criticize the government or government officials" this restricting freedom of speech (first citing Judith Schenk Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816, 825 (1984); then citing Jeffrey K. Walker, *A Poisen in Ye Commonwealthe: Seditious Libel in Hanoverian London*, 25 ANGLO-AM. L. REV. 341, (1996); then citing William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L REV. 91, 98 (1984); then citing The Case de Libellis Famosis, or of Scandalous Libels [1605] 77 Eng. Rep. 250 (Eng.); then citing R v. Chief Metropolitan Stipendiary Magistrate, ex parte

power to control the content of newspapers;[14] a practice that offended the colonists.[15] British authorities also prosecuted colonists for their speech. Perhaps the most famous seditious libel prosecution in the colonies involved John Peter Zenger.[16] When Zenger, a New York publisher, published stories mocking the royal Governor and his administration, he was prosecuted for seditious libel.[17] While Zenger languished in jail for eight months awaiting trial, the Royal Governor arranged for the disbarment of his lawyers for stating exceptions on Zenger's behalf.[18] When the case was finally tried, Zenger's lawyer admitted that Zenger had published the allegedly libelous statements, and offered to concede the libel if the prosecution could prove that the allegations were false.[19]When the prosecution declined, the lawyer offered to prove that the statements were true.[20] Although the court disallowed the evidence on the then valid basis that truth was immaterial, Zenger was acquitted in what is viewed as an illustration of jury nullification.[21]

Also in the colonies, James Franklin (Benjamin Franklin's brother), who published *The Courant*, was jailed at one point for showing "disrespect" to governmental officials.[22] Because James had a tendency "to mock religion and bring it into disrespect," a court ordered that "'James Franklyn, the printer and publisher [of the Courant], be strictly forbidden by this court to print or publish the New England Courant' unless he submitted each issue of

---

Choudhury [1991] 1 QB 429 (Eng.); and then citing William R. Glenson, *The Trial of John Peter Zenger*, 68 N.Y. ST. B. J. 48 (1996))).

14. *See* H.W. BRANDS, THE FIRST AMERICAN: THE LIFE AND TIMES OF BENJAMIN FRANKLIN 31 (2000) ("Declaring that the tendency of the *Courant* was 'to mock religion and bring it into disrespect,' the General Court ordered that 'James Franklyn, the printer and publisher thereof, be strictly forbidden by this court to print or publish the New England Courant' unless he submitted each issue of the paper to the censor for prior approval.").

15. *See* Thomas v. Chicago Park Dist., 534 U.S. 316, 320 (2002) (first citing William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Publishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 248 (1982); then citing FRED SEATON SIEBERT, FREEDOM OF THE PRESS IN ENGLAND, 1476–1776: THE RISE AND DECLINE OF GOVERNMENT CONTROLS 240 (1952); and then citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 152 (1769)).

16. *See* Elizabeth I. Haynes, *United States v. Thomas: Pulling the Jury Apart,* 30 CONN. L. REV. 731, 744 (1998) (citing JOHN GUNTHER, THE JURY IN AMERICA 27 (1988)).

17. *See id.* (citing GUNTHER, *supra* note 16, at 27).

18. *See* THE RIGHT TO SPEAK ILL, *supra* note 13, at 7 (citing Cohen v. Hurley, 366 U.S. 117, 140 (1961) (Black J., dissenting)).

19. *Id.* (citing William R. Glendon, *The Trial of John Peter Zenger*, 68 N.Y. STATE BAR J. 48, 50 (1996)).

20. *Id.* (citing Glendon, *supra* note 19, at 50).

21. *See* Haynes, *supra* note 16, at 744–45 (citing GUNTHER, *supra* note 20, at 27–30).

22. *See* BRANDS, *supra* note 14, at 30 (noting that James was ultimately imprisoned for about 30 days).

the paper to the censor for prior approval."[23] James was also prosecuted for printing a fake letter to the editor (fake in the sense that James was the real author, but he attributed the letter to someone else) that implied that the authorities were not pursuing pirates (operating off the New England coast) with sufficient vigor.[24] In that letter, James reported (sarcastically) that the captain, who was heading up the expedition against the pirates, "will sail sometime this month, if wind and weather permit."[25] James was jailed for publishing this letter, and Benjamin Franklin was questioned, but ultimately released.[26] Many believed that the arrest was politically motivated, and was designed simply to silence James for his stinging political commentaries.[27] While his brother was in prison, Benjamin Franklin continued publishing the newspaper.[28] When Benjamin left Boston for New York, he was motivated in part by a fear of prosecution by Boston's elite.[29] Subsequently, well aware of what had happened to his brother, Benjamin Franklin was sometimes cautious about using his newspaper to provoke the authorities.[30]

Because of the colonial abuse, when the early Americans achieved independence from England in the late eighteenth century, the Framers of the U.S. Constitution retained a healthy skepticism of governmental authority which led them to attempt to restrict the scope of federal authority.[31] One way they sought to achieve that objective was by providing the federal government with only limited and enumerated powers.[32] In addition, the

23. *Id.* at 31.

24. *Id.* at 29.

25. *Id.*

26. *Id.* at 30.

27. *Id.* ("A commonly accepted explanation was that ever since the smallpox scuffles [in which James Franklin had opposed Cotton Mather], the court had been seeking an excuse to silence the turbulent pressman; this was simply the excuse that fell to hand.").

28. *Id.*

29. *Id.* at 34 ("Consequently Ben saw no recourse but flight—which recommended itself on other grounds as well. To a curious boy, Boston had been an exciting place; to an independent-minded young man, it was starting to stifle. The Mathers did not say such threatening things about Ben as about James, but it was clear they and their supporters had doubts about the younger Franklin too . . . Now might be a good time to leave, before the clerics and judges came after him as they had come after James. 'It was likely I might if I stayed soon bring myself into scrapes.'").

30. *Id.* at 114 ("Some journalists enter their profession from a zeal to right wrong and oppose entrenched authority; this was what had motivated Franklin's brother James—and landed James in jail. Ben Franklin certainly learned from James's experience and from his own experience on James's paper. He had no desire to publish from prison, and even less desire to *not* publish from prison or anywhere else. Journalism for him was a business rather than a calling, or perhaps it was a calling that could call only so long as the business beneath it flourished. Unlike James, Ben Franklin would not provoke the authorities into closing him down. If nothing else, such rashness would lose him his primary contract with the provincial government.").

31. *See* U.S. CONST. art. I, § 8.

32. *See id.*

Framers embraced the ideas of Baron de Montesquieu, who is credited with articulating the doctrine of separation of powers,[33] and incorporated that doctrine throughout the Constitution.[34] Having gone to great lengths to restrain the scope of federal authority in the U.S. Constitution, the Framers decided that a bill of rights was unnecessary, believing that they had sufficiently protected the people against federal governmental authority.[35] That decision was met with vigorous dissent by those who believed that they needed explicit protections for various rights.[36] These objections nearly derailed the ratification process,[37] and ultimately led to a compromise: the Constitution would be adopted "as is," but the first Congress would create what would become the Bill of Rights.[38] As a result, the Bill of Rights entered the Constitution as the first ten amendments to the U.S. Constitution.[39]

33. *See* CHARLES BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 152 (Thomas Nugent trans., Cosimo Classics 2011) (1914) ("[T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.").

34. *See* U.S. CONST. art. I, § 7 ("Every Order, Resolution, or Vote to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.").

35. *See* Wallace v. Jaffree, 472 U.S. 38, 92–93 (1985) (Rehnquist, J., dissenting) ("During the debates in the Thirteen Colonies over ratification of the Constitution, one of the arguments frequently used by opponents of ratification was that without a Bill of Rights guaranteeing individual liberty the new general Government carried with it a potential for tyranny.").

36. *See id.* at 93 (Rehnquist, J., dissenting).

37. *See id.*

38. *See* McDonald v. City of Chicago, 561 U.S. 742, 769 (2010) ("But those who were fearful that the new Federal Government would infringe traditional rights such as the right to keep and bear arms insisted on the adoption of the Bill of Rights as a condition for ratification of the Constitution." (first citing Debates in the Several State Conventions on the Adoption of the Federal Constitution (J. Elliot 2d ed. 1836); then citing LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 26-34 (1999); and then citing 1 ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS & DEVELOPMENT 110, 118 (7th ed. 1991)).

39. *See id.* (first citing DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 38; then citing LEVY *supra* note 38; and then citing KELLY ET AL., *supra* note 38); *see* Marsh v. Chambers, 463 U.S. 783, 816 (1983) (Brennan, J., dissenting) ("The first 10 Amendments were not enacted because the members of the First Congress came up with a bright idea one morning; rather, their enactment was forced upon Congress by a number of the States as a condition for their ratification of the original Constitution." (first citing 1 ANNALS OF CONG. 431–33, 662, 730 (1789); then citing Barron v. Baltimore, 32 U.S. 243 (1833); then citing EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 10–34 (1957); and then citing BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 697–980, 983–84 (1971)).

One of the rights insisted upon by the objectors was the right to freedom of expression, and it was protected in the very first amendment.[40] Given the history of speech suppression, the new Americans were determined to enshrine explicit protections for speech and press.[41] This solution was not perfect. Following the adoption of the First Amendment, the new government sought to prosecute dissenters through the Alien and Sedition Act.[42] However, that Act was later repealed, the convictions repudiated, and the fines repaid.[43]

But the legacy of the colonial period, and the limits on governmental authority, were solidly entrenched in the soul of the American people. Over the centuries, the U.S. Supreme Court has reaffirmed the right of the people to express their opinions on matters of public interest,[44] and have generally rejected governmental attempts to regulate or control public discourse.[45]

Of course, the Court has recognized that there are certain discrete categories of speech that the government may regulate or control.[46] These categories include such things as child pornography,[47] obscenity,[48] fighting words,[49] and true threats.[50] Otherwise, the people remain free to speak their mind on matters of public interest,[51] and the government may not generally impose "content-based" or "viewpoint-based" restrictions on speech[52] and cannot censor speech simply because the government holds a different view.

---

40. *See* U.S. CONST. amend. I.

41. *See id.*

42. *See* N.Y. Times v. Sullivan, 376 U.S. 254, 273-74 (1964).

43. *See id.* at 276.

44. *See N.Y. Times*, 376 U.S. at 269; Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339, 341 (2010) ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office . . . [I]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes." (first citing Buckley v. Valeo, 424 U.S. 1, 14–15 (1976) (*per curiam*); and then citing Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989))); Virginia v. Black, 538 U.S. 343, 365 (2003) ("[P]olitical speech [is] at the core of what the First Amendment is designed to protect.").

45. *See* United States v. Alvarez, 567 U.S. 709 (2012).

46. *See* U.S. CONST., *supra* note 40.

47. *See* New York v. Ferber, 458 U.S. 747 (1982).

48. *See* Miller v. California, 413 U.S. 15 (1973).

49. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

50. *See* Virginia v. Black, 538 U.S. 343, 344 (2003).

51. *See* U.S. CONST., *supra* note 40.

52. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 378 (1992) (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 (1986)).

In other words, in the U.S. Constitution, as well as in the First Amendment, the American people essentially rejected the types of governmental repression that was imposed following Gutenberg's invention of the printing press. Today, although the government has the power to require individuals to hold a federal license in order to use the broadcast waves,[53] and also has the power to impose content-based restrictions on that medium,[54] most other speech is free of governmental restrictions of that nature.[55] Indeed, licensing schemes (outside the broadcast area) are regarded as prior restraints and are presumptively unconstitutional.[56] Courts treat broadcast communication differently because there is a scarcity of broadcast waves, signals would conflict if everyone were allowed to use the air waves without regulation[57] and those that are able to obtain licenses essentially serve as fiduciaries in their use of those waves.[58] By contrast, "printing" can now be done with personal computers and home printers, technologies that are essentially accessible by everyone.[59] Likewise, in an internet and social media era, there is no scarcity problem and no inherent limits on the number of people who can communicate.[60] In addition, content censorship—requiring individuals to submit their manuscripts to censors in order to obtain permission to publish—are essentially forbidden.[61] Licensing systems are regarded as "prior restraints" on speech and are presumptively unconstitutional.[62] Similarly, the crime of seditious libel has been abolished.[63]

The U.S. Constitution and the Declaration of Independence envision a governmental system which vests sovereignty in the people.[64] Not only does the government exist through the "consent of the governed,"[65] but major components of the government (in particular, the President and Congress) are elected by the people through a popular vote (albeit, in the case of the President, a popular vote that is filtered through the Electoral College on a

53. *See* Red Lion Broad. v. FCC, 395 U.S. 367 (1969).
54. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978).
55. *See e.g.*, Lovell v. City of Griffin, 303 U.S. 444 (1938).
56. *See id.*
57. *See Red Lion Broad.*, 395 U.S. at 390.
58. *See id.* at 389.
59. *See generally* RUSSELL L. WEAVER, FROM GUTENBERG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY AND THE IMPLICATIONS FOR DEMOCRACY 63–65 (2nd ed. 2019).
60. *See generally id.*; *see also* Reno v. American Civ. Liberties Union, 521 U.S. 844 (1997).
61. *See Lovell,* 303 U.S. at 444.
62. *See id.* at 451–52.
63. *See* Garrison v. Louisiana, 379 U.S. 64 (1964).
64. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).
65. *Id.*

state-by-state basis).[66] To the extent that the people must make decisions regarding candidates or issues, freedom of expression is one of the essential building blocks in American democracy.[67] Indeed, the U.S. Supreme Court has emphatically stated that "speech concerning public affairs is more than self-expression; it is the essence of self-government"[68] and "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people" so that "changes may be obtained by lawful means."[69]

Going hand in hand with the right of free expression is the corresponding right to be free of governmental censorship.[70] While the U.S. government might have the authority to prohibit a few limited categories of unprotected speech (e.g., child pornography),[71] it does not generally have the power to censor and control citizen debates on matters of public interest.[72] The U.S. Supreme Court expressed a similar idea in *Matal v. Tam*, a case in which the Court emphasized the importance of having government act with viewpoint neutrality, because "the right to create and present arguments for particular

66. *See* U.S. CONST., Art. II, § 1.

67. *See generally* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877 (1963); Alexander Meiklejohn, *The First Amendment as an Absolute*, 1961 SUP. CT. REV. 245 (1961); U.S. CONST. amend. I.

68. Connick v. Myers, 461 U.S. 138, 145 (1983) (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)) (cleaned up); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., White, J., Blackmun, J., concurring) ("Core political speech occupies the highest, most protected position . . . . "); *see also* Roth v. United States, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.").

69. New York Times, Co. v. Sullivan, 376 U.S. 254, 269 (1964) (first quoting Roth, 354 U.S. at 484; and then quoting Stromberg v. California, 283 U.S. 359, 369 (1931)); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339 (2010) ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office . . . [I]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes." (cleaned up) (first citing Buckley v. Valeo, 424 U.S. 1, 14–15 (1976); and then citing Eu v. San Francisco Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989))); Virginia v. Black, 538 U.S. 343, 365 (2003) ("Political speech [of course, is] at the core of what the First Amendment is designed to protect.").

70. *See* Lovell v. City of Griffin*,* 303 U.S. 444 (1938).

71. *See generally* RUSSELL L. WEAVER & CATHERINE HANCOCK, THE FIRST AMENDMENT: CASES, MATERIALS & PROBLEMS 69–178 (Carolina Academic Press, 7th ed. 2023) [hereinafter THE FIRST AMENDMENT] (describing content-based speech restrictions).

72. *See generally id.*

positions in particular ways, as the speaker chooses," is necessary to prevent government from silencing dissent and distorting the public debate.[73]

II. FREEDOM OF EXPRESSION IN A CHANGING COMMUNICATIONS LANDSCAPE

The Biden Administration's actions arose in the context of the internet and the proliferation of social media platforms. As we shall see, since most speech now goes through those platforms, governments have a unique ability to pressure the platforms to suppress speech.

Of course, governmental attempts to suppress speech are nothing new. Johannes Gutenberg introduced movable type into Europe in the fifteenth century,[74] thereby enabling printers to type set a page and relatively quickly create multiple copies of that page, and eventually create books and other documents.[75] The printing press was transformative because although it did not increase the speed at which information moved, it made it possible to create and disseminate multiple copies of documents, allowing information to spread more broadly. The printing press led to a flowering of knowledge, information and ideas,[76] as well as to the Protestant Reformation[77] and to changes in governmental systems.[78]

Because the printing press was a transformative technology, governments actively sought to limit and control its use.[79] Perhaps Kings correctly perceived that the printing press would ultimately lead (as it did) to the demise of monarchy as a governing institution in Europe.[80] To control printing, the English imposed an array of licensing schemes.[81] For one, the government limited the total number of printing presses that could exist,[82]

73. Matal v. Tam, 582 U.S. 218, 249 (2017) (Kennedy, J., concurring).

74. *See* CHARLES T. MEADOW, MAKING CONNECTIONS: COMMUNICATION THROUGH THE AGES 64–65 (2002) ("Johannes Gutenberg did not invent the printing press. Nor was he the first to use movable type but he brought the movable-type printing press into existence in the western world. Printing of a sort, was known in China as far back as the seventh century CE. This was printing from wood blocks into which reverse images of written ideographs were carved . . . . It is something like using a large rubber stamp.").

75. *See* WEAVER, *supra* note 59, at 9–11.

76. *See id.* at 12–13.

77. *See id.* at 13–14.

78. *See id.* at 14–18.

79. *See id.* at 115.

80. *See id.*

81. *See* Thomas v. Chicago Park Dist., 534 U.S. 316, 320 (2002) (citing William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine,* 67 CORNELL L. REV. 245, 248 (1982)).

82. *See* Edward Lee, *Guns and Speech Technologies: How the Right to Bear Arms Affects Copyright Regulations of Speech Technologies*, 17 WM. & MARY BILL RTS. J. 1037, 1072 (2009)

and it did so with the objective of controlling the flow of information by limiting the number of people who could print material, and by choosing who received those licenses.[83] The English government also enacted the Printing Act of 1662 which imposed a licensing requirement, allowing the government to withhold licenses from those whose views it found objectionable,[84] and prohibiting the publication of any book or pamphlet without a license specifically authorizing its publication.[85] Those who wished to publish a document were required to submit it for review and a license could be denied if a governmental censor deemed it to contain objectionable content.[86]

The English even went so far as to impose the crime of seditious libel, which allowed them to prosecute those who criticized the Crown and certain high-level religious officials.[87] The British Crown aggressively used seditious libel prosecutions as a way to intimidate and silence governmental critics.[88] Moreover, truth was not a defense.[89] Indeed, proof of truth was an aggravating factor that could draw a more severe sentence: "Since maintaining a proper regard for government was the goal of this new offense, it followed that truth was just as reprehensible as falsehood . . . [and] was eliminated as a defense."[90]

Similar restrictions were imposed in other countries. Prior to the French Revolution, the French government imposed licensing restrictions and censorship.[91] A 1563 edict required that all books be licensed prior to

(first citing Edward Lee, *Freedom of the Press 2.0*, 42 Ga. L. Rev. 309 (2008); then citing HIS MAJESTY'S STATIONARY OFFICE, ACTS AND ORDINANCES OF THE INTERREGNUM 1642–1660 (C. H. Firth & R. S. Rait eds., 1911); then citing Star Chamber Decree for Orders in Printing, 1586; and then citing Raymond Astbury, *the Renewal of the Licensing Act in 1693 and its Lapse in 1695*, 33 LIBR. 195, 195 (1978)).

83. *See Thomas*, 534 U.S. at 320 (quoting Mayton, *supra* note 81, at 248).

84. *See id.* (first citing Mayton, *supra* note 81; then citing FRED SEATON SIEBERT, FREEDOM OF THE PRESS IN ENGLAND, 1476–1776 (1952); and then citing BLACKSTONE, *supra* note 15, at 86); Lovell v. City of Griffin, 303 U.S. 444 (1938).

85. *See Thomas*, 534 U.S. at 320 (quoting Mayton, *supra* note 81, at 248); *see also* SIEBERT, *supra* note 84, at 239–41.

86. *See Lovell*, 303 U.S. at 451; *see also* City of Lakewood v. Plain Dealer Publ'g, Co., 486 U.S. 750, 757 (1988); Lowe v. SEC, 472 U.S. 181, 205 (1985) (citing *Lovell*, 303 U.S. at 444).

87. The crime of seditious libel was based on the holding *De Libellis Famosis*, [1606] 77 Eng. Rep. 250 (Star Chamber).

88. *See* William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984) (first citing WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 341 (1922); and then citing LEONARD WILLIAMS LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 10 (1960)).

89. *See id.* at 103 (citing *De Libellis Famosis*, 77 Eng. Rep. at 251).

90. *Id.* (citing *De Libellis Famosis*, 77 Eng. Rep. at 251).

91. *See* John B. Thompson, *The Trade in News*, *in* COMMUNICATION IN HISTORY: TECHNOLOGY, CULTURE, SOCIETY 113, 116 (Karon Bowers ed., 2007) ("In France, a centralized

publication, and gave governmental authorities discretionary power to censor material.[92] In Germany, governmental authority was intertwined with church authority and gave the Catholic Church the power to censor publications that were regarded as "heretical" works.[93] In response to Martin Luther's attack on indulgences, Emperor Charles V commanded that all of Luther's writings be burned.[94]

Despite these governmental efforts, attempts to suppress speech were not always effective. Charles V's edict against Luther's writings spurred great interest and almost "desperate eagerness" to read everything that Luther wrote.[95] Thus, even though Luther's attack on indulgences was banned, thousands of copies were printed, some of which ridiculed the Pope.[96] Four thousand copies of one pamphlet were distributed within three weeks, and the pamphlet ultimately went through thirteen to twenty-five editions.[97] Reformation works were printed even in cities that were primarily Catholic.[98] Although the Catholic Church tried to suppress these "heretical" writings, secular officials did not always cooperate.[99]

During the fifteenth to the eighteenth centuries, governmental repression led to the creation of an underground book trade.[100] Banned books were highly sought after, commanding high prices,[101] and the sale of contraband literature was "an everyday feature of the city scene at that time."[102] In the sixteenth century, a royal decree only allowed a small number of Parisian printers to publish books.[103] However, the decree was never enforced and more books were published in the year after the decree than the year before.[104] A 1547 decree prohibited the sale of any book that had not previously been submitted to governmental censors.[105]

---

and highly restrictive system of licensing, supervision and censorship existed until the Revolution . . . .").

92. *See* LUCIEN FEBVRE & HENRI-JEAN MARTIN, THE COMING OF THE BOOK: THE IMPACT OF PRINTING 1450-1800 246 (1976).

93. *See id*. at 244.

94. *See id.* at 290.

95. *See id.* at 291–92.

96. *Id.* at 291 ("To ridicule the Pope and the monks, pamphlets entitled *Pope Donkey* and *Cow Monk* were produced.").

97. *See id.* at 291–92.

98. *See id.* at 292.

99. *See id.* at 245.

100. *See id.* at 244.

101. *See id.* at 238.

102. *Id.*

103. *See id.* at 310.

104. *See id.*

105. *See id.* at 310–11.

In the sixteenth century, the book trade flourished even though "many street vendors were burned at the stake because they were caught selling heretical books,"[106] and even though the French king forbade the printing of banned books "on pain of death by hanging."[107] In the seventeenth and eighteenth centuries, "many [Frenchmen] were sent to the Bastille for having sold pamphlets hostile to the royal authority."[108] Despite the persecutions, "banned books continued to circulate more or less everywhere with the same ease."[109] For book sellers, the banned books attracted considerable interest and substantial profits.[110] However, some publishers, fearful of prosecution, set up operations just outside of France and shipped banned publications into the country.[111] Imported books easily moved past governmental officials, even into monasteries and seminaries,[112] and French publishers frequently omitted their addresses from banned books that they published.[113]

But the printing press, like the more advanced technologies that came later (e.g., radio, television, satellite and cable) was under the control of "gatekeepers" who controlled the use of that technology.[114] The Gutenberg printing press was relatively expensive to obtain, requiring not only the purchase of a printing press, but also the purchase of lead type, ink and other essential components, meaning that only a few individuals could afford to own and operate a printing press, and those few could exercise "gatekeeper" power over the technology.[115] In other words, they had the power to decide

106. *Id.* at 238, 309–10 ("November 1534 saw the first series of spectacular executions. On the 10th it was a printer who was burned, for having printed and bound the 'false works" of Luther, and on the 19th, it was the turn of a bookseller.").

107. *Id.* at 310.

108. *Id.* at 238–39.

109. *Id.* at 246.

110. *Id.* at 304–05.

111. *See id*. at 298–99 (noting that Reformation French-language publications were created in Germany and Belgium and smuggled into France: "Such books printed just beyond the borders of France, often at the instigation of Frenchmen, entered France in large numbers and with ease"—indeed, an underground network developed).

112. *See id*. at 316 ("[H]eretical books poured into France. Not simply in a few isolated copies, but in hundreds at a time in packing cases, in the baggage of a merchant or the wagon of a colporteur. As there was no effective police force the risks of being caught on the road were few, except perhaps by watchmen at the city gates. But how were watchmen to find the crate or crates of books among all the other crates of legitimate merchandise, especially if, as a further precaution, the books were concealed under other goods?").

113. *See id*. at 307 ("The truth is that French booksellers were able in many cases to go on selling and printing heterodox literature in response to the demands of their eager clients without running any serious risk, so long as they acted prudently and adopted a few elementary subterfuges . . . . Thus editions of doubtful orthodoxy multiplied despite all the condemnations.").

114. *See* WEAVER, *supra* note 59, at 5.

115. *See id*. at 7.

who could use print technology and what they could say.[116] Subsequent technologies, including radio,[117] television[118] and satellite communications,[119] all came with their own gatekeepers.[120] They required substantial technological investments, and some broadcast communications like radio and television also required an operating license, and this combination of factors meant that only a small number of people (or corporations) could own and operate them.[121] Those who controlled those communications technologies could exercise gatekeeper control.[122] Thus, these new technologies did not enable ordinary people to mass disseminate their own ideas absent the assent of gatekeepers.

The internet was a transformative technology because it was the first technology that enabled ordinary individuals to communicate on a mass scale,[123] as well as to avoid the traditional media which had historically served as the principal gatekeeper and filter of communication and information.[124] This broadening of communicative capacity had a profound impact on modern societies, propelling new social movements and societal changes.[125] However, the great strength of the internet—the enabling of mass communication by ordinary individuals—has also proven to be its greatest weakness.[126] As the internet enabled mass communication by virtually everyone, it created the potential for mischief. Using devices such as Twitter (now X), WhatsApp, Facebook, and other social media platforms, individuals could easily distribute political arguments, truthful information and disinformation.[127] As a result, there has been a dramatic rise in the quantity of disinformation. As one commentator noted, "digging up large-scale misinformation on Facebook was as easy as finding baby photos or birthday greetings."[128] In 2018, there "were doctored photos . . . of Latin

116. *See id*. at 3.

117. *See* DAVID CROWLEY & PAUL HEYER, COMMUNICATION IN HISTORY: TECHNOLOGY, CULTURE, SOCIETY
204 (5th ed. 2007).

118. *See id*. at 243.

119. *See* RUTH SCHWARTZ COWAN, A SOCIAL HISTORY OF AMERICAN TECHNOLOGY 313 (1997).

120. *See* WEAVER, *supra* note 59, at 3.

121. *See id*. at 3, 15.

122. *See id*. at 3.

123. *See id.* at 37.

124. *See id.* at 39.

125. *See generally id.* at 79–142.

126. *See generally id*. at 73–74.

127. *See* Kevin Roose, *Facebook Had a Good Election, But It Can't Let Up on Vigilance*, N.Y. TIMES, Nov. 8, 2018, at B1.

128. *Id.*

American migrants headed towards the United States border,"[129] and "easily disprovable lies about the woman who accused Justice Brett M. Kavanaugh of sexual assault, cooked up by partisans with bad-faith agendas."[130] Indeed, "[e]very time major political events dominated the news cycle, Facebook was overrun by hoaxers and conspiracy theorists, who used the platform to sow discord, spin falsehoods and stir up tribal anger."[131]

In recent years, as public discourse has shifted to social media platforms such as X and Facebook, those platforms have increasingly become the new "gatekeepers" of communication in the sense that they have the ability to control what people say, and have exercised that authority by removing, demoting, or taking down social media posts. Thus, just as the publishers of newspapers could control what was published in their papers, those who own and control social media platforms can regulate and control what is posted on their platforms.

Historically, social media platforms were viewed as private entities and therefore regarded as exempt from First Amendment protection (which only restricts governmental action).[132] Freed from the constraints of the First Amendment, social media platforms seemingly possessed broad authority to censor content. Their authority was reinforced by Section 230 of the Communications Decency Act of 1996 (CDA) which gave social media platforms broad protection against civil liability for information posted on their platforms by others,[133] and contained a "Good Samaritan" defense which explicitly gave them the power to censor posts on their platforms without the risk of civil liability.[134] That defense reads as follows:

> No provider or user of an interactive computer service shall be held liable on account of— (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[135]

Section 230 is unique. If the government had tried to restrict the type of speech that Section 230 allows social media companies to prohibit, the

129. *Id.*

130. *Id.*

131. *Id.*

132. *See* Ashutosh Bhagwat, *Why Social Media Platforms Are Not Common Carriers*, 2 J. FREE SPEECH L. 127, 127 (2022).

133. *See* Communications Decency Act of 1996, 47 U.S.C. § 230.

134. *See id*. § 230(c).

135. *Id.*

governmental restrictions would undoubtedly have been struck down as unconstitutional. Indeed, Section 230 allows social media companies to remove material that is "excessively violent, harassing, or otherwise objectionable."[136] Undoubtedly, such language suffers from an unconstitutional level of vagueness[137] and overbreadth.[138] Moreover, it is doubtful whether speech that is regarded as "lascivious" or "filthy" or "otherwise unobjectionable" would be treated as "unprotected speech" unless it is obscene or involves child pornography.[139] That is presumably why the CDA explicitly gives social media companies the authority to censor speech "whether or not such material is constitutionally protected."[140]

The nature of social media platforms gives the government a unique opportunity to repress speech.[141] Since social media platforms are the "gatekeepers" of speech on their platforms, and can easily control or remove posts, the government can easily pressure them to engage in content moderation,[142] and can thereby affect and control how people discuss the issues of the moment. Moreover, government may not merely attempt to influence how the public talks about current issues, it can attempt to persuade (or sometimes coerce) social media platforms into censoring the speech of users by removing it from their platforms. Even worse, the government can take these actions surreptitiously by interacting directly with social media platforms.[143] Thus, while individuals may realize that their posts are being removed from social media platforms, they might not know that the government is behind the take down.

In some respects, social media platforms are uniquely vulnerable to governmental persuasion. For one thing, social media platforms are "critically dependent on the protection provided by [Section] 230 of the CDA of 1996,[144] . . . which shields them from civil liability for content" posted by others on their platforms, and the government has the power to remove that protection.[145] In addition, social media platforms can be subjected to antitrust

136. *Id.*

137. *See generally* THE FIRST AMENDMENT, *supra* note 71, at 427–41, (discussing of the vagueness doctrine).

138. *See id*. (discussing the overbreadth doctrine).

139. *See generally* Brown v. Entertainment Merch. Assoc., 564 U.S. 786 (2011).

140. 47 U.S.C. § 230(c)(2).

141. *See* Murthy v. Missouri, 603 U.S. 43, 80 (2024) (Alito, J., dissenting) ("[I]nternet platforms, although rich and powerful, are at the same time far more vulnerable to Government pressure than other news sources.").

142. *See id.*

143. *See id*. at 80–90 (describing actions the government took with Facebook in regards to speech posted on the social media platform).

144. 47 U.S.C. § 230.

145. *Murthy*, 603 U.S. at 80 (Alito, J., dissenting).

prosecutions.[146] In the case of social media platforms, as we shall see, the Biden Administration routinely threatened the platforms with antitrust actions, something which Facebook CEO Mark Zuckerberg described as an "existential" threat to his company.[147] Finally, since the major social media platforms operate all over the world, including Europe, they depend on the U.S. government to provide diplomatic cover and protection.[148]

III. THE BIDEN ADMINISTRATION AND SPEECH REPRESSION

The evidence shows that the Biden Administration engaged in an aggressive surreptitious effort to control speech on the various social media platforms. To achieve its objectives, the Administration clandestinely encouraged, pressured, and even threatened social media platforms in an effort to get them to censor material with which the government disagreed or objected. In order to facilitate its efforts, the Administration promulgated a regulation requiring social media platforms to provide the Administration with information about their censorship decisions.[149] The Administration also pressured social media platforms to curb what it regarded as disinformation, flagging information that it wished to have censored, and even going as far as encouraging platforms to suspend and de-platform users.[150] The Administration's actions may have been justifiable had they involved an imminent health emergency and the dissemination of disinformation that may have had a critical impact on that emergency. But the government sought censorship on both health-related and non-health-related issues, including a range of hot button issues such as Hunter Biden's laptop (which will be

146. *See id*. at 85 (quoting Press Briefing by Press Secretary Jen Psaki and Secretary of Agriculture Tom Vilsack (May 5, 2021), https://bidenwhitehouse.archives.gov/briefing-room/press-briefings/2021/05/05/press-briefing-by-press-secretary-jen-psaki-and-secretary-of-agriculture-tom-vilsack-may-5-2021/).

147. *Id.* at 80 (quoting Casey Newton, *Read the Full Transcript of Marck Zuckerberg's Leaked Internal Facebook Meetings*, THE VERGE (Oct. 1, 2019, 5:04 AM), https://www.theverge.com/2019/10/1/20892354/mark-zuckerberg-full-transcript-leaked-facebook-meetings).

148. *See id.* at 80–81.

149. *See* Missouri v. Biden Jr., 680 F. Supp. 3d 630, 661 (W.D. La. 2023), *rev'd,* 603 U.S. 43 (2024), and *vacated*, 80 F.4th 641 (5th Cir. 2024) (describing a March 3, 2022, Request for Information ("RFI") issued by the Office of the Surgeon General, "published in the Federal Register, seeking data from social media platforms about misinformation"). The RFI expanded the government's efforts to control misinformation and requested details on censorship policies, enforcement, and disfavored speakers. *See id.* The RFI, sent to Facebook, Google/YouTube, LinkedIn, Twitter, and Microsoft by Murthy's Chief of Staff, Max Lesko, sought platform responses. Murthy later reiterated social media's responsibility to reduce misinformation in a GQ interview and called on Spotify to censor health information. *See id*.

150. *See id*. at 641.

discussed more fully below),[151] Covid-19,[152] Covid vaccines,[153] Covid lockdowns,[154] climate change,[155] abortion,[156] gender discussions,[157] as well as health,[158] and economic policy.[159] Moreover, even regarding Covid or health issues the Administration sought to suppress even truthful information.[160]

The evidence shows that Biden administration officials constantly interacted with social media platforms through emails, private portals, and meetings.[161] During these interactions, White House officials "made it very clear to social-media companies what they wanted suppressed and what they wanted amplified."[162] For example, the day after the White House Press Secretary made remarks about removing the antitrust exemption from social media companies, White House officials followed up with emails demanding to know what the social media platforms were doing about alleged disinformation.[163]

Although a few of the communications were aggressive and hostile,[164] the Biden Administration and the social media platforms began to refer to themselves as "partners" and as being "on the same team."[165] Indeed, Twitter created a "partner portal" for governmental communications.[166] These communications led social media platforms to aggressively suppress information, even information that did not violate the platforms' terms of use

151. *See id*. at 642.

152. *Id.*

153. *Id*.

154. *Id.*

155. *Id*. at 655.

156. *Id.*

157. *Id*. at 653.

158. *Id*.

159. *Id*. at 655.

160. *See id*. at 649 (e.g., the Biden administration sought to squelch a medical doctor's discussion of acknowledged health risks regarding the Johnson & Johnson Covid vaccine).

161. *Id*. at 708.

162. *Id*. at 698.

163. *Id*. at 652 (describing an email from Flaherty to Facebook, in which he "chastised" the platform for failing to address COVID-19 misinformation, demanded data on content demotion, and criticized its handling of the "Disinformation Dozen," stating: "Not to sound like a broken record, but how much content is being demoted, and how effective are you at mitigating reach, and how quickly?").

164. *Id*. at 653 (discussing how "[t]hings apparently became tense between the White House and Facebook . . . culminating in Flaherty's July 15, 2021 email to Facebook, in which Flaherty stated: "Are you guys fucking serious? I want an answer on what happened here and I want it today").

165. *Id*. at 697 ("The White House Defendants used emails, private portals, meetings, and other means to involve itself as "partners" with social-media platforms.").

166. *Id.*

policies, but which the government simply wanted suppressed.[167] Governmental officials routinely "flagged" for Facebook and other social-media platforms posts the White House Defendants considered "misinformation."[168] The White House followed up by demanding updates and reports from the platforms regarding their handling of the alleged disinformation, and the social-media companies usually complied with these demands for updates.[169]

In addition to communicating with social media platforms, the Biden Administration threatened social media platforms in order to ensure compliance with the Administration's wishes. For example, officials threatened to remove Section 230 liability protections from the platforms if they did not do more to censor "misinformation" and "disinformation."[170] These threats were reinforced by "emails, meetings, press conferences, and intense pressure by the White House, as well as by the Surgeon General Defendants."[171] While threats were made under the Trump administration, the level of threats increased significantly under the Biden administration.[172] The Biden administration's efforts "paired with the public threats and tense relations between the Biden administration and social-media companies, seemingly resulted in an efficient report-and-censor relationship between Defendants and social-media companies."[173] The threats were reinforced by public statements made by the President's press secretary regarding potential antitrust actions against the major social media platforms if they did not act to curb disinformation.[174] Mark Zuckerberg (of Facebook which is owned by Meta) flatly declared that he regarded "the threat of antitrust enforcement [as]

167. *See id*. at 697–98.

168. *Id*. at 664.

169. *See id*. at 665.

170. *See id*. at 644, 697.

171. *Id*. at 697.

172. *Id.* at 715 ("Government officials began publicly threatening social-media companies with adverse legislation as early as 2018. In the wake of COVID-19 and the 2020 election, the threats intensified and became more direct.").

173. *Id*.

174. *Id.* at 652 ("At a White House Press Conference, Psaki publicly reminded Facebook and other social-media platforms of the threat of 'legal consequences' if they do not censor misinformation more aggressively. Psaki further stated: 'The President's view is that the major platforms have a responsibility related to the health and safety of all Americans to stop amplifying untrustworthy content, disinformation, and misinformation, especially related to COVID-19 vaccinations and elections.' Psaki linked the threat of a 'robust anti-trust program' with the White House's censorship demand. 'He also supports better privacy protections and a robust anti-trust program. So, his view is that there's more that needs to be done to ensure that this type of misinformation; disinformation; damaging, sometime life-threatening information, is not going out to the American public.'" (quoting Press Briefing, Press Secretary and Secretary of Agriculture Tom Vilsack, *supra* note 146)).

'an existential threat to his platform.'"[175] Also, "the White House National Climate Advisor Gina McCarthy . . . blamed social-media companies for allowing misinformation and disinformation about climate change to spread and explicitly tied these censorship demands with threats of adverse legislation regarding the Communications Decency Act."[176] Finally, the White House issued a memorandum about disinformation which specifically threatened the platforms with sanctions if they did not do enough to curb disinformation.[177] Thus, the U.S. government's efforts were backed by implied and explicit threats to take action against social media platforms that were not in compliance with its wishes.

In the vast majority of instances, the Biden administration's requests related to protected speech. The U.S. government was not seeking to censor unprotected speech such as obscenity, child pornography, or fraudulent commercial speech. As previously discussed, none of that speech is entitled to First Amendment protection,[178] can be prohibited, and the disseminator might even be subject to criminal prosecution.[179] However, the speech involved in the *Biden* case did not necessarily involve prohibited speech.[180] On the contrary, it involved topics like climate change,[181] Covid-19,[182] the efficacy and safety of Covid-19 vaccines,[183] and the Hunter Biden laptop story.[184] While some of the statements on those topics might be regarded as "inaccurate" or "disinformation," none of the topics fell within one of the categories of unprotected speech. Thus, the statements were not otherwise prohibitable.

175. *Id*. at 644.

176. *Id.* at 655.

177. *Id.* ("On June 16, 2022, the White House announced a new task force to target 'general misinformation' and disinformation campaigns targeted at women and LBGTQI individuals who are public and political figures, government and civic leaders, activists, and journalists. The June 16, 2022, Memorandum discussed the creation of a task force to reel in 'online harassment and abuse' and to develop programs targeting such disinformation campaigns. The Memorandum also called for the Task Force to confer with technology experts and again threatened social-media platforms with adverse legal consequences if the platforms did not censor aggressively enough.").

178. *See* New York v. Ferber, 458 U.S. 747, 764 (1982) (stating that First Amendment does not protect child pornography and obscene speech); Miller v. California, 413 U.S. 15 (stating the First Amendment does not protect obscene speech); Zauderer v. Office of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 638 (1985) (stating that First Amendment does not protect commercial speech which is false (citing Friedman v. Rogers, 440 U.S. 1 (1979))).

179. *See Ferber*, 458 U.S. at 749; Miller, 413 U.S. at 19.

180. *See* Missouri v. Biden, 680 F. Supp. 3d, 630, 641 (W.D. La. 2023).

181. *See id*. at 655.

182. *See id.* at 642.

183. *See id*.

184. *See id*.

Regarding disinformation, the U.S. Supreme Court has made it clear that false speech is not necessarily prohibitable under the First Amendment.[185] *United States v. Alvarez* involved an individual's false assertion that he had won the Congressional Medal of Honor.[186] While *Alvarez* recognized that individuals could be prosecuted for false speech in limited and defined circumstances (e.g., perjury in a judicial proceeding or making false statements to a governmental official or agency),[187] the Court held that Alvarez could not be convicted for making a false statement to the effect that he won the medal.[188] Of course, if an individual disseminates false and defamatory information about another person, it might be possible to recover for defamation.[189] However, it is extremely difficult for public officials[190] and public figures[191] to recover for defamation, and until recently, defamation litigation was relatively uncommon in the United States.[192] In addition, courts are rarely permitted to enjoin false speech except for false commercial speech.[193] As such, the First Amendment generally prohibits the government from censoring speech simply because it regards that speech as disinformation. Indeed, the U.S. does not have "truth commissions" or "censorship boards" that are allowed to dictate which ideas and which facts are correct, and which are not. On the contrary, the U.S. Supreme Court has been wary of governmental attempts to control the flow of information, and has generally regarded both content-based and viewpoint-based restrictions on speech as presumptively unconstitutional.[194] Ultimately, it is not for the government to dictate what people should believe, but rather for the people to decide for themselves. If the legitimacy of our governmental system

185. *See* United States v. Alvarez, 567 U.S. 709, 718 (2012) (citing New York Times v. Sullivan, 376 U.S. 254, 271 (1964)).

186. *See id*. at 713.

187. *See id*. at 734–35.

188. *See id*. at 729–30.

189. *See generally* THE RIGHT TO SPEAK ILL, *supra* note 13.

190. *See New York Times*, 376 U.S. at 283 (requiring actual malice in actions for "libel . . . brought by public officials against critics for their official conduct").

191. *See* Curtis Publ'n v. Butts, 388 U.S. 130, 155 (1967) (stating that a "'public figure' who is not a public official may also recover damages for a defamatory falsehood . . . on a showing of highly unreasonable conduct").

192. *See* Thad Lankiewicz, *Defamation: Think before Speaking, or Filing Suit*, 69 Boston Bar J. 24, 24 (2025).

193. *See* Zauderer v. Office of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 638 (1985) (stating that First Amendment does not protect commercial speech which is false (citing Friedman v. Rogers, 440 U.S. 1 (1979))).

194. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (first citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991) (Kennedy, J., concurring in judgment); then citing Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y., 447 U.S. 530, 536 (1980); and then citing Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972)).

depends on the consent of the governed, it is inconsistent with that system to give the government the power to control, limit, and suppress the range of ideas that the people can hear or consider.[195]

The Biden administration's actions are particularly disturbing because the government's efforts to squelch disinformation sometimes resulted in the dissemination of disinformation, and the Biden administration effectively coerced social media platforms into collaborating with its efforts to disseminate disinformation. Consider, for example, the Hunter Biden laptop story.[196]Before the story broke, White House officials warned social media platforms that Russia was about to disseminate disinformation.[197] After the laptop story broke, fifty-one former intelligence officials came forward to brand the story as "Russian disinformation."[198] "The FBI additionally likely misled social-media companies into believing the Hunter Biden laptop story was Russian disinformation" because, even though it had control of the laptop and knew that the allegations were true, the FBI failed to counteract the narrative that the story was false.[199] Even worse, "the FBI was included in Industry meetings and bilateral meetings, [and it] received and forwarded alleged misinformation to social-media companies, and actually mislead social-media companies . . . regard[ing] the . . . story."[200]

The governmental efforts were successful. After the story was released, most reputable news organizations denounced the allegations as "fake news," and refused to report the story even though there were allegations of corruption by the Bidens.[201] For example, National Public Radio (NPR), in a segment issued just a couple of weeks before the presidential election,

195. *See* Ashcroft v. American Civ. Liberties Union, 535 U.S. 564, 573 (2002) (first quoting Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 686 (1989); and then quoting Bolger v. Young Drug Products Corp., 463 U.S. 60, 65 (1983)).

196. *See* Missouri v. Biden Jr., 680 F. Supp. 3d 630, 642 (W.D. La. 2023).

197. *See id*. at 675 ("Before the Hunter Biden Laptop story breaking prior to the 2020 election on October 14, 2020, the FBI and other federal officials repeatedly warned industry participants to be alert for 'hack and dump' or 'hack and leak' operations.").

198. Luke Broadwater, *Officials Who Cast Doubt on Hunter Biden Laptop Face Questions*, N.Y. TIMES (May 16, 2023), https://www.nytimes.com/2023/05/16/us/politics/republicans-hunter-biden-laptop.html; *see* Weekend Edition Saturday, *More Details Emerge in Federal Investigation into Hunter Biden*, NPR (Apr. 9, 2022, 8:25 AM), https://www.npr.org/2022/04/09/1091859822/more-details-emerge-in-federal-investigation-into-hunter-biden ("And then there was this cohort of paid pundits - 50 former national security officials, many of them appearing frequently in mainstream media outlets - who came together for a statement saying that this surfacing of the laptop bore all the hallmarks of a Russian misinformation campaign." (quoting David Folkenflik)).

199. *Biden Jr.*, 680 F. Supp. 3d at 702.

200. *Id*. at 701.

201. *See* Robby Soave, *The Mainstream Media is Still in Denial About Hunter Biden's Laptop*, Reason (June 13, 2024), https://reason.com/2024/06/13/the-mainstream-media-is-still-in-denial-about-hunter-bidens-laptop/.

dismissed the laptop story as "questionable,"[202] and suggested that the allegations were part of a conspiracy theory pushed by then President Trump and his allies.[203] The Public Broadcasting Service (PBS) similarly dismissed the allegations, suggesting that Trump's allies were pushing "Russian disinformation,"[204] and the New York Times suggested that Trump was colluding with the Russians and dismissed the story stating that "Giuliani's dirty tricks are the scandal, not Hunter Biden's hard drive."[205]

On social media networks, including Facebook and Twitter, the story was essentially squelched due, in large part, to the government's suppression efforts.[206] Not only did Twitter squelch the story,[207] it blocked users from sharing links to the New York Post story and prevented users who had previously sent tweets sharing the story from sending new tweets until they deleted their prior tweets.[208] Further, Facebook began reducing the story's distribution on its platform pending a third-party fact-check.[209]

Today, reputable news organizations recognize that the Hunter Biden laptop story was not "disinformation," "fake news," or "Russian propaganda." A New York Times article, citing reporting by a staff member at Politico, stated that "the most explosive emails from Hunter Biden's purported laptop were entirely genuine" and were not simply Russian-planted disinformation.[210] Even NPR has recognized that there was some validity to the allegations regarding the laptop: "much of the mainstream

202. *See* David Folkenflik, *Analysis: Questionable 'N.Y. Post' Scoop Driven by Ex-Hannity Producer and Giuliani*, N.P.R. (Oct. 17, 2020, 7:00 AM), https://www.npr.org/2020/10/17/924506867/analysis-questionable-n-y-post-scoop-driven-by-ex-hannity-producer-giuliani.

203. *See id.* ("The story fits snugly into a narrative from President Trump and his allies that Hunter Biden's zealous pursuit of business ties abroad also compromised the former vice president.").

204. *See Are Trump Allies Sharing Russian Disinformation About Biden?* (PBS News Hour Clip Oct. 16, 2020), https://www.pbs.org/video/warning-signs-1602880956/.

205. *See* Michelle Goldberg, *Is the Trump Campaign Colluding with Russia Again?*, N.Y. TIMES (Oct. 21, 2020), https://www.nytimes.com/2020/10/19/opinion/trump-campaign-rudy-giuliani.html.

206. *See More Details Emerge in Federal Investigation into Hunter Biden*, *supra* note 198 (stating that platforms "tampered down on sharing of the . . . story" by Twitter suspending the publisher's Twitter account and blocking the sharing of the story).

207. *See id.* ("First, let's acknowledge social media's role. A number of platforms tamped down on sharing of the

Post's story. In the case of Twitter, not only did they try to block sharing of it, they suspended The New York Post's actual Twitter account for sharing its own article. That was a wild overreach, and even Twitter had to acknowledge that." (quoting David Folkenflik)).

208. *See id*.

209. *See id*.; David Molloy, *Zuckerberg Tells Rogan FBI Warning Prompted Biden Laptop Story Censorship*, BBC (Aug. 26, 2022), https://www.bbc.com/news/world-us-canada-62688532.

210. *See* Bret Stephens, *An Ethically Challenged Presidency*, N.Y. TIMES (Oct. 5, 2021), https://www.nytimes.com/2021/10/05/opinion/biden-ethics-son.html.

media dismissed a story about Hunter Biden's business dealings[,] [n]ow emails supporting the story have been authenticated,"[211] and the Boston Globe questioned its decision to suppress the story.[212]

IV. COMPARISONS TO SPEECH REPRESSION IN CHINA AND RUSSIA

Considering what the Biden administration has done, it is appropriate to inquire whether there are meaningful distinctions to be made between what the Biden administration did, and the speech repression imposed by more authoritarian regimes.

One distinction that might be made is that the Biden administration's actions were more surreptitious whereas speech repression in China and Russia is more blatant and open. China has developed "the world's most sophisticated and brutal internet censorship system, called the Great Firewall."[213] Under the Chinese system, many social platforms are completely blocked, including Google, Twitter, Facebook, and "thousands of other foreign websites."[214] Indeed, even the New York Times is blocked on the Chinese internet.[215] Likewise, Russia banned Apple and Google from providing the LinkedIn app.[216] For China, the goal of internet regulation is to create a "harmonious society," including "stability above all," as well as to prevent social unrest.[217] As part of this effort, China has created the Golden

211. *See More Details Emerge in Federal Investigation into Hunter Biden*, *supra* note 198.

212. *See* Hiawatha Bray, *We Ignore Musk's 'Twitter Files' At Our Peril*, BOSTON GLOBE (Jan. 19, 2023), https://www.bostonglobe.com/2023/01/19/business/we-ignore-musks-twitter-files-our-peril/ ("Another discovery: There's no evidence of any "deep state" conspiracy behind Twitter's decision to suppress the New York Post's October 2020 story about the contents of a laptop belonging to President Biden's son Hunter. Twitter executives screwed up that decision all by themselves. They chose to believe a false allegation that the data had been stolen by hackers.").

213. *See* Li Yuan, *The Infowards Hubbub, and China's Chokehold*, N.Y. TIMES (Aug. 13, 2018), at B3.

214. *Id*.

215. *See* Keith Bradsher, *China Blocks Web Access to Times After Article*, N.Y. TIMES (Oct. 25, 2012), https://www.nytimes.com/2012/10/26/world/asia/china-blocks-web-access-to-new-york-times.html.

216. *See* Cecilia Kang & Katie Benner, *Russia Requires Apple and Google to Remove LinkedIn from Local App Stores*, N.Y. TIMES (Jan. 6, 2017), https://www.nytimes.com/2017/01/06/technology/linkedin-blocked-inrussia.html#:~:text=Russia%20Requires%20Apple%20and%20Google%20to%20Remove%20LinkedIn%20From%20Local%20App%20Stores,Share%20full%20article&text=WASHINGTON%20%E2%80%94%20Smartphone%20users%20in%20Russia,York%20Times%20app%20on%20iPhones.

217. *See* Andrew Jacobs & Jonathan Ansfield, *For China, "Stability Above All"; State Pours Resources Into Monitoring Critics and Quelling Dissent,* INT. HERALD TRIBUNE, Dec. 10, 2010, at News 6.

Shield Project which involves a national filtering system,[218] used to preclude citizens from accessing certain foreign news sources,[219] and to block Gmail (Google's electronic mail service).[220] China has placed restrictions on web access,[221] blog postings,[222] and internet use,[223] including restrictions on political speech,[224] as well as on the websites of international news organizations such as CNN and the BBC.[225] China also requires computer manufacturers to install internet filtering software, and China has shut down more than 700 internet websites, including Facebook, Twitter and YouTube.[226] In addition, China prohibits Chinese journalists from reporting unverified information that they find on the internet.[227] China has pressured Google to filter and limit information that it makes available over the internet in China.[228] In response, Google moved its search engine out of mainland

218. *See* James Glanz & John Markoff, *Egypt Leaders Found 'Off' Switch for Internet,* N.Y. TIMES (Feb. 15, 2011), https://www.nytimes.com/2011/02/16/technology/16internet.html.

219. *See* Matt Richtel, *Egypt Cuts Off Most Internet and Cell Service*, N.Y. TIMES (Jan. 28, 2011), https://www.nytimes.com/2011/01/29/technology/internet/29cutoff.html.

220. *See* David Barboza & Claire Cain Miller, *Google Accuses Chinese of Blocking Gmail Service*, N.Y. TIMES (Mar. 20, 2011), https://www.nytimes.com/2011/03/21/technology/21google.html.

221. *See* David Barboza, *China Moves to Block Foreign News on Nobel Prize*, N.Y. TIMES (Dec. 9, 2010), https://www.nytimes.com/2010/12/10/world/asia/10china.html (noting that Chinese censors have blocked access to the websites of the BBC, CNN and a Norwegian newscaster).

222. *See* Andrew Jacobs, *Internet Usage Rises in China*, N.Y. TIMES (Jan. 14, 2009), https://www.nytimes.com/2009/01/15/world/asia/15iht-15beijing.19375212.html (noting that, even though China has 298 million Internet users (roughly equivalent to the population of the United States), only 23% of the Chinese population uses the Internet, and noting that China regularly blocks Web sites and blog postings).

223. *See* Sharon LaFraniere, *China Imposes New Internet Controls,* N.Y. TIMES (Dec. 17, 2009), https://www.nytimes.com/2009/12/18/world/asia/18china.html.

224. *See id.* ("The authorities say the stricter controls are intended to protect children from pornography; to limit the piracy of films, music, and television shows; and to make it hard to perpetuate Internet scams. But the measures also appear devised to enhance the government's already strict control of any political opposition. In various pronouncements, top propaganda and security officials have stressed anew the need to police the Internet on ideological and security grounds.").

225. *See* Barboza, *supra* note 221; Jeremy Page, *Empty Chair Emphasizes Nobel Schism,* WALL ST. J., Dec. 11–12, 2010, at A11.

226. *See* LaFraniere*, supra* note 223.

227. *See* Michael Wines, *China Rolls Out Tighter Rules on Reporting,* N.Y. TIMES, Nov. 12, 2011, at A7.

228. *See* Michael Liedtke, *Google has Censorship Balancing Act Outside China,* CHICAGO DAILY HERALD, Apr. 3, 2010, at 2.

China.[229] Russia has also tried to suppress internet content.[230] For example, Russia banned dozens of websites related to the former (now deceased) dissident Alexei Navalny.[231] In addition, Russia pressured Apple and Google to suppress a Navalny related app that was designed to coordinate protest voting.[232] By contrast, the Biden administration did not block any platforms or newspapers, but did try to control the content and viewpoints expressed on social media platforms.

China also seems to censor more content. For example, in 2017, China issued a list of sixty-eight categories of material that should be censored, including information regarding excessive drinking or gambling, ridicule of China's revolutionary leaders, current members of the army, or police, and discussions of "the luxury life," prostitution, rape, masturbation, "unhealthy marital values," and partner swapping.[233] In that respect, China functions like the Biden administration did in terms of censoring content and viewpoints. A distinction can perhaps be made in the sense that China seeks to censor a much broader array of categories.

One similarity between China and the Biden Administration is that both tried to use censorship to push their messages, and to control the public dialogue. For example, in 2024, China was aggressively trying to portray a rosy view of its economy, and to control critical commentary.[234] Its censorship extended to economists, financial analysts, investment banks, and social media influencers, with critical news stories being removed.[235] China's control even extended to mainstream economic commentary.[236] Some believe that the Chinese effort has reduced confidence in the economy.[237] Similarly, the Biden administration aggressively tried to control the public debate on a variety of issues, including climate change, Covid-19, Covid

229. *See* James Glanz & John Markoff, *Vast Hacking by a China Fearful of the Web: Cables Depict Google Shock, Censorship and Cyberattacks,* N.Y. TIMES, Dec. 5, 2010, at A1 ("The cables catalog the heavy pressure that was placed on Google to comply with local censorship laws, as well as Google's willingness to comply – up to a point.").

230. *See* Andrew E. Kramer, *How the Kremlin Works to 'Manage' Democracy While Holding Elections,* N.Y. TIMES, Sept. 18, 2021, at A9.

231. *See id*.

232. *See* Anton Troianovski & Adam Satariano, *Tech Giants Pull Navalny App After Kremlin Threatens Prosecution,* N.Y. TIMES, Sept. 18, 2021, at A9.

233. *See* Steven Lee Myers & Amy Cheng, *China Expands Its Internal Web of Online Censors and Forbidden Topics,* N.Y. TIMES, Sept. 25, 2017, at A7.

234. *See* Daisuke Wakabayashi & Claire Fu, *China's Censors Target Critics of Its Economy,* N.Y. Times, Jan. 31, 2024, at B1.

235. *See id*.

236. *See id*.

237. *See id*.

vaccines, the Hunter Biden laptop story and others.[238] Thus, both China and the Biden administration were invoking governmental power for similar purposes.

Russia has also tried to control the public debate, but has sometimes been more brutal and overt than the Biden administration.[239] When a Russian police officer exposed police corruption in a video, he was arrested and interrogated.[240] Russian governmental officials have also tried to quell anti-government protests,[241] seized computers that dissident groups were using to communicate on the internet,[242] forced Microsoft to cooperate in investigating the computers of dissidents,[243] shut down mobile internet access,[244] and installed a monitoring system that allowed it to spy on internet communications.[245] Similar actions have been taken in China. For example, China has permanently removed or disabled various blogs,[246] and it monitors the movement of dissidents by cell phone tracking mechanisms.[247] Dissidents have been taken into police custody, and one Twitter user was sentenced to a year in prison for a single three-word Tweet.[248]

In other instances, Russian actions simply involve censorship. In 2018, Russian leaders blocked the website of an opposition leader (Alexei Navalny) because it included a video accusing a high-ranking Russian official of accepting a bribe from a businessman.[249] The video depicted a deputy prime

238. *See* Mark Sweney, *Mark Zuckerberg Says White House 'Pressured' Facebook to Censor Covid-19 Content*, GUARDIAN (Aug. 27, 2024), https://www.theguardian.com/technology/article/2024/aug/27/mark-zuckerberg-says-white-house-pressured-facebook-to-censor-covid-19-content?utm_source=chatgpt.com.

239. *See* Adam Satariano, *Kremlin Steps Up Online Censorship,* N.Y. TIMES, Feb. 26, 2022, at B1.

240. *See* Clifford J. Levy, *Videos Rouse Russian Anger Toward Police*, N.Y. TIMES, July 28, 2010, at A1.

241. *See* Ellen Barry, *Russia Cracks Down on Antigovernment Protests*, N.Y. TIMES, Dec. 7, 2011, at A6.

242. *See* Clifford J. Levy, *Using Microsoft, Russia Suppresses Dissent,* N.Y. TIMES, Sept. 12, 2010, at A1.

243. *See id.*

244. *See* Alan Cullison, *Web Problems Plague Russia Critics,* WALL ST. J. (Dec. 12, 2011), https://www.wsj.com/articles/SB10001424052970204336104577092642660966970.

245. *See id*.

246. *See China Appears to Tighten Internet Access Around Tiananmen Anniversary*, PBS: PBS NEWS HOUR (June 1, 2009, 4:30 PM), https://www.pbs.org/newshour/science/asia-jan-june09-china_06-01.

247. *See* Paul Mozur et al., *Beijin's Eye Always Trails Protesters*, N.Y. TIMES, Dec. 3, 2022, at B1.

248. *See* Brook Larmer, *In China, an Internet Joke is not Always Just a Joke. It's a Form of Defiance — and the Government is Not Amused*, N.Y. TIMES MAG., Oct. 30, 2011, at 34.

249. *See* Ivan Nechepurenko, *Russia Blocks Website of Dissident Who Accused Oligarch,* N.Y. TIMES, Feb. 16, 2018, at A7.

minister on the businessman's yacht with a "high class escort" and other alleged prostitutes.[250] The order to remove the video extended to YouTube and Instagram, with government orders requiring them to remove some of the accuser's information from their websites.[251] Instagram complied with the request, but YouTube was slow to do so.[252]

China also seems to involve far more individuals in the censorship task. In the U.S., the Biden administration seemed to be use existing staff to try to pressure social media platforms rather than creating a separate censorship agency.[253] It also used existing personnel at various administrative agencies.[254] By contrast, China employs some 50,000 internet censors[255] who are tasked with the job of monitoring and disrupting the actions of dissidents.[256]

Russian censorship increased dramatically following Russia's invasion of Ukraine.[257] For one thing, it started blocking Instagram, and it referred to Instagram's parent company, Meta, as an "extremist" organization.[258] A report by Citizen Lab at the University of Toronto, which monitors online censorship, analyzed court orders against Vkontakte (a Russian social media site) which documented the increase.[259] Prior to the war, the Russian government issued a takedown order roughly once every fifty days.[260] After the start of the war, it issued a takedown order almost every day.[261] Some of the more recent orders were directed at independent media sites.[262] The government also blocked key words such as "lesbian," "gay," "bisexual," "transgender" and "queer."[263] In addition, it restricted search functions on international sites.[264] The government also sought to block certain

250. *See id*.
251. *See id*.
252. *See id*.
253. *See* Missouri v. Biden Jr., 680 F. Supp. 3d 630, 645 (W.D. La. 2023).
254. *See id*.
255. *See* Larmer, *supra* note 248.
256. *See* Jacobs & Ansfield, *supra* note 217.
257. *See* Paul Mozur et al., *Internet Censorship by Russia Has Soared 30-Fold During War,* N.Y. TIMES, July 27, 2023, at B5.
258. *See* Kelvin Chan, *Russia State Media Outlets Banned From Meta's Apps Over 'Foreign Interference Activity'*, PBS: PBS NEWS (Sept. 17, 2024), https://www.pbs.org/newshour/world/russian-state-media-outlets-banned-from-metas-apps-over-foreigninterferenceactivity#:~:text=Meta%20and%20Facebook%20%E2%80%9Calready%20blocked,and%20blocking%20Facebook%20and%20Instagram.
259. *See* Mozur et al., *supra* note 257.
260. *See id*.
261. *See id*.
262. *See id*.
263. *Id*.
264. *See id*.

community and personal accounts on the website, cracked down on independent media sites covering the war,[265] and blocking access to international sites such as Facebook, Instagram and Twitter (now X), but not Telegram and YouTube.[266] In some instances (such as the revolt by Yevgeny Prigozhin of the Wagner Group), the censors were slow to react so that there was significant discussion on social media before the government intervened.[267] Despite the censorship, Citizen Lab concluded that there was less censorship than in other speech repressive nations.[268]

A final distinction is that, in both the U.S. and China, enterprising individuals have found ways to avoid censorship. After Donald Trump was banned by Twitter[269] and Facebook,[270] he decided to start his own social media platform, Truth Social.[271] Even before he established that platform, Trump continued to be present on Facebook and Twitter because his supporters would post his messages on their own accounts.[272] These who posted Trump's messages included some of his more prominent supporters such as Breitbart News, the President Donald Trump Fan Club (on Facebook), Fox News, and a lawyer who made regular appearances as Trump's representative.[273] Regarding one Trump post, those four accounts had 159,500, 48,200, 42,000, and 36,700 likes and shares of the Trump reposts.[274] There was a drop in online engagement (e.g., "likes") from a high of 272,000 to 36,000, but 11 of Trump's 89 statements "after the ban attracted as many likes or shares as the median post before the ban, if not more."[275] In addition, following Trump's ban, while many of his supporters remained present on Facebook and Twitter, many also moved to other apps such as LBRY, Minds and Sessions.[276] When YouTube removed videos created by

265. *See id*.

266. *See id.*

267. *See id.*

268. *See id.*

269. *See* Nathaniel Popper, *Social Networks Without the Power of Big Tech,* N.Y. TIMES, Jan. 27, 2021, at B1.

270. *See* Kate Conger & Mike Isaac, *Citing Risk of Violence, Twitter Permanently Suspends Trump,* N.Y. TIMES, Jan. 9, 2021, at A1.

271. *See* Matthew Goldstein et al., *A Musk Takeover of Twitter Could Endanger Trump's Truth Social,* N.Y. TIMES, Apr. 23, 2022, at B3.

272. *See* Davey Alba et al., *What Happened When Trump Was Banned on Social Media,* N.Y. TIMES (June 7, 2021), https://www.nytimes.com/interactive/2021/06/07/technology/trump-social-media-ban.html.

273. *Id*.

274. *Id*.

275. *Id*.

276. *See* Popper, *supra* note 269.

Way of the World, those videos were moved to LBRY.[277] In addition, some conservatives migrated to other platforms. After then President Trump was banned by certain social media platforms, two of Trump's followers used conservative websites (Trash Regan and Gateway Pundit) to criticize a Twitter executive for his tweets critical of the president and other republicans. The posts quickly spread to "dozens of Facebook groups, Reddit forums and YouTube videos." Interestingly, Facebook labels (questioning the veracity of the posts) reduced the public's belief in the veracity of those posts by only 13%. So, the Biden administration's attempted cure may have been worse than the disease.

As in the U.S., some Chinese citizens have found ways to avoid governmental blocking and to access banned information.[278] However, unlike the U.S., if they are discovered, they can be held for questioning and detained.[279]

V. CONCLUSION

The Biden Administration engaged in an aggressive and surreptitious campaign to suppress internet content. The Administration's actions were inconsistent with the free speech tradition of the U.S. While resembling the actions of authoritarian regimes, in the sense that the Biden administration tried to control public debate on matters of public interest, the Biden administration did not block websites, social media platforms, or newspapers, nor did it jail or interrogate those with whom it disagreed. However, it did engage in surreptitious efforts to remove internet content and even to encourage social media platforms to "deplatform" (or preclude) certain individuals.

In light of the U.S. free speech tradition, the Biden administration's actions are very troubling. If the U.S. is going to function as a democracy, and the people are going to engage in debates regarding candidates and issues, they must be allowed to speak freely. As James Madison emphatically stated in challenging an attempted governmental restriction on speech—in a Republic like ours, "the censorial power is in the people over the Government, and not in the Government over the people."[280]

---

277. *See id*.

278. *See* Yuan, *supra* note 213 (referring to a family which has been "using tools to bypass the Great Firewall for years").

279. *See* Paul Mozur, *He Was Chained to a Chair in China. What Was His Offense? Posting on Twitter,* N.Y. TIMES, Jan. 11, 2019, at A1.

280. New York Times v. Sullivan, 376 U.S. 254, 275 (1964) (citing 4 ANNALS OF CONG. 934 (1794)).

Since this article was written, President Biden left office, and President Trump replaced him. In theory, Trump's ascension brought an end to governmental attempts to suppress social media speech because he issued an Executive Order precluding the government from engaging in similar conduct.[281] Whether President Trump and his administration will comply with the order when push comes to shove, remains to be seen. In addition, there are questions regarding whether it is infringing free speech in other ways. But those topics are for discussion in later articles.

281. Exec. Order No. 14146, 90 Fed. Reg. 8109 (Jan. 19, 2025).

SECULARISM UNVEILED: A COMPARISON ANALYSIS OF FRENCH *LAÏCITÉ* AND THE AMERICAN FIRST AMENDMENT

Kate Weaver*

Abstract

This article will look comparatively at French law and United States law as it relates to the wearing of hijabs in public schools. France and the United States have two of the strongest and most recognized secularist systems in the world, with completely different interpretations of the concept. To categorize the respective systems simply, the United States guarantees freedom of religion, whereas France strives for freedom from religion. In both countries, courts have been asked to determine whether students have the right to wear hijabs or other similar religious garb to school as an expression of their faith. In each of the countries, the federal government (in the American case, the Department of Justice, in the French, the Prime Minister and the Conseil d'Etat interior division) released a statement of their view of how each country's secularity principles should be applied in the respective controversies. This article examines the language used by the respective federal governments when making these statements to analyze each country's vested interest in religious expression. Taking the issue of hijabs in schools as a microcosm of the larger debates over secularism, this article will question how the United States and France justify their vastly different positions on the topic under the same umbrella of "religious freedom." These differences ultimately derive from the origins of each country's current government: the United States started as a haven for a "melting pot" of various religious groups and national origins, whereas France's Third Republic adopted the secular principle of Laïcité as a reaction to the once-pervasive influence of the Catholic Church. Despite France's interconnectedness in the geopolitical landscape, its approach to

* Immigrant Justice Corps Fellow. J.D., Duke Law; B.A., Vanderbilt University. The author would like to extend her strong gratitude to Professor Emily Greble for inspiring this article and for her guidance and revisions. The author would also like to thank the Southwestern Journal of International Law for hosting an enlightening symposium and for their thorough edits of this piece.

learning and expression is more nationalist. This nationalist view is expressed not only in the French decision to ban hijabs in public school as contrary to republican values, but also in their extension of that prohibition to the public workplace. In France, religious expression is not a privileged individual right; it is an affront to the secular power of the state. By contrast, the United States takes the position that students have the right to wear their hijabs as an expression of their faith, which leads to an approach to schooling and expression that privileges individual rights over state power.

I. INTRODUCTION

In 1989 and 2003, France and the United States respectively were forced to reckon with religious expression in schools in the face of rising immigration and religious diversity. Controversies in both countries began when public schools suspended Muslim girls for wearing their hijabs to class.[1] The schools alleged that the girls' hijabs sparked fear in their fellow

1. *See* United States' Memorandum of Law in Support of its Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment, Hearn v. Muskogee Pub. Sch. Dist. 020, No. CIV 03-598-S, at ¶¶ 31–33 (E.D. Okla., May 6, 2004), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/hearnokbrief.pdf [hereinafter Hearn DOJ Memorandum]; *see also* Conseil d'Etat [CE] [Council of State], Nov. 27, 1989, No. 346.893 (Fr.).

students.[2] Both controversies arose following large events—September 11 in the United States and the Salmon Rushdie Affair[3] throughout Europe—which cast Islam in a negative light and invoked nationalist sentiments. Both France and the United States increasingly viewed Islam as antithetical to the liberal values that each country prides itself on upholding.

Legal battles commenced in both countries, which were ended by a federal advisory body—the Department of Justice in the United States[4] and the Conseil d'Etat's interior division in France[5]—stepping in to offer grandiose sentiments on free speech, nationalism, religious expression, and the role of public schools.[6] Each demonstrated a strong vested interest in framing the issue along specific lines, indicating that the debate over religious garb in school is important in defining the boundary between church and state.[7] This paper analyzes the language and framing of the Department of Justice and Conseil d'Etat's statements, offering insights into the meaning of free expression, religious liberty, and secularism in both countries.

Although both countries pride themselves on religious freedom, France and the United States have opposite interpretations of the concept. To categorize the respective secularist ideologies simply, the United States guarantees freedom *of* religion, whereas French laïcité (their word for secularism) strives for freedom *from* religion.[8] Public conflicts over religious topics occur in a variety of spheres in each country—from adoption agencies[9] to public beaches[10]—but one of the most prominent battlegrounds for these

2. *See* Hearn DOJ Memorandum, at 22 (stating that other students' reactions "centered around [their] curiosity and concern about seeing an unfamiliar object"); *see also* Conseil d'Etat, *supra* note 1.

3. The Rushdie Affair was a controversy that led to deaths in several countries because of a book written by Salman Rushdie that portrayed Islam in an offensive light. The Rushdie Affair will be discussed more in depth *infra* Sec. II.B. *See* Andrew Anthony, *How One Book Ignited a Culture War*, THE GUARDIAN, (Jan. 10, 2009), https://www.theguardian.com/books/2009/jan/11/salman-rushdie-satanic-verses; *see also* James M. Markham, *Fallout Over Rushdie: The Muslim Presence in Western Europe Is Suddenly Starker*, N.Y. TIMES (Mar. 5, 1989), https://www.nytimes.com/1989/03/05/weekinreview/world-fallout-over-rushdie-muslim-presence-western-europe-suddenly-starker.html.

4. *See generally* Hearn DOJ Memorandum, *supra* note 1.

5. *See generally* Conseil d'Etat [CE] [Council of State], Nov. 27, 1989, No. 346.893 (Fr.).

6. *See generally id.;* Hearn DOJ Memorandum, *supra* note 1.

7. *See* Hearn DOJ Memorandum, *supra* note 1; Conseil d'Etat, *supra* note 1.

8. *See* U.S. CONST. amend. I.; TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY 186 (2003).

9. *See, e.g.*, Fulton v. City of Philadelphia, 593 U.S. 522, 542 (2021) (holding that an adoption agency cannot refuse to contract with a Catholic organization because they would not work with same sex couples, which they viewed as against their faith).

10. Some Muslim women wear "Burkinis" (a form of full coverage swimsuit) as a way to remain modest at the beach. France banned Burkinis on public beaches, and the French police enforce these bans in the name of "good morals and secularism." Many of the Burkini bans are

values is the school, especially in France, which prizes its public elementary and secondary schools as the place where republican values are imparted to students of all faiths and backgrounds.[11]

Demographic researchers indicate that France is one of the strongest assimilationist countries.[12] As a concept, "assimilation" requires that newcomers shed their ethnic identity.[13] By contrast, in the United States "multiple national or ethnic identities" are viewed (at least on a theoretical level) as "positive marks of a diverse heritage."[14] Patrick Simon at the French Institute of National Demographic Studies defines French assimilation as follows:

> The notion of assimilation makes reference to a digestive metaphor . . . . The social body and institutions are supposed to digest the newcomers and transform them into French people. The goal is that they are no longer identifiable in the social structure, that their cultural, religious, or social specificities disappear so that they become similar in all respects to the French people.[15]

---

written in a way that discriminatorily focus on Islam. The Nice ban forbids "clothing that 'overtly manifests adherence to a religion at a time when France and places of worship are the target of terrorist attacks.'" The ban was enacted after the terrorist attack in the city on Bastille day. *See* Ben Quinn, *French Police Make Women Remove Clothing on Nice Beach Following Burkini Ban*, THE GUARDIAN (Aug. 23, 2016, 7:43 PM EDT), https://www.theguardian.com/world/2016/aug/24/french-police-make-woman-remove-burkini-on-nice-beach.

11. *See* David Saville Muzzey, *State, Church, and School in France I. The Foundations of the Public School in France*, 19 SCH. REV. 178, 186 (1911).

12. *See* PATRICK SIMON, FRENCH NATIONAL IDENTITY AND INTEGRATION: WHO BELONGS TO THE NATIONAL COMMUNITY?, 3 (2012).

13. *Id.* ("[A]ssimilationist countries, with France in the lead, tend to insist on exclusive choices and consider the retention of an ethnic identity to be a sign of incomplete assimilation." (citing Irene Bloemraad, *Unity in Diversity? Bridging Models of Multiculturalism and Immigrant Integration*, 2 DUBOIS REV.: SOC. SCI. RSCH. ON RACE 317, 322-23 (2007))).

14. *Id.* (citing Bloemraad, *supra* note 13); *see* Daniel Greene, *What Does it Mean to be a Land of Immigrants?*, PBS, https://www.pbs.org/kenburns/us-and-the-holocaust/what-does-it-mean-to-be-a-land-of-immigrants (last visited Feb. 2, 2025) (illustrating that America identifies as a "nation of immigrants," due to its founding by immigrants and continued diversity of immigration, but the country still struggles with xenophobic policies aimed at limiting immigration and forcing people to become more "American").

15. Anne Chemin, *Intégration ou assimilation, une histoire de nuances* [Integration or Assimilation, a Story of Nuances], LA TRIBUNE (Nov. 15, 2016), https://www.djazairess.com/fr/latribune/122428 ("La notion d'assimilation fait appel à une métaphore digestive, explique Patrick Simon, socio-démographe à l'Institut national d'études démographiques (Ined). Le corps social et les institutions sont censés digérer les nouveaux venus et les transformer en Français. Le but est qu'ils ne soient plus repérables dans la structure sociale, que leurs spécificités culturelles, religieuses, ou sociales disparaissent afin qu'ils deviennent semblables en tout point aux Français.").

The French "digestive" assimilationist model, in which hijabs serve as a visual indication of a potential disconnect with the French identity, is applicable in all public spaces, but especially in public schools.

The contrast between France and the United States' approaches to religious expression is attributable to the varying ways in which the nations were primarily founded. Both countries began with profound revolutions. The French responded to the domination of the Catholic Church by instituting sweeping uniformity meant to erase the inequality that had persisted throughout the preceding centuries.[16] Given the link between the Catholic Church and the King, the push against monarchical influence necessarily involved removing religion from the public consciousness.[17] The French took a nationalist approach—defining the nation based on shared "Frenchness" and excluding identities that conflicted with that ideal.[18] Although families "bring up children to respect certain values . . . the State makes it very clear that these so-called private values must be relativized by reference to public values."[19] Before the revolution, France mainly had private, religious education.[20] Post-revolution, public schools became the mechanism through which children learned the new republican values and what it meant to be "French" and secular.[21] Scholars of French citizenship have found that "[c]itizenship education has traditionally been high on the political agenda in France," due to the "need to consolidate national support for the Third Republic when democracy was restored in 1871."[22] In the early

16. *See generally* ASAD, *supra* note 8, at 192; Muzzey, *supra* note 11, at 181 ("The moral-social movement out of which the public school in France grew was the French Revolution; the peculiar features which the public school in France shows in all its development are a great tendency to uniformity, almost monotony, in organization and function, strict centralization of authority, uncompromising opposition to influences antagonistic to the revolutionary principle (such as the Catholic church), and firm belief that the faithful pursuit of an elaborately formulated program will make scholars.").

17. *See* Sophia H. MacLehose, *Separation of Church and State in France in 1795*, 15 SCOTTISH HIST. REV. 298, 299 (1907).

18. *See* Muzzey, *supra* note 11, at 179.

19. Audrey Osler and Hugh Starkey, *Citizenship Education and National Identities in France and England: Inclusive or Exclusive?*, 27 OXFORD REV. EDUC. 287, 290 (2001).

20. *See* Muzzey, *supra* note 11, at 184 ("Before the French Revolution there was practically no such thing as public education. The church . . . made some provision for the training of the youth in some of the dioceses of France; but the object of such training was rather exclusively the recruitment of the clerical order.").

21. *See id.* at 179-81 ("[T]he great absorbing need for the cause of public education in France . . . has been to build a school which should furnish the youth of the land training in the fundamental principles of the French Revolution: namely, the sufficiency of the human mind, illumined by the sole light of reason, to devise and maintain a social state in which every virtue shall have encouragement for its full perfection and every man find employment for his utmost talent . . . [T]he school is the state in the making.").

22. Osler & Starkey, *supra* note 19, at 289.

days of the Third Republic, citizenship education—"moral and civic instruction"—was prioritized ahead of basics such as reading and writing.[23]

The American founders, on the other hand, descended from immigrants from several countries, many of whom had been persecuted for their beliefs. The United States instead instituted a more open policy designed to erase burdens on religious practice and speech, especially burdens that they had experienced under British rule and which their ancestors had endured and fled.[24] Although civic education is an important aspect of children's schooling in the United States, it is not and was never the central purpose of public education as in France. In the United States, anthropological scholars find that "teaching methods that impart the skills and dispositions of democratic citizenship" have been "eclipsed" by teaching methods that are "suited for imparting standardized academic knowledge" and "so-called 'lifelong learning'—arguably a euphemism to train flexible labor for capital."[25] Civic education varies greatly within and between the states with varying degrees of emphasis.[26] One popular citizenship education book in the United States discusses the rights of American citizens substantially more than the responsibilities of American citizens or the obligations of citizens to participate in our democratic system.[27] By contrast, in France, the duties of citizens within the national community are strongly emphasized.[28]

These origins shaped the underlying systems, philosophies, and principles of secularism adopted in each country. Those secularist principles in turn shaped the United States' position that female students have the right to wear hijabs in public schools as an expression of their faith, and the French position that wearing hijabs could disturb the functioning of schools and

23. *Id.* (stating that "'instruction morale et civique' was put even before reading, writing and literature in terms of national priorities" (citing J. Costa-Lascoux, *L'education civique ... trop tard?* [*Civic Education ... too late?*], 16 LA REVUE EDUCATIONS 53 (1998))).

24. *See* RUSSELL WEAVER, FROM GUTENBERG TO THE INTERNET 18 (2d ed. 2019) (first citing THOMAS PAINE, COMMON SENSE (1776) (Dover ed., 1997); and then citing Everson v. Board of Educ., 330 U.S. 1, 8–9 (1947)).

25. Bradley A.U. Levinson, *Citizenship, Identity, Democracy: Engaging in the Political in the Anthropology of Education*, 36 ANTHRO. & ED. Q. 329, 329 (2005).

26. *See* Kara Yorio, *A Look at Civics Education, State by State*, SCH. LIB. J.: NEWS & FEATURES, (Feb. 3, 2020), https://www.slj.com/story/a-look-at-civics-education-state-by-state.

27. *See* SAGE PUBL'NS, THE SAGE HANDBOOK OF EDUCATION FOR CITIZENSHIP AND DEMOCRACY (James Arthur et al. eds., 2008).

28. *See* Osler & Starkey, *supra* note 19, at 296, 299 (first citing QUALIFICATIONS AND CURRICULUM AUTH., THE NATIONAL CURRICULUM: HANDBOOK FOR PRIMARY TEACHERS IN ENGLAND: KEY STAGES 1 AND 2 (1999); then citing QUALIFICATIONS AND CURRICULUM AUTH., EDUCATION FOR CITIZENSHIP AND THE TEACHING OF DEMOCRACY IN SCHOOLS: FINAL REPORT OF THE ADVISORY GROUP ON CITIZENSHIP 49 (1998); and then citing QUALIFICATIONS AND CURRICULUM AUTH., THE NATIONAL CURRICULUM: HANDBOOK FOR PRIMARY TEACHERS IN ENGLAND: KEY STAGES 3 AND 4 20 (2004)).

contradict Republican values. This paper will examine each country's response to the question of hijabs in public schools, using the governments' statements as insight into France and the United States' conflicting positions on religious freedom, and into each country's understanding of their own secularist ideologies. Part II will set up *Hearn v. Muskogee Public School District 020*, the American case on hijabs in public schools and will give an overview of American religious freedom. Part III will outline the French equivalent to *Hearn*, titled Opinion: "Wearing an Islamic Headscarf" and will discuss the French revolution and its influence on the French secularist ideology. Part IV will compare and contrast the language the government used in the two cases to illuminate the stark difference between the countries' religious freedoms. Part IV will focus on four particular differences between the countries: (1) Whether the countries view religious garb as a disturbance to public order, (2) how each country's protections for freedom of expression affect students' religious liberties, (3) whether the countries offer religious exemptions from school activities, and (4) whether the countries have to consult with any other bodies or principles in making their decisions.

II. THE AMERICAN PERSPECTIVE

A. History and Principles of American Secularism

The First Amendment to the United States Constitution sets forth the right to religious expression. That Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[29] The Amendment is read to include both an Establishment Clause (prohibiting government from "establishing" an official religion) and a Free Exercise Clause (guaranteeing Americans the right to freely exercise their religions).[30] Together, these clauses are known as the "Religion Clauses."[31]

The Religion Clauses reflect "the memory of the religious persecution from which many colonists fled" and thus sought to enable diversity of religious thought and expression.[32] The protection of the Religion Clauses is bolstered by the strong protection given to freedom of speech, which

29. U.S. CONST. amend. I.

30. *See* Walz v. Tax Commission, 397 U.S. 664, 667–68 (1969).

31. *See id.*

32. RUSSELL L. WEAVER & CATHERINE HANCOCK, THE FIRST AMENDMENT: CASES, PROBLEMS, AND MATERIALS 795 (6th ed. 2020).

provides extra protection for religious actions.[33] In addition to the explicit references to religion in the First Amendment, religious freedoms are also protected by the Equal Protection Clause, which states "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."[34] Individuals can challenge religious discrimination under the Equal Protection Clause when they are treated differently than other religions or their right to free exercise has been burdened.[35]

The principles of free speech and free exercise of religion are generally attributed to the American Revolution and the enlightenment values underpinning that revolution.[36] Many of the post-revolutionary principles that informed the Constitution arose from a mistrust in the British government, which led the Framers of the U.S. Constitution to embrace Baron de Montesquieu's ideas regarding separation of powers.[37] There are two prevailing reasons for this mistrust's influence on the Constitution:

> First, the new Americans had just revolted against the British empire, and claimed their independence, because of alleged abuses by the British monarch. Second, many of the new Americans had emigrated to the American colonies in order to escape religious persecution in Europe. In particular, they were seeking to escape "established" religions that required everyone to support those religions, and aggressively persecuted those who tried to practice other religions.[38]

---

33. *See id.* at 1007.

34. U.S. CONST. amend. XIV, § 1.

35. *See* Hearn DOJ Memorandum, *supra* note 1, at 10 (first citing Johnson v. Robinson, 415 U.S. 375 n.14 (1974); then citing Locke v. Davey, 540 U.S. 712, 720 n.3 (2004); then citing Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 715 (O'Connor, J., concurring); and then citing West v. Devby Unified Sch. Dist., 206 F.3d 1358, 1365 (10th Cir. 2000)).

36. *See* WEAVER, *supra* note 24, at 16 (first citing RALPH KETCHMAN, THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES: THE CLASHES AND THE COMPROMISES THAT GAVE BIRTH TO OUR FORM OF GOVERNMENT xv (1986); then PAINE, *supra* note 24; then citing THE DECLARATION OF INDEPENDENCE (U.S. 1776); and then citing Everson v. Board of Educ., 330 U.S. 1, 8–9 (1947)).

37. *See generally* CHARLES DE SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF LAWS (Thomas Nugent trans., Batoche Books Kitchener 2001).

38. *See* WEAVER, *supra* note 24, at 16 (first citing RALPH KETCHMAN, THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES: THE CLASHES AND THE COMPROMISES THAT GAVE BIRTH TO OUR FORM OF GOVERNMENT xv (1986); then PAINE, *supra* note 24; then citing THE DECLARATION OF INDEPENDENCE (U.S. 1776); and then citing Everson v. Board of Educ., 330 U.S. 1, 8–9 (1947)); *see also Thomas Jefferson and Religious Freedom*, THE JEFFERSON MONTICELLO, https://www.monticello.org/research-education/thomas-jefferson-encyclopedia/thomas-jefferson-and-religious-freedom/ ("Before the Revolution, Virginia had an official church – the Church of England – and dissenters from that Church (primarily Presbyterians and Baptists) were discriminated against and seriously persecuted. This deeply disturbed Jefferson . . . Jefferson saw religious freedom as essential for a functioning republic.").

The "abuses" by the British empire in the colonies included not providing equal rights to the colonists as to the British.[39] The rights of the Englishmen, such as freedom of conscience and freedom of speech, were praised as the "apex of human liberty and ingenuity."[40]

Initially, despite the discrimination and persecution that the colonists feared, the new Americans were not necessarily accepting of the idea of religious diversity. Some of those who fled European religious persecution sought to establish their own enclaves where they could discriminate against those who did not agree with them.[41] Indeed, some of the original thirteen states had established religions.[42] However, over time, a consensus developed that religious tolerance by the government was essential. Some of the founding fathers, in particular Thomas Jefferson and James Madison, were eventually successful in encouraging Virginia, and subsequently the nation, of the importance of religious tolerance.[43]

The Constitution itself makes no reference to the "separation between Church & State" that many believe is the lynchpin to American secularism.[44] This phrase was pulled from Thomas Jefferson's 1802 Letter to the Danbury Baptists, which is considered an authority for interpreting the First Amendment given his role in crafting the Constitution.[45] In the letter, Jefferson writes:

> Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State.[46]

---

39. USCIS, Intermediate Level Establishing Independence, USCIS, https://www.uscis.gov/sites/default/files/document/lesson-plans/Intermediate_establishing_independence_handouts.pdf (last visited Mar. 28, 2025).

40. *See* WEAVER, *supra* note 24, at 32 (stating that enlightenment thinkers such as Voltaire, Diderot, and Montesquieu participated in what was termed "Anglomania" to celebrate the natural rights enshrined in the British Constitution).

41. *See* John R. Vile, *Established Churches in Early America*, (July 2, 2024) FREE SPEECH CENTER: ARTICLES, https://www.mtsu.edu/first-amendment/article/801/established-churches-in-early-america.

42. *See id.*

43. *See id.*

44. Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802) (available at https://founders.archives.gov/documents/Jefferson/01-36-02-0152-0006#).

45. *See id.*

46. *Id.*

Jefferson's writings affirm the government's interest in allowing Americans to exercise their religious freedom without interference from the state, notwithstanding the lack of a clear statement in the Constitution about the interaction between the church and the state.

A variety of landmark Supreme Court Cases delineated the border between the church and state in the educational context. In *Engel v. Vitale*, the Court ruled that a school holding a non-denominational and optional prayer is a violation of the Establishment Clause, emphasizing that the First Amendment was "to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support, or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government."[47] Ten years later in *Wisconsin v. Yoder*, the Court ruled that children could be exempted from compulsory education laws if the laws burdened the students' practice of their religion.[48] Throughout these cases, the Court defined the role of the government in religion as one that supports the ability for all to practice freely by not endorsing or financially supporting any one religion over another, and by allowing certain exemptions from federal laws that conflict with religious practices.

A more recent authority on the meaning of the religion clauses in the context of education is former President Bill Clinton's 1995 memorandum on Religious Expression in Public Schools, written for the Secretary of Education and the Attorney General.[49] He begins by stating that "[r]eligious freedom is perhaps the most precious of all American liberties—called by many our 'first freedom.' Many of the first European settlers in North America sought refuge from religious persecution in their native countries."[50] He goes on to say that students have the right to excusals from religiously objectionable content in class, the right to be free from coercion by any employees of the school, the right to leave school premises to participate in religious instruction, and, most critically for the topic of hijabs, to wear religious messages and religious garb.[51] President Clinton's memorandum emphasizes the amount of flexibility that the United States offers students to ensure that their rights to free exercise of their religion are not burdened.

47. Engel v. Vitale, 370 U.S. 421, 429–30 (1962).

48. *See* Wisconsin v. Yoder, 406 U.S. 205, 234–35 (1972).

49. *See generally* Memorandum from William J. Clinton, President of the U.S., to the Secretary of Education and the Attorney General (July 12, 1995) (on file with Authenticated U.S. Government information), https://www.govinfo.gov/content/pkg/WCPD-1995-07-17/pdf/WCPD-1995-07-17-Pg1227.pdf.

50. *Id.*

51. *See id*.

A significant piece of legislation that bolstered the United States' accommodation of religious practice is the Equal Access Act, passed in 1984.[52] The Act emphasized that all student-led groups that meet outside of class time, regardless of religious status, should have access to the same resources and be guided under the same rules.[53] The Act affirmed that it is unlawful for a public school "to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting . . . on the basis of the religious, political, philosophical, or other content of the speech at such meetings."[54] In other words, if a robotics club is allowed to meet during lunch time and has access to meeting spaces and bulletin boards, then a Catholic bible study group must be allowed to meet during lunch time and have access to the same spaces and bulletin boards. The Act's constitutionality was upheld by the Supreme Court in *Board of Education of Westside Community Schools v. Mergens*, which reiterated that allowing religious clubs to function as other clubs minimizes religious discrimination and promotes free exercise.[55]

B. Hearn v. Muskogee Public School District 020

Hearn v. Muskogee Public School District 020[56] was a test to American secularism generally and the application of that secularism in public schools more specifically. Although expression of religious beliefs on school grounds had been the subject of litigation before,[57] the issue raised in *Hearn*—whether or not students have the right to wear symbols that outwardly convey their religious beliefs[58]—had uneven implications for religions that frequently wear certain garb as part of their faith. The boundaries of religious freedom and equality in schools were put to the test by Nashala Hearn, a student in the Muskogee Public School District in Oklahoma who wore a hijab to school.[59] A hijab is an Islamic headscarf or "veil" for women that wraps

52. *See* The Equal Access Act, 20 U.S.C. § 4071 (1984).

53. *See id.*

54. *Id.* § 4071a.

55. *See* Board of Educ. Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990).

56. *See generally* Hearn DOJ Memorandum, *supra* note 1.

57. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 316 (2000) (striking down a school policy allowing for student-led prayer before school football games on the premise that the prayers could be seen as government endorsement of religion).

58. *See* Hearn DOJ Memorandum, *supra* note 1, at 1.

59. *See id.* at ¶ 21.

around the head but does not cover the face; it is less conservative than some of the other Islamic headscarves.[60]

Nashala began wearing a hijab as part of her Islamic faith during the summer of 2003.[61] She was twelve years old and starting sixth grade.[62] Before she returned to school for the 2003–2004 year, her father asked her homeroom teacher, Ms. Walker, whether or not she would be able to wear her hijab at school.[63] Ms. Walker informed Nashala's father that she could do so.[64] As a result, at the beginning of the school year on August 18, 2003, Nashala began wearing her hijab to school without incident.[65] However, on September 11, 2003, Ms. Walker stopped Nashala in the hall and told her that hijabs were not allowed at school, despite her prior statement that hijabs were permissible.[66] Notably, Ms. Walker had been discussing the September 11 terrorist attacks with another teacher at the time Nashala walked past.[67] The school supported Ms. Walker's decision, asserting that her hijab was "frightening" that it could be construed as a "gang-related symbol," and that it impermissibly brought "religion into the school."[68] Nashala was suspended twice from school over her hijab.[69]

Nashala and her father sued the school district in October 2003, for infringing Nashala's constitutional rights to freely exercise her religion under the First Amendment and to equal protection of the laws under the Fourteenth Amendment.[70] The case was filed in the Eastern District of Oklahoma, and the parties came to an interim agreement allowing Nashala to wear her hijab pending the outcome of the litigation.[71] When the Department of Justice heard of the case, they intervened in the matter, writing a memorandum of law in support of Nashala's right to wear the hijab and helping to broker an agreement.[72] Although the exact motivation behind the Department of Justice's decision to intervene is unknown, it is likely that the growing negative political sentiments towards Islam after the September 11 attacks

60. *See* Rachel Payne Gill, *Hijab | Definition, History, & Purpose*, STUDY.COM, https://study.com/academy/lesson/hijab-definition-and-relation-to-islam.html.

61. *See* Hearn DOJ Memorandum, *supra* note 1, at ¶ 21.

62. *See* Jesse Lee, *Nashala's Story*, THE WHITE HOUSE (June 4, 2009, 3:20 PM), https://obamawhitehouse.archives.gov/blog/2009/06/04/nashalas-story.

63. *See* Hearn DOJ Memorandum, *supra* note 1, at ¶¶ 24–25.

64. *Id.* at ¶ 25.

65. *See id.* at ¶ 27.

66. *See id.* at ¶¶ 28–29.

67. *See id.* at ¶ 28.

68. *See id.* at 16–17.

69. *See id.* at ¶¶ 32–33.

70. *See* Lee, *supra* note 62.

71. *See* Hearn DOJ Memorandum, *supra* note 1, at ¶ 35.

72. *See* Lee, *supra* note 62; Hearn DOJ Memorandum, *supra* note 1, at ¶ 24.

and the burgeoning war with Iraq played a role in the Department of Justice's decision to issue a statement on Nashala's behalf. The U.S. Department of Justice stated that the school's denial of Nashala's choice to wear the hijab violated both her First and Fourteenth Amendment rights.[73]

In its memorandum in *Hearn*, the Department of Justice emphasized that religious liberties are more important than the school's perception that Nashala wearing the hijab would create a "disturbance."[74] The Department of Justice believed that the school did not have a compelling governmental interest[75] in forbidding Nashala from wearing her hijab. Moreover, the memorandum noted that the seemingly neutral law banning head coverings was actually an affront to religious freedom since it provided exemptions for special occasions or circumstances (such as for students undergoing chemotherapy) but not for religious purposes.[76] The school's assertion that it was a religiously neutral institution was at odds with its policies, as they sought to keep religious messages off of school grounds to keep the classroom secular,[77] but, in so doing, they unevenly favored faiths without specific dress requirements. Although the school district expressed concern over students bringing religion into the classroom, the Department of Justice seemed more concerned about the implications of keeping religion *out* of the classroom and thus found that the school had an obligation to support Nashala in wearing her hijab.[78]

Following the Department of Justice's intervention, the Muskogee School District and the Hearns agreed to a consent order, permitting Nashala and other students to wear hijabs or other religious garb; requiring that the school inform teachers, parents, students, and administrators regarding the new policy; creating a program to ensure that the school complies with the agreement; and providing an undisclosed amount of damages to the Hearns.[79] Afterwards, the Justice Department's Assistant Attorney General for Civil Rights released a statement saying:

---

73. *See* Hearn DOJ Memorandum, *supra* note 1, at 10, 20–21.

74. *See id.* at 21 (citing Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 508 (1969)).

75. The school needed to show a "compelling interest" in denying Nashala an exemption to the headgear ban, because the school's system of exemptions made the headgear ban not "generally applicable," which triggered strict scrutiny. To overcome strict scrutiny and continue applying the ban to Nashala, the school needed to show that their policy was "narrowly tailored to further a compelling interest." *See id.* at 7–8, 17.

76. *See id.* at 8.

77. *See id.* at 17.

78. *See id.* at 20–21.

79. *See* Consent Order, Hearn v. Muskogee Pub. Sch. Dist. 020, No. CIV 03-598-S, at 3–5 (E.D. Okla., May 6, 2004) (hereinafter "Hearn Consent Order").

> This settlement reaffirms the principle that public schools cannot require students to check their faith at the school house door. . . . The Department of Justice will not tolerate discrimination against Muslims or any other religious group. As the President and the Attorney General have made clear repeatedly, such intolerance is un-American, and is morally despicable.[80]

Because the Department of Justice's intervention in *Hearn* and the ultimate consent order did not have a nationwide effect, at least one other student was prevented from attending school because of her hijab after the decision.[81] She was eventually allowed to return to school following the intervention of the Council on American-Islamic Relations.[82] However, the Department of Justice's statement can nonetheless serve as a guideline to the application of Constitutional principles in the public school setting because it reflects the federal government's stance on religious expression in school.

III. THE FRENCH PERSPECTIVE

A. History and Principles of French Secularism

France's republican system began after the French revolution against the then all-encompassing influence of the monarchy and the Catholic Church.[83] The revolution involved a textbook model of secularization: the "'freeing' of property from church hands into the hands of private owners, and thence into market circulation."[84] The revolution also led to creation of the French motto: *Liberté, Equalité, Fraternité* (Liberty, Equality, Fraternity) that has remained central to the French identity throughout the modern Fifth Republic.[85] The Catholic Church, hopelessly entangled with the French monarchy, became a distinct symbol of opposition to republican revolutionary ideals,[86] leading to

80. DEP'T OF JUST., No. 04-343, JUSTICE DEPARTMENT REACHES SETTLEMENT AGREEMENT WITH OKLAHOMA DISTRICT IN MUSLIM STUDENT HEADSCARF CASE (2004).

81. *See* Catherine J. Ross, *Accommodating Children's Religious Expression in Public Schools: A Comparative Analysis of the Veil and Other Symbols in Western Democracies*, *in* WHAT IS RIGHT FOR CHILDREN? THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS 283, 289 (Martha Albertson Fineman & Karen Worthington eds., 2009) (describing a school that initially barred a student from wearing a hijab at school in 2005).

82. *See id.*

83. *See* ASAD, *supra* note 8, at 24.

84. *See id.* at 192 (citing *Säkularisation, Säkularisierung in* GESCHICHITLICHE GRUNDBEGRIFFE: HISTORISCHES LEXIKON ZUR POLITISCH-SOZIALEN SPRACHE IN DEUTSCHLAND [*Secularization, Secularization in* BASIC HISTORICAL TERMS: HISTORICAL LEXICON OF POLITICAL AND SOCIAL LANGUAGE IN GERMANY] 789 (Otto Brunner et al. eds., 1972)).

85. *See Liberty, Equality, Fraternity*, ELYSEE, https://www.elysee.fr/en/french-presidency/liberty-equality-fraternity (last visited Mar. 16, 2025).

86. *See* MacLehose, *supra* note 17, at 299.

a push to create unity around a common "French" secular identity, a Republic that would be "one and indivisible."[87]

Today, an expectation persists that the identity of being "French" comes before all other identities, thus leaving no space for so-called "Hyphenated-identities" (ex: Chinese-French, Egyptian-French, etc.).[88] Scholars emphasize that France differs from other multicultural societies in that this concept of "dual belonging" has been rejected in France, "where many perceive identity as a zero-sum game" as "commitment to a minority culture or a foreign country detracts from the quality of one's commitment to French identity."[89] A prominent example of this unity over a common "Frenchness" is the fact that the French census has no questions regarding nationality.[90] In addition, the concept of "community leaders" is not prominent in French culture because "the suggestion that 'communities,' in the sense of ethnic or religious groups, exist in France is strongly denied, and indeed resisted, by a number of mainstream political groups and well-known thinkers."[91]

The education system is the primary method through which this "Frenchness" is socialized. Textbooks emphasize French unity and discourage community building.[92] One study of French education describes French textbooks as making "clear that any attempt to develop a sense of community founded not on citizenship but on a sense of ethnic identity is totally alien to the values of the Republic: 'The Republic cannot accept an inward-looking communitarianism which is likely to endanger the unity of the nation.'"[93] This is the type of message conveyed in the Conseil d'Etat's statement, as they emphasized the importance of peaceful coexistence.[94]

The legal basis of French secularism is generally attributed to the Law of December 9, 1905, on the Separation of Churches and the State.[95] This Law, among other things, affirmed that "the Republic ensures freedom of conscience,"[96] ended the recognition and subsidization of religions, outlawed

87. *See id.* at 303.

88. *See* SIMON, *supra* note 12, at 1. By contrast, Americans regularly use "hyphenated" identities (Chinese-American, Egyptian-American, etc.).

89. *Id.*

90. *See id.* at 3, 12–13.

91. Osler & Starkey, *supra* note 19, at 299.

92. *See id.* at 301.

93. *Id.* at 302.

94. *See* Conseil d'Etat, *supra* note 1.

95. Loi du 9 Décembre 1905 concernant la séparation des Eglises et de l'Etat [Law of December 9, 1905 on the Separation of Churches and the State], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 11, 1905, p. 1.

96. "La République assure la liberté de conscience." *Id.* at art. 1.

religious signs and references in "any public place whatsoever"[97] (with small exceptions), and imposed punishments on individuals who interfere with other individuals' or a group's right to exercise their religion.[98] Portions of the Law of 1905 were reinforced by the 1958 iteration of the Constitution's Article Two, which similarly declared that "France is a secular republic" which "ensures equality before the law of all citizens without distinction of origin, race, or religion."[99] These dramatic steps resulted in a separation of church and state designed to reject the pre-revolutionary supremacy of the Catholic church in France.

These ideas of "Frenchness," however, are colored by the French tradition, which was generally Christian. Thus, despite the stated desire to push religion out of the public sphere, there are six Christian public holidays.[100] Some businesses are also prevented from opening on Sundays.[101] Around Christmas, some Frenchmen believe that nativity scenes should be erected at town halls because they are "not religion, but culture."[102]

Throughout the Constitution and the French code, France emphasizes not only the importance of secularism in public generally but also in schools more specifically. The Jules Ferry Laws of the 1880s established a free and mandatory public education system and required that schools be secular.[103] These laws were enacted as part of a secularization process or "'dechristianisation'" of France.[104] The fact that state-run public schools

97. "[E]n quelque emplacement public que ce soit . . . ." *Id.* at art. 28.

98. *Id.* at art. 31–32.

99. "[L]a France est une république . . . laïque . . . elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion." Conseil d'Etat, *supra* note 1.

100. France recognizes the following Christian holidays as national holidays: Easter Monday, Ascension Day (the day Jesus went to heaven after his resurrection), Whit Monday (Pentecost Monday), Assumption of the Blessed Virgin Mary, All Saints' Day, and Christmas Day. Some regions of France also celebrate Good Friday and Saint Stephen's Day as public holidays, but these are not nationally recognized public holidays. *See* Stephen Maunder, *French Public Holidays in 2025*, EXPATICA (Nov. 2, 2025), https://www.expatica.com/fr/lifestyle/holidays/french-public-holidays-103612/.

101. *See* Jessica Jones, *What Shops Can Open in France on Sundays and Does it Vary by Region?* CONNEXION FRANCE (June 2, 2024, 7:00 AM), https://www.connexionfrance.com/practical/what-shops-can-open-in-france-on-sundays-and-does-it-vary-by-region/661160.

102. *See* Catherine Fieschi, *Muslims and the Secular City: How Right-Wing Populists Shape the French Debate Over Islam*, BROOKINGS (Feb. 28, 2020), https://www.brookings.edu/articles/muslims-and-the-secular-city-how-right-wing-populists-shape-the-french-debate-over-islam/.

103. *See Jules Ferry Laws Establishing Free, Secular, Compulsory Education in France*, CAL. STATE UNIV. SACRAMENTO, https://www.csus.edu/indiv/c/craftg/hist127/Jules%20Ferry%20laws%20establishing%20free.pdf.

104. *See* Gemma Betros, *The French Revolution and the Catholic Church*, HISTORY TODAY (Dec. 2010), https://www.historytoday.com/archive/french-revolution-and-catholic-church; *see*

were free was critical in the effort to further republican education, as poorer areas of the country had previously relied on the Catholic Church for schooling.[105] In 1946, the interest in and commitment to secular education was enshrined in the preamble to the Constitution, which stated that "the organization of free and secular public education is at all levels a duty of the state."[106]

While the importance of public education in enforcing and modeling secularism is evident throughout these French laws, they are also reinforced by subsequent memos and statements from public officials. The 2003 Stasi Commission Report, issued by an investigative committee established by then-President Jacques Chirac to explore the applications of secularism in France, states: "Many legal obligations for both public services and its users will result from this founding principle [of secularism], starting with the national Education."[107] The Stasi Commission, based on their investigations, recommended an official ban on religious garb, which was actualized in early 2004.[108] The text of the ban was framed neutrally, without singling out particular faiths. However, a vote for the ban was framed as a "vote against headscarves" that would "support women battling for freedom in Afghanistan, schoolteachers trying to teach history in Lyon, and all those who wished to reinforce the principles of liberty, equality and fraternity."[109] The 2004 ban brought forth similar debates as those which took place in 1989 when the Conseil d'État was first asked to render its opinion on headscarves in schools.[110]

A memorandum released by the French Government's Secularism Monitoring Centre, multiple decades after the "Port du Foulard Islamique"

Giampaola Lecce et al., *Birth and Migration of Scientists: Does Religiosity Matter? Evidence from 19th-Century France,* 187 J. ECON. BEHAV. & ORG., 274, 277 (2021).

105. *See Jules Ferry Laws Establishing Free, Secular, Compulsory Education in France*, *supra* note 103.

106. "L'organisation de l'enseignement public gratuit et laïque à tous les degrés un devoir de l'Etat." Conseil d'Etat, *supra* note 1.

107. "De ce principe fondateur découlent de nombreuses obligations juridiques aussi bien pour les usagers que pour les services publics, à commencer par l'Education nationale." COMMISSION DE REFLEXION SUR L'APPLICATION DU PRINCIPE DE LAÏCITÉ DANS LA REPUBLIQUE [COMMISSION FOR REFLECTION ON THE APPLICATION OF THE PRINCIPLE OF SECULARISM IN THE REPUBLIC], RAPPORT AU PRESIDENT DE LA REPUBLIQUE [REPORT TO THE PRESIDENT OF THE REPUBLIC] 19 (2003) [hereinafter Commission Stasi].

108. *See* JOHN BOWEN, WHY THE FRENCH DON'T LIKE HEADSCARVES: ISLAM, THE STATES, AND PUBLIC SPACE, 1 (2007).

109. *Id.*

110. *See id.* at 4.

opinion by the Conseil d'État, provides an explanation of the reasoning and motivation behind French secularism.[111] The Centre writes that:

> France today is characterized by more cultural diversity than before. This is why she needs secularism now more than ever, secularism that guarantees to all citizens, regardless of their religious or philosophical beliefs, to live together with liberty of conscience, liberty to practice a religion or not to practice one, equality of rights and obligations, and republican solidarity.[112]

Although this memorandum postdated Conseil d'Etat's opinion by a number of years, the principles reflected in it of republican solidarity and living together are emphasized throughout the Conseil d'Etat's opinion and other interpretations of secularism. These principles existed before the Conseil d'Etat's opinion and have persisted to the present. Secularism in France is the vehicle through which multiculturalism is managed, one in which an allegiance to the state is supposed to take precedence over individual identities.

B. Opinion: "Wearing an Islamic Headscarf"

As in *Hearn*, the French suspensions of Muslim schoolgirls were also an influential and groundbreaking test of the country's values. The French equivalent to *Hearn* began when Principal Ernest Chénieres in Creil, a city outside Paris, banned three girls from wearing headscarves at his school in September 1989.[113] Two fourteen-year-old girls, Fatima and Samira, and one fifteen-year-old girl, Leila, wore hijabs to school as part of their Muslim faith.[114] They declined to remove them in the face of the ban.[115] The girls were suspended for not complying with the order, and sisters Fatima and

111. *See La Laïcité Aujourd'hui, Note D'orientation De L'Observatoire De La Laïcité* [*The Secularism of Today, Guidance from the Observatory for Secularism*], L'OBSERVATOIRE DE LA LAÏCITÉ [OBSERVATORY FOR SECULARISM] (May 26, 2014), https://www.gouvernement.fr/la-laicite-aujourd-hui-note-d-orientation-de-l-observatoire-de-la-laicite.

112. "La France se caractérise aujourd'hui par une diversité culturelle plus grande que par le passé. C'est pourquoi elle n'a jamais eu autant besoin de la laïcité, laïcité qui garantit à tous les citoyens quelles que soient leurs convictions philosophiques ou religieuses, de vivre ensemble dans la liberté de conscience, la liberté de pratiquer une religion ou de n'en pratiquer aucune, l'égalité des droits et des devoirs, la fraternité républicaine." *Id.* Some commentators note that this rhetoric and the "newfound prominence" of secularism are a way to discriminate against Muslims. *See, e.g.,* Audrey Pettit, *In France, Secularism Is a Justification for Discrimination Against Muslims*, JACOBIN (June 6, 2023), https://jacobin.com/2023/06/french-muslim-hijab-ban-laicite.

113. *See* Nicky Jones, *Beneath the Veil: Muslim Girls and Islamic Headscarves in Secular France*, 9 MACQUARIE L. J. 47, 49 (2009).

114. *See id.*

115. *See id.* at 50.

Leila's father withdrew them from school.[116] French[117] and American[118] media were quick to comment on the matter. The incident also resulted in demonstrations, with some protesting on behalf of the right to education, some protesting in favor of strict secularism, some advocating for religious freedom, and some asserting that the hijab is "a sign of imprisonment" or an "insult to the principle of women's emancipation."[119] Some other Muslim girls began to wear their hijabs to school in solidarity and then protested the suspensions that resulted.[120]

In response to the protests, Principal Chenières played into the fears of the French people. He warned of a "nightmare" of "thousands and fifty thousands" of girls wearing hijabs to school.[121] Principal Chenières proposed a compromise with Fatima, Leila, and Samira: the girls could wear their hijabs in common areas but would have to wear the scarves on their shoulders in the classroom.[122] The girls held their ground and were suspended for a second time.[123] There were some protests and media coverage before the second suspension, but the second suspension elevated the debate into the controversy that the media began to refer to as the headscarf "affair."[124] Media coverage increased, and protests became more widespread.[125] A group of Muslim women organized a march where women wore chadors (a full-body cloth that covers everything except a woman's face), and another organized a countermarch in favor of secularism.[126]

At this point, legal guidance was sought by several parties. A father of a Muslim girl suspended from school in Lille (a city in northeastern France) said, "if the State decides that the headscarf is prohibited at school, I will agree. It is the State. But the teachers cannot decide that it is forbidden."[127]

---

116. *Id.*

117. *See id.*

118. *See, e.g.*, Youssef M. Ibrahim, *Arab Girls' Veils at Issue in France*, N.Y. TIMES, Nov. 12, 1989, § 1 at 5, https://www.nytimes.com/1989/11/12/world/arab-girls-veils-at-issue-in-france.html.

119. *Id.*

120. *See* Jones, *supra* note 113, at 50.

121. *Id.* (citing Jean-Francoid Guyot, *Creil: le "défi permanent"* [*Creil: the "permanent challenge"*], LE FIGARO, Oct. 21, 1989 (Fr.)).

122. *See id.*

123. *See id.* at 51.

124. *See id.*

125. *See id.*

126. *See id.* at 51–52 (citing FRANÇOISE GASPARD & FARHAD KHOSROKHAVAR, LE FOULARD ET LA RÉPUBLIQUE (1995); and then Elisabeth Chikha, *September to December 22, 1989: an Autumn in France and Around the* World, 1129–1130 HOMMES ET MIGRATION [MEN AND MIGRATION] 101 (1990)**).**

127. *Id.* at 52 (citing Monique Gladberg et al., *Le choc de l'Islam sur l'école de la République* [*The shock of Islam on the School of the Republic*], LIBÉRATION, Oct. 21, 1989).

The father's statement showed deference to the state's interpretation of secularism and an acceptance of the fact that he might be required to subordinate his religious beliefs to adhere to the state's decision. This respect for the state's interpretations of secularism is common in France, where social cohesion and respect for the public sphere are ingrained as pivotal values from a young age.[128] An Islamic students' association in Montpellier and the teachers at the school in Creil joined the father's call to the Minister for National Education and the Prime Minister for a statement on the matter, and the ministers in turn reached out to the Conseil d'Etat on November 4.[129] The amount of national and international attention that the controversy had attracted between the first suspension in September and the Conseil d'Etat taking up the case in November put a particularly intense spotlight on the Conseil as they considered the issue.

The Conseil d'Etat has two functions: first, it is a legal advisory body that oversees lawmaking and answers legal or policy questions upon request; second, it serves as the nation's highest court and final arbiter on certain legal questions, similarly to the U.S. Supreme Court.[130] The interior division of the Conseil d'Etat, which works in an advisory capacity on legal matters in a similar manner to the Department of Justice, was the one tasked with answering the call for an opinion on the issue.[131]

As the Conseil d'Etat considered the place of religious garb in schools and the lives of the three Muslim schoolgirls in Creil, they drew from the laws and principles about secularism that had preceded the "affair."[132] The Conseil issued its statement on November 27, 1989, concluding that the female students could not wear hijabs in school over their school's ban, but that schools could make exceptions for this religious practice if they wished.[133] The Conseil ultimately found that "equality before the law" meant that students could not visually impose their religious beliefs on others by wearing "ostentatious" religious apparel.[134] The freedom of conscience required by the Law of 1905, amongst others, is viewed as just that—freedom

128. *See generally* Osler & Starkey, *supra* note 19.

129. *See* Jones, *supra* note 113, at 52 (citing Conseil d'Etat [CE] [Council of State], Nov. 27, 1989, No. 346.893 (Fr.)).

130. *See Council of State of France*, EUROPEAN LAW INSTITUTE, https://www.europeanlawinstitute.eu/membership/institutional-members/council-of-state-of-france/ (last visited Jan. 6, 2025).

131. *See id.*

132. *See* Conseil d'Etat, *supra* note 1.

133. *Id.*

134. *Id.*

of conscience, not freedom to demonstrate your conscience to anyone else.[135] In the Conseil's view, "equality before the law" requires that French people approach the public sphere as citizens of the republic rather than as members of a particular faith.[136] France thus views individual community factions as antithetical to the long-term success of the French republic: "According to the Republican way of thinking, living together in a society requires agreement on basic values . . . . To do so means adhering to a certain brand of political philosophy, one that emphasizes general interests and shared values over individual interests and pluralism."[137]

After the decision, the Prime Minister declared that "[t]he French community has its rules, and in these rules the fight for equal rights between men and women. The entire French community, its legislative system, and its public authorities, no longer accept signs of male domination over women on French soil."[138] There was significant discourse about 'male domination' during the headscarf discourse in France.[139] The hijab, according to one

135. *See id.*; *see also* Loi du 9 Décembre 1905 concernant la séparation des Eglises et de l'Etat [Law of December 9, 1905 on the Separation of Churches and the State], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 11, 1905, p. 1.

136. *See* Conseil d'Etat, *supra* note 1.

137. BOWEN, *supra* note 108, at 11.

138. "La communauté française a ses règles, et dans ses règles est inscrit le combat pour l'égalité des droits entre les hommes et les femmes. L'ensemble de la collectivité française, son système législatif, ses autorités publiques, n'acceptent plus sur le sol français des signes de domination de l'homme sur les femmes." "*La laïcité n'est pas seulement une affaire de religion" déclare M. Michel Rocard* [*"Secularism is not just a matter of religion" declares Mr. Michel Rocard*], LE MONDE (Nov. 30, 1989),https://www.lemonde.fr/archives/article/1989/11/30/la-laicite-n-est-pas-seulement-une-affaire-de-religion-declare-m-michel-rocard_4162103_1819218.html; *see also* Angelique Chrisafis, *Nicolas Sarkozy says Islamic Veils are not Welcome in France*, THE GUARDIAN (June 22, 2009, 2:35 PM), https://www.theguardian.com/world/2009/jun/22/islamic-veils-sarkozy-speech-france ("The problem of the burka is not a religious problem, it's a problem of liberty and women's dignity. It's not a religious symbol, but a sign of subservience and debasement. I want to say solemnly, the burka is not welcome in France. In our country, we can't accept women prisoners behind a screen, cut off from all social life, deprived of all identity. That's not our idea of freedom."). It is worth noting that hijab bans can sometimes have the effect of furthering "male domination" if girls who are forced to wear hijabs are kept at home or fall behind in school because of the bans. *See* Sandra Feder, S*tanford Scholars Report French Headscarf Ban Adversely Impacts Muslim Girls*, STAN. SCH. HUMANS. & SCIS. (Aug. 25, 2020), https://humsci.stanford.edu/feature/stanford-scholars-report-french-headscarf-ban-adversely-impacts-muslim-girls.

139. The debate on whether headscarves are intrinsically a symbol of oppression continues to the present across the world, furthered by non-Muslims and Muslims alike. Some Muslim women find that the debate is "another way of policing a minority community." Iman Amrani, *I Didn't Want to Wear my Hijab, and Don't Believe Very Young Girls Should Wear Them Today*, THE GUARDIAN (Feb. 2, 2018, 12:58 PM), https://www.theguardian.com/commentisfree/2018/feb/02/hijab-girls-ofsted-headscarves-british-values. Others find that "[T]he hijab . . . isn't about feminism. It isn't an empowering rejection of being judged by your appearance. It is a form of submission: the chaining up of women to the

analysis, became throughout the affair a "convenient, and prominent, symbol of external and internal dangers to France."[140] With an understanding that Islam was a threat to French values in general and French secularism in particular, the Conseil d'Etat's decision came at a critical and high-stakes moment for the future of the French understanding of religious freedom.

Like the American case with September 11, the French case closely followed a dramatic event in which Islam was pitted against national values. The Rushdie affair began in England in early 1989 and centered around a book titled The Satanic Verses, written by Salman Rushdie.[141] The Satanic Verses portrayed Islam and the Prophet Muhammad in a post-modern, satirical style.[142] Some Muslims viewed the book as blasphemous and insulting, which led to protests and to a fatwa (a religious decree) by Ayatollah Khomeini, the religious leader of Iran.[143] Khomeini's fatwa condemned both Rushdie and those who published his book to death.[144] The fatwa urged followers of Islam to carry out its decree.[145] Protests turned violent, and several people involved with the book were killed.[146] Like the September 11 attacks, although on a different scale, the actions of certain Muslims became unjustifiably associated with the general community. Although the Rushdie affair began in England, the French right capitalized on the fallout.[147] For example, Jean-Marie Le Pen, leader of a far-right political party, told a crowd that "Islam is a religion of intolerance."[148]

---

mullahs who promulgate this nonsense. For women who have been forced to wear a hijab, World Hijab Day is an insult. It's an open attempt to portray oppressors as victims, and to overlook the feelings of women who have been taught to believe throughout their lives that they are second-class beings." Soutiam Goodarzi, *There's Nothing Liberating About Being Forced to Wear a Hijab*, THE SPECTATOR (Feb. 17, 2019, 12:00 AM), https://www.spectator.co.uk/article/there-s-nothing-liberating-about-being-forced-to-wear-a-hijab/. Activist Malala Yousafzai argues that women can choose either path: "Years ago I spoke against the Taliban forcing women in my community to wear burqas — and last month I spoke against Indian authorities forcing girls to remove their hijabs at school. These aren't contradictions — both cases involve objectifying women. If someone forces me to cover my head, I will protest. If someone forces me to remove my scarf, I will protest." Malala Yousafzai, *Please Stop Telling Us How to Dress,* MEDIUM (Dec. 20, 2022), https://medium.com/@MalalaYousafzai/please-stop-telling-us-how-to-dress-2ae92f2a1eb1.

140. BOWEN, *supra* note 108, at 4.

141. *See* Anthony, *supra* note 3.

142. *See id*.

143. *See id.*

144. *See id.*

145. *See id.*

146. *See id.* (noting deaths of several publishers and translators for the Rushdie Affair who were killed or injured).

147. *See* Fieschi, *supra* note 102.

148. James M. Markham, *Fallout Over Rushdie: The Muslim Presence in Western Europe Is Suddenly Starker*, N.Y. TIMES: THE WORLD, Mar. 5, 1989, § 4 at 2,

The timing of the Conseil's decision was also important because 1989 marked an anniversary in France: the 200th anniversary of the French revolution.[149] Large parades, conversations regarding the price of liberty, and passionate renditions of the French Anthem—*La Marseillaise*—took place throughout the year, particularly in the summer during the July 14 Bastille day celebrations.[150] These celebrations likely stimulated an increased awareness of the values of the republic and the fight for liberty as well as a heightened consciousness regarding what it means to be "French."

IV. COMPARATIVE ANALYSIS OF THE CONSEIL D'ETAT AND THE DEPARTMENT OF JUSTICE'S STATEMENTS

This section will detail four key differences between France and American secularism, as illuminated by the statements by the Department of Justice and the Conseil d'Etat. The first of these differences is each country's opinion on whether signs of religious affiliation disturb public order, and, if so, whether or not such a disturbance is a valuable tradeoff for the price of religious liberty. France found the hijab to be both a disturbance and an act of proselytization,[151] whereas the United States indicated that the hijab does not disturb public order but would be allowed even if it did.[152] The second difference is the extent of the bounds of freedom of expression. While France offered caveats for their right to freedom of expression, indicating that students' expression must respect pluralism amongst other things,[153] the United States emphasized that freedom of expression is a preferred right

https://www.nytimes.com/1989/03/05/weekinreview/world-fallout-over-rushdie-muslim-presence-western-europe-suddenly-starker.html.

149. *See id.*

150. *See* Stanley Meisler, *As 200th Anniversary Nears, French Still Fret Over Revolution*, LA TIMES (Oct. 13, 1987, 12:00 AM), https://www.latimes.com/archives/la-xpm-1987-10-13-mn-13768-story.html.

151. "[L]e port par les élèves de signes par lesquels ils entendent manifester leur appartenance à une religion . . . par leur caractère ostentatoire ou re-vendicatif, constitueraient un acte de pression, de provocation, de prosélytisme ou de propagande, porteraient atteinte à la dignité ou à la liberté de l'élève ou d'autres membres de la communauté éducative, compromettraient leur santé ou leur sécurité, perturberaient le déroulement des activités d'enseignement et le rôle éducatif des enseignants, enfin troubleraient l'ordre dans l'établissement ou le fonctionne-ment normal du service public." Conseil d'Etat, *supra* note 1 (describing the wearing of "ostentatious" religious garb as "an act of pressure, provocation, proselytism or propaganda" which "would violate the dignity or freedom of the student or other members of the educational community, would compromise their health or their safety, would disrupt the progress of teaching activities and the educational role of teachers, and finally would disturb order in the establishment or normal operation of the public service").

152. *See* Hearn DOJ Memorandum, *supra* note 1, at 21 (citing Tinker v. Des Moines Indep. Cnty. Sch. Dist. 393 U.S. 503, 508 (1969)).

153. Conseil d'Etat, *supra* note 1.

within the Constitution and should be protected when possible.[154] The third difference is the acceptance of religious exemptions from school activities. The Conseil d'Etat's statement linked the concept of religious exemptions to the permission to wear a headscarf, rejecting both as biased and opposed to French unity.[155] The United States, on the other hand, did not mention religious exemptions, as they were a previously acknowledged right in multiple Supreme Court cases and acts of Congress.[156] The final difference is who has the final decision in these controversies: in France, European bodies such as the European Court of Human Rights can influence or change French decisions, whereas there is no such international body at play in the United States.

A. Signs and Demonstrations of Religious Affiliation: A Disturbance to Public Order?

The statements by both France and the United States explicitly reference the need to balance between liberty of expression against the possibility for disturbances in educational settings. In *Hearn*, the Department of Justice wrote, quoting the seminal free speech case *Tinker v. Des Moines*, that "[m]ore than mere speculation about disruption and interference are required: 'undifferentiated fear or apprehension of disturbance' is not enough to overcome the right to freedom of expression."[157] Despite the school's assertion that students were frightened by Nashala's hijab, the Department of Justice emphasized that such fears did not disturb public order.[158] Additionally, even if her hijab did disrupt public order, the U.S. Supreme

154. *See* Hearn DOJ Memorandum, *supra* note 1, at 16 ("The Supreme Court has consistently held that religious speech is entitled to the same protection under the Free Speech Clause as secular speech." (citing Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (plurality opinion))).

155. Conseil d'Etat, *supra* note 1.

156. *See* Yoder, 406 U.S. 205, 234 (1972) (allowing Amish parents to take their children out of school earlier than the state requirement to accommodate Amish culture); Zorach v. Clauson, 343 U.S. 306, 319–20 (1952) (upholding a New York City program where students could leave during the school day for religious instruction or exercise); *see, e.g.,* Parents for Privacy v. Barr, 949 F.3d 1210, 1239–40 (9th Cir. 2020) (allowing a school to accommodate transgender students despite objections from religious parents); Brown v. Hot, Sexy, and Safer Prods., 68 F.3d 525, 540–41 (1st. Cir. 1995) (allowing a school to provide AIDS education which was viewed as indecent for some religions); *see also* Moody v. Cronin, 484 F. Supp. 270, 275–77 (C.D. III., 1979) (allowing students who were members of the United Pentecostal Church to decline participation in school physical education classes because they would see members of the opposite sex in "immodest" dress, which was against their faith). *See generally* Hearn DOJ Memorandum, *supra* note 1.

157. *See* Hearn DOJ Memorandum, *supra* note 1, at 21 (quoting Tinker, 393 U.S. at 508).

158. *See id.* at 17, 22 (stating that Nashala had worn her hijab for the whole school year after the original suspension without notable disturbances) (citing West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1366 (10th Cir. 2000)).

Court had ruled over sixty years prior to her case in *Cantwell v. Connecticut* that, while maintenance of public order is a valid state interest, it could not be used to justify the suppression of "free communication of views, religious or other."[159] Only a "substantial disruption" is sufficient to justify limiting students' free expression rights.[160]

On the question of public order, the Conseil d'État offered a more convoluted answer which strongly contrasts the message of the Department of Justice:

> [I]n educational establishments, the wearing by students of signs by which they intend to manifest their religious membership is not in itself incompatible with the principle of laïcité, to the extent that it constitutes an exercise of liberty of expression and an expression of religious beliefs, but that this liberty would not allow students to display the signs of religious membership which, by their nature, by the conditions in which they are worn individually or collectively, or by their ostentatious or protesting character, would constitute an act of pressure, of provocation, of proselytization, or of propaganda, would violate the dignity or the liberty of the pupil or other members of the educational community, jeopardize their health or safety, would disrupt the course of teaching activities and the educational role of teachers, and would disturb the order in the establishment or the normal functioning of the public service.[161]

In other words, the French Conseil D'État found that the sole act of wearing overt religious garb, even without any accompanying statements, constitutes an act of proselytization which would disturb not only the learning environment but also the liberties of other students. By expressing concern for the "dignity" or "liberty" of "other members of the educational community" and by referring to the hijab as an act of "pressure," the French response demonstrates their long-held philosophy towards a religious-free public sphere. This is a key difference from the American system: France

159. Canterwell v. Connecticut, 310 U.S. 296, 308 (1940).

160. *See* Hearn DOJ memorandum, *supra* note 1, at 22 (quoting Tinker, 393 U.S. 514).

161. Translation by author. Original text in French states: "[D]ans les établissements scolaires, le port par les élèves de signes par lesquels il entendent manifester leur appartenance à une religion n'est pas par lui-même incompatible avec le principe de laïcité, dans la mesure où il constitue l'exercice de la liberté d'expression et de manifestation de croyances religieuses, mais que cette liberté ne saurait permettre aux élèves d'arborer des signes d'appartenance religieuse qui, par leur nature, par les conditions dans lesquelles ils seraient portés individuellement ou collectivement, ou par leur caractère ostentatoire ou revendicatif, constitueraient un acte de pression, de provocation, de prosélytisme ou de propagande, porteraient atteinte à la dignité ou à la liberté de l'élève ou d'autres membres de la communauté éducative, compromettraient leur santé ou leur sécurité, perturberaient le déroulement des activités d'enseignement et le rôle éducatif des enseignants, enfin troubleraient l'ordre dans l'établissement ou le fonctionnement normal du service public." Conseil d'Etat, *supra* note 1.

strives for freedom *from* religion and the United States strives for freedom *of* religion.

Both France's laïcité and American secularism proudly boast freedom of conscience, allowing individuals to believe what they wish. However, America couples that freedom with freedom of expression and freedom of practice of that religion, whereas France resigns that expression to the private sphere to protect the public order. Students learn this at school from course materials and from the bans on "ostentatious" religious garb. A textbook designed for French citizenship education programs depicted a group of Muslims praying on the street in Paris with the caption:

> To be a citizen is to be able to exercise one's rights freely. Practicing the religion of one's choice is a fundamental right. However, exercising this right implies not offending other people's religious convictions; there is no place for acts of worship in public places. Consequently all religions should have available properly appointed places of worship.[162]

This caption captures the essence of France's "freedom from religion:" although people have the "fundamental right" to hold religions and to practice them, that right does not exist in the public sphere. Once that belief is visible in the public sphere, it is viewed as encroaching on the beliefs of your fellow Frenchmen.[163]

The word "ostentatious,"[164] used in the Conseil's description of the girls' scarves, has been pivotal in the French debate about religious garb. The ban on wearing signs of religious affiliation applies solely to signs viewed as ostentatious (i.e. attention grabbing/conspicuous), such as the Jewish kippah or the Islamic hijab, rather than to signs that are more modest, such as a cross necklace (although large crosses are allegedly banned as well).[165] Of course, the question of what is "ostentatious" is a subjective one, and the answer is colored by French tradition, which has no religious garb. Whereas some Muslims view the hijab as an essential part of their faith, as the kippah is for orthodox Jewish men, wearing a large cross carries no such significance for Christians. The idea behind the ban on "ostentatious" garb is that wearing visible signs of religion creates tension in the public space and creates division among the national community.[166] This French national community

---

162. Osler & Starkey, *supra* note 19, at 302 (quoting JEAN-PIERRE LAUBY, ÉDUCATION CIVIQUE, 3E [CIVIC EDUCATION, 3RD] (2017)).

163. *See id.* (citing GASPARD & KHOSROKHAVAR, *supra* note 126).

164. "[O]stentatoire." Conseil d'Etat, *supra* note 1.

165. *See* William J. Kole, *French Ban Religious Symbols in Public Schools*, NBC NEWS (Dec. 15, 2004, 1:18 PM), https://www.nbcnews.com/id/wbna6707664 (describing how overt symbols of religion can include hijabs, kippahs, large crosses, and even Christmas chocolates, but noting that mainly Muslim, Jewish, and Sikh children have been affected by the ban on religious symbols).

166. *See generally* SIMON, *supra* note 12.

is supposed to be centered around a common French identity, rather than multiple religious identities or other dividing characteristics.[167]

These French arguments over the place for religious garb in the public sphere and the relative ostentatiousness of that garb, as discussed in the Conseil d'Etat's statement, contrast significantly with the American view. As Justice Brennan stated in 1986, a ban on religious symbols without strong reasoning would divide religion into those "with visible dress and grooming requirements and those without . . . . [t]he practical effect of this categorization is that, under the guise of neutrality and evenhandedness, majority religions are favored over distinctive minority faiths . . . . [u]nder the Constitution there is only *one* relevant category—*all* faiths."[168] Although Justice Brennan was dissenting in that particular case, his sentiment is echoed throughout the Department of Justice's Memorandum on the *Hearn* case and other debates about neutrality in the public sphere.[169] In order to avoid favoring one religion over another, the United States has generally taken a stance of leniency towards religious exemptions, religious garb, and religious speech. An example of such openness regarding religious garb in public spaces is reflected in the fact that a Massachusetts woman was allowed to wear a spaghetti strainer in her driver's license photo after claiming that wearing it was mandated by her religious beliefs.[170]

This divergence between France and the United States on religious exemptions illustrates the difference between freedom *of* and *from* religion which can be traced to the founding of each country's current governmental system. France's system began with the overthrow of a monarchical hierarchy under which those who were not of the ruling class were discriminated against or sometimes killed (as with the case with the Huguenots, a group of French Protestants who were persecuted by the government).[171] The monarchy was entangled with the Catholic Church, and the Revolution fought against both as symbols contrary to republican

167. *See id.* at 3 (noting that the French view "identity as a sort of finite stock: any sense of belonging to another country must necessarily weaken an individual's sense of being French").

168. Goldman v. Weinberger, 475 U.S. 503, 521 (Brennan, J., dissenting).

169. *See* Hearn DOJ Memorandum, *supra* note 1, at 17–18, 20; *see, e.g.,* Menora v. Illinois High Sch. Ass'n, 527 F. Supp. 637 (N.D. Ill. 1981), *vacated*, 683 F.2d 1030 (7th Cir. 1982) (holding a public school's athletic association's interest in prohibiting wearing headgear during a basketball game was insufficient to overcome First Amendment rights of plaintiffs to exercise their beliefs by wearing yarmulkes while playing basketball).

170. *See* Samantha Grossman, *Woman Wins Right to Wear Colander on Her Head in Driver's License Photo*, TIME MAGAZINE (Nov. 16, 2015, 11:50 AM), https://time.com/4114369/pastafarian-colander-license-photo/.

171. *See Huguenots*, HISTORY.COM, https://www.history.com/topics/european-history/huguenots (Oct. 31, 2022).

values.[172] Post-revolution, the French united under the banner of being "French," with the idea that everyone would be equal in the eyes of the law.[173] The Church was thus removed from daily affairs.[174] "Hyphenated identities," such as being a French Muslim, are viewed by some Frenchmen as threatening this banner of unity,[175] with headscarves being viewed as a visual reminder of that "threat." Americans, on the other hand, had come from different countries around the world, and engaged in a wider variety of religious practices.[176]

B. Freedom of Expression, With Caveats

Both France and the United States use the phrase "freedom of expression"[177] throughout their statements, with different effects. The Conseil d'État almost always immediately adds a qualifier, within the same paragraph or even sentence, which limits that freedom. The Conseil quotes a law from July 10, 1989, which states that students have "freedom of expression" but that "these freedoms may not affect teaching activities" and that students must exercise these freedoms "while respecting pluralism and the principle of neutrality."[178] The Conseil also adds five qualifiers to its discussion of freedom of expression, indicating that students can be prohibited from wearing signs of their religious membership if it would: (1) "disrupt the course of teaching activities"[179]; (2) "disturb the order in the establishment or the normal functioning of the public service"[180]; (3) "constitute an act of pressure, provocation, proselytization, or

172. *See* MacLehose, *supra* note 17, at 299.

173. *See id.* at 303.

174. *See id.* at 299.

175. *See* SIMON, *supra* note 12, at 3.

176. *See* WEAVER, *supra* note 24, at 29.

177. "[L]iberté d'expression." Conseil d'Etat, *supra* note 1 (quoting Loi No. 89-486 du 10 Juillet 1989 D'Orientation Sur L'Education [Law of Orientation on Education], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 14, 1989, p.8861 (Fr.)); *see* Hearn DOJ Memorandum, *supra* note 1, at 21, 23.

178. Text of law translated by author. Original text of the opinion and the law reads: "Dans les collèges et les lycées, les élèves disposent, dans le respect du pluralisme et du principe de neutralité, de la liberté d'information et de la liberté d'expression. L'exercice de ces libertés ne peut porter atteinte aux activités d'enseignement . . . ." Conseil d'Etat, *supra* note 1 (quoting Loi No. 89-486 du 10 Juillet 1989 D'Orientation Sur L'Education [Law of Orientation on Education], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 14, 1989, p.8861 (Fr.)).

179. "[P]erturberaient le déroulement des activités d'enseignement . . . ." *Id.*

180. "[T]roubleraient l'ordre dans l'établissement ou le fonctionnement normal du service public." *Id.*

propaganda"[181]; (4) "would violate the dignity or the liberty"[182] of the student or their peers; or (5) "would jeopardize their health or safety."[183]

The Department of Justice's statement on freedom of expression is more absolute, the only qualifiers being that expression cannot cause "substantial disruption" or "material interference" with school activities, which are both viewed in a limited manner.[184] The memorandum emphasizes that "[p]ublic school students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"[185] The Department of Justice makes it clear that wearing religious garb, such as a hijab, is a protected form of *speech* in addition to protected religious exercise, and it characterizes the school's actions as "suppression of speech."[186] The combination of free speech and free exercise is referred to as "hybrid rights."[187] Beyond the hybrid right of free speech and free exercise, religious speech is also characterized as speech in itself.[188]

This is a key difference between French and American secularism: France has less protection for speech and expression, which in turn affects their protection of religion. France's protections for speech are contained in

181. "[C]onstituteraient un acte de pression, de provocation, de prosélytisme ou de propaganda . . . ." *Id.*

182. "[P]orteraient atteinte à la dignité ou à la liberté de l'élève ou d'autres membres de la communauté educative . . . ." *Id.*

183. "[C]ompromettraient leur santé ou leur sécurité . . . ." *Id.*

184. *See* Hearn DOJ Memorandum, *supra* note 1, at 21 (citing Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 666 (S.D. Tex. 1997)).

185. *Id.* (quoting Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 506 (1969)) (holding that wearing black armbands to school to protest the Vietnam war is protected speech).

186. *Id.* at 22.

187. *Id*. at 15 ("[T]he dress code policy, as applied to [plaintiff], violates her free speech and free exercise rights under the 'hybrid rights' principle. When a free exercise claim is coupled with some other constitutional claim, such as free speech, strict scrutiny is triggered . . . . [C]ourts have found the wearing of rosaries and hair exceeding a certain length to be protected student speech.") (first citing Employment Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 881 (1990); then citing Axson-Flynn v. Johnson, 356 F.3d 1277, 1295 (10th Cir. 2004); then citing Chalifoux, 976 F. Supp. at 664–65; then quoting Alabama & Coushatta Tribes of Tex. v. Trs. of Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319, 1334 (E.D. Tex. 1993); and then citing Isaacs v. Bd. of Educ. of Howard County, Md., 40 F. Supp. 2d 335, 338 (D. Md. 1999)).

188. *See id.* at 15–16 ("Defendants attempt to dismiss the free speech claim as simply derivative – 'the purported speech, wearing a religious scarf, derives directly from the fact that the scarf is a religious symbol.' . . . . The short answer to this contention is that religious speech is still speech. The Supreme Court has consistently held that religious speech is entitled to the same protection under the Free Speech Clause as secular speech." (first citing Capitol Square Review and Advisory Bd. v. Pinnette, 515 U.S. 753, 760 (1995) (plurality opinion); then citing Good News Club v. Milford Cent. Sch., 533 U.S. 98, 111–12 (2001); and then citing Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393–94 (1993))).

the 1789 Declaration of the Rights of Man.[189] While that document declares that freedom of speech is a fundamental right, it does not treat free speech as a preferred right, indicating that those rights can be limited "when the exercise of those rights intrudes upon another's right to enjoy his rights."[190] That "intrusion" is viewed broadly in France. France regularly criminalizes speech, notably sending people to prison for periods of around a year for denying the Holocaust[191] and fining comedian Dieudonné M'bala M'bala 10,000 euros for anti-Semitic hate speech.[192] By contrast, the United States treats free speech as a preferred right that usually prevails over competing interests.[193] Thus, religious expression is a doubly protected right in the United States—as speech and as an exercise of religious belief—but not in France.

C. Religious Exemptions and the Ideals of Equality and Neutrality in Schools

The Conseil d'État repeatedly mentions religious-based exemptions from school attendance requirements, which are notably absent from the Department of Justice's statement. In the United States, the right to waive attendance requirements for religious purposes was recognized before *Hearn*: American students can both leave public school during the day to receive outside religious education and leave school in some circumstances to avoid content viewed as objectionable to their religious beliefs (i.e. evolution or sexual education).[194] These rights evolved out of a concern for

189. *See* Russell Weaver et al., *Holocaust Denial and Governmentally Declared 'Truth': French and American Perspectives*, 41 TEX. TECH. L. REV. 495, 507 (2009) (citing *Declaration of the Rights of Man – 1798*, YALE L. SCH.: THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/rightsof.asp.).

190. *See id.* (citing French Declaration of the Rights of Man and of the Citizen, Art. IV (1789)).

191. *See* Marcy Oster, *French Holocaust Denier Sentenced to Prison for Publishing Denial Material on Website*, JEWISH TELEGRAPHIC AGENCY (Apr. 2019), https://www.jta.org/quick-reads/french-holocaust-denier-sentenced-to-prison-for-publishing-denial-material-on-website.

192. *See* Dan Bilefsky, *Court Rules Against French Comedian Dieudonné in Free-Speech Case*, N.Y. TIMES (Nov. 10, 2015), https://www.nytimes.com/2015/11/11/world/europe/dieudonne-mbala-mbala-france-european-rights-court.html; *see also* U.S. DEP'T OF STATE, France 2021 International Religious Freedom Report 4, 9 (2021) (noting that private hate speech is a criminal offense with up to a $1,700 fine and that the French government has banned the Boycott, Divestment, and Sanction movement against Israel).

193. *See, e.g.,* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Snyder v. Phelps, 562 U.S. 443 (2011); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

194. *See* Yoder, 406 U.S. 205, 234 (1972) (allowing Amish parents to take their children out of school earlier than the state requirement to accommodate Amish culture); Zorach v. Clauson, 343 U.S. 306, 319–20 (1952) (upholding a New York City program where students could leave during the school day for religious instruction or exercise); *see also* Moody v. Cronin, 484 F. Supp. 270, 275–77 (C.D. III., 1979) (allowing students who were members of the United Pentecostal Church

the government infringement on religious beliefs.[195] The fact that attendance requirements are not mentioned in *Hearn* suggests that such a right is not at issue with the principles of secularism discussed within the opinion.

By contrast, the Conseil d'État emphasizes the importance of student attendance over religious freedom, stating that "[t]he freedom thus recognized for pupils includes for them the right to express and manifest their religious beliefs within educational establishments, while respecting pluralism and the freedom of others, and without prejudice to teaching activities, the content of the programs, and the attendance requirement."[196] Given the importance that France assigns to schools as the place where French citizens are molded, this focus is perhaps expected. One study notes that France's citizenship education is

> Crucial to the whole notion of state schooling. The school is the Republic's primary institution for socialising its citizens . . . . The view of successive Republican governments, which finds expression in the education legislation in France, is based on the premise that there is a danger of society fragmenting into ghettos or ethnic minority or religious communities, referred to as *communautés*. Such a tendency would undermine the very basis of the French State which is to integrate all citizens into a single Republic.[197]

Through this lens, the relationship between allowing hijabs in school and excusing attendance requirements can be viewed in the same light: as ways to visually perpetuate the "fragmenting" of society into *communautés*. An educational environment free of religion is regarded as a way to prevent these *communautés* from taking hold.[198]

---

to decline participation in school physical education classes because they would see members of the opposite sex in "immodest" dress, which was against their faith). Note, however, that students do not have an absolute right to avoid all religiously objectionable content. *See, e.g.,* Parents for Privacy v. Barr, 949 F.3d 1210, 1239–40 (9th Cir. 2020) (allowing a school to accommodate transgender students despite objections from religious parents); Brown v. Hot, Sexy, and Safer Prods., 68 F.3d 525, 540–41 (1st. Cir. 1995) (allowing a school to provide AIDS education which was viewed as indecent for some religions).

195. *See* Ursula Kilkelly, *The Child's Right to Religious Freedom in International Law: The Search for Meaning, in* WHAT IS RIGHT FOR CHILDREN? 243, 257–59 (Martha Albertson Fineman & Karen Worthington eds., 2009). Note, however, that the religious speech being protected is *student* speech. Schools cannot themselves sponsor or endorse religious speech. *See, e.g.,* Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449 U.S. 39, 42 (1980).

196. Text translated by the author. Original text in French reads: "La liberté ainsi reconnue aux élèves comporte pour eux le droit d'exprimer et de manifester leurs croyances religieuses à l'intérieur des établissements scolaires, dans le respect du pluralisme et de la liberté d'autrui, et sans qu'il soit porté atteinte aux activités d'enseignement, au contenu des programmes et à l'obligation d'assiduité." Conseil d'Etat, *supra* note 1.

197. Osler & Starkey, *supra* note 19, at 290.

198. *See id.*

The fact that the French stand firm in their statement that the attendance requirement overrides "the right to express and manifest"[199] religious beliefs illuminates one of the central divides between American secularism and French laïcité. American secularism creates accommodations to enable students to maintain their religious practices according to their belief systems (within reason).[200] This is why the *Hearn* decision concludes that the Muskogee school's headgear ban was not "neutral towards religion," because it "singled out [plaintiff] based on her faith" in not offering her an accommodation.[201] In theory, the ban on headgear applied to all students and religions, but Nashala (the plaintiff in the case) was not given an exemption from the ban where other students, such as a student with cancer, had been given one.[202] Under the American system, this demonstrates bias against exercise of Nashala's faith. Requirements on headgear and attendance, while recognizably important, are subordinate to the American government's interest in allowing people to practice their faith as they wish.

Additionally, the French idea of using the school system as a method of socialization into the national community does not carry as much weight in the American system, which perhaps contributes to the United States' openness towards religious accommodation. Throughout the 1900s and early 2000s, a variety of cases disputed the role of public schools to "Americanize immigrant children."[203] In these cases, the rights of parents to make choices on behalf of their children and to enforce their belief systems prevailed over any government interest in citizenship education.[204] For example, in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, the Court

199. "La liberté ainsi reconnue aux élèves comporte pour eux le droit d'exprimer et de manifester leurs croyances religieuses à l'intérieur des établissements scolaires . . . ." Conseil d'Etat, *supra* note 1.

200. *See* Yoder, 406 U.S. 205 (1972) (allowing Amish parents to take their children out of school earlier than the state requirement to accommodate for Amish culture).

201. Hearn DOJ Memorandum, *supra* note 1, at 9.

202. *See id.* at 14.

203. *See* Ross, *supra* note 81, at 290 (first citing STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993); then citing David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 AM. HIST. REV. 74 (1968); and then citing Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 WM. & MARY 995 (1992)); *see also* Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (overruling a Nebraska state law which required children's education to be in English out of a fear of foreign subversion: "[n]o emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed.").

204. *See* Meyer, 262 U.S. at 403.

emphasized parents' rights to control the education of their children by allowing them to enroll their children in parochial schools.[205]

Despite the similar phrasing of Article Two of France's 1958 Constitution ("equality before the law")[206] and America's Fourteenth Amendment ("equal protection of the laws"),[207] the countries' respective understandings of what "equal" means differ significantly, which is clear from the way in which Conseil d'État and the Department of Justice apply the idea of "equal" to opposite groups. In the *Hearn* case, the Department of Justice applies it to Nashala as she seeks to wear her hijab.[208] The Department of Justice noted that her equal protection rights had been violated in two ways: first, in that the equal protection clause applies to the freedom to exercise her religion; and second, in that she was intentionally discriminated against on the basis of her faith and, thus, not treated equally with those who are "similarly situated."[209]

In contrast, France makes no accommodations on the basis of faith, prioritizing educational conformity over individual religious exemptions. Although in stark contrast to the American model, the theoretical aim of state neutrality and equality for students is the same. While the United States applied the concept of equality to the student wearing a hijab, France applied it to her *peers*.[210] The fact that France provides no exemptions from educational requirements means, under their view, that all students are on equal footing. As far as the French are concerned, there is no conflict in offering one religious group an exemption from class (for example, providing Muslim students wearing a hijab an exemption from gym class or Catholic students an exemption from science class) and not another when there are no exemptions in the first place. By not acknowledging the individuality of religious groups, France affirms the notion of an undivided French national community: "the principle of the secularity of public education . . . requires that education be provided with respect on the one hand for this neutrality by

205. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

206. "[L]'égalité devant la loi . . . ." Conseil d'Etat, *supra* note 1 (quoting 1958 CONST. art. II (Fr.)).

207. U.S. CONST. amend. XIV, § 1.

208. *See* Hearn DOJ Memorandum, *supra* note 1, at 1.

209. *See id.* at 10 (quoting Buckley Constr., Inc. v. Shawnee Civic & Cultural Dev. Auth., 933 F.2d 853, 859 (10th Cir. 1991)).

210. *See* Conseil d'Etat, *supra* note 1.

the programs and by the teachers and on the other hand for the freedom of conscience of the students."[211]

These conflicting views on religious exemptions can be traced back to the founding of the countries' current governmental systems. France, for an extended period of time, was completely under the control of the Catholic church: most wealth was held by the church, education was controlled by church officials, and baptism was a necessity to hold civil rights.[212] However, as enlightenment ideas spread across the world and in France, the French came to realize that "[s]uch domination was inconsistent with the theories of Liberty and Equality promulgated by the Declaration of the Rights of Man."[213] This declaration, written in consultation with Thomas Jefferson,[214] outlined the rights of French men and citizens, including "liberty, property, security, and resistance to oppression" and being "free and equal,"[215] helped inspire the push for the U.S. Constitution which eventually led to religion being "pitted against" new ideas of patriotism towards the Republic.[216]

Throughout the French revolutionary period, the Catholic church and the monarchy were regarded as interchangeable. People protested the "compact between the throne and the altar," which led to a push to remove religious sentiment from certain groups and events.[217] The rapid villainization and degradation of the Catholic Church in favor of more liberalized ideas of logic and reason contributed to the revolutionary fervor in France.[218] These values are reflected in the French secularist mentality that was enshrined after the revolution. From the French perspective, inequality means that one faith (Catholicism, during the pre-revolutionary days) receives special exemptions and rewards at the expense of all others. Equality, on the other hand, means that all faiths are placed on a neutral playing field with no room for special treatment for one group over another.

211. Translation provided by the author. Original text of the opinion reads: "[L]e principe de la laïcité de l'enseignement public . . . impose que l'enseignement soit dispensé dans le respect d'une part de cette neutralité par les programmes et par les enseignants et d'autre part de la liberté de conscience des élèves." *Id.*

212. *See* MacLehose, *supra* note 17, at 298–99.

213. *Id.* at 299.

214. See Harrison W. Mark, *Declaration of the Rights of Man and of the Citizen*, WORLD HIST. ENCYCLOPEDIA: ARTICLE (June 8, 2022), https://www.worldhistory.org/article/2012/declaration-of-the-rights-of-man-and-of-the-citizen/.

215. *Declaration of the Rights of Man – 1798*, *supra* note 190.

216. MacLehose, *supra* note 17, at 299.

217. *Id.* at 300.

218. *See supra* Sec. III.A.

D. Who Decides What is Secular and What is Appropriate in Schools?

Although an in-depth discussion of the role of international laws and bodies in France and the United States is beyond the scope of this paper, it is worth noting briefly that France's legal system is more internationally connected than that of the United States—a fact reflected in both countries' statements. France, like many other European countries, adheres to European and international conventions and even subjects itself to international courts in relation to these conventions. International laws are quoted or referenced both throughout the Conseil d'Etat's opinion and more recent government reports on secularism.[219] The Conseil d'Etat's opinion begins with a list of both French laws and international conventions of which they are a part, presenting them together with equal weight.[220] French domestic law, including the 1989 immigration law referenced by the Conseil, also makes reference to international conventions.[221] More recently, French organizations and citizens have petitioned the United Nations[222] and the European Court of Human Rights[223] regarding the treatment of Muslims in France.

The United States, on the other hand, is significantly more hesitant to be bound to international law, typically avoiding signing these laws, adding conditions to our signing, or designating them as interpretive guides rather than authoritative requirements.[224] International bodies also have limited enforcement power against the United States to ensure compliance to international laws and norms.[225] Perhaps unsurprisingly, then, there is no

219. *See* Conseil d'Etat, *supra* note 1; Commission Stasi, *supra* note 107, at 20–21 (referencing the Universal Declaration of Human Rights, the European Convention on the Rights of Man and Fundamental Liberties, and a United Nations Educational, Scientific, and Cultural Organization (UNESCO) Convention against Discrimination in Education).

220. *See* Conseil d'Etat, *supra* note 1.

221. *See id.*

222. *See* U.S. DEP'T OF STATE, *supra* note 192, at 20 ("[I]n January, a coalition of 36 civil society and religious organizations from 13 countries, including the Strasbourg-based European Initiative for Social Cohesion, wrote to the United Nations Human Rights Committee to request that it open formal infringement procedures against the government for 'entrenching Islamophobia and structural discrimination against Muslims.' The 28-page document stated that the country's actions and policies in relation to Muslim communities violated international and European laws.").

223. *See* S.A.S. v. France, App. No. 43835/11, (July 1, 2014), https://hudoc.echr.coe.int/eng?i=001-145466.

224. *See* Doug Cassel, *The United States and Human Rights Treaties: Can We Meet Our Commitments?*, 41 HUM. RTS. 5, 5 (2015).

225. *See* Frederic L. Kirgis, *Enforcing International Law*, AM. SOC. INT'L L. (Jan. 22, 1996), https://www.asil.org/insights/volume/1/issue/1/enforcing-international-law#:~:text=is%20used%20sparingly.-,Frederic%20L.,failure%20to%20pay%20assessed%20dues.

mention of international law in the Department of Justice's memorandum in *Hearn*.[226]

V. CONCLUSION

The secular ideologies of France and the United States play out in schools in a similar, if not more intense, way as they do in the general public sphere. Because schools are a pivotal place where students are introduced to the values of their country, governments have a vested interest in framing students' experiences. This is especially the case in France, where schools have been used as a way to consolidate the French Republic and create a national French identity for over two hundred years. When a female student with a hijab entered the academic environment, each country's ideas of secularism were tested as they responded to this manifestation of religious belief.

The statements by the Conseil d'État in the Headscarf Opinion and the Department of Justice in *Hearn* provide perspectives on the relationship between each country's secular ideology and their system of education. As seen by the results in the French and American controversies, these differing perspectives yielded vastly different results even though the countries purport to share common goals regarding the separation of church and state, the protection of human rights, and the freedom of religious expression. At a time when prejudice towards Muslims is on the rise[227] and concerns about "globalization" are fueling far-right populist parties,[228] the opinions presented by the Department of Justice and the Conseil are as relevant today as they were decades ago.

226. *See generally* Hearn DOJ Memorandum, *supra* note 1.

227. *See* Shibley Telhami, *Prejudice Toward Muslims is Highest Amongst All Religious and Ethnic Groups*, BROOKINGS (Aug. 27, 2024), https://www.brookings.edu/articles/prejudice-towards-muslims-is-highest-among-all-religious-and-ethnic-groups/.

228. *See* Fieschi, *supra* note 102.

A POLICY REVIEW AND RHETORICAL ANALYSIS OF NEO-RACIST POPULIST DISCOURSE ON THE UK-RWANDA PARTNERSHIP

Ibrahim Berrada*

Abstract

From 2022 until their election loss in 2024, prominent British Tory politicians intentionally conveyed harmful populist rhetoric regarding the influx of irregular migrants to the United Kingdom. The ill-conceived and ill-fated UK-Rwanda Partnership, along with the rationales adopted by the Tories to circumvent court rulings and other liberal democratic institutions, sought to limit the rights of asylum seekers fleeing persecution. Employing Martin Barker's Argument from Genuine Fears framework, this paper sheds light on the use of neo-racist logical fallacies designed to ostracize asylum seekers and migrants alike by portraying them as socially incompatible, wholly undesirable, and a threat to British culture and values. These hostile depictions subsequently justified the legislative implementation of a two-tiered asylum system that targeted 'undesirable' migration, favoring those considered more acceptable based on race and nationality. Using textual analysis software, anti-migrant rhetoric was measured in speeches delivered by former Home Secretary Suella Braverman in the House of Commons, testing the constructs of hardship, aggression, blame, exclusion, liberation, and human interest. The results demonstrate that Braverman—a notable anti-migrant advocate, a leading UK-Rwanda Partnership architect, a minority politician, and a child of immigrants—employed nearly 200% more divisive rhetoric on migrants

* Dr. Ibrahim Berrada is an Assistant Teaching Professor of Sociology at Northern Arizona University. He is a former parliamentary staffer and policy analyst, handling a variety of national and international portfolios for several Canadian Members of Parliament and Cabinet Ministers. His current research focuses on organizational principles and national characteristics in Canada, the United Kingdom, and the United States, with particular emphasis on the intersection of populism with rhetoric, race, borders, elections, and the criminalization of migrants. The author thanks weekly writing group colleagues Dr. April Petillo, Dr. Juan Ochoa, Dr. Jennifer Kim, Dr. Candi Corral, and participants from the annual Association for Borderlands Studies Conference hosted by the Western Social Science Association, including Paul Coleman Jr., for their comments and conversations.

and migration compared to other issues after her promotion to ministerial roles. By applying the Argument from Genuine Fears framework and conducting a quantitative rhetorical analysis of Braverman's speeches, this policy review and study argues that prominent British Tory politicians intentionally employed neo-racist populist rhetoric to justify harmful border externalization policies, marginalize asylum seekers, and undermine their liberal democratic protections.

I. INTRODUCTION

In April 2022, former British Prime Minister (PM) Boris Johnson[1] and his Home Secretary, Priti Patel[2] announced the UK-Rwanda Partnership[3] seeking to deport asylum seekers arriving irregularly to the UK via small boats. Johnson's announcement was considered strategic to detract attention from his scandalous pandemic lockdown parties dominating British headlines at the time.[4] Since the announcement, and until their fall in July 2024, Tory politicians have attempted to push through border externalization policies and limit protections afforded to asylum seekers by domestic and international courts and pre-existing legislation. Consequently, the UK-Rwanda Partnership had been marred by legal challenges, unsustainable financial commitments, logistic uncertainties, and frequent legislative amendments with little debate and no recourse. Unsurprisingly, criticisms by legal scholars, non-governmental organizations (NGOs), and various parliamentary factions, notably fierce debates by many peers from the House of Lords (HoL), lambasted the proposed UK-Rwanda Partnership and its potential breach of multiple international laws and conventions, including its contravention of the European Convention on Human Rights,[5] the 1951 Refugee Convention,[6] and its 1967 Protocol.[7]

The UK-Rwanda Partnership and its corresponding sociolegal implications are novel in academic research, with few publications on the topic currently available.[8] Nevertheless, border externalization policies are

---

1. *See* Boris Johnson, U.K. Prime Minister, *PM Speech on Action to Tackle Illegal Migration* (Apr. 14, 2022), https://www.gov.uk/government/speeches/pm-speech-on-action-to-tackle-illegal-migration-14-april-2022.

2. *See World First Partnership to Tackle Global Migration Crisis,* GOV.UK: NEWS (Apr. 14, 2022), https://www.gov.uk/government/news/world-first-partnership-to-tackle-global-migration-crisis.

3. *See Addendum to the Memorandum of Understanding Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda,* GOV.UK: POL'Y PAPER, https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/addendum-to-the-memorandum-of-understanding (Apr. 6, 2023) [hereinafter *Addendum to the Memorandum of Understanding*].

4. *See* Jill Lawless, *UK Plan to Fly Asylum-Seekers to Rwanda Draws Outrage*, ASSOC. PRESS (Apr. 14, 2022, 10:00 AM), https://apnews.com/article/immigration-boris-johnson-africa-europe-migration-30126570727dd5227f8cde50392c9b01.

5. EUROPEAN CONVENTION ON HUMAN RIGHTS (1950).

6. 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES (1951).

7. 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (1951).

8. *See* Michael Collyer & Uttara Shahani, *Offshoring Refugees: Colonial Echoes of the UK-Rwanda Migration and Economic Development Partnership*, SOC. SCIS., Aug. 11, 2023, at 1; Jason Haynes, *Human Trafficking: Iconic Victims, Folk Devils and the Nationality and Borders Act 2022*, 86 MOD. L. REV. 1232 (2023); Talitha Kwon, *Illegal Migration Act: A Strain on the UK's Economy and International Law*, CHI. POL'Y REV. (Jan. 29, 2024),

not new; time and again, Western nations have regularly employed externalization practices with the ulterior motive of progressing population control and demographic engineering.[9] The scholarship on border externalization and the nexus of race, gender, and other intersecting identities demonstrate an innate relationship with Western anti-migrant attitudes propagated by populist politicians to cement unlawful extraterritorial migration practices.[10] Nevertheless, a significant gap exists in the scholarship regarding the role of the UK-Rwanda Partnership in institutionalizing a neo-racist and tiered asylum system that relies on logically fallacious hostile portrayals of asylum seekers and migrants to justify unlawful deportation measures.

The following research considers transgressive populist rhetoric and racially divisive state policies progressed by minority spokespersons to justify inequitable migration directives that violate international asylum laws. Initially, this paper reviews the UK-Rwanda Partnership and the ill-conceived painstaking legal maneuvers instituted by the ruling Tories to deport asylum seekers to Rwanda. This study employs Martin Barker's conceptual framework, the *Argument from Genuine Fears*, to explain the use of neo-racist logical fallacies in justifying the UK-Rwanda Partnership.[11] Finally, this work evaluates divisive rhetoric on migrants espoused by former Home Secretary Suella Braverman in the House of Commons, who

---

https://chicagopolicyreview.org/2024/01/29/illegal-immigration-act-a-strain-on-the-uks-economy-and-international-law/; Todd Landman et al., *Taking Back Control: Human Rights and Human Trafficking in the United Kingdom*, SOCIETIES, Apr. 3, 2024, at 1; Jennifer Morgan & Lizzy Willmington, *The Duty to Remove Asylum Seekers Under the Illegal Migration Act 2023: Is the Government's Plan to 'Stop the Boats' Now Doomed to Failure?*, 52 COMMON L. WORLD REV. 103 (2023); Sian Oram, *Modern Slavery in the United Kingdom: The Illegal Migration Act Risks Undermining Efforts to Combat Exploitation*, PLOS MED., Sept. 5, 2023, at 1; Alex Powell & Raawiyah Rifath, *Sexual Diversity and the Nationality and Borders Act 2022*, 43 LEGAL STUD. 757 (2023); Cristina Saenz Perez, *The Securitization of Asylum: A Review of UK Asylum Laws Post-Brexit*, 35 INT'L J. REFUGEE L., 304 (2023); Alexander Smith et al., *The United Kingdom's Rwanda Asylum Policy and the European Court of Human Rights' Interim Measure: Challenges for Mental Health and the Importance of Social Psychiatry*, 69 INT'L J. SOC. PSYCHIATRY 239 (2023).

9. *See* Ridvan Emini & Mentor Tahiri, *Forced Migrations and the International Law*, 17 SEEU REV. 34, 37 (2022).

10. *See* Hindpal Singh Bhui, *The Place of 'Race' in Understanding Immigration Control and the Detention of Foreign Nationals*, 16 CRIMINOLOGY & CRIM. JUST. 267 (2016); Sigrid Corry, *Carceral Islands: The Rise of the Danish Deportation Archipelago*, 64 RACE & CLASS 94 (2022); Arun Kundnani, *The Racial Constitution of Neoliberalism*, 63 RACE & CLASS 51 (2021); Alpa Parmar, *The Power of Racialized Discretion in Policing Migration*, 10 INT'L J. CRIME, JUST. & SOC. DEMOCRACY 41 (2021); Alpa Parmar, *Feeling Race: Mapping Emotions in Policing Britain's Borders*, 31 IDENTITIES 14 (2024); Sarah Turnbull, *Immigration Detention and the Racialized Governance of Illegality in the United Kingdom*, 44 SOC. JUST. 142 (2017).

11. MARTIN BARKER, THE NEW RACISM: CONSERVATIVES AND THE IDEOLOGY OF THE TRIBE 14-16 (1981).

"want[ed] to make her mark as the toughest home secretary to date."[12] The textual analysis software measuring anti-migrant rhetoric in speeches delivered by former Home Secretary Suella Braverman, tests the constructs of hardship, aggression, blame, exclusion, liberation, and human interest. The results of this study demonstrate that as a cabinet minister, Braverman—a notable anti-migrant advocate, a leading UK-Rwanda Partnership architect, a minority politician, and a child of immigrants—employed nearly 200% more divisive rhetoric on migrants and migration in juxtaposition to other issues. This paper's policy critique, conceptual framework, and quantitative rhetorical analysis address the following research question: How have Tory politicians employed anti-migrant rhetorical strategies and logical fallacies to advocate for border externalization policies?

II. THE UK-RWANDA PARTNERSHIP

Much of the legislation that was adopted by the Tories amended pre-existing policies and established new questionable protocols for managing asylum seekers. While it is not uncommon for Western nations to implement specific policies to address migration, the distinctive nature of the UK-Rwanda Partnership lies squarely in the Tories' attempt to undermine national and international laws designed to protect the most vulnerable of people globally. Moreover, established international laws under fire have been deliberately integrated into the UK's domestic legal framework to safeguard refugees and asylum seekers from opportunistic politicians and neo-racist policies that have shaped European sociopolitical discourse on migration since the Second World War.

Johnson and Patel relied on a non-binding and legally unenforceable Memorandum of Understanding (Memorandum) to establish a border and asylum externalization partnership with Rwanda.[13] The UK-Rwanda Partnership's foundation and justification were predicated on the rationale—and misguided notion—that the threat of externalizing the asylum process would deter irregular migration.[14] The HoL International Agreements Committee, tasked with reviewing international treaties[15] were aggrieved by

12. Erica Consterdine, *The Government Passed a Major Immigration Law Last Year – So Why Is It Trying to Pass Another One?*, THE CONVERSATION (July 13, 2023, 12:00 PM), https://theconversation.com/the-government-passed-a-major-immigration-law-last-year-so-why-is-it-trying-to-pass-another-one-207343.

13. *See Addendum to the Memorandum of Understanding*, *supra* note 3.

14. *See id.*

15. The House of Commons International Agreements Committee reviews all treaties that fall under the terms of the Constitutional Reform and Governance Act 2010. *See* Constitutional Reform and Governance Act 2010, c. 25 (Eng.) [hereinafter CRaG]; *see also Treaty scrutiny under the*

the Tories' use of a Memorandum rather than a bona fide and binding international treaty.[16] Nevertheless, despite bypassing appropriate parliamentary processes, procedures, and scrutiny reflecting proper protocol when engaging in nation-to-nation agreements, the HoL International Agreements Committee opted to review the Memorandum and concluded that they had grave concerns about the possibility of human rights violations.[17]

The HoL International Agreements Committee was not the sole authority assessing the severity of the challenges linked to the Memorandum. Both the Supreme Court of the United Kingdom (UKSCt) and the European Court of Human Rights (ECtHR) also examined the UK-Rwanda Partnership, highlighting its failure to ensure the safety of asylum seekers.[18] For instance, on June 14, 2022, the ECtHR, through an interim measure, issued an injunction that prevented the initial deportation of an Iraqi asylum seeker who had crossed the English Channel in a small boat.[19] The Iraqi national had his asylum application and subsequent appeal rejected.[20] However, when he appealed to the UK High Court of Justice to block his impending deportation and review the lawfulness of the UK-Rwanda Partnership, the Court agreed that there were serious concerns with the structure of the UK-Rwanda Partnership.[21] Nevertheless, they remained overly optimistic that Rwanda would adhere to the stipulations outlined in the Memorandum.[22] After failed appeals in the Court of Appeal and the Supreme Court, the European Court of Human Rights intervened, issuing an interim measure under Rule 39 of the European Convention on Human Rights temporarily halting his deportation.[23]

Constitutional Reform and Governance Act 2010, UK PARLIAMENT, (Jan. 5, 2020), https://committees.parliament.uk/committee/448/international-agreements-committee/content/116407/treaty-scrutiny-under-the-constitutional-reform-and-governance-act-2010/.

16. *See* UK-Rwanda Asylum Agreement: Why is it a Memorandum of Understanding and not a Treaty?, UK PARLIAMENT, (Jan. 26, 2023), https://lordslibrary.parliament.uk/uk-rwanda-asylum-agreement-why-is-it-a-memorandum-of-understanding-and-not-a-treaty/.

17. *See* INTERNATIONAL AGREEMENTS COMMITTEE, MEMORANDUM OF UNDERSTANDING BETWEEN THE UK AND RWANDA FOR THE PROVISION OF AN ASYLUM PARTNERSHIP AGREEMENT, 2022–23 HL 71, at 10 (UK).

18. *See* R v. Secretary of State for the Home Dep't [2023] WLR 4433 (UKSC), at ¶ 149.

19. *See* N.S.K. v. United Kingdom, App. No. 28774/22, at 1 (Apr. 5, 2023), https://hudoc.echr.coe.int/eng?i=001-224302.

20. *See id.*

21. *See id*.

22. *See id.*

23. *See id.*

The European Court of Human Rights highlighted that the Memorandum offered no mechanism, nor did the government demonstrate any ability, to ensure that asylum seekers would be protected from degrading, torturous, or inhuman treatment.[24] This included physical and psychological harm, extreme forms of detention, and the threat of torture.[25] Consequently, the potential for ill-treatment was found to violate Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms,[26] which is also domestically enforced through the Human Rights Act 1998.[27] Moreover, the European Court of Human Rights concluded that asylum seekers were likely to face unfair treatment in determining their refugee claims, with minimal or no opportunity for objective appeal, increasing the risk of refoulement.[28] This concern reiterated the High Court's opinion that designating Rwanda as a safe third country lacked evidentiary support.[29] Citing concerns about Rwanda's general safety, the absence of guarantees for human rights, the risk of refoulement, and the Memorandum's failure as an effective governing mechanism, the European Court of Human Rights deemed the UK-Rwanda Partnership's legal standing highly questionable.[30]

III. LAWFULNESS OF THE MEMORANDUM

The HoL International Agreements Committee scrutinized the use of a Memorandum rather than an international treaty.[31] The Committee pointed out that the Memorandum serves only to bypass parliamentary scrutiny afforded by the legislative process in testing the UK-Rwanda Partnership's congruency with domestic and international law, its feasibility, financial ramifications, and preventive measures that protected asylum seekers from refoulement, torture, and persecution.[32]

Moreover, the government's deliberate attempt to circumvent the rigor of the parliamentary processes had not gone unnoticed. Baroness Hayter and Lord Lansley stated that the Tory Government intentionally used the Memorandum to avoid the power afforded by the Constitutional Reform and

24. *See id.* at 2.
25. *See id.*
26. *See id.*; Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 213 U.N.T.S. 221.
27. *See* Human Rights Act 1998, c. 42 (UK).
28. *See* N.S.K., App. No. 28774/22, at 1–2.
29. *See id.*
30. *See id.*
31. *See* Memorandum of Understanding, *supra* note 16, at 9.
32. *See id.*

Governance Act 2010 (CRAG).[33] Under CRAG, the government must present nation-to-nation treaties before the Parliament with haste for further scrutiny, and either the House of Commons or House of Lords may criticize or object to the treaty's parameters.[34] A Memorandum of Understanding is not classified as an international agreement or covered under the stipulations outlined in CRAG.[35] Both Hayter and Lansley, peers of opposing parties, agreed that the government employed the Memorandum to evade formal scrutiny afforded by outlined parliamentary processes on a matter that holds significant national and international interest, and may impose severe consequences for the human rights of individuals fleeing persecution.[36]

The HoL International Agreements Committee made it a point to consult various organizations, including the Anti Trafficking Monitoring Group, Bail for Immigration Detainees, Medical Justice, Public Law Project, Refugee and Migrant Children's Consortium, Refugee Law Initiative-University of London, Queen Mary School of Law, Amnesty International UK, United Nations High Commissioner for Refugees, and the Law Society of England and Wales.[37] Unsurprisingly, they concluded that the plan egregiously violated "the Refugee Convention, the European Convention on Human Rights, and the Council of Europe Convention on Action against Trafficking in Human Beings."[38] The consensus of the proceedings affirmed that the agreement breached multiple international conventions, including a higher and unacceptable propensity for claimants to face additional penalization and refoulement.[39]

IV. THE NATIONALITY AND BORDERS ACT 2022 AND THE UK-RWANDA PARTNERSHIP

The Nationality and Borders Act was instrumental in progressing the UK-Rwanda Partnership's objectives in legislating a two-tiered asylum system into practice.[40] Under the Nationality and Borders Act, Patel and the Tories championed a segregationist, two-tier asylum system hindering the rights of asylum seekers hailing from certain nations that lack direct access

33. *See* HL (1 Feb. 2023) (827) col(s) 1037–39.

34. See CRaG, *supra* note 15; *see also Treaty scrutiny under the Constitutional Reform and Governance Act 2010*, *supra* note 15.

35. *See* CRaG, *supra* note 15.

36. *See* HL (1 Feb. 2023) (827).

37. *See* Memorandum of Understanding, *supra* note 16, at 13.

38. *Id.* at 6.

39. *See id.*

40. *See* Nationality and Borders Act 2022 (NBA), c. 36 (UK).

to the UK.[41] If the Tories deemed certain refugees admissible, they would be granted access to the UK via restrictive and exclusive resettlement schemes that limited the number and types of asylum seekers arriving.[42] However, if one were to cross into the UK via irregular means, their asylum claims would be rejected on the grounds of their 'illegal' status in the country; claiming asylum in the UK is no longer an option despite the protection afforded to asylum seekers by the 1951 Refugee Convention and its 1967 Protocol, the European Convention on Human Rights, and various domestic legal frameworks.[43]

The Nationality and Borders Act endorsed the reclassification of asylum, increased penalties on human smugglers facilitating entry through irregular means and removed provisions that hindered deportation attempts. The purpose of the Nationality and Borders Act was not to fix an ailing asylum system; rather, its rationale could be explained by the Copenhagen School of Securitization[44] framework.[45] Within this framework, asylum seekers pose a danger not in tangible security concerns, but instead, they are depicted as a social concern that poses a threat to national cohesion.[46] In doing so, this paradigm justifies the espousal of intentionally divisive and incendiary rhetoric about othered and vulnerable groups. Political actors rationalize seemingly coherent policies by expressing that the survivability of identity, culture, and values hinges on enacting divisive and unfavorable policies typically absent from conventional political processes. Thus, it would be justifiable in the case of the UK-Rwanda Partnership and the Nationality and Borders Act to adopt policies that infringe on legitimate human rights since the status, condition, and incongruent cultural attributes of asylum claimants are incompatible with Britishness.[47]

Cristina Saenz Perez, a lecturer in the School of Law at the University of Leeds in the UK, posits that the Nationality and Borders Act divides the asylum system into two inequitable tiers; the first tier permits asylum claims from migrants arriving directly to the UK who have no association to and

41. *See id.* § 12(5).

42. *See id.* § 13(1)(3A).

43. *See id.* § 40; 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES, *supra* note 6; 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, *supra* note 7.

44. *See* Haynes, *supra* note 8, at 1263 (stating that "For scholars belonging to the Copenhagen School, issues become security threats through language. It is language that characterises certain actors as existentially threatening to a particular political community, thereby enabling securitization.").

45. *See* Titilayo Aishat Otukoya, *The Securitization Theory*, 11 INT'L J. SCI. & RSCH. ARCHIVE, 1747 (2024).

46. *See id.* at 1749.

47. *See* Haynes, *supra* note 8, at 1232.

have not stopped in a safe third country.[48] The second tier is reserved for applicants who have landed in safe third countries before continuing their journey to the UK.[49] The top tier is exclusive, benefiting claimants who have been granted permission to claim asylum in the UK, possess no affiliation with a safe third country, or have had the privilege of arriving directly without transiting through a safe third country.[50] The system is strategically designed with inequity in mind to limit certain individuals arriving from specific nationalities while offering resettlement to others deemed more compatible with European and British culture. The asylum system hinges on the nature and will of the government actors who offer resettlement through restrictive schemes reserved solely for first-tier asylum claimants. Individuals unable to comply with first-tier requirements face limited options and often choose to arrive irregularly—through smuggling—across the English Channel in small boats.[51] Claimants who enter the UK irregularly face the prospect of failed claims under section 16 of the Nationality and Borders Act.[52]

Scholar, Frances Webber, human rights lawyer and Vice Chair of the Institute of Race Relations in the UK, advances that resettlement schemes are highly exclusive and that accepting asylum seekers who satisfy the requirements is nearly impossible, impeding access to safe, secure, and lawful pathways for people fleeing persecution.[53] Moreover, mandating that asylum seekers file claims after arriving in the first safe country is antithetical to Refugee Convention principles, enforcing what amounts to a government-concocted fiction.[54]

V. RESETTLEMENT DISCRIMINATION

A noteworthy difference exists between satisfying the requirements and acceptance under a resettlement scheme. The UK's withdrawal from Afghanistan[55] demonstrates the privilege imparted to refugees who are

48. *See* Perez, *supra* note 8, at 310.

49. *See id.* (citing AUTHORITY OF THE HOUSE OF COMMONS, NATIONALITY AND BORDERS BILL: EXPLANATORY NOTES ¶¶ 142–54 (2021)).

50. *See id.* (citing Nationality and Borders Act 2022, *supra* note 40).

51. See *id.* at 309 (citing INDEP. CHIEF INSPECTOR OF BORDERS AND IMMIGR., AN INSPECTION OF THE HOME OFFICE'S RESPONSE TO IN-COUNTRY CLANDESTINE ARRIVALS ('LORRY DROPS') AND TO IRREGULAR MIGRANTS ARRIVING VIA 'SMALL BOATS,' (2019)).

52. *See id.* at 310.

53. *See* Frances Webber, *Impunity Entrenched: The Erosion of Human Rights in the UK*, 63 RACE & CLASS 56, 62 (2022).

54. *See id.* at 64.

55. *See generally* HOUSE OF COMMONS DEFENSE COMMITTEE, WITHDRAWAL FROM AFGHANISTAN, 2022–23 HC 725 (UK).

fortunate enough to have been bestowed admission under intentionally restrictive criteria while neglecting rightful asylum status for Afghan nationals who, during the Afghan war, were employed by the British Armed Forces or UK subsidiaries. Their affiliation with the British has designated them enemies of the state, and in doing so, they face retribution from the Taliban.[56] Despite promises, after a long delay, the Home Office developed a resettlement scheme that, at face value, seemingly ensures the safety of those at risk.[57] In true fashion and through discriminatory intent, the Tories limited the number of allowable claims by Afghan nationals whose lives were at risk for assisting the British.[58]

To amplify adversity and deepen the inequality, Afghans who had worked with the British in some capacity during the war and who opted to arrive via irregular routes without being previously enrolled in a restrictive resettlement scheme were met with the prospect of deportation to Rwanda.[59] The narrative of Muhammad captured the hearts and minds of British citizens and illustrated the maltreatment of individuals who were devoted to British service during the war. Muhammad, a British citizen, served as an interpreter for the British Armed Forces for a decade, and as a result, his family, who are Afghan nationals, are currently in Belgium, facing barriers to entering the United Kingdom.[60] Since the Home Office designed Afghan resettlement schemes with exclusive intent, Muhammad's family did not meet the admission requirements.[61] If Muhammad's family had resolved to brave the risky and often deadly journey to the UK through an irregular route, they would have faced deportation to Rwanda.[62] Moreover, Muhammad cannot afford the exorbitant fees necessary to legally challenge his family's right to be in the UK.[63] Likewise, other Afghan Special Forces who served alongside British troops for years faced expulsion if they journeyed across the English Channel.[64]

---

56. *See* Webber, *supra* note 53, at 62 (citing Nigel Morris, *Why the Government Considered Shipping Refugees 4,000 Miles to a Remote Asylum Processing Centre Island in the Atlantic*, THE PAPER, (Sept. 30, 2020, 11:32 am), https://inews.co.uk/news/politics/government-considered-refugees-immigration-ascension-island-atlantic-ocean-shipping-explained-671347).

57. *See id.* (citing Morris, *supra* note 56).

58. *See id.*

59. *See* Haroon Siddique, *Afghanistan Interpreter Told His British Citizenship Bars Family from UK Visa*, THE GUARDIAN (Apr. 21, 2024, 3:05 pm), https://www.theguardian.com/uk-news/2024/apr/21/afghanistan-interpreter-told-his-british-citizenship-bars-family-from-uk-visa.

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.*

64. *See* Holly Bancroft, *Rwanda Bill: Afghans Who Helped British Troops Beg Rishi Sunak to Back Deportation Exemption*, INDEPENDENT (Apr. 22, 2024, 4:11 PM),

The Nationality and Borders Act enforced a two-tier asylum system that privileged top-tier claimants and subsequently approached second-tier "asylum applicants as second-class asylum seekers and expose[d] them to relocation under nonbinding bilateral agreements, such as the UK–Rwanda MoU."[65] Furthermore, Section 16 of the Nationality and Borders Act [66] amends the Nationality, Immigration, and Asylum Act 2002, furnishing the government with the necessary instruments to deny a claim based on an individual's 'connection' to a safe third country. Perez postulates that 'connection' to a safe third country ubiquitously broadens the interpretation to include previous asylum approval, another protection status, or if a claimant landed in a safe country before arriving in the UK and failed to file an asylum claim.[67]

Perez also asserts that adverse consequences emerged based on the differentiation between the two tiers that legislated a variance of rights for each applicant class.[68] The Nationality and Borders Act criminalized involvement in human trafficking, outlawing the facilitation of irregular migration.[69] Conversely, the Act does not differentiate between traffickers and asylum seekers, criminalizing both for failure to obtain the necessary visa to enter the UK.[70] As such, second-class claimants fleeing persecution are criminalized and accordingly revictimized based solely on their pathway of entry. Webber argues that contrary to the Refugee Convention and long-standing international legal norms, the UK cannot penalize a claimant based on their path of entry.[71] Nevertheless, the Act dictates that landed individuals fleeing oppression who have not been endorsed under a pre-existing tier-one resettlement scheme, having not received the appropriate documentation to enter the UK, may face fines or imprisonment for up to four years or both.[72]

Central to the Tory-driven anti-migrant legislation is the core claim that forceable deportations will deter future second-tier asylum seekers from undertaking the perilous journey across the Channel.[73] Tories argued that

---

https://www.independent.co.uk/news/uk/home-news/rwanda-flights-bill-afghan-deportation-mps-lords-b2532470.html.

65. Perez, *supra* note 8, at 320.

66. *See* Nationality and Borders Act 2022, *supra* note 40, § 16.

67. *See* Perez, *supra* note 8, at 310.

68. *See id.*

69. *See* Nationality and Borders Act 2022, *supra* note 40, §§ 68–69.

70. *See id.*

71. *See* Webber, *supra* note 53, at 61.

72. *See* Nationality and Borders Act 2022, *supra* note 40, § 40.

73. *See* Powell & Rifath, *supra* note 8, at 758 (citing Lucy Mayblin, *Complexity Reduction and Policy Consensus: Asylum Seekers, the Right to Work, and the 'Pull Factor' Thesis in the UK Context*, 18 BRITISH J. POL & INT'L REL. 812 (2016)).

deterrence will stifle criminal organizations' primary source of revenue and, in doing so, will curtail or end the influx of small boats arriving on UK shores.[74] However, in scrutinizing the objective of deterrence as a central rationale for anti-migrant laws, the notion of forcible deportation and the premise of the UK-Rwanda Partnership efficaciously reformulated the conditions of criminality, unfavorably positioning human traffickers and asylum seekers under one offending category. Thus, the objective of deterrence shifts the focus of human rights away from the oppressed, leading to further retribution and punishment.[75]

Webber contends that the absolutist tendencies of the Nationality and Borders Act epitomized Johnson and Patel's migrant-averse authoritarian vision.[76] Accordingly, their aspirations have enabled the unconstitutional compromise of a judiciary that has opposed the deprivation of asylum rights. Their legislation has reframed the status of migrants, amplifying anti-migrant attitudes and racist perceptions levied on vulnerable asylum seekers. Divisive rhetoric in support of the Nationality and Borders Act sanctions the renunciation of structural racism, disregards the enduring legacy of colonialism, shuns the prevalence of modern slavery, and fortifies anti-migrant securitization practices. The Act and subsequent anti-migrant legislation discussed in this paper contravene international conventions that safeguard basic human rights and are liable to result in additional deaths, and if not the demise of asylum seekers, then the inevitability of "desperation . . . self-harm, [and] . . . destitution."[77]

VI. THE ILLEGAL MIGRATION ACT 2023

The Illegal Migration Act 2023[78] was the brainchild of former Home Secretary Suella Braverman, who zealously endorsed her anti-migrant prejudiced philosophy whenever given the opportunity. Erica Consterdine, Senior Lecturer in Public Policy at Lancaster University, posits that ratifying the Illegal Migration Act was intrinsically an inadvertent confession by the Tories that their ill-conceived Nationality and Borders Act strategy failed in deterring unwanted second-tier asylum seekers.[79] Consterdine furthers that

74. *See id*. (citing Mayblin, *supra* note 73).

75. *See* Perez, *supra* note 8, at 315 (citing Michael Welch & Liza Schuster, *Detention of Asylum Seekers in the US, UK, France, Germany and Italy: A Critical View of the Globalizing Culture of Control*, 5 CRIMINOLOGY & CRIM. JUST. 331 (2005)).

76. *See* Webber, *supra* note 53, at 57.

77. *Id.*

78. Illegal Migration Act 2023, c. 37 (UK).

79. *See* Consterdine, *supra* note 12.

the Illegal Migration Act's immoderate nature was unrivaled compared to other migrant-centric legislation at the time.[80]

The Illegal Migration Act added provisions like amending the offshore processing of asylum seekers.[81] The Home Office has stated that the Act was built on the Nationality and Borders Act because it reinforced the criminalization of tier-two asylum seekers prescribing that anyone arriving on or after March 7, 2023, will no longer have the right to remain in the UK.[82] True to the UK-Rwanda Partnership and the Nationality and Borders Act, the Illegal Migration Act's stated purpose is to act as a deterrent. The goal of deterrence undermines human rights, and despite this, legislative attempts to dissuade individuals from crossing the English Channel have proven unsuccessful.[83] Moreover, by their own admission, the Home Office declared that policies related to deterrence do not follow the standard research or practices evident in other countries.[84] It must be said that deterrence as a policy rationale has simply served to support and enshrine the determination of human traffickers and has subsequently resulted in higher risk, harm, and death of asylum seekers.[85]

Valdez-Symonds asserted that the Illegal Migration Act revokes human rights protected by asylum laws.[86] The Act intensifies the pressure on asylum seekers, making the asylum system a quagmire of hurdles. Furthermore, "UN experts deem the act to be punitive more than a resolution of root causes."[87] In a system already mired by staffing shortages, bureaucratic hurdles, and overwhelming legal issues,[88] the Illegal Migration Act contributed another layer of difficulty for asylum seekers, introducing processes that punished those seeking refuge.

Morgan and Willmington contend that the Illegal Migration Act gave the Home Secretary the power to enforce removals to Rwanda and to

80. *See id.*

81. *See id.*

82. *See The Illegal Migration Act: Latest Updates*, RIGHT TO REMAIN: LEGAL UPDATES, https://righttoremain.org.uk/the-illegal-migration-act-latest-updates/ (May 15, 2024).

83. *See* THE TRUTH ABOUT CHANNEL CROSSINGS AND THE IMPACT OF THE ILLEGAL MIGRATION ACT, REFUGEE COUNCIL (2013), https://refugeenetwork.hyadcms.net/files/refugeenetwork/resources/174/additional/The-truth-about-channel-crossings-and-the-impact-of-the-illegal-migration-act-Oct-2023.pdf (stating that refugees are nonetheless crossing the English channel to come to England).

84. *See* Consterdine, *supra* note 12.

85. *See* Webber, *supra* note 53, at 57.

86. *See* Steve Valdez-Symonds, *UK's Cruel Immigration Bill: Explained*, AMNESTY INT'L: BLOGS (Apr. 5, 2023), https://www.amnesty.org.uk/blogs/campaigns-blog/immigration-bill.

87. Kwon, *supra* note 8.

88. *See id.*

distinguish the status of second-tier asylum seekers.[89] The Nationality and Borders Act presented several difficult legal issues that limited the Tories response. The Illegal Migration Act was designed to address legal concerns by limiting court challenges from asylum claimants who have crossed the border irregularly.[90] The United Nations High Court for Refugees argued that removing the rights afforded to asylum seekers to make claims under the Illegal Migration Act "increas[es] the burden placed on asylum seekers and the country to which they are being sent."[91]

The Illegal Migration Act acknowledged the global humanitarian crisis caused by slavery and human trafficking.[92] Notwithstanding, it subsequently deprived asylum seekers of the ability to file claims related to trafficking and exploitation.[93] The Act "significantly diminishes" the safeguards guaranteed to protect individuals from modern slavery, further reinforcing an already prevalent global humanitarian crisis.[94] Landman, Brewster, and Thorton of the University of Nottingham's Rights Lab convey that the UK-Rwanda Partnership emerges "[a]gainst this backdrop of estimated prevalence of modern slavery and human trafficking and the array of anti-slavery organizations, the issue of immigration has in part confounded the policy agenda and raised significant concerns over the UK's commitment to human rights."[95]

The Illegal Migration Act and its precursor, the Nationality and Borders Act, refocuses the standard of proof on asylum seekers to present credible claims. Powell and Rifath argue that the lives and liberty of claimants are at stake "because asylum seekers are unlikely to compile and carry dossiers of evidence out of the country of persecution."[96] To some, this is a reasonable practice. However, the standard has been heightened to an unachievable level, further victimizing claimants facing violence, abuse, or exploitation. The type of evidence requested is often challenging to acquire and attempts to obtain any level of evidence retraumatizes victims in the process.[97]

89. *See* Morgan & Willmington, *supra* note 8, at 104–5.

90. *See id.* at 105.

91. Kwon, *supra* note 8.

92. *See* Consterdine, *supra* note 12.

93. *See id.*

94. *See* Oram, *supra* note 8, at 1 (citing MODERN SLAVERY & HUMAN RIGHTS, EXPLAINER: THE ILLEGAL MIGRATION ACT MODERN SLAVERY PROVISIONS (2023)).

95. Landman et al., *supra* note 8, at 8.

96. Powell & Rifath, supra note 8, at 760 (citing United Kingdom: Home Office, *Asylum Policy Instruction: Assessing Credibility and Refugee Status, Version 9.0*, (Jan. 6, 2015), https://www.refworld.org/policy/legalguidance/ukho/2015/en/103849).

97. *See* Loraine Masiya Mponela, *"Our Wish is to be Human Again": Refugee Women Speaking Up and Taking Space*, 41 REFUGEE SUR. Q. 381 (2022).

Former PM Theresa May stressed that the Act threatens the safety of claimants fleeing modern slavery, adding to an already existing problem, and rather than collaborating on ways to reject trafficking victims, the UK and other Western nations can pool resources to mitigate and remedy the issue of human smuggling.[98] May's perspective juxtaposed Braverman's wholehearted defense of the Act[99] and her public avowal that "modern slavery victims were gaming the system."[100]

Perhaps most concerning, the Illegal Migration Act also extended the revocation of rights, detention, and deportation of children.[101] In a report published by Medical Justice, Burnett indicated that the indefinite detention of children amounted to state-sponsored cruelty.[102] Their findings outline that children in detention faced "depression, withdrawal, and anxiety," with some attempting to take their own lives.[103] Needless to say, the ill-informed and ill-conceived legislation denied fundamental human rights, criminalizing vulnerable groups in the process.

Consterdine posits that both the Nationality and Borders Act and the Illegal Migration Act are legally dubious and are, in essence, a political strategy embedded in performance politics.[104] They divert the preoccupied attention of Conservative voters from other pressing issues and tangible, legitimate steps to solve the problems within the asylum system.[105]

VII. THE SUPREME COURT OF THE UNITED KINGDOM

In November 2023, the UKSCt declared the UK-Rwanda Partnership non-binding and unlawful.[106] Justices stated that deportations could not

98. *See* Margaret Evans, *New U.K. Law Allowing Deportation of Illegal Migrants Benefits Traffickers, Says Former PM*, CBC: NEWS, https://www.cbc.ca/news/world/modern-slavery-migrants-traffickers-theresa-may-1.6989373 (Oct. 8, 2023, 1:00 AM).

99. *See id.*

100. Landman et al., *supra* note 8, at 11 (citing Lizzie Dearden, *Suella Braverman's Claims Modern Slavery Victims Are 'Gaming' System Questioned by Home Office's Own Stats*, THE INDEP. (Feb. 23, 2023), https://www.the-independent.com/news/uk/home-news/modern-slavery-migrants-home-office-b2287965.html).

101. *See* Valdez-Symonds, *supra* note 86.

102. *See* JON BURNETT ET AL., STATE SPONSORED CRUELTY: CHILDREN IN IMMIGRATION DETENTION (2010), https://medicaljustice.org.uk/wp-content/uploads/2022/02/2010_State-Sponsored-Cruelty_Final.pdf.

103. *Id.* at 41.

104. *See* Consterdine, *supra* note 12.

105. *See id.*

106. *See* R v. Secretary of State for the Home Department, [2023] UKSC 42, Judgment [149] (appeal taken from Eng.).

proceed without the commitment and assurance of Rwanda's safety and certainty of nonrefoulement.[107]

> Refoulement is prohibited by numerous international law instruments, including the European Convention on Human Rights, the UN Refugee Convention, the UN Convention against Torture, and the UN International Covenant on Civil and Political Rights. Those instruments have been given effect in UK national law by the Human Rights Act 1998, the Asylum and Immigration Appeals Act 1993, the Nationality, Immigration and Asylum Act 2002, and the Asylum and Immigration (Treatment of Claimants etc) Act 2004.[108]

International conventions stipulate that any transfer agreements must possess legally binding mechanisms that provide an avenue to contest decisions and permit enforcement through legal proceedings.[109] The UKSCt, the HoL International Agreements Committee, and multiple NGOs have demonstrated that the Tories have adopted overt disconcerting approaches in crafting the UK-Rwanda Partnership. The improper considerations and lamentable method by which the Partnership materialized ignored asylum laws and directly violated international conventions and their supporting domestic provisions.

VIII. THE SAFETY OF RWANDA (ASYLUM AND IMMIGRATION) ACT 2024[110]

Former PM Rishi Sunak wasted no time addressing the UKSCt's ruling on the Partnership. In December 2023, his Home Secretary, James Cleverly, tabled the Safety of Rwanda Bill (which then became known as the Safety of Rwanda Act upon royal assent), asserting, once again, that the Safety of Rwanda Bill advances the objectives of the Nationality and Borders Act and the Illegal Migration Act to deal with an influx of irregular migration.[111] Nevertheless, Home Secretary Cleverly "explicitly states on the face of the

---

107. *See id.* at [5].

108. *See* Jonathan Jones, *The Supreme Court's Rwanda Verdict and Rishi Sunak's Response: What Happens Next?*, INST. FOR GOV'T (Nov. 16, 2023), https://www.instituteforgovernment.org.uk/comment/supreme-court-rwanda-rishi-sunak-response.

109. *See* Perez, *supra* note 8, at 318 (citing U.N. High Commissioner for Refugees (UNHCR), *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers,* ¶ 3 (2013), https://www.refworld.org/policy/legalguidance/unhcr/2013/en/16943).

110. Safety of Rwanda (Asylum and Immigration) Act 2024, c. 8 (UK) [hereinafter Safety of Rwanda Act].

111. *See Safety of Rwanda (Asylum and Immigration) Bill: Factsheet*, GOV.UK: POLICY PAPER, https://www.gov.uk/government/publications/the-safety-of-rwanda-asylum-and-immigration-bill-factsheets/safety-of-rwanda-asylum-and-immigration-bill-factsheet-accessible (Apr. 25, 2024).

bill that he is unable to confirm it complies with the European Convention on Human Rights."[112] In rebuke of the UKSCt ruling, the Home Office boasted that they "have devised a solution that, while innovative, is within the framework of [i]nternational law."[113] However, they refrained from mentioning the imminent threat posed by the 'solution.'[114] In its illiberal affront to the judiciary, the Safety of Rwanda Act capacitates a potential constitutional crisis pitting parliament's powers against the courts.[115]

The Safety of Rwanda Bill received royal assent in April 2024, nearly two years after Johnson announced the ill-conceived Partnership.[116] Singer argues that the Safety of Rwanda Act radically challenges the UKSCt ruling, appropriating the judiciary's role.[117] Like the Memorandum of Understanding, the Nationality and Borders Act and the Illegal Migration Act , the Safety of Rwanda Act undermines protections guaranteed by the 1951 Refugee Convention and its 1967 Protocol, the European Convention on Human Rights, and the domestic provisions that support international conventions set in the Human Rights Act 1998.[118]

The UKSCt questioned the safety of asylum seekers in Rwanda imposed by the possibility of refoulement.[119] They deemed the border externalization initiative unlawful.[120] In response to the question of Rwanda's safety, Sunak, Cleverly, and the Tories, offered no tangible assurances to satisfy the

112. Rashmin Sagoo, *The UK's Safety of Rwanda Bill is a Reminder That Democracies are not Immune from Attacks on the Rule of Law*, CHATHAM HOUSE, https://www.chathamhouse.org/2023/12/uks-safety-rwanda-bill-reminder-democracies-are-not-immune-attacks-rule-law (Mar. 21, 2024).

113. *Safety of Rwanda (Asylum and Immigration) Bill: Factsheet*, *supra* note 111.

114. *See id.*

115. *See* Conor Crummey, *The Safety of Rwanda (Asylum and Immigration) Bill and the Judicial 'Disapplication' of Statutes*, UK CONST. L. ASS'N (Mar. 26, 2024), https://ukconstitutionallaw.org/2024/03/26/conor-crummey-the-safety-of-rwanda-asylum-and-immigration-bill-and-the-judicial-disapplication-of-statutes.

116. *See* Safety of Rwanda Act, *supra* note 110.

117. *See* Sarah Singer, *Why the Safety of Rwanda Bill Should Be Concerning for Us All*, LSE BLOG (Dec. 20, 2023), https://blogs.lse.ac.uk/politicsandpolicy/why-the-safety-of-rwanda-bill-should-be-concerning-for-us-all/.

118. *See Analysis of Safety of Rwanda (Asylum and Immigration) Bill (as Introduced to Parliament),* AMNESTY INT'L UK (2023), https://www.amnesty.org.uk/files/2023-12/Safety%20of%20Rwanda%20%28Asylum%20and%20Immigration%29%20Bill_2.pdf?VersionId=BrnmmsE5dvsFSMvnyCUVly_nbx4DQ_wL; Joe Middleton et al., *Rwanda Supreme Court Ruling LIVE: Cleverly Says Plan B 'Is Ready' as Sunak Unveils Effort to Save Scheme*, THE INDEP. (Nov. 16, 2023, 9:09 AM), https://www.independent.co.uk/news/uk/politics/rwanda-ruling-supreme-court-braverman-b2447567.html; *see also id.*

119. *See Safety of Rwanda (Asylum and Immigration) Bill: Factsheet*, *supra* note 111.

120. *See* Jones, *supra* note 108; *see also* R v. Secretary of State for the Home Department, [2023] UKSC 42, Judgment [72]–[73] (appeal taken from Eng.); Sagoo, *supra* note 112.

UKSCt's concerns.[121] Instead, the Safety of Rwanda Act specified that Rwanda is a safe country and, as such, there should be no doubt that Rwandan officials will uphold their end of the agreement.[122]

The normal course of action in liberal democracies, following the ratification of questionable legislation, is to bring the draconian regulation before the courts to determine its constitutional and legal viability. However, the Tories declared triumphantly that they had 'devised a solution' to limit the scrutiny of domestic courts.[123] In knowingly setting a harmful precedent and potentially triggering a constitutional crisis, the Tories employed the Safety of Rwanda Act as a tool to legislate domestic courts out of the process of questioning Rwanda's safety for asylum seekers. "[D]ecision-makers and courts and tribunals [must] treat Rwanda as generally safe, when making decisions, or hearing claims about decisions relating to the removal of a person to Rwanda."[124]

The Safety of Rwanda Act was expedited with limited scrutiny. The House of Lords, among others, proposed numerous changes, including exempting certain second-tier asylum seekers, but all proposed amendments were rejected.[125] Unsurprisingly, the House of Commons and House of Lords Joint Committee on Human Rights concurred that little advancement has been made on the status of Rwanda's safety.[126] Moreover, NGOs like Amnesty International UK have expressed grave concerns about the lawfulness and lack of protection afforded by the Safety of Rwanda Act.[127]

---

121. *See* Jones, *supra* note 108.

122. *See* Safety of Rwanda Act, *supra* note 110, at 1–2.

123. *See Safety of Rwanda (Asylum and Immigration) Bill: Factsheet*, *supra* note 111.

124. *Id.*

125. *See* Crummey, *supra* note 115.

126. *See* Elspeth Guild & Valsamis Mitsilegas, *"Get That Judge Out of My Sight": The Safety of Rwanda (Asylum and Immigration) Bill*, EU IMMIGR. & ASYLUM L. & POL'Y BLOG (Mar. 4, 2024), https://eumigrationlawblog.eu/get-that-judge-out-of-my-sight-the-safety-of-rwanda-asylum-and-immigration-bill/.

127. *See* Adam Tucker, *The Rwanda Policy, Legal Fiction(s), and Parliament's Legislative Authority*, UK CONST. L. ASS'N (Nov. 22, 2023), https://ukconstitutionallaw.org/2023/11/22/adam-tucker-the-rwanda-policy-legal-fictions-and-parliaments-legislative-authority/; *Analysis of Safety of Rwanda*, *supra* note 118; ; Crummey, *supra* note 115; Joshua Jowitt, *Parliament Passes Bill Declaring Rwanda Safe – but Can It Really Be Called a Law at All?*, THE CONVERSATION (Apr. 23, 2024, 12:21 PM), https://theconversation.com/parliament-passes-bill-declaring-rwanda-safe-but-can-it-really-be-called-a-law-at-all-228541; *Rwanda Bill Seeks to Overturn Finding of Fact Confirmed by the Highest Court in the UK*, THE L. SOC'Y.: PRESS RELEASE, (Dec. 11, 2023), https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/rwanda-bill-seeks-to-overturn-finding-of-fact-confirmed-by-the-highest-court-in-the-uk; *Serious Human Rights Concerns About United Kingdom's Rwanda Bill*, COMM'N. FOR HUM. RTS. (Apr. 23, 2024), https://www.coe.int/en/web/portal/-/serious-human-rights-concerns-about-united-kingdom-s-rwanda-bill; Guild & Mitsilegas, *supra* note 126; Sagoo, *supra* note 112; Singer, *supra* note 117.

This paper outlines only ten criticisms of the Safety of Rwanda Act, although countless more exist:

1. The Safety of Rwanda Act limits the judiciary's role as a check on power and balance by ignoring fact-based findings presented in the UKSCt ruling. Purposefully disregarding the evidence adversely affects the constitutionally protected division of power between parliament and the courts and, in doing so, the basis of legal doctrine.[128]

2. Governing bodies, policy architects, and decision-makers that willfully discount the will of the courts and fact-based evidence give legal precedence "to a fiction."[129]

3. The UKSCt exhibited Rwanda's political, cultural, and institutional ineptitude in ensuring just and fair operations of an asylum processing system. The Safety of Rwanda Act does not eliminate the threat of refoulement, indicating that human rights violations are possible.[130]

4. The European Convention on Human Rights and the Refugee Convention forbid the subjugation of any person to refoulement, directly or indirectly.[131] The Safety of Rwanda Act willingly violates stipulations outlining the protection of asylum seekers from the risk of refoulement.[132]

5. The Human Rights Act 1998, among other domestic legislation, reinforces the protection of asylum seekers mandated by the European Convention on Human Rights.[133]

6. The Tories have not demonstrated interest in amending the domestic legal framework that protects asylum seekers from deportation because of potential refoulement.[134]

7. The Safety of Rwanda Act permits retroactive deportations based on the Illegal Migration Act schedule.[135] Retroactive laws are also proscribed by the Human Rights Act 1998 and the European Convention on Human Rights.[136]

---

128. *See Rwanda Bill Seeks to Overturn Finding of Fact Confirmed by the Highest Court in the UK*, *supra* note 127.

129. Jowitt, *supra* note 127.

130. Tucker, *supra* note 127.

131. *See* EUROPEAN COURT OF HUMAN RIGHTS, COURTALKS DISCOURSE 2 (2016), https://www.echr.coe.int/documents/d/echr/COURTalks_Asyl_Talk_ENG; Final Act and Convention to the Status of Refugees, U.N. Doc. A/CONF.2/108 (Dec. 14, 1950).

132. *See Serious Human Rights Concerns About United Kingdom's Rwanda Bill*, *supra* note 127; Tucker, *supra* note 127.

133. *See* Tucker, *supra* note 127.

134. *See id.*

135. *See* Illegal Migration Act 2023, *supra* note 78, §2(3).

136. *See* GUIDE ON ARTICLE 7 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, EUR. CT. H.R. (2024) (first citing Del Rio Prada v. Spain, App. No. 42750/09, ¶ 116 (Oct. 21, 2013), https://hudoc.echr.coe.int/eng?i=001-127697; and then citing Kokkinakis v. Greece,

8. Deportations that contravene international obligations will remain legally unchallenged, and claimants with inappropriate outcomes have no avenue for appeal or recourse.[137]

9. The Safety of Rwanda Act proactively withdraws the jurisdiction of domestic courts to administer any interim measure presented by the European Court of Human Rights.[138] Noting this, the Act's integrity, credibility, and validity are questioned based on its scripted attempt to evade a European Court of Human Rights challenge.[139]

10. The Home Secretary retains the authority to review European Court of Human Rights interim measures.[140] They may inevitably conduct themselves in a manner that excludes and prohibits any form of judicial oversight of their conduct.[141]

The Safety of Rwanda Act provides little assurance to alleviate the UKSCt's apprehensions. Unsettlingly, the Home Office openly proposed that other nations dealing with an influx of asylum seekers should adopt the same questionable and unprecedented practices they have embraced to circumnavigate legal challenges.[142] Tory architects have set a precedent that weakened the judiciary's power and, consequently, the mechanisms protecting asylum seekers to achieve border externalization. They encouraged future governments to enact the omission of courts when faced with legal opposition.[143]

If the reader considers this a heavy accusation of Tory conduct, one need not look further than Braverman's assertions, as the UK-Rwanda Partnership was before the UKSCt. Braverman stated that she expects the UKSCt to agree that the Partnership is lawful: "If the government is 'thwarted' they are prepared to do 'whatever it takes' to action the Rwanda policy, displaying a total disregard for the principles of the separation of powers and

App. No. 14307/88, ¶ 52 (May 25, 1993), https://hudoc.echr.coe.int/eng?i=001-57827); *see also* Jowitt, *supra* note 127; Singer, *supra* note 117.

137. *See* Guild & Mitsilegas, *supra* note 126.

138. *See id.*

139. *See id.*; *see* Singer, *supra* note 117.

140. *See* Adrian Berry, *The Illegal Migration Bill: Interim Measures from the European Court of Human Rights,* COSMOPOLIS (Apr. 1, 2023), https://cosmopolismigration.com/2023/04/01/the-illegal-migration-bill-interim-measures-from-the-european-court-of-human-rights/.

141. *See Analysis of Safety of Rwanda*, *supra* note 118, ¶ 13.

142. *See Safety of Rwanda (Asylum and Immigration) Bill: Factsheet*, *supra* note 111.

143. *See* Alice Donald & Joelle Grogan, *What are the Rwanda Treaty and the Safety of Rwanda (Asylum and Immigration) Bill?*, UK IN A CHANGING EUROPE (Apr. 17, 2024), https://ukandeu.ac.uk/explainers/what-are-the-rwanda-treaty-and-the-safety-of-rwanda-asylum-and-immigration-bill/.

independence of the judiciary."[144] The Safety of Rwanda Act was thus a domineering, unyielding, undemocratic, and illiberal populist gambit designed to outmaneuver the judiciary's power, setting a dangerous precedent in the process.

IX. THE ARGUMENT FROM GENUINE FEARS - CONCEPTUAL FRAMEWORK

This review has thus far offered insight into the legislative parameters and the illiberal practices employed by Tory politicians to deal with asylum seekers and irregular migration. The Copenhagen School of Securitization demonstrates that security concerns expressed by politicians exert the rhetoric of survival, existentialism, and a risk to society, "thereby enabling securitization."[145] To understand the Copenhagen approach, this paper employs the Argument from Genuine Fears framework to consider the central rationale of the Partnership, and each subsequent piece of legislation enacted. The Argument from Genuine Fears explains the rhetoric and rationale adopted by the Tories to condone hostility towards asylum seekers and support their claims of a supposed threat to British culture.[146] To understand the role of the Argument from Genuine Fears, one must first consider the relationship between biological racism and neo-racism. Both biological racism and neo-racism are more commonly associated with anti-migrant sentiments than widely discussed. Biological racism is regarded as the antecedent to neo-racist practice and thought—the evolution from one to the other stems from the political incorrectness of biologically racist justifications.[147]

It has been nearly 185 years since the publication of *Crania Americana* by Samuel George Morton.[148] His research was seminal in laying a foundation for biological supremacy and the justification riddled with methodological fallacies and racially supremacist rationales.[149] Morton, along with others in the study of Phrenology, progressed prejudiced arguments and outlined a connection between discriminatory and stratified

144. Morgan & Willmington, *supra* note 8, at 107 (citing Radio 4: Today, Suella Braverman at 2:20–2:24:30, (Aug. 28, 2023), https://www.bbc.co.uk/sounds/play/m001q0mp (last visited Sept. 18, 2023).

145. Haynes, *supra* note 8, at 1236.

146. *See* BARKER, *supra* note 11, at 14–16.

147. *See id.* at 4–5.

148. *See* SAMUEL GEORGE MORTON, CRANIA AMERICANA OR A COMPARATIVE VIEW OF THE SKULLS OF VARIOUS ABORIGINAL NATIONS OF NORTH AND SOUTH AMERICA: TO WHICH IS PREFIXED AN ESSAY ON THE VARIETIES OF THE HUMAN SPECIES (1839).

149. *See generally id.*; Paul Wolff Mitchell, *The Fault in his Seeds: Lost Notes to the Case of Bias in Samuel George Morton's Cranial Race Science*, PLOS BIOLOGY, Oct. 4, 2018, at 1.

biological and social hierarchies.[150] Using little scientific rigor, he concluded that Caucasians occupy superior positions in the biological order.[151] Under the pretext of science, Morton's research considered cranial sizes to explain race stratification in society.[152] Colonial regimes employed his research to legitimize enslavement, exploitation, and deprivation of so-called 'lesser' races.[153]

Biologically supremacist research was not exclusively limited to Morton or his era of research. In *Race, Evolution, and Behavior,* Canadian Psychologist J. Philippe Rushton suggested that race-based behavior is predisposed to genetic variations along with environmental conditions.[154] Rushton argued that "racial group differences in intelligence are observed worldwide, in Africa and Asia, as well as in Europe."[155] Others like Herrnstein and Murray asserted that lower IQ scores among Black populations in the United States warranted the reconsideration and limitation of social and education funding since inherently genetic conditions constrained their progress.[156]

Today, explicit biologically supremacist explanations have been replaced with modern politically correct assertions justifying exclusionary practices. Modern assertions have evolved to include arguments that stress the incompatibility of beliefs, values, cultural variations, and the imperative desire to defend cultural homogeneity. Neo-racist discourse, riddled with logical, culturally specific fallacies, imposes cultural, linguistic, and religious differences as a cover to validate the institutionalization of racist policies. Neo-racism also justifies xenophobia and discrimination against the other in the name of nationalism and national security. By invoking seemingly rational arguments, neo-racist rhetoric and strategies are employed to justify two-tiered, discriminatory, and unlawful border externalization policies.

X. NEO-RACISM AND LOGICAL FALLACIES

Logical fallacies have been exercised in defense of neo-racist policies for decades. Martin Barker argued that Tories have expertly navigated the delicately sensitive tapestry of race and migration by invoking neo-racist

150. *See id.*

151. *See id.* at 8.

152. *See id.* at 100–64.

153. *See* Mitchell, *supra* note 149, at 1.

154. *See* J. PHILIPPE RUSHTON, RACE, EVOLUTION, AND BEHAVIOR: A LIFE HISTORY PERSPECTIVE 27 (3rd ed. 2000).

155. *Id.* at 4.

156. *See* RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 314–15 (1994).

logical fallacies without explicit reference to biologically racist justifications.[157] Since 1968, the Tories have carefully and methodically crafted logically fallacious arguments to convey an unassailable 'genuine' fear of the 'other.'[158] The arguments repeatedly emerge when presented with an influx of undesirable migration and a purported threat to cultural homogeneity. Race-based logical fallacies stringently adhere to the steps of an unsound argumentation model adopted by Tory politicians—the Argument from Genuine Fears.[159]

The Argument from Genuine Fears model is simplistic in its orientation but considers the application of culturally divisive rhetoric that conveys seemingly reasonable arguments while simultaneously evading racially intolerant sentiments. The Argument from Genuine Fears facilitates arguments that generalize the 'other' as a culturally incongruent entity.[160] The model offers a pathway for Tories to endorse neo-racist policies since measures adopted advocate for cultural protection. Veiled by the rationally unsound genuine fears façade, neo-racist policies cannot be labeled as racist since biologically supremacist arguments are never explicitly mentioned.[161] Barker posits that the Argument from Genuine Fears model utilizes a tripartite approach:

> [1] The argument begins with the apparently unchangeable statement that these people are ordinary normal citizens; [2] Before you can take a breath it adds that the feelings they express are real, powerful sentiments, not to be ignored; [3] And then, as though no change has been made in the argument, it is stated that the object of [British] fears [are] real.[162]

However, a newly inaugurated fallacious step embraced by the Tory Party must also be considered when analyzing the UK-Rwanda Partnership. The argument is presented by a high-profile racial minority designated as a spokesperson to champion a discriminatory and neo-racist policy. The racialized representative, celebrated as a diverse leader, embodies the illusive impression of progressive ideals. They have shattered the proverbial multicultural glass ceiling. The diverse spokesperson unveils the neo-racist argument without the risk of being portrayed as intolerant. Their minority status and the high-profile government position they occupy are pivotal characteristics in marketing fear, and as such, the plan is not perceived as racist by any stretch of the imagination. Intolerant policies shared by

157. *See* BARKER, *supra* note 11, at 25.
158. *See id.*
159. *See id.* at 14.
160. *See id.* at 2.
161. *See generally id.*
162. *See id.* at 15.

minorities have accordingly blurred the boundaries of race and social order, making racism a complex attitude to discern.[163] Thus, it is prudent to consider a diverse spokesperson as the newly instated fourth condition of the modern Argument from Genuine Fears process: *Finally, the object of their fear is infallible, as validated by a diverse spokesperson*.

Barker posits that the Argument from Genuine Fears approach has emerged "as a central weapon in the Tory armory."[164] For instance, Margaret Thatcher, among other Tories, have incorporated the Argument from Genuine Fears model in her rhetoric on immigration:

> If we went on as we are, then by the end of the century there would be [four] million people of the New Commonwealth of Pakistan here. Now that is an awful lot and I think it means that people are really rather afraid that this country might be swamped by people with a different culture. And, you know, the British character has done so much for democracy, for law, and done so much throughout the world, that if there is a fear that it might be swamped, people are going to react and be rather hostile to those coming in.[165]

Barker argues that the rhetoric employed by Thatcher reinforces the importance of upholding values of British supremacy, "providing a myth of something to defend."[166] The Argument from Genuine Fears process of concocting a myth around race and immigration fosters the blurring of boundaries between the two, obscuring their prominent distinctions and justifying rhetoric by fallaciously asserting that the "other" is unable to integrate. Tories have repeatedly leveraged the Argument from Genuine Fears blueprint to garner support, all under the guise of: "[D]efending our way of life. A way of life is what binds us together, gives the possibility of unity and purpose. Immigration somehow threatens all that."[167] Arriving at the crux of the issue, Thatcher's 1978 commentary ominously mirrors the racially divisive sentiments expressed by Braverman in her 2023 keynote at the American Enterprise Institute.[168] Just like Thatcher, Braverman employed logically fallacious reasoning, specifically following the Argument from Genuine Fears approach in her disagreement over immigration policy:

---

163. *See* Oyku Hazal Tural, *Reinscribing Migrant "Undeservingness" and "Deportability" into Detention Centres' Visiting Rooms*, 11 SOC. INCLUSION 59 (2023).

164. *See* BARKER, *supra* note 11, at 15.

165. *Id.* (quoting TV interview with Margaret Thatcher, Leader of the Conservative Party in UK (Jan. 30, 1978)).

166. *Id.*

167. *Id.* at 16.

168. *See* Suella Braverman, UK Sec'y of State for the Home Dep't, Keynote Address: American Enterprise Institute (Sept. 26, 2023).

> There is an optimal level of immigration. It is not zero. But there has been more migration to the UK and Europe in the last 25 years than in all the time that went before. It has been too much too quick, with too little thought given to integration and the impact on social cohesion. And the fact that the optimal level is hard to define, and will vary across time and for different countries, doesn't change that fundamental fact. Nor should it blind us from the simple truth. If cultural change is too rapid and too big, then what was already there is diluted. Eventually, it will disappear.[169]

Braverman's invocation of the Argument from Genuine Fears suggests that various categories of migration threaten the unity and fabric of the nation-state. The logically fallacious construction of her argument "enabled the theory of new racism [neo-racism] to step forward when needed."[170] In this context, neo-racist sentiments emerge when Tories are confronted with a deluge of 'undesirable' asylum seekers hailing from the 'wrong' nationalities. The UK-Rwanda Partnership enabled the Tories to craft a solution—a two-tiered asylum system—that restricted asylum access by labeling as criminal what they deemed were unfavorable and undesirable foreign nationals. Concurrently, they implemented more expansive resettlement schemes that exclusively guaranteed asylum for individuals originating from more desirable nations.

Barker posits that the Argument from Genuine Fears bolsters the myth that the nation requires defense, legitimizing the fears of the citizenry.[171] The object of these fears remains unquestioned, and the distinction between race and immigration is neither acknowledged nor considered. To further reinforce the myth of defense, high-ranking politicians occupying prominent political offices and possessing notable gravitas, like Sir Winston Churchill, emphasize fear-ridden fairy tales to validate the reality of these fears. "Winston Churchill . . . put it with complete bluntness: 'we cannot fail to recognise the deep bitterness that exists among ordinary people who one day were living in Lancashire, and woke up the next day in New Delhi, Calcutta or Kingston, Jamaica."[172]

Braverman flagrantly articulates equally polarizing language with more racially charged generalizations to convey fabricated narratives of undesirability and incompatibility. Braverman states: "UK police chiefs have warned me of heightened levels of criminality connected to some small boat arrivals, particularly in relation to drug crime, exploitation, and prostitution.

169. *Id.*

170. BARKER, *supra* note 11, at 15.

171. *See id.*

172. *Id.* (quoting HC Deb (5 July 1976) (914) cols. 964–1094 (Eng.)).

People who choose to come across the Channel illegally from another safe country have already shown contempt for our laws."[173]

When pressed to verify facts about criminal behavior, Braverman admitted that her evidence was anecdotal and based solely on conversations with law enforcement.[174] Moreover, criminologists have long acknowledged that "crime and offences by asylum seekers are reported disproportionately, sensationalised with emotive language and given more space than befits the crime."[175] The Office for National Statistics also confirmed that no available numbers exist on crimes asylum seekers commit.[176] Fabricated realities, devised with the intent to stereotype by further blurring the lines between criminality and migrants, effectively convey the object of fear. Imposing the illegality of asylum status, alongside fabricated criminality, myths about the inability to integrate, the conflation of race and immigration, and the perceived threat posed by 'the other' to British supremacy, have each reinforced Tory efforts to circumvent democratic processes and legitimized the unlawful deportation of asylum seekers.

It is prudent to note that the Argument from Genuine Fears model required refinement to align with more recent Tory practices. By extending the framework's parameters, the Argument from Genuine Fears now reflects endorsements from diverse spokespersons. Their minority status is left unquestioned and serves to validate the object of fear. The diverse spokesperson often remains unchallenged, sustaining the logically fallacious argument confirming its infallibility. Braverman was not the first diverse Home Secretary to utilize the Argument from Genuine Fears framework to support the UK-Rwanda Partnership. Priti Patel has also engaged in similar "disreputable, dishonest, and dangerous arguments," conflating the number of asylum seekers with genuine intent to arrive in the UK, and arguing that they were male migrants seeking economic relief when, in reality, the number of those fleeing persecution were much greater.[177] Thus, the enactment of a racialized, two-tier asylum system relegated certain nationalities to lower

173. Braverman, *supra* note 168.

174. *See* Rajeev Syal, *Does Suella Braverman Have Evidence to Link Boat Arrivals to Crime?*, THE GUARDIAN (Apr. 26, 2023, 1:47 PM), https://www.theguardian.com/politics/2023/apr/26/does-suella-braverman-have-evidence-to-link-boat-arrivals-crime.

175. Keelin Howard et al., *Is It a Crime to Seek Refuge?*, 43 CRIM. JUST. MATTERS 18, 18 (2001) (emphasis omitted).

176. *See Crimes Committed by Asylum Seekers or Illegal Immigrants Since 2020*, OFF. FOR NAT'L STAT.: FREEDOM OF INFO. (FOI) (Oct. 9, 2023), https://www.ons.gov.uk/aboutus/transparencyandgovernance/freedomofinformationfoi/crimescommittedbyasylumseekersorillegalimmigrantssince2020..

177. Frances Webber, *Impunity Entrenched: Policing the Borders*, INST. OF RACE RELS, (Jan. 17, 2022), https://irr.org.uk/article/policing-the-borders-impunity-entrenched/.

echelons of the social order, subjecting asylum claimants to discriminatory rules, undefined confinement, indefinite detention, deplorable living conditions, and indiscriminate criminalization of status.[178]

Haynes argues that the political elite have wantonly and collectively reframed asylum seekers, smugglers, and terrorists as a unified criminal entity, depicting them as a collective threat to British existentialism.[179] Migrant criminalization and overgeneralized narratives of their 'illegality' are thus state constructs conceived to undermine their legitimate and legally protected status.[180] The success of prejudiced policies like the UK-Rwanda Partnership hinges on the criminalization of asylum seekers to formally substantiate the violation of international human rights.[181] The characterization of asylum seekers as a threat to social unity is legitimized by divisive rhetoric espoused "by politicians and in the media, with words like "bogus," "economic migrants" arriving without authorisation, "abusers" of the system, and "illegal" people "deserving" of punishment."[182] The undesirable has been "universally recognized [as a] 'folk devil,' the 'usual suspect' par excellence."[183] Hostile portrayals and institutionalized illegality enhance the legitimacy of policies that seek to abolish international rights and, in doing so, threaten the stability of democratic institutions. "The depiction of asylum seekers in terms of liabilities, a risky group that needs to be prevented, contained and, preferably, repatriated, is one that permeates liberal democracies."[184] Consequently, illiberal approaches—progressed by divisive populist actors that violate liberal democratic institutions and aim to strip asylum seekers of their human rights by circumventing court rulings—are packaged and presented to the public as genuine, pragmatic, and reasonable safeguards. Illiberal measures are framed as imperative to shield 'normal' homogenous citizens from the perceived undesirability and deplorability of the 'other' while being systematized to uphold the mirage of protecting the sanctity of Britishness.

---

178. *See* Ana Aliverti, *Making People Criminal: The Role of the Criminal Law in Immigration Enforcement*, 16 THEORETICAL CRIMINOLOGY 417, 422 (2012).

179. *See* Haynes, *supra* note 8, at 1236.

180. *See* Simon Goodman & Susan A. Speer, *Category Use in the Construction of Asylum Seekers*, 4 CRIT. DISCOURSE STUD. 165 (2007).

181. *See* Nicholas P. De Genova, *Migrant "Illegality" and Deportability in Everyday Life*, 31 ANN. REV. ANTHROPOLOGY 419, 439 (2002).

182. Tural, *supra* note 163, at 59; *see also id.* at 419.

183. *See* Ben Bowling & Sophie Westenra, *'A Really Hostile Environment': Adiaphorization, Global Policing and the Crimmigration Control System*, 24 THEORETICAL CRIMINOLOGY 164, 178 (2020) (emphasis omitted).

184. Margaret S. Malloch & Elizabeth Stanley, *The Detention of Asylum Seekers in the UK: Representing Risk, Managing the Dangerous*, 7 PUNISHMENT & SOC'Y 53, 54 (2005).

Hostile portrayals of racial minorities have been used recurrently to justify the maltreatment of asylum seekers and endorse the expansion of an asymmetrical two-tier border externalization system. Turnbull notes that "the UK's nine immigration removal centers primarily incarcerate racialized people [underscoring] the salience of race for making sense of the logics of confinement" and the governing of illegality.[185] Accepting externalization as the norm reinforces the dispensability, alienation, and marginalization of immigrants as a whole.[186] The Tories' resolute defense of the UK-Rwanda Partnership, despite its illegality, can be explained by the dominant predisposition of neo-racist ideology found hidden under the thinly veiled outer layer of their Party. Political operatives, bureaucrats, and populist politicians tasked with progressing divisive and illiberal policies have developed masterful proficiency in negotiating the Argument from Genuine Fears. In doing so, they have reframed debates about the vulnerability of those fleeing persecution to condemn their presence as security risks and cultural pariahs.[187]

Considering the difference in refugee portrayals emerging from different global conflicts lends credence to the Argument from Genuine Fears and border externalization.[188] Objectively, Western governments and Western media organizations are both guilty of depicting the criminality of racialized migrants. Połońska-Kimunguyi describes the broad disparities in portraying migrants fleeing persecution from Ukraine who were offered asylum through generous resettlement schemes compared to those crossing the English Channel.[189] Ukrainians were seen as European, biologically identified as blond-haired and blue-eyed, and expressed as civilized compared to third-world refugees. They were shown as having fallen victim to the whims of a dictatorial regime through no fault of their own.[190] The same kindness offered through expansive resettlement schemes that welcomed Ukranian refugees to the UK was not extended to refugees from other 'undesirable' nations.

Anti-migrant sentiments have been utilized as a justification for population control and demographic engineering.[191] The dualized, segregationist, and exclusionary treatment of certain racial groups that

185. Turnbull, *supra* note 10, at 143.

186. *See* Kundnani, *supra* note at 10; *see id.* at 143.

187. *See* Perez, *supra* note 8, at 314.

188. *See* Eva Połońska-Kimunguyi, *War, Resistance and Refuge: Racism and Double Standards in Western Media Coverage of Ukraine*, LONDON SCH. ECON. & POL. SCI. (May 10, 2022), https://blogs.lse.ac.uk/medialse/2022/05/10/war-resistance-and-refuge-racism-and-double-standards-in-western-media-coverage-of-ukraine/.

189. *See id.*

190. *See id.*

191. *See id.*

embody the second tier epitomizes the prejudiced intentions of the UK-Rwanda Partnership architects. A system that promotes justice and equality while concurrently denying the rights of specific racial groups is rendered hypocritical and ineffective.

XI. THE ARGUMENT FROM GENUINE FEARS AND DIVISIVE POPULIST RHETORIC

When questioned about Braverman's inflammatory populist rhetoric, moderate Tory MPs accused Braverman of hurting the Tory brand by frequently provoking racial polarization.[192] One former senior Minister under Johnson indicated that Braverman is egregiously chauvinistic, remarking that the former Home Secretary is "not stupid, she believes she has a license to say these things because she's not white [b]ut all her language does is exacerbate hatred."[193]

Braverman unambiguously applies the fourth step by methodically outlining her minority status as a child of immigrants. This, her justification as a racialized minority, is integrated into her fallacious proposition that endorsed racially divisive ideologies and polarizing policy positions. "Saying so does not make one anti-immigrant, nor does it mean you are anti-immigration. I am the child of immigrants. And it is no betrayal of my parents' story to say that immigration must be controlled."[194] Her racial positionality affirms the infallibility of her policy. She frames her racially alienating perspectives as "practical argument[s] against controlled and illegal immigration," presenting her logic as unimpeachable.[195]

Populists have adopted seemingly pragmatic illustrations to address the migration influx, employing antagonistic depictions and derogatory generalizations.[196] Columnist Nesrine Malik stresses that Braverman leans on generalities to substantiate her anti-migrant attitudes.[197] Braverman ensures that her rhetoric incorporates "everyone who has migrated, not only the several cohorts over time ("illegals," "fake asylum seekers," or simply

192. *See* Aletha Adu et al., *Senior Conservatives Hit Out Suella Braverman's 'Racist Rhetoric'*, THE GUARDIAN, (Apr. 13, 2023, 4:12 pm), https://www.theguardian.com/world/2023/apr/13/senior-conservatives-hit-out-at-suella-bravermans-racist-rhetoric.

193. *Id.*

194. Braverman, *supra* note 168.

195. *Id.*

196. *See* Nesrine Malik, *In One Vulgar Swoop, Suella Braverman Has Humiliated Every Single Migrant in the UK*, THE GUARDIAN, (Oct. 2, 2023, 1:00 AM), https://www.theguardian.com/commentisfree/2023/oct/02/suella-braverman-migrant-uk-multiculturalism; *see also* De Genova, *supra* note 181, at 419; BARKER, *supra* note 11, at 12.

197. *See* Malik, *supra* note 196.

"the boats") that have served as the targets of the government's most extreme rhetoric and policies."[198] Adversarial stereotypical generalizations stand out prominently in the void between the second and third steps of the Argument from Genuine Fears *framework*. Moreover, rhetorical generalizations facilitate the illustration of endangered Britishness, notably as a threat posed by the racialized other. Malik asks:

> What level of assimilation does Braverman think is desirable? To what extent are we expected to shed the different religions, customs, foods and cultural heritages in order to render the UK a place where there is only one culture? Is it OK to attend a mosque, a synagogue, a temple? . . . . [T]here is no coherent answer to this of course, other than Braverman's repetition of a conveniently uncodified set of British values.[199]

Braverman's main concerns are not based on the distinction between race, ethnicity, and religion. Instead, in service to her populist strategies and overarching Tory policies, her anti-migrant rhetoric is meant to depict the racialized other as a viable threat to British homogeneity.

Accordingly, Barker proposes a reconceptualization to comprehend racial prejudice adopted by Tory-led Argument from Genuine Fears practice.[200] The UK-Rwanda Partnership's survival relies on an institutionalized subscription to the doctrine of cultural homogeneity. Tories market the proposition that lacking the protectionist measures to preserve "traditions, customs, beliefs, language – in a word, culture – there could be no society . . . . The fears are self-validating."[201] The reconceptualization advances the ideological proposition that racial prejudice ceases to be about outwardly loathing minorities or blatantly positioning them at the bottom of the social order without justification; rather, their undesirability is endowed to them because of their incapacity to assimilate. Furthermore, 'illegal' migrants will never achieve the backing of perfect assimilation; their dissimilarities and criminality are excessively too significant to gratify.

For the Tory Party, Braverman has succeeded in embodying the quintessentially homogenized minority. Conversely, the values, beliefs, customs, and traditions of asylum seekers are irreconcilable with British homogeneity. Thus, the logical fallacies adopted by Tories on combatting 'illegal' migration promote the perils that migrants pose to British homogeneity, and the only reasonable next step is externalization. Rationally minded, logically oriented British citizens daring to question the official policy adopted by the Tories and their proposed illegal deportation measures

198. *Id.*
199. *Id.*
200. *See* BARKER, *supra* note 11, at 16.
201. *Id.* at 17.

are concurrently generalized as woke, leftist, irrational individuals[202] and have, in the process, signified their own abandonment and betrayal of British values and demonstrated resistance to safeguarding British society. Braverman concurs that those who are worried about the illegality of asylum seekers, based on her own logically fallacious justifications, should not be ignored: "Dismissing as idiots or bigots, those members of the public who express legitimate concerns, is not merely unfair, it is dangerous."[203] However, historical Tory strategies bare the truth proposed by Braverman and her rhetoric. Other Tory Members of Parliament (MPs) have previously embraced the same Argument from Genuine Fears process to portray the cultural vulnerabilities manifested by the arrival of undesirable migration. Former MP John Stokes said:

> I came here [as an MP] only six years ago. I came to help my country. I have seen my task as that of trying to keep all that is best in England and to be able to hand on to my children, as my father handed to me, a country to be proud of, a homogenous nation sharing the same faith, history and background. I must make it clear that I do not blame the immigrants for coming – they came largely for the money – but I blame those who encouraged and still encourage them.[204]

Like Stokes, Braverman interrogates the genuine intentions of migrants arriving irregularly in the United States. She begrudgingly confesses that "some, perhaps many, were genuine refugees."[205] However, she qualifies the preceding premise: "But not all of them were."[206] Since trusting the authentic intent of ingenuine migrants arriving irregularly is an ineptly hazardous enterprise, she argues, "if immigration is uncontrolled, it makes it harder for society to adapt and accommodate new cultures and customs, and for communities to meld together."[207] Thus, migrants are inevitably a threat to the sanctity of cultural homogeneity. Affirming her resolute intent of protecting homogeneity, Braverman issues a sweeping indictment of multiculturalism, the very construct that binds the diverse social fabric of British and European societies. Thus, "uncontrolled immigration, inadequate integration, and a misguided dogma of multiculturalism have proven a toxic combination for Europe over the last few decades." [208]

202. *See* Webber, *supra* note 53, at 57.
203. Braverman, *supra* note 168.
204. BARKER, *supra* note 11, at 18 (quoting HC Deb (5 July 1976) (914) (Eng.)).
205. Braverman, *supra* note 168.
206. *Id.*
207. *Id.*
208. *Id.*

To ensure that her illogically fashioned and ambiguously distorted argument successfully achieves the desired outcome, she notably underlines the impossibility of migrant assimilation: "If people are not able to settle in our countries and start to think of themselves as British, American, French, or German, then something is going badly wrong."[209] The migrant's inability to integrate thus confirms the irrefutable threat they pose to national identity. And to Braverman, "[n]ational identity is not something invented in an ivory tower or by advertising executives. The nation-state has endured because it means something real to almost all of us."[210] Migrant values are not British, European, or Western values. Since migrant allegiances will never matriculate to the supposed superiority of Braverman's representation of British identity, and since British identity, according to her, is a homogenous concept that cannot be combined with the distorted tenets of multiculturalism, the undesirable migrant is rendered unwanted and unwelcomed.[211]

Braverman's unwavering support for the UK-Rwanda Partnership, up until her dismissal for inflammatory rhetoric about hate marches and homelessness, is difficult to comprehend.[212] Yet, her sentiments on migrants and border externalization epitomize the Argument from Genuine Fears process and the polarizing nature of the Tory Party in recent years. The Argument from Genuine Fears provides a blueprint for the scrutiny of Tory-oriented racial prejudice and divisive political rhetoric on race and migration. The Argument also explains why a racialized minority politician like Braverman would blatantly share her aspirations, her "dream," and her "obsession" to see asylum seekers deported to Rwanda.[213]

Political regimes have propagandized externalization policies by selling illogical narratives to rationalize and legitimize their strategies[214] despite the violations of international covenants.[215] According to Braverman, international humanitarian laws established to protect the most vulnerable threaten British values, and as a result, she argues that safeguarding Western

209. *Id.*

210. *Id.*

211. *See id.*

212. *See* Jill Lawless, *A Day After Britain's Prime Minister Fired Her, Suella Braverman Accuses Him of Being a Weak Leader*, ASSOCIATED PRESS, (Nov. 14, 2023, 10:15 AM), https://apnews.com/article/fired-braverman-british-sunak-government-8c101f1f08c80e750d2623cc61612feb.

213. *See* Lizzie Dearden, *Suella Braverman Says It Is Her 'Dream' and 'Obsession' to See a Flight Take Asylum Seekers to Rwanda*, INDEPENDENT, (Oct. 5, 2022, 10:10 AM), https://www.the-independent.com/news/uk/politipo/suella-braverman-rwanda-dream-obsession-b2195296.html.

214. *See* Emini & Tahiri, *supra* note 9.

215. *See generally* Victoria Colvin & Phil Orchard, *A Forgotten History: Forcible Transfers and Deportations in International Criminal Law*, 32 SPRINGER NATURE 51 (2021).

values must be supported by the restructuring of humanitarian protections established in the Refugee Convention: "Throughout the course of the Rwanda litigation through the courts, the Home Secretary has ramped up the rhetoric on the role of the European Convention on Human Rights and the Court in Strasbourg, stating that they are at odds with British values."[216] For Braverman, the Refugee Convention realized its intended purpose after World War II, asserting that reform would better align with the modern globalized order.[217] However challenging the task may be, one must objectively question any political intent seeking to legitimize internationally established human rights reform. Despite this, when speaking on the Illegal Migration Act, Braverman openly admitted that the legislation would test the limits and endanger the sanctity of international laws.[218] Thus, the intent of the Act, and indeed the UK-Rwanda Partnership, was based solely on the ambition of unrestrained and immoderate politicians to administer a policy that seeks to demographically engineer incompatible undesirability, guarantee the prominence of homogeneity, achieve objectives in cultural rebalancing, and realign the organizing principles of liberal democratic institutions.

XII. METHOD

This paper has provided a cross-examination of the illiberal and populist legislative agenda adopted by the Tories, the hostility of anti-migrant depictions, and the logically fallacious arguments employed to conjure support for the UK-Rwanda Partnership. Each piece of legislation enacted by the Tories was predicated on the promise that further regulations would reinforce deterrence, limiting asylum seekers from arriving in the UK irregularly. According to the Argument from Genuine Fears framework, the legislative agenda was aided by hostile rhetoric to legitimize the adoption of a two-tiered asylum system. To understand the rhetorical strategies of leading policy architects and to help explain the purpose of the Argument from Genuine Fears approach, this research considers the rhetoric adopted by former Home Secretary Suella Braverman on migration in her House of Commons speeches.

This study utilizes all speeches delivered by Braverman in the House of Commons (N=305) since her election in May 2015 until her dismissal as

216. Morgan & Willmington, *supra* note 8, at 107.

217. *See* Natasha Mellersh, *Braverman Questions Role of U.N. Refugee Convention*, INFOMIGRANTS, (Sept. 26, 2023), https://www.infomigrants.net/en/post/52099/braverman-questions-role-of-un-refugee-convention.

218. *See* Kwon, *supra* note 8.

Home Secretary by Sunak in November 2023.[219] The test examines migration rhetoric in comparison to other issues, employing the constructs of hardship, aggression, blame, exclusion, liberation, and human interest.

Speeches were collected using publicly available parliamentary proceedings.[220] The Hansard transcripts were edited to remove exchanges by others, ensuring that only Braverman's language appears in the sample. The sample consists of thirty-five speeches on migrants and migration, fifty-three speeches on Brexit, eight speeches on terrorism, eighty-three speeches on crime and criminal justice, forty-five speeches related to the economy and economic development, eight speeches on the military, sixty-nine speeches on social development (including healthcare, taxes, education, families, to other local constituency issues), and four uncategorized speeches. Other than migration, the remaining topics formed a comparison group (N=270) to compare her rhetoric across the identified constructs.

Finally, the sample is further divided to analyze speeches delivered before and after her promotion to Cabinet. The second test aims to assess whether there was a shift in rhetoric following her ministerial appointments. Braverman held several ministerial posts. She served as Attorney General under Boris Johnson (February 13, 2020 to September 6, 2022) and had two tenures as Home Secretary—first under Liz Truss (September 6, 2022 to October 19, 2022) and later under Rishi Sunak (25 October 2022 to 13 November 2023).[221]

This paper uses Diction 7.2.1[222] to analyze rhetorical constructs and determine whether Braverman is excessively harsh, more aggressive, overly condemning, unnecessarily exclusionary, and openly nationalistic when discussing migrants and migration in juxtaposition to speeches on other issues.

A. Variables

1. Hardship

The hardship construct focuses on qualities expressing "hostile actions . . . censurable human behavior . . . unsavory political outcomes . . . normal

219. *See* Nikhil Batra, *Who Is Suella Braverman? Know Why the UK Minister Is Fired*, JAGRAN JOSH (Nov. 14, 2023, 9:14 PM), https://www.jagranjosh.com/general-knowledge/know-why-suella-braverman-is-fired-1699976279-1.

220. *See* Hansard, UK PARLIAMENT, https://hansard.parliament.uk.

221. *See Suella Braverman: Parliamentary Career*, UK PARLIAMENT: HOUSE OF COMMONS, https://members.parliament.uk/member/4475/career (last visited May 23, 2025).

222. *See* DIGITEXT, INC., DICTION 7.2 HELP (2013) (referring to the software manual for reader's reference) [hereinafter DICTION MANUAL].

human fears . . . [and] capacities (error, cop-outs, weakness)."[223] Rhetoric that emphasizes hardship capitalizes on social anxieties associated with adverse events. Hardship also reflects immoral behavior, weakness, or insecurity and invokes fear as it relates to the human condition. According to the Argument from Genuine Fears framework, Braverman's speeches concerning migrants and migration are hypothesized to contain more hardship-oriented rhetoric in comparison to all other issues.[224]

2. Aggression

The aggression construct examines two dimensions—one centered on competition and opposition and the other on force and coercion.[225] Aggression encompasses rhetoric related to obliteration, resistance, and social domination.[226] Given that the Tory approach often emphasizes aggression on migration, the Argument from Genuine Fears framework provides rhetorical justification for Braverman's use of aggressive language. Accordingly, Braverman's speeches concerning migrants and migration are hypothesized to contain more aggressive rhetoric than her speeches across all other issues.

3. Blame

The blame construct examines political incorrectness, denigration in verbiage, social immodesty, malevolence, and conveys culpability.[227] It also considers descriptors describing unfortunate and ill-fated situations.[228] Since blame for the encumbered social conditions attributed to migrants is commonly expressed in the Tory approach, according to the Argument from Genuine Fears framework, Braverman's speeches concerning migrants and migration are hypothesized to contain more blame-oriented language on migrants and migration than on all other issues.

4. Exclusion

The exclusion construct focuses on the nature of social division, seclusion, and isolationist rhetoric.[229] It considers both active and passive sentiments

223. *Id.* at .7.
224. *See generally* BARKER, *supra* note 11, at 14–16.
225. *See* DICTION MANUAL, *supra* note 223, at 8.
226. *See id.*
227. *See id.* at 7.
228. *See id.*
229. *See id.* at 10.

that evoke separation and segregationist ideals.[230] Exclusion conveys purposeful and accidental perspectives reflecting exclusionary political principles like secession, ostracism, discrimination, small-mindedness, loneliness, right-wing ideologies, and nihilism.[231] According to the Argument from Genuine Fears framework, Tories have frequently promoted the exclusion of migrants, thus Braverman's speeches concerning migrants and migration are hypothesized to contain greater exclusionary rhetoric in comparison to other issues.

5. Liberation

Liberation is a political construct reflecting individualism and autonomy and a "rejection of social conventions (unencumbered, radical, released)."[232] It conveys ideas of "suffrage, liberty, freedom, emancipation…exodus, riotous[ness, and] deliverance."[233] Since Tory rhetoric on migrants often reflects a need to protect British cultural homogeneity, promote nationalism, and oppose perceived threats from outsiders, according to the Argument from Genuine Fears approach, Braverman's speeches concerning migrants and migration are hypothesized to evoke stronger nationalist sentiments than on other issues.

6. Human Interest

The human interest construct conveys an understanding of the human condition, emphasizing human activities, behavior, authentic experience, and realistic human actions.[234] Higher human interest scores reflect a focused interest in subjects and their behavior.[235] A higher score on migrants and migration relative to other issues would confirm Braverman's targeted interest in them and a lack of interest in other issues.

XIII. RESULTS

Table 1 reports construct means, standard deviations, and p-values. To analyze rhetoric, independent sample t-tests were conducted to compare the thirty-five speeches on migration with Braverman's other speeches. Table 2 presents the results of independent sample t-tests, illustrating changes in

230. *See id.*
231. *See id.*
232. *Id.*
233. *Id.*
234. *See id.* at 9.
235. *Id.*

means and percentage shifts in rhetorical constructs before and after her promotion to Cabinet.

Table 1: Construct–Migration Rhetoric vs All Other Rhetoric

Construct	M/SD	Other Rhetoric N = 270	Migration Rhetoric N = 35	P-Value
Hardship	M	2.44	3.89	0.016
	SD	3.36	2.96	
Aggression	M	1.84	3.09	0.002
	SD	2.22	2.43	
Blame	M	.72	1.74	<0.001
	SD	1.09	1.92	
Exclusion	M	1.09	1.85	0.008
	SD	1.45	2.41	
Liberation	M	1.17	1.38	0.534
	SD	1.95	1.26	
Human Interest	M	9.72	14.91	<0.001
	SD	8.06	10.82	

Table 2: Pre-Ministerial and Post-Ministerial Appointment Change in Rhetoric

Construct	Pre-Ministerial Appointment Mean (SD)	N	Post-Ministerial Appointment Mean (SD)	N	M Change	Percentage Change (+/-)	Post-Ministerial P-values
Hardship Migration Speeches	1.66 (2.01)	16	5.76 (2.26)	19	4.10	+247%	0.490
Hardship All Other Speeches	1.69 (2.84)	211	5.14 (3.71)	59	3.45	+204%	
Aggression Migration Speeches	1.57 (1.81)	16	4.37 (2.16)	19	2.80	+178%	0.133
Aggression All Other Speeches	1.44 (1.79)	211	3.27 (2.93)	59	1.83	+127.08%	
Blame Migration	0.56 (.95)	16	2.73 (1.99)	19	2.17	+387.5%	<0.001
Blame All Other Speeches	0.56 (.93)	211	1.31 (1.40)	59	0.75	+133.9%	
Exclusion Migration Speeches	1.69 (3.33)	16	1.99 (1.31)	19	0.30	+17.75%	0.027
Exclusion All Other Speeches	1.07 (1.45)	211	1.13 (1.48)	59	0.06	+5.61%	
Liberation Migration Speeches	0.85 (1.14)	16	1.83 (1.21)	19	0.98	+115.29%	<0.001
Liberation All Other Rhetoric	1.28 (2.15)	211	0.78 (.85)	59	0.50	-39.06%	
Human Interest Migration Speeches	6.56 (5.72)	16	21.93 (8.94)	19	15.38	+234.70%	<0.001
Human Interest All Other Speeches	9.01 (8.13)	211	12.27 (7.31)	59	3.26	+36%	
Total Migration Speeches	12.89 (12.43)	16	38.62 (13.02)	19	25.73	+199.3%	<0.001
Total All Other Speeches	15.05 (13.33)	211	23.89 (12.73)	59	8.84	+58.6%	

A. Results: Hardship Rhetoric

Braverman utilizes more hardship-oriented rhetoric on migration (M: 3.89; $p<0.016$) than other constructs, except for human interest. Hardship evoked fear of the 'other' and portrayed the undesirability of migrants. Braverman employs hardship rhetoric on migration, expressing hostility, unsavory political outcomes, censurable human behavior, and the immorality of such actions, reflecting her negative perceptions of migrants. Although her hardship rhetoric increased by 247% after her Cabinet promotion, the results are statistically insignificant ($p<.490$), indicating that the variability in her language patterns makes consistency harder to identify. The increased use of hardship rhetoric before and after her promotion to Cabinet does not show any systematic difference.

B. Results: Aggression Rhetoric

Regarding aggression, Braverman employs a higher degree of aggressive rhetoric on migration (M = 3.09) compared to all other speeches

delivered (M=1.84) with statistically significant results (p<.0.001). According to the Argument from Genuine Fears framework, aggression and othering rhetoric on migrants and migration are central to the Tory approach.[236] More prominently, after her promotion to Cabinet, Braverman's aggressive response to migration and migrant-related rhetoric increased by 178% compared to 127% on other topics, with marginally significant differences (p<0.133). Braverman's aggressive rhetoric toward migrants reflects her willingness to adopt a more hostile and forceful tone on migration issues.

C. Results: Blame Attribution

Braverman employs significantly more blame-ridden rhetoric, assigning culpability to migrants (M=1.74) compared to other issues (M=.72; p<0.001). Braverman's rhetoric on blame and blameworthiness of migrants rose exponentially by 387.5% after her promotion to Cabinet (p<0.001). Blame demonstrated the most significant increase in her rhetoric, far surpassing all other constructs tested, highlighting her attitudes and polarizing tendencies as a minister.

D. Results: Exclusionary Language

On exclusion, Braverman reinforces attitudes of isolation, seclusion, divisiveness, and marginalizing migrants within society (M=1.85) compared to the other topics (M=1.09; p<0.008). In line with the Argument from Genuine Fears, Braverman's exclusionary rhetoric on migrants increased by nearly 18% (p<0.027) compared to only 5.61% on other topics after her promotion to Cabinet. Braverman adopted more polarizing rhetoric following her rise in power, suggesting that exclusionary rhetoric is central to her political strategy.

E. Results: Liberation Rhetoric

Braverman's overt nationalistic rhetoric on migrants and migration is statistically insignificant (p<0.534) compared to other topics. However, after her promotion to Cabinet, Braverman increased liberation-related rhetoric by 115% on migrant-related issues while reducing it by 39% on other topics. Braverman's post-Cabinet strategy emphasizes liberation rhetoric, reflecting nationalistic tendencies to ostracize migrants. Liberation emerges as a

236. *See* BARKER *supra* note 11, at 15.

cornerstone of Braverman's post-Cabinet strategy to reject migrants in British society ($p<0.001$).

F. Results: Human Interest Appeal

Human interest as a construct analyzes rhetoric related to humanity and humanism and evaluates Braverman's rhetoric on migration relative to other issues impacting the British public. The results show that Braverman focuses more on the status of migrants ($M=14.91$; $p<0.001$) than on issues affecting British citizens ($M = 9.72$). This construct highlights Braverman's disproportionate focus on migrants in her speeches. After her promotion, disproportionality became central to her strategy, with her human interest rhetoric on migrants and migration increasing by 234% compared to 36% on other issues ($p<0.001$).

G. Total Rhetorical Intensity Across Constructs

The total score reflects divisiveness, polarization, and injustice, demonstrating Braverman's overt and transgressive rhetoric as a means to legitimize her anti-migrant stance, externalization policies, and the othering of groups. The results show that Braverman's anti-migrant rhetoric increased by nearly 200% after her promotion to Cabinet across all constructs compared to an increase of 60% on all other topics ($p<0.001$).

XIV. DISCUSSION AND CONCLUSION

Braverman and the Tories' disdain for migrants and the racialized other, along with the justifications employed to illiberally defend border externalization policies and the revocation of internationally protected human rights, is evident. Braverman's overall approach to migrants and migration, marked by a 199.3% shift in anti-migrant rhetoric as a senior Cabinet minister, reflects a worrying change in attitudes toward human rights and the protection of vulnerable populations.

Consterdine argues that adopting illiberal policies like externalization "will be done at all costs, even through unworkable, unethical and unevidenced policies."[237] Morgan and Willmington advocated that the government must adopt "a less ideology-fuelled and more research-based policy" to address the current crisis.[238] The new UK government may explore alternatives to criminalizing vulnerability and focus on combatting human

237. Consterdine, *supra* note 12.

238. Morgan & Willmington, *supra* note 8, at 109.

smuggling while also reassessing discriminatory and racially divisive resettlement schemes. The rise of right-wing and far-right-wing populist attitudes has only served to instigate anti-migrant sentiments, undermining asylum protections and reinforcing discriminatory policies.[239]

The policy review, Argument from Genuine Fears framework, and rhetorical analysis of speeches delivered by a senior cabinet minister and key policy architect demonstrate how the Tories have sought to justify the UK-Rwanda Partnership. The findings of the rhetorical analysis reveal that Braverman's divisive and polarizing rhetoric on migration is strategically motivated. The updated Argument from Genuine Fears framework outlines that Braverman's minority status is tokenized on the Tory political platform, projecting strength and policy legitimacy despite its illiberal nature and overt neo-racist tonality.

In concluding this analysis, it is impossible to ignore the level in which neo-racist attitudes have influenced senior members of the Tory Party—a party that governed a multiracial nation for fourteen years.[240] The UK-Rwanda Partnership diverted attention from the root causes of asylum and reinforced a racist two-tier asylum system that criminalized asylum seekers for failing to adhere to impossible standards embedded in restrictive resettlement schemes. Echoing some of the darkest chapters of British colonialism, the Tories adopted the UK-Rwanda Partnership to maliciously perpetuate dehumanization by criminalizing race and migrant status in defense of cultural purity.

The divisive rhetoric adopted by Braverman and the Tories has surreptitiously enforced through the state apparatus a pledge that the most "vulnerable people will be exposed to further harm, hostility, and xenophobia."[241] Despite their fervent chase for a flawed border externalization policy, pinpointing the threat to the nation-state remains genuinely unclear—is it the undesirable racialized migrant fleeing persecution and seeking refuge under the protection of a set of predetermined international laws or the incongruous and deceptive illiberal actions by the Tories to outmaneuver and weaken liberal democratic institutions to achieve border externalization?

239. *See* Kwon, *supra* note 8.

240. *See* Sam Knight, *Time's Up*, THE NEW YORKER, (Apr. 1, 2024).

241. Kwon, *supra* note 8.

EFFECTIVE U.S. INTERCHANGE FEE REGULATION THAT WILL ENSURE CONSUMER WELFARE BASED ON THE EUROPEAN UNION'S IFR

Luka Émile Vihuto*

Abstract

The single most influential credit card-related fee is widely unregulated in the U.S. The interchange fee, which network providers like Visa and Mastercard set, cost merchants and consumers upwards of $133.75 billion in 2023. Network providers have worked extremely hard to keep the regulation of these fees at bay while abusing their competitive advantages to charge merchants more year after year while simultaneously restricting their economic freedom of externalizing these costs. In a landmark legislative act, the E.U. chose to regulate these interchange fees for credit cards in 2015 and has since kept close track of how this legislation has affected the credit card market. Through this paper, it will become clear how regulatory reforms in the U.S. based on the 2015 E.U. Regulation are a highly effective way of restoring consumer welfare in the current U.S. credit card market.

While most academic publications in the U.S. have singled out specific issues, this paper proposes regulatory solutions that target multiple elements of consumer welfare, specifically meant to ensure pricing transparency and a competitive pricing environment through enabling choice. Merchants will be able to reject payments with certain credit cards

* Luka Vihuto graduated with a Mag. Iur. from the University of Cologne in 2023, specializing in corporate and commercial law. He earned his LL.M (Business Law) in 2024 from the University of Texas School of Law, and is currently studying in preparation for the New York Bar Exam while working for his mentor. Thanks to my parents for their support and to Hayden Hill, Niklas Häggmark and Philip Hittmeyer for their critical review and comments. Thanks also to the SWJIL editing staff for their great work. This paper was developed as part of the seminar 'Credit Cards in Transition' taught by Prof. Angela K. Littwin at UT Law. Email the author at l.vihuto@gmail.com.

while being able to select alternative processing networks if they accept the card. Finally, at the core, merchants all around the country will be able to surcharge for credit card transactions and thereby give the informed consumer the final say over the means of payment and the costs associated with it.

I. BACKGROUND

The regulation of interchange fees has long been the subject of intense debates between advocates for consumer protection, regulators,[1] and providers of transaction processing networks ("network providers").[2]

1. *See generally* Kenley Young, *Is Congress Going to Kill Rewards?*, NERDWALLET (Feb. 23, 2024, 11:26 AM), https://www.nerdwallet.com/article/credit-cards/is-congress-going-to-kill-credit-card-rewards; Consumer Fin. Prot. Bureau, *CFPB Report Finds Credit Card Companies Charged Consumers Record-High $130Billion in Interest and Fees in 2022*, CFPB, (Oct. 25, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-finds-credit-card-companies-charged-consumers-record-high-130-billion-in-interest-and-fees-in-2022/ (arguing that consumers stay in debt while providers profit).

2. *See Excessive Swipe Fees and Barriers to Competition in the Credit and Debit Card Systems: Hearing Before the U.S. S. Judiciary Comm.*, 117th Cong. 6, (2022) (testimony of Ed Mierzwinski, Senior Director, Federal Consumer Programs, U.S. PIRG); Samuel J. Merchant, *Merchant Restraints: Credit Card Transaction Surcharging and Interchange Fee Regulation in the Wake of Landmark Industry Changes*, 68 OKLA. L. REV., 327, 331 (2016); *Credit card fees account for $3 B in back-to-school costs*, THE GREEN SHEET (July 20,

Interchange fees are meant to compensate for facilitating and processing card transactions and are set by network providers on behalf of banks, consumers, and merchants.[3] In order to facilitate a transaction, the cardholder's bank that issues the card ("issuer") must place a network on their card, while the merchant needs to accept transactions that are routed through this processing network.[4] Network providers typically set different fees for different credit card products, typically higher fees for high-rewards cards and lower fees for low-rewards cards.[5] When a transaction is made, the merchant's bank ("acquirer") will transfer the transaction fee to the issuer, who passes a portion on to the network provider.[6] Acquirers usually compensate for having to pay interchange and other fees by charging the merchants a merchant discount fee ("MDF"). In turn, merchants typically compensate for having to pay the MDF by passing the costs down to consumers in the form of adjusted prices or, in some cases, surcharges.[7] It is important to understand that if enough issuers brand their card with a specific network, merchants will tend to accept the network.[8] This is why network providers compete with issuers by setting high interchange fees, a portion of which issuers keep as revenue.[9]

At its core, the debate surrounding interchange fees is about consumer welfare, with ever-rising "swipe fees" having cost merchants a yearly average of $135.75 billion in 2023, more than twice as much as in 2019.[10] Because merchants pass transaction costs through, these fees can cost consumers up to $1000 per household annually.[11] In 2019 Visa and Mastercard processed "83% of all general-purpose credit card transactions in

2023), http://www.greensheet.com/newswire.php?newswire_id=57792&search_string=swipe%20fees.

3. *See* Merchant, *supra* note 2, at 331-34.

4. *See id.* at 339.

5. *See id.* at 340.

6. *See id.* at 331.

7. *Id.* at 332-33 (describing the fee system on merchants and consumers).

8. Complaint at 6-7, United States v. Visa Inc., 1:21-cv-07214 (S.D.N.Y., Sept. 24, 2024).

9. *See* Merchant, *supra* note 2, at 339 ("Issuing banks generate revenue directly from cardholders in the form of interest, fee, and other finance changes . . . .").

10. Jack Caporal, *Average Credit Card Processing Fees and Costs in 2024*, MOTLEY FOOL MONEY (Dec. 10, 2024), https://www.fool.com/the-ascent/research/average-credit-card-processing-fees-costs-america/; *see generally* Press Release, J. Craig Shearman, Merch. Payments Coal., Merchants Call for Action as Swipe Fees Rise Again (Mar. 21, 2023), https://merchantspaymentscoalition.com/merchants-call-action-swipe-fees-rise-again; Press Release, J. Craig Shearman, Nat'l Retail Fed'n, Retailers Say Delay of Visa/Mastercard Swipe Fee Increase Should be Made Permanent (Mar. 16, 2021), https://www.marketscreener.com/news/latest/Retailers-Say-Delay-of-Visa-Mastercard-Swipe-Fee-Increase-Should-be-Made-Permanent-32708339/.

11. Nat'l Retail Fed'n, *Swipe Fees*, NRF, https://nrf.com/advocacy/policy-issues/swipe-fees (last visited Jan. 1, 2025).

the U.S." and are by far the largest network providers.[12] They claim interchange fees are simply the cost of doing business and benefit merchants by increasing the number of customers, revenue, and guaranteeing payment services.[13] According to providers, consumers benefit because the revenue from the interchange fees funds credit, rewards programs, and fraud prevention and detection services.[14] In reality, merchants and consumers hardly hold any bargaining power, while network providers and issuers are left to inflate their profits and market shares.[15] With the cost of credit at an all-time high[16] and the total volume of U.S. credit card transactions forecast to reach 74,962.8 in 2028, the acute need for effective regulation is evident.[17]

II. INTRODUCTION

Current U.S. federal regulation of interchange fees is ineffective at ensuring consumer welfare. Instead, it creates and perpetuates an anticompetitive price-setting environment that allows network providers to inflate profits through imposing contractual restraints on merchants.[18] Such restraints include "honor-all-card" rules that obligate merchants to accept high-fee credit cards and "network exclusivity rules" that require merchants to process transactions exclusively via one network and hinder new network providers from entering the market.[19] There are also rules that allow network providers to charge so-called 'blended' MDFs that misconstrue the true cost of interchange fees.[20] In addition, a lack of unified rules allowing merchants

12. BD. OF GOVERNORS FED. RSRV. SYS., REPORT TO THE CONGRESS ON THE PROFITABILITY OF CREDIT CARD OPERATIONS OF DEPOSITORY INSTITUTIONS 7 (2020) (referencing HSN Consultants, Inc., *The Nilson Report Issue 1169*, NILSON REPORT (Feb. 2020), https://nilsonreport.com/newsletters/1169/).

13. *See* Edward Wyatt, *Retailers Push Fed for Yet Lower Debit Fees*, N.Y. TIMES (Nov. 23, 2011), https://www.nytimes.com/2011/11/24/business/retailers-push-for-yet-lower-debit-fees.html.

14. *Id.*

15. European Economic and Social Committee 2013 O.J. (C 170/78) ¶ 1.2 [hereinafter O.J.]; Press Release, Off. of Pub. Aff., Justice Department Sues American Express, Mastercard and Visa to Eliminate Rules Restricting Price Competition (Oct. 4, 2010), https://www.justice.gov/opa/pr/justice-department-sues-american-express-mastercard-and-visa-eliminate- rules-restricting.

16. *See* CONSUMER FIN. PROT. BUREAU, THE CONSUMER CREDIT CARD MARKET 49-50 (2023).

17. MARKETLINE INDUSTRY PROFILE, CREDIT CARDS IN THE UNITED STATES 14 (2024), https://advantage.marketline.com/Analysis/ViewasPDF/united-states-credit-cards-152299.

18. *See* Merchant, *supra* note 2, at 330-31.

19. *See id.* at 342, 344.

20. *See id.* at 335.

to surcharge for credit card transactions curtail fee transparency, consumer choice, and, thereby, bargaining power.

In 2010, Congress regulated interchange fees for debit card transactions via the Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[21] Analysis of the Durbin Amendment, but more importantly, analysis of E.U. Regulation 2015/751 ("Interchange Fee Regulation" or "IFR") and its effects will ensure that regulatory amendments result in more competitive price-setting and ultimately benefit consumer welfare in the U.S. market.[22] The IFR includes several rules that aim to regulate the contractual restraints imposed on merchants. Firstly, it regulates "honor-all-cards" rules.[23] Adopting similar regulations will strengthen merchants' ability to exert pressure on pricing practices.[24] Further, the IFR mandates issuers to enable the processing of credit card transactions through unaffiliated networks ("co-badging") and gives merchants the right to select a network at the point of sale.[25] Adopting rules to similar effect will further strengthen merchant bargaining positions. Lastly, the IFR requires networks to charge merchants an unblended MDF,[26] adoption of which will lead to more transparent pricing and ensure not only that merchants and consumers can make informed choices but also that merchants pass any savings through to consumers.

Every regulatory solution proposed in this article is based on IFR regulation. They have been amended based on observed shortcomings of both the IFR and similar regulations set forth in the Durbin Amendment. Reforms would lead to competitive pricing and improved welfare by strengthening the value of consumer and merchant choice of processing network and by lowering the barrier of entry for new network providers.

21. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 2068 (2010).

22. *See* Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on Interchange Fees for Card-Based Payment Transactions, 2015 O.J. (L 123/1) ¶ 37 [hereinafter Regulation (EU) 2015/751].

23. *See id.* at art. 10.

24. *See id.*

25. *See id.* at art. 8.

26. *See id.* at art. 9, 12.

III. CURRENT PROBLEMS OF U.S. INTERCHANGE FEE REGULATION

A. Contractual Merchant Restraints

1. Honor-All-Cards Rules

Honor-all-cards ("HAC") rules hold that if a merchant accepts *any* credit card product from a network provider, it must accept *all* credit card products from this network provider.[27] This keeps merchants from leveraging their market power which lies in accepting or denying the transaction fees associated with a particular card product; thus, HAC rules hinder competitive interchange fee pricing. In other words, if a market for high-fee cards is guaranteed because merchants are forced to accept them, network providers have no reason to lower their transaction processing fees.

Network providers include HAC rules in their merchant rules.[28] They typically entail two dimensions.[29] First, an obligation of the merchant to accept a credit card branded by a particular network provider regardless of issuer ("honor-all-issuers"), meaning if a merchant accepts a Visa-branded card issued by Chase, it must accept a Visa-branded card issued by the Bank of America.[30] Secondly, HAC rules can obligate merchants to accept all products offered under the network provider's brand ("honor-all-products"). In the case of Visa, if a merchant accepts any Visa credit card product, for example, the low-reward "Traditional Rewards" card, it must also accept all other Visa credit cards ("Visa Infinite Spend Qualified," "Visa Infinite Spend Not Qualified," "Visa Signature Preferred," "Visa Signature").[31] Importantly, in an all-or-nothing fashion,[32] if merchants accept credit cards with lower interchange fees, typically non- or low-reward cards, they must accept high-reward cards with higher interchange fees.[33] In the case of Visa,

27. *See* Merchant, *supra* note 2, at 344.

28. *See* VISA, VISA CORE RULES AND VISA PRODUCT AND SERVICE RULES 110 (2024), https://usa.visa.com/content/dam/VCOM/download/about-visa/visa-rules-public.pdf; *see also* MASTERCARD, MASTERCARD RULES 325 (2025), https://www.mastercard.us/content/dam/public/mastercardcom/na/global-site/documents/mastercard-rules.pdf.

29. *See* RESERVE BANK OF AUSTRALIA, REFORM OF THE EFTPOS AND VISA DEBIT SYSTEMS IN AUSTRALIA 40 (2005), https://www.rba.gov.au/payments-and-infrastructure/debit-cards/consult-doc-feb05/pdf/consult-doc-feb05.pdf (listing the "honor all issuers rule" and "honor all products rule"); *see also* Regulation (EU) 2015/751 at para. 37.

30. *See* RESERVE BANK OF AUSTRALIA, *supra* note 29, at 40.

31. VISA, VISA USA INTERCHANGE REIMBURSEMENT FEES, CONSUMER CREDIT INTERCHANGE REIMBURSEMENT FEES 7 (2024), https://usa.visa.com/content/dam/VCOM/download/merchants/visa-usa-interchange-reimbursement-fees.pdf.

32. Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 HARV. J. LEGIS. 12 (2008).

33. *Id.*

the current interchange fee for a "Visa Infinite Spend Qualified" transaction at a restaurant can be up to 2.60% of the total amount charged[34] while the interchange fee for a Visa "Traditional Rewards" card transaction will only be 2.20% of the amount charged,[35] a significant difference over a given number of transactions. In unison with the lack of a statutory fee cap, HAC rules mean that network providers can freely set interchange fees for high-fee cards and ensure that merchants will accept them.[36] Contrary to claims by network providers, HAC rules restrain trade and merchants gain no advantage by accepting these high fee cards.[37] The cardholders of high-fee, high-reward cards usually have the purchasing power for products they purchase with their credit card,[38] meaning they would likely have made the purchase regardless of whether the merchant accepts their credit card or not. HAC rules, therefore, serve no purpose to consumers or merchants.

2. Blended Merchant Discount Fees

MDFs, as defined in the introduction, are charged from acquirer to merchant and typically comprise three fees: the interchange fee, which the acquirer pays to the issuer, the network fee, which the acquirer pays to the network provider, and the processing fee, which the acquirer keeps.[39] Acquirers can pursue different models when charging merchants MDFs. Large merchants are typically charged under the "interchange plus plus" model, which assesses all three fees individually.[40] Large merchants prefer

34. VISA, *supra* note 31, at 8.

35. *Id*. at 9.

36. Defendant's Memorandum in Support of Final Approval of Definitive Class Settlement Agreement at 10, *In re* Payment Card Interchange Fee and Merch. Disc. Antitrust Litig., E.D.N.Y.R (2013), (1:05-md-01720-JG-JO, Document 2110), https://paymentcardsettlement.com/Content/Documents/Defendants%20Memorandum%20in%20Support%20of%20Final%20Approval.pdf.

37. Levitin, *supra* note 32, at 16; *see also* Wyatt, *supra* note 13; *see generally Overview of Interchange and its Value,* ELECTRONIC PAYMENTS COALITION (June 16, 2021), https://electronicpaymentscoalition.org/resources/overview-of-interchange-and-its-value/.

38. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 16, at 88.

39. Fumiko Hayashi, *The New Debit Card Regulations: Effects on Merchants, Consumers, and Payments System Efficiency*, 98 ECON. REV. FED. RSRV. BANK KAN. CITY J. 89, 97 (2013), https://www.kansascityfed.org/Economic%20Review/Economic%20Review/documents/1625/The_New_Debit_Card_Regulations_Effects_on_Merchants_Consumers_and_Payments_System_Effi.pdf.

40. Kathleen A. McConnell, *The Durbin Amendment's Interchange Fee and Network Non-Exclusivity Provisions: Did the Federal Reserve Board Overstep Its Boundaries*, 18 N.C. BANKING INST. 627, 634 (2014), https://scholarship.law.unc.edu/ncbi/vol18/iss2/16/ (first citing Fumiko Hayashi, *The New Debit Card Regulations: Effects on Merchants, Consumers, and Payments System Efficiency*, 98 ECON. REV. FED. RSRV. BANK KAN. CITY J. 89, 97 (2013); then citing David S. Evans et al., *Economic Analysis of Claims in Support of the "Durbin Amendment" to Regulate*

individual pricing because it is more transparent and directly reflects an often individually negotiated interchange fee. In contrast, smaller merchants typically choose to be charged a 'blended' rate, which either entails a flat fee, a percentage of the transaction value, or a percentage of the total transaction value over a given period.[41] This model is popular because it allows for easier budgeting[42] and because the flat fee is charged irrespective of card type and brand.[43] However, being charged a blended fee has multiple drawbacks.

First, when the acquirer charges a blended fee, changes in interchange fees are not reflected in the blended rate until it is recalculated in its entirety.[44] If fees are determined by total transaction value over a given period, this might only be quarterly, semiannually, or even annually. Second, a blended fee is much less transparent because merchants cannot individually assess the interchange fees charged by card type, brand, or transaction value.[45] If the merchant is charged a flat fee this could result in them paying more than the applicable interchange rate for a single transaction.[46] Finally, a blended fee allows acquirers to make up for losses in interchange revenue by adjusting other fees and keeping the blended rate near its previous level. This hinders the pass-through of any reduced interchange fee. While blended fees might be preferable to some merchants due to their administrative ease, the fact that they make fees less transparent and are frequently exploited by acquirers means they pose an issue for effective regulation of interchange fees with the goal of competitive pricing.

3. Network Exclusivity Rules

There are no regulations that hinder network providers from including clauses in their agreements that tie merchants or acquirers exclusively to one network. In a few cases, these 'exclusivity clauses' might be part of a negotiated agreement with large merchants to offer lower interchange fees,[47] but by and large, such clauses are detrimental for merchants because they

Debit Card Interchange Fees 2 n.5 (Visa, Inc., Working Paper 1843628, 2011) (2009); and then citing Debit Card Interchange Fees and Routing, 76 Fed. Reg. at 43,396 n.17).

41. *Id.* (first citing Debit Card Interchange Fees and Routing, 76 Fed. Reg. at 43,396 n.17; and then citing Fumiko Hayashi, *The New Debit Card Regulations: Effects on Merchants, Consumers, and Payments System Efficiency*, 98 ECON. REV. FED. RSRV. BANK KAN. CITY J. 89, 97 (2013)).

42. Hayashi, *supra* note 39, at 97.

43. *Id.* (listing lack of resources as the reason it is preferred by smaller merchants).

44. *See id.* at 98.

45. *See id.* at 97 (stating that larger merchants prefer the interchange plus fee structure).

46. McConnell, *supra* note 40, at 634-35.

47. David Chang, *Will Costco Ever Accept Another Type of Credit Card?*, THE GLOBE AND MAIL (Mar. 10, 2023), https://www.theglobeandmail.com/investing/markets/stocks/V-N/pressreleases/14963667/will-costco-ever-accept-another-type-of-credit-card/.

give networks an incentive to set their interchange fees higher than their competitors to attract more issuers.[48] In other words, once the merchant is tied to a processing network through an exclusivity clause, network providers can drive interchange fees up and market themselves to issuers, who keep a portion of the interchange fee as revenue. This substantially restricts competition for issuers amongst network providers[49] by allowing "dominant networks . . . to raise their network fees . . . without concern for lost transaction volume because merchants have no alternatives for routing transactions."[50] A consequence of tying merchants to one network provider is that new or smaller network providers are prevented from competing for merchants and for issuers because they can neither offer interchange fees as high as large networks, nor access merchants that are tied to dominant processing networks through exclusivity clauses. In order to achieve competitive pricing, exclusivity clauses must be banned.

B. Regulation of Surcharges

Adding to these contractual restraints, unclear and fractionated surcharge provisions mean that most merchants are left to externalize the excessive costs of transaction processing by raising product prices. Current surcharge rules are the cause of three main issues: (1) regressive cross-subsidization, (2) unfair competitive advantages of large merchants over small ones, and (3) confusion and administrative difficulty that can deter merchants from imposing surcharges in the first place.[51]

Generally, U.S. federal law allows merchants to surcharge if they give network providers 30 days' notice of their intention to do so and disclose the surcharge to the consumer at the point of sale ("POS") and on the receipt. However, because the federal surcharge statute is not protected many states

48. Hayashi, *supra* note 39, at 98; *see also* United States v. Visa USA, Inc. 163 F. Supp. 2d 322, 333 (S.D.N.Y. 2001).

49. U.S. GOV'T ACCOUNTABILITY OFF., CREDIT AND DEBIT CARDS: FEDERAL ENTITIES ARE TAKING ACTIONS TO LIMIT THEIR INTERCHANGE FEES, BUT ADDITIONAL REVENUE COLLECTION COST SAVINGS MAY EXIST, at 56 app. II, (2008), https://www.gao.gov/assets/gao-08-558.pdf.

50. NACS v. Bd. of Governors of Fed. Rsrv. Sys., 958 F. Supp. 2d 85, 90 (D.D.C. 2013), rev'd, 746 F.3d 474 (D.C. Cir. 2014).

51. *See Is It Legal to Surcharge On Credit Cards? Your Guide To 2022 Surcharge Laws,* NAT'L MERCH. ASS'N, https://www.nationalmerchants.com/is-it-legal-to-surcharge-on- credit-cards-your-guide-to-2022-surcharge-laws/ (last visited Feb. 12, 2025).

have differing regulations.[52] In Connecticut,[53] Maine,[54] and Massachusetts[55] no-surcharge statutes are currently in effect. No-surcharge statutes have been in effect in Colorado,[56] New York,[57] California,[58] and Texas,[59] but repeals have happened and are pending. The no-surcharge statutes have been declared unconstitutional by federal courts of appeals in Florida.[60]

Regressive cross-subsidization mostly occurs in states with no-surcharge statutes or states with non-mandatory surcharge statutes. In short, regressive cross-subsidization means that cardholders with lower credit scores pay in part for the rewards of cardholders with higher credit scores. This phenomenon happens because interchange fees make up the second-highest source of income for issuers,[61] and substantially fund rewards.[62] Therefore, network providers will charge higher interchange fees for processing transactions of high-reward cards. Since non-reward card users, cash users, or low-reward card users buy products that merchants are forced to mark up, they essentially pay for part of the interchange fees that fund the rewards of high-reward card consumers.[63] Because cardholders of high-reward cards usually have higher credit scores, and cardholders of lower or no-reward cards usually have lower credit scores, this system is regressive.[64] This can still occur in states where surcharging is permitted but not required, since in these states, small merchants tend to surcharge less due to competitive risks (alienating customers due to demanding a surcharge).[65] Aside from leading to cross subsidization, non-mandatory surcharge states

52. Merchant, *supra* note 2, at 353; Matt Rej, *Credit Card Surcharge Laws by State (Updated for 2025)*, MERCHANT COST CONSULTING, (Dec. 24, 2024), https://merchantcostconsulting.com/lower-credit-card-processing-fees/credit-card-surcharge-laws-by-state/.

53. CONN. GEN. STAT. § 42-133ff (2024).

54. ME. REV. STAT. ANN. TIT. 9-a, § 8-509 (West 2024).

55. H.D. 260, 193 Gen. Ct. (Ma. 2023).

56. S.B. 21-091, 73rd Gen. Assemb., (Co. 2021).

57. Expressions Hair Design v. Schneidermann, 808 F.3d 118, 118 (2nd Cir. 2015); A.B. 314, 244th Leg. Sess. (N.Y. 2021); *see also* Levitin, *supra* note 32, at 56-57.

58. *See* Italian Colors Rest. v. Becerra, 878 F.3d 1165, 1168 (9th Cir. 2018) (stating California "prohibits" imposing surcharges.").

59. Rowell v. Pettijohn, 816 F.3d 73, 76 (5th Cir. 2016).

60. *See* Dana's R.R. Supply v. Att'y Gen., 807 F.3d 1235, 1239 (11th Cir. 2015) (explaining how the law is unconstitutional " . . . by discriminating on the basis of the speech's content . . .").

61. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 16, at 22, 24-25.

62. *Id*. at 98-99.

63. Emily Stewart, *The ugly truth behind your fancy rewards credit card*, VOX (June 3, 2021), https://www.vox.com/the-goods/22454885/who-pays-for-credit-card-rewards.

64. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 16, at 99; *see also* Levitin, *supra* note 32, at 3.

65. Stewart, *supra* note 63.

favor big merchants (e.g., Costco) that carry enough transaction volume to negotiate lower interchange fees that they can absorb without needing to raise product prices.[66]

Lastly, fractionated and complex regulations mean merchants must invest considerable resources in determining whether they can surcharge, what amount on what card transaction, and how they must disclose such surcharges to consumers.[67] In addition to the constantly changing state rules[68] and federal rules, network providers can also set their own contractual rules. Both Visa's and Mastercard's merchant rules include provisions according to which a surcharge must not exceedthe MDF and never exceed 3.00% (Visa)[69] and 4.00% (Mastercard)[70] of the transacted amount. Surcharging under current regulation is a cost and time-intensive undertaking for many small merchants, only to be confronted with potential competitive disadvantages.

IV. PROPOSED SOLUTIONS BASED ON A REVISED VERSION OF THE IFR

Regulatory reform is the most effective way of subjecting interchange fee pricing to competitive market pressures. Such reforms could empower the merchant's bargaining position and confront consumers with the actual cost of credit card payments. Not only would merchants and consumers benefit from interchange fee prices that would most likely be lower than now, but the regulations in the following section will enable them to make active choices and provide them with options regarding which interchange fees they deem acceptable and which they do not. Moreover, the high likelihood of lower interchange fees would mean the U.S. market would finally be on eye level with other jurisdictions that have regulated credit card interchange fees.

66. *See id.*

67. *Visa Reduces Its Merchant Surcharge Cap to 3% Effective April 15, 2023: Merchants Should Ensure They Are in Compliance to Avoid Fines, Fees, and Litigation,* ARENT FOX SCHIFF (July 24, 2023), https://www.afslaw.com/perspectives/alerts/visa-reduces-its-merchant-surcharge-cap-3-effective-april-15-2023-merchants [hereinafter Fox Schiff].

68. *See* Expressions Hair Design v. Schneiderman, 137 S.Ct. 1444, 1147 (2017) (remanding to determine whether no-surcharge provisions regulate free speech in New York).

69. Fox Schiff, *supra* note 67; *see also* Visa, *Merchant Surcharging Considerations and Requirements*, https://usa.visa.com/content/dam/VCOM/global/support-legal/documents/merchant-surcharging- considerations-and-requirements.pdf (last visited Feb. 10, 2025).

70. *Merchant Surcharge FAQ*, MASTERCARD, https://www.mastercard.us/content/dam/public/mastercardcom/na/us/en/documents/Merchant_Surcharge_FAQ.pdf (last visited Feb. 10, 2025).

In direct comparison, credit card interchange fees in the U.S. average 1.76%, while they average around 0.96% in the E.U.[71]

A. The Lacking Impact of Statutory Fee Caps

The simplest way of keeping interchange fees at bay would be a statutory fee cap. IFR Article 4 introduces fee caps on all consumer credit card products of "no more than 0.3% of the value of the transaction" to prevent network providers from competing with issuers by offering them high interchange fees to the detriment of merchants and consumers.[72] Similarly, Title X of the Durbin Amendment to the Dodd-Frank Act set a statutory fee cap for debit card interchange fees in the U.S. of 21 cents.[73]

In reality, a statutory fee cap is inefficient for consumer welfare purposes for multiple reasons. Primarily because it does not further a more competitive price-setting environment amongst issuers by itself. Big issuers have a potential competitive advantage over smaller issuers like credit unions or consumer banks because they are more likely able to absorb any loss of interchange revenue due to economies of scale.[74] Regarding debit card interchange fees, the U.S., Congress effectively prevented this by excluding issuers with less than $10 billion in assets from the statutory fee cap, meaning small issuers could continue charging higher interchange fees.[75] Initially, the excluded issuers were concerned about the possibility of being subjected to pressures by merchants to lower interchange fees and having to compensate for this loss of interchange revenue by charging their clients higher banking fees than big issuers.[76] However, within the first year, the total[77] interchange income made by issuers, that were subject to the fee cap, dropped by 34% compared to only a drop of 2% for issuers that were excluded from the fee

71. *See* Joe Resendiz, *The Cost of Accepting Credit Card Payments: NA vs. EU*, LENDINGTREE (Aug. 16, 2023), https://www.lendingtree.com/credit-cards/articles/na-vs-eu-interchangefees/.

72. *See* EUR. COMM'N, STUDY ON THE APPLICATION OF THE INTERCHANGE FEE REGULATION: FINAL REPORT 83 (2020) [hereinafter IFR STUDY] (assessing the impact of the interchange fee regulations on merchants, issuers, and consumers only for credit cards operated in an open-loop system).

73. Jessie Cheng, *The Fed Proposes a Sea Change in Debit Card Interchange Fee Regulation*, AMERICAN BAR ASSOCIATION (Nov. 2023), https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-november/fed-proposes-sea-change-debit-card-interchange-fee-regulation/.

74. *See* Press Release, Michelle W. Bowman, Bd. of Governors of the Fed. Rsrv. Sys., Statement on Proposed Revisions to Regulation II's Interchange Fee Cap (Oct. 25, 2023), https://www.federalreserve.gov/newsevents/pressreleases/bowman-statement-20231025.htm.

75. *Id.*

76. *See* Nicholas Georgiton, *The Dodd-Frank Act: What Community Bankers Need to Know*, 128 BANKING L. J., 6 (2011).

77. "Total" meaning both for credit card and debit card transactions.

cap.[78] This meant smaller issuers could stay competitive by maintaining low banking fees and could continue offering their clients services and benefits such as free checking accounts and rewards programs, which larger issuers had to scrap as a result of the reduced interchange income.[79] In theory, a similar solution could be employed for a credit card interchange fee cap. While this would mitigate competitive disadvantages for small issuers, it will not do the same for network providers and will therefore not meaningfully benefit merchants and consumers.

Network providers rely on issuers branding their cards with their networks and on merchants accepting cards and routing transactions through this network.[80] Issuers are more likely to brand their cards with a network if the interchange fees are higher, while merchants are more likely to accept and route transactions through a network if the interchange fees are lower. In practice, network providers must balance these fees to be profitable. With a statutory fee cap in place, it would be impossible for new or small network providers to compete for issuers on interchange fees. Further, it would be unprofitable to compete for merchants on interchange fees lower than the fee cap because a fee cap should come as close as possible to the true cost of the service provided and not allow for a profit margin to be undercut. While new or small network providers are currently unable to compete due to HAP rules and exclusivity agreements, introducing a statutory fee cap would dampen the results of any regulatory reforms that targets such contractual restraints and enables competitive price-setting.

Additionally, an asset threshold does not address the fact that statutory fee caps could potentially hurt small merchants and consumers. Before the Dodd-Frank Act came into effect, some network providers charged lower interchange fees for small transactions or transactions at small businesses, which they could cross-subsidize by overcharging for other transactions.[81] Currently, Visa offers reduced credit card interchange rates for small merchants, presumably financed in a similar manner.[82] This changed after the

78. Zhu Wang, *Debit Interchange Fee Regulation: Some Assessments and Considerations*, 98 ECON. Q. 159, 167 (2012), https://www.richmondfed.org/-/media/richmondfedorg/publications/research/economic_quarterly/2012/q3/pdf/wang.pdf.

79. McConnell, *supra* note 40, at 654; *see also* Dakin Campbell, *Wells Fargo Cancels Pilot Program of $3 Monthly Debit-Card Fee,* BLOOMBERG (Oct. 28, 2011), https://www.bloomberg.com/news/articles/2011-10-28/wells-fargo-cancels-pilot-program-of-3-debit- card-fee-as-customers-react.

80. Hayashi, *supra* note 39, at 88.

81. *See* Renee Haltom & Zhu Wang, *Did the Durbin Amendment Reduce Merchant Costs? Evidence from Survey Results*, FED. RSRV. BANK RICH. 2 (Dec. 2015), https://www.richmondfed.org/-/media/richmondfedorg/publications/research/economic_brief/2015/pdf/eb_15-12.pdf.

82. *See* Hayashi, *supra* note 39, at 96-97.

introduction of the interchange fee cap for debit cards, which forced the large network providers to raise all interchange fees up to the cap.[83] For merchants that had previously benefited from lowered fees, this meant that the introduction of the fee cap actually had the adverse effect of higher interchange fee payments. This unintended consequence of the Durbin Amendment forced some merchants to relay these increased costs to consumers by raising product prices.[84] Additionally, issuers suffering losses from lower interchange revenue responded by scrapping free basic checking accounts and increasing monthly account fees,[85] which was detrimental for consumers who relied on such services.

Finally, determining which expenses to include in a statutory fee cap is extremely complicated and requires considerable effort to set and adjust as the market and technologies of payment systems advance. Experience with the debit card interchange fee shows that choices to include and exclude certain factors in the determination process are very controversial and have gone as far as to cause efforts to be litigated by merchant groups, like in the case of the Federal Reserve's decisions on debit interchange.[86] Many of these "nasty complexities associated with rate-making procedures"[87] that make regulation inefficient and ineffective could be avoided by opting not to cap credit card interchange fees.

Because of its deficits regarding competition among network providers and the detrimental effect observed for merchants and consumers when introduced to debit card interchange fees, this proposal argues that statutory fee caps are ineffective for enhancing competition and consumer welfare.

B. Regulation of Honor All Products Rules

Enabling merchants to leverage their market power against network providers effectively is integral to achieving lower interchange fees. One way this can be done is by banning HAP provisions and thereby allowing them to discriminate against high-fee credit cards associated with a network of which they accept other credit cards. E.U. legislators hold that HAP rules are a

83. *See* Kaitlyn E. Evans, *A Call for Change in Interchange Fee Regulation: Examining the Durbin Amendment Disaster Through the Lens of NACS v. Federal Reserve Board*, 9 LIBERTY UNIV. L. REV. 559, 565-66 (2015); *see also* McConnell, *supra* note 40, at 656.

84. Wang, *supra* note 78, at 170.

85. *See id* at 171 ("[m]ajor banks include[ed] Bank of America, Wells Fargo, and Chase. . .").

86. Evans, *supra* note 83, at 560 (referencing Nat'l Ass'n of Convenience Stores v. Bd. of Governors of the Fed. Reserve Sys., 746 F.3d 474, 481 (D.C. Cir. 2014)).

87. Richard A. Epstein, *The Regulation of Interchange Fees: Australian Fine-Tuning Gone Awry,* 3 COLUM. BUS. L. REV. 551, 586 (2005).

"tying practice" and have decided to ban such provisions with the IFR[88] apart from certain exceptions.[89]

Network providers argue that HAP rules provide consumers with the certainty that merchants will accept their credit card and, therefore, the certainty of being able to make the desired purchase.[90] This argument only stands in part because the cards merchants would most likely no longer accept are high-fee cards typically held by consumers who are likely to have a high credit score and do not rely on this particular card as a sole means of payment.[91] In fact, the main factor driving cardholders to pay with high-fee cards over other cards or other means of payment is, in most cases, the premium rewards associated with the usage of the high-fee card.[92] Of course, the cardholder would be denied the convenience of paying with this card and receiving said rewards but will typically still be able to make the purchase through other means.[93] Further, ensuring card acceptance by merchants should not be an issue of legislation but rather of competitive free market principles. Because networks rely on merchants to accept their cards, allowing merchants to refuse high-fee cards would force networks to avoid non-acceptance by pricing interchange fees for all their products similarly. Discrimination against high-fee cards would mainly hurt network providers and issuers due to the likely loss in interchange revenue, but not the cardholders of high-fee cards or merchants.

Considering all this, it is important to recognize that effective surcharging would make aban on HAP rules much less important. Through surcharging, the cost of accepting a high-fee credit card would lie with consumers, not with merchants, and the financial motivation of the latter to deny high-fee cards would likely be outweighed by the motivation to access as broad a customer base as possible.

C. Mandatory Co-Badging and Enabling Merchant Choice at the POS

Another effective way of removing existing barriers to a competitive pricing environment would be a regulation that mandates issuers to associate a credit card with two or more unaffiliated network providers and allows its transactions to be processed through either ("co-badging") while enabling merchants to select which network they would prefer to use at the POS.

88. Regulation (EU) 2015/751 ¶ 37.
89. *Id.* at art. 10 ¶ 2.
90. *Id.* at ¶ 37.
91. CONSUMER FIN. PROT. BUREAU, *supra* note 16, at 88-89 figs. 17 & 18..
92. Levitin, *supra* note 32, at 27.
93. *See id.* at 24.

IFR Article 8 and the Durbin Amendment include routing provisions, which mandate issuers to enable transaction routing through at least two unaffiliated networks and enable merchants to select which of these networks to use.[94] Although, in the case of the Durbin Amendment, the regulations did not extend to all debit card transactions,[95] they have shown a significant impact on the ability of merchants to exert pressure and effectuate lower interchange fees. The example of Interlink[96] stands out in particular. Interlink was a major PIN debit transaction processing network operated by Visa. After the Dodd-Frank Act went into effect, Interlink's market share plummeted due to merchants opting to process the transactions through cheaper networks.[97] Naturally, in order for this to work, multiple network providers must be available. This is the case in the E.U. because credit cards will typically be associated with a domestic and an international network, allowing the processing of domestic transactions via either one of the networks and its international transactions exclusively through the international network.[98] This practice allows card usage across different E.U. member states.[99] Before the IFR came into effect, domestic network providers were able to compete with international networks because issuers would co-badge their cards to provide as much service to their clients as possible.[100] International networks naturally wanted access to the domestic processing market and forbidding issuers from co-badging in their issuer rules, a practice quickly recognized and prohibited by IFR Article 8 (1-4).[101] In the U.S. issuers have no existing practice of co-badging and no need to do so because the same networks process national and domestic transactions. Still, co-badging would most likely impact credit card interchange fees substantially since new network providers would not be blacklisted through issuer or network rules and would subject interchange fees of existing networks to competitive pricing.[102]

94. Wang, *supra* note 78, at 165; Evans, *supra* note 83, at 569; *see* 15 U.S.C. § 1693o-2(b)(1)(A).

95. *See* NACS v. Bd. of Governors of Fed. Reserve Sys., 958 F. Supp. 2d 85, 110 (2013) (mandating co-badging on cards so there was no longer the requirement of two networks per card).

96. Hayashi, *supra* note 39, at 98.

97. *See id*.

98. *See* IFR STUDY, *supra* note 72, at 190 ("[C]o-badgered cards typically carry a domestic card brand and an international card brand allowing the cardholder to use the same card for both domestic . . . and cross-border card payment transactions. . .").

99. *See id.* at 190, 191.

100. *See id.*

101. Regulation (EU) 2015/751 art. 8 ¶¶ 1-4.

102. Merchs. Payments Coal., *Credit Card Routing Matters: Support the Credit Card Competition Act, S. 1838/H.R 3881*, https://merchantspaymentscoalition.com/sites/default/files/2024-04/CreditCardRoutingMatters-2024-04-29_0.pdf (last visited Feb. 23, 2025).

When analyzing the application and effects of IFR Article 8, legislators need to make two amendments to ensure effectivity in the U.S.

First, U.S. regulation must make it obligatory for issuers to co-badge and issue these co-badged credit cards to cardholders. The IFR gives issuers the choice of whether or not to co-badge their cards. While co-badging was already common in member states with domestic processing networks before the IFR went into effect, the share of issuers that chose to co-badge only after the IFR went into effect (meaning they did not offer co-badged cards before) increased by only 2%.[103] In the case of France, the percentage of co-badged credit cards remained constant at around 75% between 2015 and 2017.[104] While this lack in increase is in part attributable to the market being saturated, meaning there was simply no demand or financial benefit to co-badging even more cards than they already were,[105]the choice of E.U. legislators to not require issuers to co-badge under the IFR also played a significant role.[106] Additionally, under the IFR, consumers only receive a co-badged card if they demand one from their issuer.[107] Since the IFR entails no duty for issuers to inform consumers of the option to co-badge, consumers need to be sufficiently motivated and educated to find out whether their issuer offers a co-badged card and demand one.[108] In the U.S., this 'opt-in' system of co-badging would be even less effective than it has shown to be in the E.U. since co-badging is not already common practice here. It is safe to assume that if given the option, U.S. issuers would most likely lack financial motivation to change workflow, technology, and accounting practices to accommodate for co-badging while having to educate consumers on the option to do so while consumers in the U.S. would lack the motivation to gain knowledge or become sophisticated enough to demand a co-branded card from their issuer. Even though every household in the U.S. is estimated to pay an average of $1000 per year in interchange fees,[109] these fees are usually passed on via markups.[110] They are not transparent enough to enable consumers to discern how much interchange fee was paid on a given transaction and what these fees amount to, while there is no guarantee that merchants might pay lower MDFs and pass savings on by lowering markups. Therefore, to ensure that issuers in the U.S. will co-badge their credit cards and consumers will receive

103. IFR STUDY, *supra* note 72, at 194 fig. 75.

104. *Id*. at 191-92.

105. *Id.* at 196.

106. *Id.* at 195.

107. *See id.* at 196.

108. *See id.* ("Nearly two thirds of issuers reported that they did not receive requests from their customers asking for co-badging of cards beyond their current offer.").

109. *See* Press Release, Merchs. Payment Coal., *supra* note 10.

110. *Id.*

and use them, co-badging itself and the issuing of co-badged cards must be obligatory. Co-badging should enhance competition amongst network providers, not burden consumers.

Secondly, it must be ensured that merchants retain the final right to select the network for processing the transaction at the point of sale. The IFR grants this right of final choice to the consumers, 85% of whom were unaware of the possibility of making such a choice when payingwith a co-badged card,[111] meaning in 85% of cases, the merchants effectively made this choice already.[112] Merchants are also much more motivated to gain sophistication in network selection, as they pay an estimated $126.4 billion in fees per year.[113] Many retailers have reported interchange fees as one of their highest expenses, topped only by product and wages.[114] Since the best choice for merchants will likely be the cheapest choice, consumer and merchant interests align.

In summation, co-badging, when made obligatory, will cause lower interchange fees and benefit consumer welfare because network providers will be able to compete for the same transactions, and merchants will choose the cheaper option, thereby subjecting interchange fees to competitive pricing pressure.

D. Anti-Blending Provisions

In addition to ensuring that new and small network providers have a stronger position, it is integral that merchants are fully aware of the costs they pay to network providers. Blended MDF pricing prevents smaller merchants from making an informed choice when selecting the transaction network at the POS. Further, blended pricing gives acquirers an easy way of making up for losses in interchange revenue by adjusting other fees to maintain or only marginally decrease the blended rate that they charge merchants.

IFR Article 9 holds that the models under which acquirers price the MDF must include an unblended interchange rate by default.[115] Still, around 40% of merchants in the E.U. opted for a blended rate after the IFR came into effect, mostly due to administrative hurdles.[116] The same merchants, meaning those that opted for blended MDFs, experienced a decrease in interchange

111. IFR STUDY, *supra* note 72, at 196.

112. *See id.*

113. *See* Press Release, Merchs. Payment Coal., *supra* note 10.

114. *See* Christina Morales, *Using a Credit Card? At These Restaurants It'll Cost You*, N.Y. TIMES (Aug. 14, 2023), https://www.nytimes.com/2023/08/14/dining/restaurant-credit-card-fees.html.

115. IFR STUDY, *supra* note 72, at 151.

116. *Id.* at 152.

costs by around 0.08%, while merchants that chose the non-blended MDF reported an average decrease of more than 20.[117] This shows that an unblended rate that individually assesses the interchange fee gives acquirers less opportunity to make up for losses by raising other fees and is thereby much more effective at passing through lower interchange fees from acquirers to merchants.[118] Similarly, an unblended display of the interchange fee is essential to ensure transparency. Only with a non-blended fee are merchants adequately informed when selecting their preferred processing network at the POS as proposed in the article's previous section.

The European Central Bank stressed the importance of unblended fees during the conception of the IFR.[119] Any regulatory reform of anti-blending provisions would have to include an individual display of "fees paid (by merchants) for each category and . . . individual brand (of card) for which the acquirer provides services."[120] This way, transparency and informed decision-making are ensured, and merchants will know the exact fees they will surcharge their consumers.

E. Unified and Amended Surcharge Rules

Lastly, based on the problems explained until this point, a unified and amended surcharge provision is essential for the success of the proposed regulations. To be effective, surcharge provisions must fulfill three main criteria: (1) surcharging is unified and not contractually modifiable, (2) surcharging is mandatory, and (3) surcharging is capped at all payment processing fees that the merchant pays to the acquirer.

With this in mind, merchants will be given simple and clear surcharging instructions while ensuring that consumers are not excessively surcharged and that potential savings are passed through. Further, effective surcharge rules would eliminate regressive cross-subsidization since every consumer would pay their own transaction fee. Consumers would be enabled to make an informed choice about their preferred payment method at the payment terminal thereby create competitive pressure. When viewed in unison with the other regulations proposed in this article, transactions would most likely be routed through the cheapest network if merchants were able to choose the preferred processing network (as discussed in the section regarding co-badging), know which fees applied for the transaction (as discussed in the section regarding blended fees), and consumers would be able to make an

117. *Id*.
118. *See id.*
119. *See* Opinion of the European Central Bank, 2014 O.J. (C 193/2) ¶ 2.
120. *Id.*

informed decision about which payment method to use based on surcharges which will have to be disclosed before the transaction is initiated.[121] As a result, interchange fee pricing, now subject to consumer and merchant decisions, will finally be set in a competitive environment and improve consumer welfare.[122]

As part of the "Revised Payments Services Directive" ("PSD2"), the E.U. has allowed surcharging on non-fee-regulated cards, meaning cards that are not subject to the statutory fee cap.[123] Provided there is no contrary national legislation,[124] merchants can surcharge on certain transactions, importantly on transactions made with commercial credit cards which carry significant volume. While this regulation was welcomed by around 60% of merchants who applied surcharges on commercial credit card transactions data suggests it lacked impact because network providers raised other fees and, at least in part, due to consumer confusion. Since fee regulation in the form of statutory fee caps has shown to be ineffective, the latter issue can be bypassed by requiring surcharging for every credit card transaction.[125]

(1) First, surcharge provisions need to be federal or unified. State rules pose a significant hurdle to surcharging for merchants, particularly for merchants operating in multiple states, because they are constantly changing and non-uniform.[126] In addition to this, network providers can impose contractual restrictions on surcharging when surcharging itself does not affect networks beyond the fact that the consumer is now confronted with the actual cost associated with the transaction. It is crucial that issuers are prohibited from regulating surcharges in their contracts with merchants.

(2) Secondly, surcharging must be mandatory. This is important to overcome competitive pressures on smaller merchants that occur when surcharging is voluntary. Those opposing surcharging often claim that

121. *See* RONALD J. MANN, CHARGING AHEAD: GROWTH AND REGULATION OF PAYMENT CARD MARKETS 122 (1st ed. 2006); Merchant, *supra* note 2, at 367 (first citing Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005); then citing Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (2009); and then citing Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010)).

122. Merchant, *supra* note 2, at 370 (quoting *in re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F.Supp.2d 207, 231 (E.D.N.Y. 2013)).

123. *See* Council Directive 2015/2366, 2015, O.J. (L 337/35) ¶ 1 (EU).

124. *See* IFR STUDY, *supra* note 72, at 203 (identifying Belgium, Bulgaria, Croatia, France, Hungary, Latvia, Lithuania, Malta, Portugal, Spain, and Romania for not allowing surcharging on commercial cards).

125. *See id.* at 139, 182, 203; BUNDESKARTELLAMT, 2022 REVIEW OF THE SECOND PAYMENT SERVICES DIRECTIVE (PSD2) - CONTRIBUTION BY THE BUNDESKARTELLAMT ON SURCHARGING 2 (2022).

126. *See* Levitin, *supra* note 32, at 10.

smaller merchants will not surcharge due to the risk of driving away customers.[127] This argument concerns small merchants in particular since they are usually not able to compete with larger merchants on product prices. In Australia, where surcharging is non-obligatory, payment service provider Tyro reported that out of its more than 66,000 customers in May 2023, "40 per cent of cafes and restaurants levied surcharges, compared to 25 percent in May 2022."[128] Although the sample is arguably small compared to a total of 12,44 million credit card accounts in Australia,[129] this still shows a dramatic increase in surcharging by typically small businesses. Since implementing the IFR, 60% of all merchants in the E.U. impose surcharges where permitted.[130] While the numbers are fairly high, one must bear in mind that both these jurisdictions have imposed a statutory cap on interchange fees. This lowers surcharges and therefore reduces the competitive risk merchants take when surcharging. In Australia, the credit card interchange fee for a domestic transaction is 0.20% for Mastercard[131] and 0.21% for Visa.[132] In the E.U., for similar transactions where the merchant and issuer are located within the E.E.A., the interchange rate is typically 0.30% for Mastercard and 0.30% for Visa.[133]

---

127. Martha C. White, *A 4% Surcharge for Using a Credit Card!? Now Legal – but Not Likely*, TIME BUS. (Jan. 25, 2013), https://business.time.com/2013/01/25/a-4-surcharge-for-using-a-credit-card-legal-but-not-likely/.

128. John Collett, *More shoppers stung with card surcharges as cafes, pubs seek savings*, SYDNEY MORNING HERALD (June 20, 2023), https://www.smh.com.au/money/banking/more-shoppers-stung-with-card-surcharges-as-cafes-pubs-seek-savings-20230609-p5dff2.html; *see also* Katie Nelson, *Credit Card Surcharges: A Deep-Dive Into Surcharging, Customer Sentiment & What Other Businesses Are Doing*, LIGHTSPEED (Sept. 20, 2023), https://www.lightspeedhq.com.au/blog/credit-card-surcharges/.

129. *See* Sean Callery, *Credit Card Debt Statistics 2025,* MONEY.COM.AU, https://www.money.com.au/credit-cards/credit-card-statistics (last updated Dec. 31, 2024).

130. IFR STUDY, *supra* note 72, at 203.

131. *Understanding Interchange: Find Out what Interchange is and the Value it Delivers*, MASTERCARD, https://www.mastercard.com.au/en-au/business/overview/support/interchange.html (last visited Feb. 24, 2025) (referring to non-tokenized, card-present transaction percentage is under Australia Intercountry Credit POS Interchange Rates next to "Consumer Standard – Other Card Present").

132. *Interchange is a Part of the System that Makes Electronic Payments Possible*, VISA, https://www.visa.com.au/about-visa/interchange.html (last visited Feb. 24, 2025) (referring to non-tokenized, card-present transaction percentage found under Domestic Visa Credit Interchange Rates next to "Standard Rate").

133. *Intra-EEA – Intercountry Interchange Fees*, MASTERCARD (Sept. 15, 2025), https://www.mastercard.com/europe/en/regulatory/european-interchange.html (referring to credit card interchange fee in Australia found in MasterCard Intra-EEA Interchange Fees PDF next to "Mastercard Consumer Credit"); VISA, INTRA EUROPE EEA – MULTI-LATERAL INTERCHANGE FEES 1 (2024), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.visa.co.uk/content/dam/VCOM/regio

In the U.S., interchange rates ranges between 2.10% and 2.30% for comparable Visa transactions,[134] and between 1.85% to 2.00% for Mastercard transactions.[135] Small merchants would take on a much larger competitive risk when deciding to surcharge, which makes surcharging more unlikely. Although it has proven difficult to find data on how many small businesses in the U.S. surcharge in states that permit the practice, the emerging consensus among financial news outlets indicates that even though small businesses like cafes and restaurants increasingly impose surcharges on customers,[136] the total number of small businesses surcharging is still comparably low.[137] By obligating merchants to a surcharge, particularly smaller merchants would still benefit from being able to externalize transaction costs while not taking a competitive risk.

Above all, surcharging should be mandatory to ensure savings are passed through to consumers.[138] Experience with debit card interchange fee caps shows that issuers will most likely compensate for losses in interchange revenue by raising banking fees. Consumer welfare can only be achieved if consumers' savings through lower interchange fees outweigh any potential increase in banking fees.[139] Otherwise, this proposal could go as far as to

---

nal/ve/unitedkingdom/PDF/fees-and-interchange/april2024/intra-europe-eea-interchange-apr24.pdf.

134. *See* VISA, VISA USA INTERCHANGE REIMBURSEMENT FEES: VISA SUPPLEMENTAL REQUIREMENTS 10 (2024), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://usa.visa.com/dam/VCOM/download/merchants/visa-usa-interchange-reimbursement-fees.pdf.

135. MASTERCARD, MASTERCARD 2022-2023 U.S. REGION INTERCHANGE PROGRAMS AND RATES 2 (2022), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.mastercard.us/content/dam/public/mastercardcom/na/us/en/documents/merchant-rates-2022-2023-apr22-2022.pdf (referencing Restaurants within U.S. Region Mastercard Consumer Credit Rates).

136. *See* Sabrina Trangle, *Credit card surcharges are popping up at more merchants*, NEWSDAY BUS. (Oct. 21, 2022), https://www.newsday.com/business/credit-card-surcharge-cash-discount-i47rr8bh; Medora Lee, *Americans relying less on cash, more on credit cards may pay more fees. Here's why*, USA TODAY, https://www.usatoday.com/story/money/personalfinance/2023/10/25/cash-credit-card-fee/71246025007/ (last updated Oct. 25, 2023).

137. *See* WSJ Podcasts, *More Stores Tack on Fees for Credit-Card Purchases*, WSJ, at 1:45 (Aug. 20, 2021), https://www.wsj.com/podcasts/google-news-update/more-stores-tack-on-fees-for-credit-card-purchases/3e71c9e9-b14c-4c78-860f-dd365b539b35 (last visited Feb. 24, 2025); THE STRAWHECKER GROUP, U.S. SURCHARGING SNAPSHOT REPORT 5 (2022), https://thestrawgroup.com/u-s-surcharging-snapshot/.

138. Merchant, *supra* note 2, at 370 (quoting Daniel Fisher, *WalMart's 'Swipe Fees' are a Political Weapon Against Visa*, FORBES (July 24, 2012, 3:59 PM), https://www.forbes.com/sites/danielfisher/2012/07/24/wal-marts-swipe-fees-are-a-political-weapon-against-visa/).

139. *See* Press Release, Michelle W. Bowman, Bd. of Governors of the Fed. Rsrv. Sys., Statement on Proposed Revisions to Regulation II's Interchange Fee Cap (Oct. 25, 2023),

harm consumers. Reliable data tracing the pass-through of reduced interchange fees from merchants to consumers in the form of lower product prices is notoriously difficult to obtain.[140] Where data is available, it is usually anecdotal in nature, which impairs its applicability in other situations.[141]

(3) Thirdly, surcharging must be capped at 'all payment processing fees that the merchant pays to the acquirer' in order to prevent merchants from exploiting consumers. This broad definition protects consumers from excessive surcharging by merchants and protects merchants from acquirers that might try to raise fees that are not part of the MDF but are still charged for every transaction.

As an alternative to surcharging, many merchants in the U.S. have opted to impose eithera cash discount or "convenience" or "service fees," all of which are subject to certain rules and restrictions by network providers.[142] While cash discounting is mathematically equivalent to surcharging (consumers paying with cash get a discount in the amount that the merchant has raised product prices to compensate for transaction fees), it suffers from two issues. First, since cash payers do not pay for transaction fees, they are excluded from regressive cross-subsidization. Nonetheless, those paying with low-fee cards will still pay for the rewards of those paying with high-fee cards.[143] Furthermore, behavioral economics suggest that cash discounting is less effective than surcharging at steering the consumer's decision-making when choosing a payment method. Two concepts in particular speak for this, the "framing bias"[144] and "loss aversion."[145] A framing bias means that a surcharge, irrespective of mathematic equivalence, will provoke more negative reactions than a cash discount will provoke positive reactions.[146] Loss aversion implies that a loss (in this case, the loss of money due to surcharges) carries more weight than a gain (in this case, money saved due to cash discounts) of an equivalent amount.[147] Both mean

https://www.federalreserve.gov/newsevents/pressreleases/bowman-statement-20231025.htm.

140. *See* IFR STUDY, *supra* note 72, at 182.

141. *See id.*; Haltom & Wang, *supra* note 81, at 3.

142. *See Visa Rules and Policy, Frequently Asked Questions,* VISA, https://usa.visa.com/support/consumer/visa-rules.html (last visited Jan. 10, 2025) (see questions, "Can I charge a convenience fee for accepting a Visa card?" and "Can I charge a service fee for accepting a Visa card?").

143. *See* Levitin, *supra* note 32, at 35.

144. *See id*. at 24.

145. Merchant, *supra* note 2, at 352 (quoting *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 122 (2015)).

146. *Id.* (quoting Adam J. Levitin, *The Antitrust Superbowl: America's Payment Systems*, *No-Surcharge Rules, and the Hidden Costs of Credit*, 3 BERKELEY BUS. L.J. at 17 (2005)).

147. *See* Levitin, *supra* note 32, at 39.

that a surcharge is much more likely to keep a consumer from paying with his credit card and demonstrate the need to include surcharge provisions above all other means of externalizing costs, such as cash discounting.

In conclusion, only unified and clear surcharge rules will keep issuers from regulating surcharges in their contracts with merchants and will keep administrative difficulty at a minimum. Surcharges need to be mandatory in order to ensure smaller merchants are not disadvantaged and to ensure consumers actually benefit from savings. Surcharges must also be capped at all transaction fees to protect consumers from excessive surcharging and merchants from exploitation of other fees by acquirers.

V. CONCLUSION

In conclusion, obligatory surcharge provisions are the core of this proposal, not least because they directly target the consumer's choice. This, in synthesis with empowering merchants through regulating current constraints, is a highly effective way of ensuring a healthier, more competitive market for pricing interchange fees.

The European IFR includes many provisions that can be meaningfully amended to loosenthe grip that Visa and Mastercard have on the U.S. market for processing transactions and setting interchange fees. This article has demonstrated how effective changes to existing regulations and the introduction of new regulations can successfully ensure consumer welfare by creating an environment where interchange fees are priced competitively and where the choice of those who pay them has economic value.

PANAMA'S LEGAL OBLIGATION TO RELOCATE THE GUNA PEOPLE: INTERNATIONAL LAW AND CLIMATE CHANGE IN GARDI SUGDUB

*Ernesto Bustinza**

Abstract

The accelerating impacts of climate change are displacing vulnerable communities worldwide, raising urgent questions of state responsibility and human rights. This note examines Panama's legal obligation to implement a planned relocation of the Guna people from the island of Gardi Sugdub, which faces imminent uninhabitability due to rising sea levels. Grounded in international human rights law—including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Paris Agreement, and the United Nations Declaration on the Rights of Indigenous Peoples—this analysis contends that Panama must act to prevent further harm by ensuring a relocation process that upholds the rights to life, health, housing, and cultural integrity. The note further explores Panama's constitutional obligations toward indigenous communities and assesses comparative jurisprudence and state practices, including Fiji's model for rights-based climate relocation. It concludes that Panama's inaction not only risks violating binding legal commitments but also undermines the dignity and self-determination of the Guna people. A rights-centered relocation, developed in collaboration with affected communities and supported by international

* Ernesto Bustinza received his J.D. from Southwestern Law School in May 2025. He holds a B.A. in Political Science, with a minor in Global Studies, from the University of California, Los Angeles. He also obtained his M.P.P. from Pepperdine University, with a concentration in American Politics and International Relations. He served as the Editor-in-Chief for the Southwestern Journal of International Law during the 2024-2025 academic year. The author extends his deepest gratitude to his family, friends, and mentors for their unwavering support throughout his academic journey. He is especially grateful to Professor Miller and Professor Anthony for their invaluable guidance and feedback on this note as well as to the 2024-2025 Southwestern Journal of International Law Executive Board and Editorial Staff for their hard work in editing this piece.

cooperation, offers Panama a critical opportunity to lead in climate adaptation policy across the Americas.

I. INTRODUCTION

The inevitable impacts of climate change and global warming are drastically changing the world that we live in today. In 2023, global average

sea level set a record new high of four inches above 1993 levels.[1] The rise in sea level has severely impacted coastal communities across the world and has displaced many people from their land.

Gardi Sugdub is a tiny island in the Guna Yala province of Panama with a high point of just one meter above sea level.[2] With nearly 1,300 people on an island the size of five soccer fields, the overcrowding of the island coupled with the projected sea level rise has impacted the Guna people's livelihood.[3] Although planned relocation is a measure of last resort, the Guna people have expressed a strong desire to relocate.[4]

After a decade of empty promises and inaction, the Panamanian government must enact a planned relocation policy and relocate the people of Gardi Sugdub that minimizes the threats posed to human rights, because Panama has international human rights obligations, the government of Panama has a duty to safeguard indigenous people's rights, and a planned relocation would mitigate the risk of displacement and the need for the Guna people to flee to another country as refugees. With such policy implementation, Panama, with the support of the international community, can become the first in the Americas to set the standard for climate adaptations.

This note will begin with a background of Gardi Sugdub and the impacts of climate change that have led for the Guna people to want a planned relocation. Further, the note will discuss the various international treaties and covenants that strongly suggest that states must relocate those who are severely impacted by climate change in order to not be in violation of the rights outlined in these agreements. The note will then go into an additional obligation that Panama has to its indigenous peoples through its own constitution as well as another international covenant specifically dealing with the rights of indigenous peoples. Lastly, the note will discuss recent cases that have come across the UN Human Rights Committee that deal with Article 6 violations under the International Covenant on Civil and Political

1. Rebecca Lindsey, *Climate Change: Global Sea Level*, NAT'L OCEANIC & ATMOSPHERIC ADMINISTRATION (Aug. 22, 2023), https://www.climate.gov/news-features/understanding-climate/climate-change-global-sea-level#:~:text=In%202022%2C%20global%20average%20sea,per%20year%20from%202006%E2%80%932015.

2. *See* ERICA BOWER, HUM. RTS. WATCH, THE SEA IS EATING THE LAND BELOW OUR HOMES: INDIGENOUS COMMUNITY FACING LACK OF SPACE AND RISING SEAS PLANS RELOCATION, 1, 18 (2023), https://www.hrw.org/report/2023/07/31/sea-eating-land-below-our-homes/indigenous-community-facing-lack-space-and-rising.

3. *Id.*

4. *Id.* at 12.

Rights to establish that forced displacement and migration would not be the ideal situation for the people of Gardi Sugdub.

II. BACKGROUND

A. Brief History of Gardi Sugdub and Where They Stand Today

Carti Sugtupu, also known as Gardi Sugdub, or Crab Island, is one of the 365 islands of the San Blas Archipelago located on the Caribbean Sea along the northeastern coast of Panama.[5] Gardi Sugdub is the home of the Guna Indigenous people. Over one hundred years ago, the Guna people fled the mainland to Gardi Sugdub to escape the Spanish colonizers and mosquito-borne illnesses and have stayed living there ever since then.[6] Today, what used to be a place of refuge for the Guna people and a place to preserve their culture and traditions, is now a place of fear and destruction due to the threats of climate change and the rise of sea level.

Gardi Sugdub is currently only a little over three feet above sea level.[7] Given that the land is overcrowded, there is no space to expand or go anywhere aside from the mainland.[8] The rise in sea level along with the erratic weather such as storms and flooding have disrupted the daily lives of the Guna people—housing, water, health and education have all been impacted,[9] which as we will see below, are fundamental human rights that must be protected and provided for the people. The Human Rights Watch issued a report in July 2023 wherein they comprehensively lay out the issues that Gardi Sugdub faces and the gaps that exist within the government's actions thus far as well as some recommendations as to what the Panamanian government can do to better attack this issue.[10]

The report states that back in 2010, the Guna people have come to the realization and accepted the fact that the only "real, sustainable solution" is to relocate to the mainland.[11] The advocacy from the Guna people, along with the support of NGOs, led the Panamanian government to finally commit to build three hundred new homes at the relocation site.[12] The issue now is that the government to date has not completed this project and no one has moved

5. *San Blas Islands: Panama's Caribbean Jewel*, LATIN AM. & CARIBBEAN GEOGRAPHIC (Aug. 29, 2024), https://lacgeo.com/san-blas-islands-guna-yala-panama.

6. *See* HUM. RTS. WATCH, *supra* note 2, at 1.

7. *Id.* at 18.

8. *Id.*

9. *Id.* at 1.

10. *See generally id.*

11. *Id.* at 1.

12. *Id.* at 1, 29.

to this day. The Guna people were given a date of September 25, 2023, which was later delayed to February 29, 2024.[13]

Frustration continues to build among the community as the new site still lacks "water, sewage, and trash management, and a health center"[14] with no plans to effectively meet the needs of the people. Additionally, although a hospital was being built, the project was abandoned, and the building is deteriorating.[15] Further, a school (which was supposed to be ready in 2014) is "still unusable, because it lacks water, a sewage system, and sufficient teachers."[16] There has been no explanation with respect to the delays and not only are the basic needs of human life not being met in Gardi Sugdub, but those needs are not ready to be met at the relocation site with no solidified plans in place to remedy these issues.

B. What is a Planned Relocation?

According to the "Guidance on Planned Relocation" published by the Brookings Institute and the United Nations Refugee Agency, a common definition of planned relocation is defined as:

> A planned process in which persons or groups of persons move or are assisted to move away from their homes or places of temporary residence, are settled in a new location, *and* provided with the conditions for rebuilding their lives. Planned Relocation is carried out under the authority of the State, takes place within national borders, and is undertaken to protect people from risks and impacts related to disasters and environmental change, including the effects of climate change. Such Planned Relocation may be carried out at the individual, household, and/or community levels.[17]

Although planned relocation is a measure that should be considered as a last resort, a planned relocation is considered as an adaptation strategy to the effects of climate change.[18] The United Nations noted this at their Framework Convention Climate Change meeting in Cancun in 2010, where it was stated that[19] "enhanced action and international cooperation on planned relocation

13. *Id.*

14. *See id.* at 1.

15. *Id.*

16. *Id.*

17. Brookings Inst., Geo. Univ. Sch. Foreign Serv. Inst. St. Int'l Migration, & UNHCR, UN Refugee Agency, *Guidance on Protecting People from Disasters and Environmental Change through Planned Relocation*, UNHCR, Oct. 7, 2015, at 5, https://www.unhcr.org/media/planned-relocation-guidance-october-2015.

18. *Id.* at 4, 11.

19. *See* Cancun Climate Change Conference, *Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010*, U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011), https://unfccc.int/documents/6527.

[is] one of three types of human mobility [that] should be considered within climate change adaptation measures."[20] There has been a greater focus on migration and displacement, but a planned relocation can also work. The largest concern is that a planned relocation, if not done correctly, can violate fundamental human rights and this could be due to the fact that there is a lack of guidance on how to create such a policy.[21] We are able to see the high risk of these concerns firsthand with Panama and the Guna people in that the basic needs at the new site are not being met. It is important to note that a planned relocation does not only place an obligation on the domestic state but also on the international community—this is a joint effort to take on such a task, but it is the state's responsibility to prioritize and protect the human rights of its people.

III. PANAMA HAS INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

An emerging principle of international law strongly suggests that the victims of climate change should enjoy a right of relocation or amelioration of what they are suffering. Through several important international covenants and treaties along with the opinion of the Inter-American Court, there is an implicit obligation for states to mitigate the effects of climate change through a planned relocation. As a party to the (A) International Covenant on Economic, Social and Cultural Rights,[22] (B) Paris Agreement,[23] (C) International Covenant on Civil and Political Rights,[24] (D) Universal Declaration of Human Rights,[25] (E) United Nations Framework Convention

20. *See* BROOKINGS INSTITUTE ET AL., *supra* note 17, at 4.

21. *Id.*

22. The International Covenant of Economic, Social and Cultural Rights essentially builds on the rights set forth in the Universal Declaration of Human Rights and aims to protect economic, social and cultural rights including the right to equality between men and women, the right to work, and the right to education. *See* International Covenant of Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, adopted Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR].

23. The Paris Agreement was adopted to prevent the increase of greenhouse gas emissions, global temperature, and "to protect people, livelihoods and ecosystems, taking into account the urgent and immediate needs" of those that are vulnerable to the adverse effects of climate change. *See* Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, 3156 U.N.T.S. 79, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement].

24. The International Covenant on Civil and Political Rights was adopted by the UN General Assembly and is a human rights treaty that lays out the protections for civil and political rights. *See* International Covenant on Civil and Political Rights, 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978), S. Treaty Doc. No. 95-19, 6 I.L.M. 350 (1967) [hereinafter ICCPR].

25. The Universal Declaration of Human Rights sets forth the fundamental human rights that are to be universally protected and has been used as a basis for many other international treaties and conventions as well as state laws. *See* G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) [hereinafter Universal Decl. of Hum. Rts.].

on Climate Change;[26] and (F) the Inter-American Human Rights System,[27] Panama must abide by the rules and regulations outlined in these agreements and authoritative bodies. Moreover, Article 4 of the Panama Constitution states that Panama abides by the rules of international law.[28]

These international agreements have the underlying notion that the parties must take steps not only individually as stated, but international cooperation and assistance is also required to ensure that "the full realization" of human rights is fulfilled.[29] Although it may be argued that Panama cannot single-handedly mitigate the issues raised in Gardi Sugdub and that this requires the assistance of other states and international organizations, this does not justify Panama's inaction with respect to the planned relocation of Gardi Sugdub. The Guna people have expressed that a planned relocation is what they want, and they have been cooperative with the Panamanian government.[30] It is the government that is failing its people by delaying the date of the relocation as well as the lack of progress with the promises that they have made to the Guna people in the past.

A. International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights ("ICESCR") was adopted by the United Nations General Assembly on December 16, 1966.[31] The ICESCR essentially builds on the rights set forth in the Universal Declaration of Human Rights and aims to protect economic, social, and cultural rights including the right to equality between men and women, right to work, and the right to education.[32]

Many of the rights set forth in the ICESCR are disrupted by the effects that climate change has been having in Gardi Sugdub such as the right to

26. The United Nations Framework Convention on Climate Change is an international treaty that provides a framework to combat climate change through limiting global temperature increases but also coping with the impacts of climate change. *See* United Nations Framework Convention on Climate Change, May 8, 1992, signed June 12, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107.

27. The Inter-American System is a regional human rights system that is in place to protect the human rights of the members of the Organization of American States which is comprised of thirty-five independent countries. *See Inter-American Human Rights System*, INT'L JUST. RES. CTR., https://ijrcenter.org/regional/inter-american-system/.

28. CONSTITUCIÓN POLÍTICA DE PANAMÁ [Constitution], art. 4 (Pan.) [hereinafter Constitution of Panama].

29. *See* ICESCR, *supra* note 22, at art. 2, 6, 12, 13, and 15.

30. See HUM. RTS. WATCH, *supra* note 2, at 18.

31. *See* ICESCR, *supra* note 22.

32. *See id.* at Preamble (recognizing that the Universal Declaration of Human Rights is the foundation for the concepts expanded upon in the ICESCR, like Articles 3 (equal rights of men and women), 6 (right to work), and 13 (right to education)); *Id*. at art. 3, 6, 13.

health, food, water, sanitation, and education.[33] Article 12 sets forth the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[34] Article 13 sets forth the right to education and most importantly, Article 11 lays out the right to an adequate standard of living which includes adequate food, clothing, housing and the continuous improvement of living conditions.[35] Further, the parties are to "take appropriate steps to ensure the realization of this right."[36] These fundamental human rights must be protected at all costs and it starts with each individual state providing for their own people. Although climate change is not specifically addressed within the ICESCR, it is largely implied that if there was any threat to the rights set forth in the ICESCR, if nothing was done by the state in question, then this could lead to a violation of the state's obligations. Climate change is here to stay and will only continue to rapidly impact our globe. Coastal communities are among the most vulnerable and those states must take mitigation measures to protect its people and safeguard their human rights. Panama signed the ICESCR on July 27, 1976,[37] which means that Panama cannot do anything that undercuts this treaty.

The implementation and enforcement of the ICESCR is overseen by the UN Committee on Economic, Social and Cultural Rights which comprises of eighteen independent experts.[38] This committee released a statement in October 2018, in which they reiterate that "a failure to prevent foreseeable human rights harm caused by climate change, or a failure to mobilize the maximum available resources in an effort to do so, could constitute a breach"[39] of the parties' obligation to "respect, protect and fulfill all human rights for all."[40]

33. *See* HUM. RTS. WATCH, *supra* note 2, at 51; *see generally* ICESCR, *supra* note 22.

34. ICESCR, *supra* note 22, at art. 12.

35. *Id.* at art. 11, 13.

36. *Id.* at art. 11.

37. *Id.*

38. U.N. Human Rights Office, *Introduction to the Committee: Committee on Economic, Social and Cultural Rights (CESCR)*, U.N., https://www.ohchr.org/en/treaty-bodies/cescr/introduction-committee.

39. U.N. Human Rights Office, Econ. & Soc. Council, Comm. on Economic, Social and Cultural Rights, Climate Change and the International Covenant on Economic, Social and Cultural Rights, Statement submitted by the Committee on Economic, Social and Cultural Rights, ¶ 6, U.N. Doc. E/C.12/2018/1* (2018), https://www.ohchr.org/en/statements/2018/10/committee-releases-statement-climate-change-and-covenant.

40. *Id.* (citing a quote that is referencing the ICESCR); *see* ICESCR, *supra* note 22.

B. Paris Agreement

Panama has also adopted the Paris Agreement which recognizes that adaptation to climate change is a global challenge and is key "to protect people, livelihoods and ecosystems, taking into account the urgent and immediate needs" of those that are vulnerable to the adverse effects of climate change.[41] The Paris Agreement is legally binding and was adopted at the UN Climate Change Conference in Paris in 2015.[42] Although its overarching goal is to prevent the increase of greenhouse gas emissions and the global temperature, the underlying notion is that this binding agreement brought the nations collectively to confront the impacts of climate change and how they can adapt to these effects.[43]

Article 7 of the Paris Agreement goes into depth with respect to the adaptation and mitigation obligations that the parties to the agreement have and a standard is set as to what an adaptation action should look like:

> Parties acknowledge that adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate.[44]

There is international recognition that highlights the importance of transparency and a holistic approach when implementing an action for adaptation. This is a recurring theme throughout these international treaties, covenants, and soft laws. There is an emphasis on the burden that states have to protect indigenous people against the effects of climate change and to essentially involve as many people as possible when creating these plans and policies. This will be seen more clearly in the discussion under the United Nations Declaration on the Rights of Indigenous Peoples and the right of free, prior, and informed consent.

---

41. Paris Agreement, *supra* note 23, at art. 7 ¶ 2. Article 7 states, "Parties recognize that adaptation is a global challenge faced by all with local, subnational, national, regional and international dimensions, and that it is a key component of and makes a contribution to the long-term global response to climate change to protect people, livelihoods and ecosystems, taking into account the urgent and immediate needs of those developing country Parties that are particularly vulnerable to the adverse effects of climate change." *Id.*

42. *See id.*

43. *Id.*

44. *See id.* at art. 7 ¶ 5.

C. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (the "ICCPR") was adopted by the United Nations General Assembly on December 16, 1966, and came into force on March 23, 1976.[45] The ICCPR is a human rights treaty that lays out the protections for civil and political rights.[46] Panama signed the ICCPR in 1976 and ratified it in 1977.[47] Articles 1 and 6 are two articles under the ICCPR that strongly support the notion that States must be able to relocate its people when necessary, such as the case of Gardi Sugdub.

Article 1 states, "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[48] This right of self-determination applies to all peoples regardless of race, color, sex, religion, language, or nationality.[49] Given the fundamental right of self-determination, the Guna people are entitled to be able to move as they see fit. As we have already seen above, although a planned relocation is not an ideal measure to take, the Guna people realized that this is the only way that they would be able to survive. The environmental degradation is too far gone, and the sea levels will only continue to rise. The government of Panama should be supporting the Guna people because a planned relocation is necessary for the Guna's economic, social, and cultural development.

Further, Article 6 of the ICCPR states, "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[50] The right to life set forth in Article 6 is quite broad and per the Committee's General Comment No. 36, the right to life is a fundamental right that is a prerequisite for the enjoyment of all other human rights.[51] The right to life is seen as a backbone to all other human rights and therefore, the right to life should not be interpreted narrowly. Paragraph 3 of General Comment No. 36 widens its interpretation in a way that "it concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity."[52] Relating this to Gardi Sugdub, the

45. *See* ICCPR, *supra* note 24.

46. *See id.*

47. *See id.*

48. *Id.* at art. 1 ¶ 1.

49. *Id.* at art. 2 ¶ 1.

50. *Id.* at art. 6 ¶ 1.

51. Human Rights Committee (HRC), General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018) [hereinafter General Comment No. 36].

52. *Id.* ¶ 3.

government of Panama is not the one causing the environmental degradation and the negative impact that it is having on the Guna people. It can be argued that the lack of action on behalf of the government of Panama is an omission which could lead to unnatural or premature death. If the government of Panama continues to delay the date that the relocation site will be ready for move-in, the Guna people will continue to be exposed to danger. The sea level is set to continue rising and the negative impacts on the community will only continue to be aggravated. The situation is already severe enough that the Guna people's chances of survival are at risk, and this may be deemed as a violation of the right to life.

Additionally, the Committee provides under Paragraph 26 of the General Comment No. 36 that the States duty to protect life implies that a State "should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity."[53] The Committee provides further clarification as to what these "general conditions" can consist of such as "degradation of the environment, deprivation of indigenous peoples' lands, territories and resources, the prevalence of life-threatening diseases" to name a few.[54] This cannot be any clearer that the duty lies on the State to take action to not only mitigate but to alleviate the threats to life that its people may encounter such as the negative impacts of climate change.[55] The government of Panama is well aware and has acknowledged the issues that Gardi Sugdub has, and this is shown through their promises to the Guna people. The fact that they have already started building the new relocation site does not take away their responsibility to get this project done in a timely manner. Even then, there are still many issues that have been overlooked and not addressed by the government of Panama such as the lack of water, sewage, and trash management at the new relocation site.[56]

Moreover, the Committee identifies that environmental degradation and climate change are "some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life."[57] Although these statements are not made directly in the ICCPR itself, the general comments provided by the Committee (which are the ones who enforce the ICCPR) provide clarification and specificity as to the intent of the drafters

53. *Id.* ¶ 26.
54. *Id.*
55. *See id.*
56. HUM. RTS. WATCH, *supra* note 2, at 1.
57. General Comment No. 36, *supra* note 51, ¶ 62.

with respect to certain articles of the ICCPR.[58] These comments within General Comment No. 36 provide direct support of the underlying notion that States should provide its people with a planned relocation when it is being asked for by the people and when the threat to their right to life is severe such as seen here with Gardi Sugdub—due to the negative impacts of climate change and environmental degradation.

D. Universal Declaration of Human Rights

The Universal Declaration of Human Rights ("UDHR") was proclaimed by the United Nations General Assembly on December 10, 1948.[59] The UDHR sets forth the fundamental human rights that are to be universally protected and has been used as a basis for many other international treaties and conventions as well as state laws.[60] Although the UDHR does not go into the specificity of referring to climate change, environmental degradation, or the right to a planned relocation, the UDHR has two articles that lay the foundation that encompasses all of these things. With a broader interpretation of Articles 3 and 25, Panama would potentially be in violation of these articles.

Article 3 states that "everyone has the right to life, liberty and security of person."[61] This notion of the right to life goes in conjunction with Article 25 which sets forth the right to a standard of living.[62] The right to a standard of living must be "adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . . ."[63] These articles make it clear that, at the bare minimum, there is a standard of living that should be held by all member states.[64] Panama is required to uphold these standards that provide for adequate health, food, and housing and this is a common standard of achievement for all.[65]

---

58. *See UN Human Rights Committee Clarifies, Expands Guidance on Right to Life*, INT'L JUST. RES. CTR. (Nov. 10, 2018), https://ijrcenter.org/2018/11/20/un-human-rights-committee-clarifies-expands-guidance-on-right-to-life/.

59. Universal Decl. of Hum. Rts., *supra* note 25.

60. *See id.* at preamble.

61. *Id.* at art. 3.

62. *See id.* at art. 25.

63. *Id.* Article 25 states that, "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." *Id.*

64. Universal Decl. of Hum. Rts., *supra* note 25.

65. *See id.*

Despite the lack of the use of keywords such as "climate change," there is no distinction as to what does and does not qualify as things that could lead to a violation of these rights. The severe impacts of climate change, as seen in Gardi Sugdub due to the rise in sea level, can lead to a state not protecting people's right to life and right to a standard of living that meets the standards set forth in Article 25.[66] If people do not have adequate health, food, and housing, then this could threaten their right to life. People can get severely ill or die due to their vulnerability to diseases or to more natural disasters due to environmental degradation. There is a strong notion that member states must protect these rights and in order to prevent these rights from being threatened,[67] action must be taken whether through preventative measures or through immediate action to resolve any potential or current issues that arise.

E. United Nations Framework Convention on Climate Change

The United Nations Framework Convention on Climate Change ("UNFCCC") is an international treaty that was created in 1992.[68] The UNFCCC provides a framework to combat climate change through limiting global temperature increases but also coping with the impacts of climate change.[69] Importantly, it establishes that climate change and its adverse effects are a shared concern among all of humankind.[70]

Throughout the UNFCCC, there are multiple instances where there is acknowledgement that parties should take precautionary measures to prevent or minimize the causes of climate change and to mitigate its adverse effects.[71] Further, the parties are to take all of this into account when creating their social, economic and environmental policies and actions.[72] This strongly suggests that countries like Panama that have low-lying coastal areas should develop planned relocation policies for if and when they need to be used due to the adverse effects of climate change. Low-lying coastal areas are recognized as one of the more vulnerable communities to the impacts of climate change due to the rise in sea levels.[73] Even though Panama currently does not have a planned relocation policy in place, the government should be

66. *Id.* at art. 25.

67. *See generally Universal Declaration of Human Rights,* AMNESTY INT'L, https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/.

68. *See* United Nations Framework Convention on Climate Change, *adopted* May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107.

69. *See id.*

70. *See id.*

71. *See id.* at art. 3 ¶ 3.

72. *See id.* at art. 4 ¶ 1(f).

73. *See id.* at art. 4 ¶ 8(b).

developing one in conjunction with their planned relocation of Gardi Sugdub. Once Gardi Sugdub is able to be successfully relocated, this will just be the start for many more communities in Panama's low-lying coastal areas to be relocated at some point in the near future.

F. Inter-American System and Inter-American Court of Human Rights

Panama is also a member of the Organization of American States ("OAS") which is comprised of thirty-five independent countries.[74] The Inter-American System is regional human rights system that is in place to protect the human rights of the members of the OAS.[75] Under the Inter-American System, the Inter-American Court of Human Rights is the judicial body that not only hears cases that are brought against members of the OAS, but the Court may also issue advisory opinions on issues related to the American Convention on Human Rights at the request of a member.[76]

On November 15, 2017, the Court issued an advisory opinion at the request of Colombia interpreting Articles 4 and 5 of the American Convention on Human Rights.[77] An advisory opinion is solely an opinion from the Court interpreting the law and it is nonbinding,[78] these opinions do offer guidance as to how its member states should act.[79] It is universally known that the negative impacts of climate change are affecting human rights. In this advisory opinion, the State of Colombia posed several questions to the Court and the most important one being:

> Should we interpret, and to what extent, the provisions establishing the obligation to respect and ensure the rights and freedoms set out in Articles 4 and 5 of the Pact, as to give rise to the obligation of States parties to the Pact to respect the provisions of international environmental law which seek to prevent environmental damage that could limit or make impossible the effective enjoyment of the rights to life and to personal integrity?[80]

The Court found that the right to a healthy environment is a human right, and the states have three obligations: (i) to prevent environmental damages;

74. *Inter-American Human Rights System*, *supra* note 27.

75. *Id.*

76. *Id.*

77. The Environment and Human Rights (Arts. 4 (1) and 5(1) in Relation to Arts 1(1) and 2 of the American Conventions on Human Rights), Advisory Opinion OC-23/17, ¶¶ 1 and 37, Inter-Am. Ct. H.R. (Nov. 15, 2017) [hereinafter The Environment and Human Rights].

78. *See generally* Inter-Am. Ct. H.R., *What are the Advisory Opinions?*, INTER-AM. CT. H.R., https://www.corteidh.or.cr/que_son_las_opiniones_consultivas.cfm?lang=en.

79. *See id.*

80. The Environment and Human Rights, *supra* note 77, ¶ 3(III).

(ii) to cooperate with other states; and (iii) to provide information, justice and public participation.[81]

Once again, we see the notion that the obligation of a planned relocation cannot just rest solely upon the one individual state. There needs to be support and cooperation with and from the international community. Further, states must give their citizens the opportunity to publicly participate in the decision-making process and policies that are being created and that affect them and their environment directly.[82] It is the state's responsibility to identify these environmental issues by conducting environmental impact studies and then from there, create contingency plans to mitigate further risk of environmental damage, issue regulations to prevent damage, and take action to take care of the damage that has already occurred.[83] This advisory opinion lays out the foundation for how states need to approach this issue of climate change and how to go about adapting to these changes.

Therefore, according to Panama's international obligations set forth above through the various international agreements, covenants, and soft law, a planned relocation must at a minimum restore or improve the standard of living of the Guna people. The same underlying themes of mitigation, cooperation with states and the international community, and the idea of continuously improving the standard of living of its people through adequate health, housing, food, water, and education, are evident throughout all these international bodies of authority. These emerging principles of international law strongly suggests that the victims of climate change have a right to amelioration of what they have suffered and when necessary, a planned relocation should take place in order to give them the quality of life that they are owed.

IV. THE PANAMANIAN GOVERNMENT HAS A DUTY TO SAFEGUARD INDIGENOUS PEOPLE'S RIGHTS

Panama has additional legal obligations around safeguarding the rights of its indigenous people. The constitution of Panama spells out the collective rights of indigenous peoples which are in line with human rights standards set forth in the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP").[84] Indigenous peoples are already among the most

81. *See id.* ¶ 106.

82. *See id.* ¶ 168.

83. *See id.* ¶ 174.

84. *See* James Amaya (Report of the Special Rapporteur on the Rights of Indigenous Peoples: Addendum), *Rep. on the Status of Indigenous Peoples' Rts. in Panama,* U.N. Doc. A/HRC 27/52, at 5, 8 (2014).

impacted by climate change; thus, it is imperative that the planned relocation policy not further harm the Guna people.

A. Panama's Constitution

Given that in September 1938, Panama officially recognized the San Blas islands as a *comarca*—a territorial subdivision of the state— the Guna Indigenous people are essentially an autonomous, self-governing society.[85] The Panama Constitution is interlaced with protections for its indigenous communities, for example Article 127 of the constitution guarantees "the reservation of necessary lands and collective ownership thereof" to indigenous communities "to ensure their economic and social well-being."[86] There is no doubt that the Guna Yala province belongs to the Guna people, but the issues arises when this very land is not equipped to provide the Guna people with their basic needs. The land they are currently on does not provide them with adequate food and access to clean water. The overcrowding of the land does not allow them to have proper housing. About fifteen to twenty people are enclosed in each home due to the lack of space on the island.[87] The current living conditions are in direct violation of the rights set forth in Panama's constitution and does not even, at best, ensure the Guna people's economic and social well-being.

Additionally, the Panama Constitution sets forth specific obligations to Panama's indigenous groups with respect to providing for adequate food,[88] a quality education,[89] and the preservation of the culture of indigenous groups to ensure "active participation in public life."[90] There is an overlap between the human rights obligations that are provided under international law and the obligations that Panama has taken on domestically through its own constitution. The fact that adequate food, economic, social well-being, and

85. HUM. RTS. WATCH, *supra* note 2, at 13, 49 (first citing Creation of Comarca, Ley 2 de 1938 (art. 1) (1938) (Pan.); and then citing Ley 99 de 1998 (art. 1-3) (1998) (Pan.)).

86. Constitution of Panama, *supra* note 28, at art. 127.

87. HUM. RTS. WATCH, *supra* note 2, at 21-22.

88. *See* Constitution of Panama, *supra* note 28, at art. 124. Article 124 of Panama's Constitution states that, "The State shall give special attention to indigenous farming communities, with the purpose of promoting their economic, social and political participation in the national life." *Id.*

89. *See id.* at art. 108. Article 108 of Panama's Constitution states that, "The State shall develop programs of education and promotion for indigenous groups which possess their own cultural mores, in order to ensure their active participation in public life." *Id.*

90. *See id.* at art. 90. Article 90 of Panama's Constitution states that, "The State recognizes and respects the ethnic identity of national indigenous communities, and shall establish programs to develop the material, social and spiritual values of each of their cultures. It shall establish an institution for the study, preservation and publication of these cultures and their languages, and for promotion of full development of said human groups." *Id.*

quality education are consistently being referred to continues to prove the importance of these fundamental human rights that every state should be required to provide for its people. The added factor here is that Panama has taken on these basic human rights obligations and has made a further commitment to its indigenous groups. Once again, we see that the current living conditions of the Guna people in Gardi Sugdub are not up to par at the bare minimum required by international and domestic law.

B. United Nations Declaration on the Rights of Indigenous Peoples

Further, Panama is a member of the United Nations and the adoption of UNDRIP provides for additional guidance on the "inherent rights of indigenous peoples" deriving from "their rights to their lands, territories and resources."[91] UNDRIP was adopted by the General Assembly on September 13, 2007.[92] Importantly, UNDRIP is not a treaty, but rather a resolution that was adopted by the UN General Assembly, meaning that this does not create an international obligation to member states.[93] Although UNDRIP is not legally binding, the General Assembly has made these recommendations as a "standard of achievement" and the resolution still "retains strength and authority since [it] reflect[s] the opinion or general will" of member states on indigenous peoples.[94] This can be referred to as soft law and when combined with the aforementioned texts we have seen above, UNDRIP holds a stronger sense of authority as the same underlying themes of providing a minimum standard of living is the same throughout.[95]

First and foremost, it is important to recognize that indigenous groups of people have the right to the same fundamental human rights and freedoms that are outlined in the United Nations charter as well as in the international covenants discussed above.[96] Indigenous people are seen as equals to any other person and should not be deprived of any rights thereof.[97] Furthermore,

---

91. G.A. Res. 61/295 Declaration on the Rights of Indigenous Peoples (UNDRIP), at 2 (Sept. 13, 2007) [hereinafter UNDRIP].

92. *Id.* at 1.

93. *Id.* at art. 46, ¶¶ 1, 2.

94. *The Practical Guide to Humanitarian Law*, MEDECINS SANS FRONTIERES, https://guide-humanitarian-law.org/content/article/3/soft-law/#:~:text=Though%20they%20are%20not%20a,can%20make%20it%20legally%20binding.

95. *Id.*

96. Article 1 of the UNDRIP states that, "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law." UNDRIP, *supra* note 91, at art. 1.

97. *Id.* at art. 2. Article 2 of the UNDRIP states that, "Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of

the underlying notion in UNDRIP is that the rights set forth in the resolution are "the minimum standards for the survival" of indigenous peoples across the world.[98] These rights such as the right to education, health, adequate housing, and equality are the bare minimum. It is implied that states should be going above and beyond these standards and providing more for indigenous peoples. Currently, Panama is not even meeting these "bare minimum" requirements for survival. Panama is in direct violation of these rights and the government is not taking the appropriate measures to achieve the ends of what UNDRIP was made for.[99] Although Panama may not be directly contributing or causing the disruption in the Guna people's lives, by not having a sense of urgency and taking immediate action to relocate the Guna people out of Gardi Sugdub, Panama is not recognizing the basic needs of these people.

The Guna people have expressed their desire for relocation and the rights set forth in UNDRIP are in line with their right to improve their standard of living to one that at least gives them what they need—food, water, housing, health, and education.[100] The Guna people are currently deprived of being able to develop themselves fully and there is an entitlement to amelioration, at the least, of what they are suffering.[101] UNDRIP recognizes this right to improvement and development of indigenous peoples and the Guna people themselves can determine what priorities exist within their community and how to go about developing their own health, housing, and economic and social programs.[102] Since the Guna people have already determined that relocation is their priority, then Panama should stand by them and provide

discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity." *Id.*

98. *Id.* at art. 43. Article 43 states that, "The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world." *Id.*

99. *See generally id.* at art. 38. Article 38 states that, "States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration." *Id.*

100. *See id.* at art. 21. Article 21 states that, "Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities." *Id.*

101. *See id.* at art. 20, ¶ 2. Article 20 states that, "Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress." *Id.*

102. *Id.* at art. 23. Article 23 states that, "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions." *Id.*

them with the necessary assistance to relocate them to the new site in timely manner.

Articles 5 and 10 of the UNDRIP specifically dictate the indigenous peoples' right to free, prior and informed consent before any relocation takes place.[103] Although it is Article 10 that specifically refers to the right to free, prior and informed consent with respect to relocation, Article 5 goes towards the notion of being able to fully participate in the "political, economic, social, and cultural life of the State."[104]

The principle of free, prior, and informed consent is an underlying notion that is impliedly woven into the international treaties, as seen in Section III. The principle is closely linked to the right to self-determination which is affirmed in Article I of the covenants of International Human Rights.[105] According to a document published by the United Nations Human Rights Office of the High Commissioner ("OHCHR"), *free* implies that there is "no coercion, intimidation or manipulation."[106] *Prior* implies that consent is to be sought in advance and before anything is authorized or activities begin to move forward.[107] The definition of *informed* is commonly viewed as follows as set forth by the OHCHR:

> *Informed* implies that information is provided that covers a range of aspects, including the nature, size, pace, reversibility and scope of any proposed project or activity; the purpose of the project as well as its duration; locality and areas affected; a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks; personnel likely to be involved in the execution of the project; and procedures the project may entail. This process may include the option of withholding consent. Consultation and participation are crucial components of a *consent* process.[108]

---

103. *See id.* at art. 5, 10. Article 5 states that, "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State"; Article 10 states that, "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return." *Id.*

104. *Id.* at art. 5.

105. *Free, Prior and Informed Consent of Indigenous Peoples*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (Sept. 2013), https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf.

106. *Id.*

107. *Id.*

108. *Id.*

There is little to no doubt that the Guna people should be involved in each and every stage of the relocation process, including decisions about site selection and development. As discussed in Section II, the Guna people realized back in 2010 that relocation to the mainland was necessary in order to preserve their community and their livelihood.[109] The Guna people have worked with the Panamanian government to set this plan into motion and, although they have been involved in some discussions, the Guna people have not received any explanation as to why there is a delay with this project.[110] By this time, the Guna people should have already been moved into their new home on the mainland in "La Barriada" or now named, "Isperyala."[111] They have received a new date of February 29, 2024, and despite this new date, there is a lack of trust and hope from the Guna people in the government. The Guna people are still questioning, 'Will the new site actually be ready for relocation in three months from now?' The answer remains unknown due to the government's lack of communication with the Guna people, although there is speculation that the government is misusing the funds received for this project and allocating them to other infrastructural projects in Panama.[112]

Moreover, the new site, although incomplete, still presents many challenges to the Guna people and their livelihood. Notably, the new homes that are being built are not made in a way that caters to the needs of the Guna people.[113] The Guna peoples mostly sleep in hammocks and these new homes do not have places for them attach them.[114] Additionally, the Guna people have large families and these units can only fit up to four or five people.[115] On a larger scale, the homes are not being built with Panama's extreme weather it periodically faces in mind.[116] The new site demonstrated visible signs of "flooding, erosion and small landslides."[117] These risks will still exist once the Guna people move in, and yet nothing is being done to mitigate these challenges. The sinking issue is eliminated with the new site on the mainland, but that does not make a difference when the community and their homes will still be vulnerable and susceptible to being buried.

---

109. *See* HUM. RTS. WATCH, *supra* note 2, at 1.

110. *Id.* at 2.

111. *Id.* at 15.

112. *See* Beatriz Felipe Perez & Alexandra Tomaselli, *Indigenous Peoples and Climate-Induced Relocation in Latin America and the Caribbean: Managed Retreat as a Tool or a Threat?* 11 J. ENV'T STUD. SCI. 352, 357 (2021) (showing a history of the Panamanian government misusing funds).

113. HUM. RTS. WATCH, *supra* note 2, at 34.

114. *Id.*

115. *Id.*

116. *See id.* at 26, 27, 36.

117. *Id.* at 36.

Thus, in light of the additional legal obligations that Panama has towards its indigenous peoples through its own constitution and UNDRIP, the Guna people must be involved in all the stages of the relocation process. All the gaps that still exist with the new relocation site should be discussed with the Guna people so that they can work together not only with the Panamanian government to discuss potential solutions but also with the international community. Indigenous peoples have the right to financial and technical assistance from the international community specifically for the ability to be able to enjoy the rights set forth in UNDRIP.[118] This process of a planned relocation is not a one-man show, and the Guna people alone do not have the resources to acquire everything that they need. Panama and the international community must come together and acknowledge that this implied obligation to relocate the people of Gardi Sugdub is not only a domestic political one, but also an international obligation.

V. A PLANNED RELOCATION WOULD MITIGATE THE RISK OF ABRUPT, FORCED DISPLACEMENT

A. Migration and Displacement

Although a planned relocation does not come along risk free, a planned relocation would mitigate the larger risk of abrupt, forced displacement of people. If communities were to be displaced, this would require them to leave their homes and try to migrate on their own and find another place to call home. Migrating to another country is very high risk as the best chances for them to stay in that country legally would be to come in as refugees. The issue in this approach lies in that there are not sufficient cases internationally wherein people claim status as environmental refugees. The standard is quite high to successfully reach this status and recent cases have leaned towards a more conservative approach in whether those claiming refuge due to climate change would rise to the level to grant them status as environmental refugees. This pathway is not as secure as what a planned relocation would provide to the community at risk.

Furthermore, the migration of indigenous peoples comes at a higher cost. If indigenous peoples move to another country, they would be losing their complete sense of community and culture in that the new country would most likely not be able to provide them with the same resources and lifestyle that they are accustomed to. By looking at *Teitiota v. The Chief Executive of the*

118. UNDRIP, *supra* note 91, at art. 39. Article 39 states, "Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration." *Id.*

Ministry of Business, Innovation and Employment,[119] along with *Caceres et al. v. Paraguay*,[120] one can further understand the views of the UN Human Rights Committee when deciding cases that involve a violation of the right to life under the ICCPR and specifically those about climate change and environmental degradation.

1. Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment ("Teitiota")

Teitiota is a landmark UN case that went up to the Supreme Court of New Zealand and then brought by the applicant to the UN Human Rights Committee against the government of New Zealand.[121] At each stage of the court proceedings, the case was denied.[122] In the original claim by Mr. Teitiota at the Immigration and Protection Tribunal of New Zealand, the Tribunal found that he could not bring himself into the country legally through the Refugee Convention or New Zealand's protected person jurisdiction on the grounds that his homeland, Kiribati, was suffering the effects of climate change.[123]

Mr. Teitiota and his wife fled Kiribati in 2007 and went to New Zealand and remained in the country three years after their residency permits had expired.[124] After Mr. Teitiota was arrested after a traffic stop, he applied for refugee status/protected person status under the Immigration Act of 2009 on the grounds that climate change was causing an increase in the sea levels in Kiribati (his homeland).[125] The rise in sea level, similar to that of Gardi Sugdub, would continue to impact the environment up to the point where the citizens of Kiribati would be forced to leave their islands.[126]

Mr. Teitiota's application was denied,[127] and then he appealed to the Immigration and Protection Tribunal.[128] The Tribunal dismissed his appeal

119. *See Teitiota v. Chief Executive of the Ministry of Business Innovation and Employment* [2015] NZSC 107 (N.Z.).

120. See UNHRC, Comm. No. 2751/2016, *Caceres et al. v. Paraguay*, UN Doc. CCPR/C/126/D/2751/2016.

121. *Teitiota*, [2015] NZSC 107.

122. *Id.* at [6].

123. *Id.* at [5].

124. *Id.* at [4].

125. *Id.* at [5].

126. The sea level of the islands of Kiribati had been rising steadily which led to some environmental degradation. *Id.*

127. *Id.* at [6].

128. *Id.* "The Immigration and Protection Tribunal hears and determines appeals concerning decisions about residence class visas, decisions about the recognition of a person as a refugee or protected person, liability for deportation, decisions to stop recognizing a person as a refugee or protected person, and decisions to cancel the recognition of a New Zealand citizen as a refugee or

"holding that [Mr. Teitiota] was neither a refugee within the meaning of the Refugee Convention nor a protected person within the meaning of the ICCPR."[129] Mr. Teitiota then appealed to the Supreme Court and the Court of Appeal[130] identifying six questions of law but both appeals were denied finding that these questions of law were insufficient to justify the grant of leave.[131] Some of the main issues that he brought up before the Supreme Court in this case were: (i) whether an "environmental refugee" qualifies for protection under the Refugee Convention; (ii) whether there is a broader interpretation of "refugee" in the Immigration Act;[132] and (iii) whether the ICCPR includes a right of subsistence.[133] The Supreme Court denied the appeal on the grounds that Mr. Teitiota does not face "serious harm" if he returned to Kiribati and there was no proof that the government of Kiribati was failing to protect its citizens from the effects of climate change.[134] It is important to note that all three courts of New Zealand made it clear that their decision to deny the appeal here does not rule out the possibility for an "environmental refugee" to have a pathway through the Refugee Convention.[135]

On February 16, 2016, the UN Human Rights Committee (the "Committee") reached a decision on this case and affirmed the New Zealand courts finding that Mr. Teitiota's right to life was not violated by New

protected person." Ministry of Justice, *Immigration & Protection Tribunal*, MINISTRY OF JUSTICE, https://www.justice.govt.nz/tribunals/immigration/immigration-and-protection/ (last updated July 22, 2024).

129. *See Teitiota v. Chief Executive of the Ministry of Business Innovation and Employment* [2015] NZSC 107 at [6] (N.Z.).

130. *Id*. at [6]-[7]. The High Court is New Zealand's only court of general jurisdiction which means there are no limits on the cases the High Court can hear and the Court of Appeal is New Zealand's intermediate appeal court. It hears appeals from civil and criminal cases heard in the High Court, appeals from criminal jury trials in the District Courts, and leave applications where a second appeal is to be taken. *See* Ministry of Justice, *High Court*, MINISTRY OF JUSTICE, https://www.justice.govt.nz/courts/court-of-appeal/ (last updated Jan. 8, 2025).

131. *Teitiota*, [2015] NZSC 107 at [6].

132. *Id.* at [11b]. Section 129 of the Immigration Act of 2009 sets forth the test to determine whether one is a refugee. A person is a refugee if they meet the following requirements: "A person must be recognized as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention" and "A person who has been recognized as a refugee under subsection (1) cannot be deported from New Zealand except in the circumstances set out in section 164(3)." Immigration Act 2009, s 129 (N.Z.).

133. *Teitiota*, [2015] NZSC 107 at [11b]. The right of subsistence is a human right that ensures that each person has secure access to clean water, adequate food and shelter and basic healthcare, which are all necessary to survival. *See* Charles Jones, *The Human Right to Subsistence*, 30 J. APPLIED PHIL. 57, 61 (2013).

134. *Teitiota*, [2015] NZSC 107 at [12].

135. *Id.* at [13].

Zealand under Article 6 of the ICCPR.[136] The Committee went through some important points about the current international law surrounding the right to life outlined in Article 6 of the ICCPR.[137] Paragraph 12 of the Committee's general comment No. 31 (2004) refers to the States' obligations not to "remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm."[138] The Committee places an emphasis on the fact that there is a high threshold to establish that a risk of irreparable harm exists and the risk itself must be personal and cannot be solely based on the general conditions of the State they are fleeing from.[139]

Furthermore, specifically with respect to the right to life, the Committee refers to general comment No. 36 (2018), which states that the right to life "extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life."[140] It has been established that climate change has been identified as one of the most serious threats for people's right to life and environmental degradation may lead to a violation of this right.[141] The Committee analyzes Mr. Teitiota's supporting arguments for the violation of his right to life such as the overpopulation and frequent flooding, the lack of access to potable water and his deprivation of subsistence because of the destruction of his crops due to an increase in saltwater contamination due to the rise in sea level.[142] In each instance, the Committee found that Mr. Teitiota lacked to provide sufficient evidence with respect to each of his arguments "so as to produce a reasonably foreseeable threat of a health risk that would impair his right to enjoy a life with dignity or cause his unnatural or premature death."[143] For example, there was a lack of evidence to indicate that a supply of fresh water was inaccessible.[144] With respect to his crops, although Mr. Teitiota stated it was now more difficult to grow his crops, the Committee found that it was not an impossible task on top of there being a lack of evidence on alternate sources of employment and financial assistance.[145]

136. See UNHRC, Comm. No. 2728/2016, *Teitiota v. Chief Executive of the Ministry of Business Innovation and Employment*, ¶ 10, UN Doc. CCPR/C/127/D/2728/2016.

137. *Id.* ¶ 2.9.

138. *Id.* ¶ 9.3.

139. *Id.*

140. *Id.* ¶ 9.4.

141. *Id.*

142. *Id.* ¶¶ 2.5-2.7.

143. *Id.* ¶ 9.8.

144. *Id.*

145. *Id.* ¶ 9.9.

Due to Kiribati taking adaptive measures to mitigate the effects of climate change along with the lack of sufficient evidence to support an imminent risk of irreparable harm to Mr. Teitiota, the Committee did not find a violation under Article 6 of the ICCPR.[146] The Committee did note that with no national or international efforts, "the effects of climate change may expose individuals to a violation of their rights under Article 6 of the ICCPR, thereby triggering the non-refoulement obligations of sending States."[147]

In light of the decision of the Committee in this specific case and the adoption of this view was on October 24, 2019, there is a high threshold to meet in order to potentially be considered as an "environmental refugee" in a different State. The Committee did acknowledge that there could be potential success in making this claim in the future, but the outlook does not look very promising. There would be no guarantee that the people of Gardi Sugdub, if they were forcefully displaced and required to seek refuge in another State, would be able to stay lawfully and gain status as a refugee due to the effects of climate change. The level of uncertainty is a lot higher than that of a planned relocation and can be observed by analyzing states that have already successfully relocated entire communities due to the same reasons that the people of Gardi Sugdub are seeking to relocate—a rise in sea level.

2. Caceres et al. v. Paraguay

Caceres et al. v. Paraguay is another case regarding the right to life that was brought to the Committee against Paraguay.[148] The Committee reached a decision and adopted its views on July 25, 2019.[149] The authors of the claim state that it is Paraguay's lack of authorization and oversight over the agribusinesses in Colonia Yerutí that have led to the continued use of fumigation of crops with toxic agrochemicals.[150] These toxic agrochemicals have contaminated the water of the nearby streams and caused the death of many fish and farm animals, the loss of fruit baring trees, and crop damage.[151] In turn, this eventually led to the death of Mr. Portillo Caceres, who had a farm next to these larger agribusinesses, along with the hospitalization of 22 other inhabitants of Colonia Yerutí, who experienced similar physical symptoms of vomiting, diarrhea and fever.[152]

146. *Id.* ¶¶ 9.6, 9.12.
147. *Id.* ¶ 9.11.
148. *See Caceres*, *supra* note 120, at 1.
149. *Id.*
150. *Id.* ¶¶ 2.3, 2.4.
151. *Id.* ¶ 2.5.
152. *Id.* ¶¶ 2.7, 2.8.

After inspection of two soybean producers located next to the authors' farms, it was noted by the Ministry of Environment "that they did not maintain a buffer zone, did not hold an environmental permit and were applying toxic agrochemicals without an agrochemical certificate or the services of a technical adviser."[153] The District Court had ordered the National Plant and Seed Quality and Health Service to oversee and make sure the agribusinesses were following the policies but no steps were taken to enforce this order and fumigation had continued to take place with no environmental protection measures in place.[154]

The Committee has made it clear once again just like in *Teitiota* that a narrow interpretation of the right to life does not convey the right in its entirety and that is the States' obligation to be able to protect this right for all.[155] States must take all "appropriate measures" possible to address any potential or existing threats to the right to life.[156] Although environmental protections are not specifically outlined in the ICCPR, the Committee reiterates that severe environmental degradation may lead to a violation of the right to life.[157]

Due to the Committee's broader interpretation of Article 6 of the ICCPR, the Committee found that Paraguay was in violation of Article 6 of the ICCPR.[158] The heavy spraying of toxic agrochemicals posed a reasonably foreseeable threat to the authors' lives given that this led to the contamination of "the rivers in which the authors fish, the well water they drink and the fruit trees, crops and farm animals that are their source of food."[159] Further, Paraguay has failed to provide an alternate explanation for the hospitalization and death of Mr. Caceres and an autopsy was never conducted.[160] Further, the Committee noted that for five years before this case, multiple government authorities were aware of the fumigations that were occurring and the impact it was having on the community, but no action was ever taken.[161] The State was aware and acknowledged their responsibility to oversee the agribusinesses and therefore, the Committee deemed the State of Paraguay to be in violation of Article 6 of the ICCPR.[162]

153. *Id.* ¶ 2.12.
154. *Id.* ¶¶ 2.22, 2.23.
155. *Id.* ¶ 7.3.
156. *Id.*
157. *Id.* ¶ 7.4.
158. *Id.* ¶ 7.5.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*

3. Findings

Teitiota and *Caceres* allow us to see the views that the Committee held on claims that involved a violation of Article 6 due to environmental degradation. In *Teitiota*, the Committee did not find an Article 6 violation[163] whereas in *Caceres*, the Committee did find an Article 6 violation.[164] Although both these cases are different in that *Teitiota* was about a climate refugee case and *Caceres* was about an agribusiness using toxic agrochemicals, both these cases shine a light as to what the standard is to show that a state has violated Article 6 for the party bringing the suit. The standard is quite high, and the harm must be "imminent" and there must be sufficient evidence to show that the State acted or did not act in a way that led to the negative effects to its citizens. These cases allow us to see that if the people of Gardi Sugdub are forcefully displaced and need to migrate to another country, their chances at being able to claim status as "environmental refugees" may not be as high as one would think. The risk of being removed would be great and therefore, a planned relocation would provide for better security and protections of its people.

B. Case Study: Fiji's Low-Lying Coastal Villages

Planned relocations are not unheard of, and Fiji has relocated an entire village of 140 people and has also had a partial relocation of a village.[165] This case study will demonstrate what a planned relocation looks like in practice for a group of indigenous people. In 2014, the Vunidogoloa village relocated from its coastal village to a higher site within their land that had less environmental risks.[166] Vunidogoloa was a village that experienced flooding, erosion, saltwater intrusion and seawall failures.[167] Due to the environmental risks and the failed efforts to be able to mitigate these issues themselves such as building seawalls, the residents approached the Fijian government in 2006 asking for financial support to relocate.[168]

Although there were site leveling problems at the new proposed site, a second site was selected in 2011 that was only two kilometers inland from

163. *Teitiota v. Chief Executive of the Ministry of Business Innovation and Employment* [2015] NZSC 107 at [12] (N.Z.).

164. *Caceres*, *supra* note 120, ¶ 7.5.

165. Celia McMichael et al., *Planned Relocation and Everyday Agency in Low-Lying Coastal Villages in Fiji*, 185(3) GEOGRAPHICAL J. 325, 329 (2019) [hereinafter McMichael, *Planned Relocation*].

166. *Id.*

167. *Id.*

168. *Id.*

their old village.[169] Along with the resources received by the government (several ministries were involved) and international partners, the community members were able to contribute labor, building materials and funds gained through logging ancestral land.[170] It is important to note that the villagers were greatly involved in the planning process such as designing the new layout of the new site as well as advocating for the preservation of their culture and way of life.[171] Their involvement can be seen reflected in the fact that the new location had "four fishponds, pineapple plantations, a copra drier, and farms" in order to mirror the same agricultural conditions that the villagers were used to.[172] This is a part of their culture and a planned relocation requires the preservation of the culture.

The planned relocation of the Vunidogoloa village demonstrated the importance of the involvement of multiple actors in order to successfully go through this process. The "multi-scalar engagement includ[ed] individuals, households, communities, village heads, Provincial Councils, the Office of the Prime Minister, government ministries (e.g., Ministry of Rural and Maritime Development, Ministry of Economy, Ministry of iTaukei Affairs), Republic of Fiji Military Forces, and international donors and agencies."[173] By getting as many actors involved, the Vunidogoloa village was able to gain momentum on a national and global level.[174]

Even though the villagers are currently still waiting for a second phase to complete infrastructure works, there has already been a significant improvement in their standard of living.[175] A five-year case study that was conducted in Vunidogoloa revealed that the villagers now have access to fertile soil and farmland which in turn allows for food security, as well as income due to the development of cash crop plantations.[176] Although their access to fresh seafood is not as rich since they are no longer near the coast,[177] the benefits outweigh the loss in this situation. In turn, there has also been a noticeable increase in their overall health which it is in part due to clean water and improved sanitation services.[178] All houses now have "a shower, a

169. *Id.*

170. *See* Celia McMichael & Teresia Powell, *Planned Relocation and Health: A Case Study from Fiji*, 18(8) INT'L J. ENV'T RSCH. & PUB. HEALTH (SPECIAL ISSUE) 1, 3 (2021) [hereinafter McMichael, *Case Study from Fiji*].

171. *See* McMichael, *Planned Relocation*, *supra* note 165, at 332.

172. *Id.* at 329.

173. *Id.* at 331.

174. *Id.*

175. *Id.* at 329; *see* McMichael, *Case Study from Fiji*, *supra* note 170, at 3, 5 (see Table 1).

176. McMichael, *Case Study from Fiji*, *supra* note 170, at 7.

177. *See id.*

178. *See id.* at 11.

flushing toilet, and a sink with piped water for washing hands and dishes."[179] A local nurse reported that there is now a significant reduction in skin and eye infections and conditions as everyone is now washing their hands and faces with clean water.[180]

Moreover, in 2018, the Fijian government issued planned relocation guidelines which provide guiding principles and procedures for all stakeholders that "ensure access to basic human rights including the right to water, food, health, work, education and a clean and healthy environment."[181] Developing some type of framework for planned relocations in Fiji was imperative, because in 2017, the Fijian government identified 830 vulnerable communities that would require relocation due to the impacts of climate change.[182] Out of those 830 communities, forty-eight were marked as "urgent."[183]

The environmental risks posed by climate change are here to stay and just how Fiji developed guidelines for how to handle future relocations, Panama should take the same precautions given that many of their coastal communities are also in the same position as those in Gardi Sugdub. It is only a matter of time before those communities start to ask for a planned relocation. There is no need to wait for an issue to exacerbate or to rise to the level of urgency where immediate action is needed. The Panamanian government is aware of the impacted communities, and it is time to create a planned relocation policy with the input of community members that safeguards the fundamental human rights outlined in their own constitution as well as the various international treaties and soft law. By doing so, Panama could set precedent in the Americas on how to deal with the impacts of climate change of its many coastal regions.

VI. CONCLUSION

To ensure the proper relocation of the Guna people, Panama must abide by its international law obligations. Additionally, Panama must safeguard its additional legal obligations for indigenous peoples by honoring their right to free, prior and informed consent in every aspect of the relocation process. Furthermore, although Panama would be the first in the Americas to have a planned relocation, Panama can look to Fiji as a prime example of how to proceed, doing this could prevent the migration and displacement that would

179. *Id.* at 9.
180. *Id.*
181. *Id.* at 2.
182. *See* McMichael, *Planned Relocation*, *supra* note 165, at 326.
183. *Id.*

otherwise occur without a planned relocation. If Panama, the Guna people, and the international community work together, they have the opportunity to implement a planned relocation policy that protects human rights and provides the Guna people with an improved standard of living.

CONGRESSIONAL ACTION IS NEEDED TO PROTECT HOTEL GUESTS FROM DISCRIMINATORY AI PRICING OUTCOMES

*Roksana Czech**

Abstract

Businesses increasingly implement Artificial Intelligence technology in their products. Today, hotels use AI as agents that can answer routine questions and perform some limited actions such as checking a guest out. However soon, businesses supporting hotels may use AI to increase revenue per available room based on customer insights. This article examines a possible use of AI in hotel revenue strategies against a backdrop of unique power imbalance between hotels and their guests. This article advocates for federal regulation of AI technology when used in the hotel sector, and regular audits to fairly administer the emerging technology. A proposed approach of regulation is based on the newly passed European Union's AI Act, which tailors the extent of regulation and restrictions based on risks associated with uses.

* Roksana Czech is the Senior Lead Article Editor of the Southwestern Journal of International Law, and a part-time 4L law student at Southwestern Law School, graduating in May 2025. Roksana earned a B.S. in Hospitality Management from San Francisco State University, with a minor in Business Administration and German. After graduation, Roksana spent the fourteen years working in the hospitality industry in various roles from an overnight front desk agent to a system implementation specialist and currently consults at a large resort casino in Las Vegas. Views expressed in this student note are her own and do not reflect views of her employer or any other affiliated institutions. Roksana thanks Prof. Danielle Kie Hart and Prof. Jonathan Miller for support in writing and publishing this student note, and all staffers and editors that worked to complete the publication of this volume.

I. INTRODUCTION

In the age of Artificial Intelligence (AI), we cannot ignore the ways in which autonomous technologies can harm humans. Regulators must act cautiously to avoid stalling progress, while implementing some restrictions on new technologies to reduce societal harms. With a global race among companies working seamlessly across borders, it is the government's role to set the guard rails on the AI racetrack.

One such race is starting in hotel room pricing. Even though today hotels set prices based on general data points such as market demand, they may soon set prices with AI based on data points specific to a potential guest. Instead of the market demand driving hotel prices, hotels will seek to provide personalized prices with AI making decisions based on a company's data specific to that guest. While some scholars anticipate positive outcomes in some markets,[1] they are also skeptical and caution against discriminatory outcomes.[2] Regulators in the United States should adopt proactive AI regulation, designed after the European Union AI Act (EU AI Act),[3] to prevent undesirable outcomes from AI use in commerce such as excessive price discrimination.

On the global stage, the European Union has come the closest to a comprehensive AI regulation with its recently proposed and implemented EU AI Act.[4] During his term in office, President Biden issued an Executive Order calling the federal government to action in regulating AI.[5] However, both the EU and the U.S. face a regulatory challenge where any effective AI regulation must effectively regulate AI usage, despite most companies using proprietary and often complex algorithms to arrive at outputs.[6] To add complexity in the hotel context, hotels have inherently opaque pricing models that create an information imbalance between consumers and hotels marketing to those consumers. While companies can gather consumer data more easily than ever before using internet cookies[7] or data brokers,[8] consumers lack knowledge of whether the hotel prices offered are fair, or

1. *See* OXERA, WHEN ALGORITHMS SET PRICES: WINNERS AND LOSERS 2 (2017); Qian Li et al., *AI-Enabled Price Discrimination as an Abuse of Dominance: A Law and Economics Analysis*, 9 CHINA-EU L. J. 51, 59 (2023).

2. *See* Li et al., *supra* note 1, at 51; OXERA, *supra* note 1, at 26.

3. *See* Regulation (EU) 2024/1689, of the European Parliament and of the Council of 13 June 2024, Laying down harmonized rules on artificial intelligence and amending Regulations (EC) No. 300/2008, (EU) No 167/2013, (EU) No. 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), 2024 O.J. (L 1689) para. 1 [hereinafter EU AI Act].

4. *See generally Commission Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonized Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, at 1.1, SEC (2021) 167 final (Apr. 21, 2021); *see also id.*

5. *See* Exec. Order No. 14,110, 88 Fed. Reg. 75, 191 (Nov. 1, 2023).

6. OXERA, *supra* note 1, at 30.

7. *See* Frederick Zuiderveen Borgesius & Joost Poort, *Online Price Discrimination and EU Data Privacy Law*, 40 J. CONSUMER POL'Y 347, 350 (2017).

8. *See* EXECUTIVE OFFICE OF THE PRESIDENT, BIG DATA: SEIZING OPPORTUNITIES, PRESERVING VALUES, 43 (2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.

even based on correct personal data. Especially when AI makes automated decisions that affect consumers, legislators must ensure that no discriminatory impact occurs.

The United States Congress must regulate the use of AI to prevent consumer discrimination, especially when hotels use AI to set room and service prices that are individualized to each potential guest. In this paper, I propose using the EU AI Act risk-based framework to proactively regulate AI usage, along with regular independent, algorithmic audits for any high-risk and limited-risk systems. The EU AI Act's risk-based approach provides technology companies with adjustable levels of oversight depending on the risks associated with the technology. The Act identifies four risk categories: (i) unacceptable risk, (ii) high risk, (iii) transparency risk, and (iv) minimal risk.[9] An example of an unacceptable risk is AI-based social scoring by public authorities—explicitly prohibited in the Act.[10] Whereas AI systems that fall into the high-risk category include those which are intended to be used as a safety component of a product are not prohibited, albeit thoroughly regulated.[11] This approach fosters improvements and growth in AI, while independent algorithmic audits ensure outcomes from AI decisions are compliant with already-existing laws.

II. HOTEL REVENUE MANAGEMENT STRATEGIES TODAY AND HOW HOTELS CAN LEVERAGE AI TO LEAD TO INCREASED PROFITS

Increasingly, hotel companies use Artificial Intelligence to answer customers' questions and queries from booking a reservation to checking out.[12] As AI technology improves and becomes more prevalent, hotels embrace AI in new ways. Besides serving as guests' virtual assistants, hotels can also use AI in revenue management to set hotel room prices.[13]

Traditionally, hotels base room prices on history, forecast, and market segments, but emerging AI technology has the potential to improve revenue

9. Briefing, EU Legislation in Progress: Artificial Intelligence Act, at 3, (Sept. 2024), https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698792/EPRS_BRI(2021)698792_EN.pdf [hereinafter EU Legislation in Progress].

10. *See European Commission Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonized Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, at 5.2.2, SEC (2021) 167 final (Apr. 21, 2021).

11. *See id.* at art. 6 para. 1.

12. *See* Andelka Stilic et al., *Check-in to the Future: Exploring the Impact of Contemporary Information Technologies and Artificial Intelligence on the Hotel Industry*, TURISTICKO POSLOVANJE 5, 8 (2023).

13. IDEAS, *Hospitality Technology Trends: How AI is Revolutionizing Hotel Revenue Management*, https://ideas.com/hospitality-technology-trends-ai-hotel-revenue-management/ (last visited Apr. 30, 2025).

management practices.[14] A basis for pricing hotel rooms is past performance (History) and future demand (Forecast) as compared with the competitors' pricing. A more sophisticated way to obtain higher prices in a hotel is to segment the market based on commonalities and set prices for each independent segment (Market Segmentation). An example of a typical market segment is 'Groups and Conventions,' which encompasses guests whose primary purpose is to stay at the hotel to attend a conference or a convention. Each revenue strategy aims to increase profits. To put simply, a hotel's revenue strategies aim to increase profits by getting the most money for the hotel's rooms and other services that the market can provide. Therefore, the best price for the hotel is the highest price that the guest is willing to pay for the service.

Hotel pricing is uniquely opaque as compared to other industries. Because prices constantly change based on demand and forecast, each consumer likely pays a different price for the same room on the dates of stay. Hotel prices for rooms are inherently tied to the demand outlook at that specific moment in time. To demonstrate this, imagine John and Sara are looking to stay at a popular hotel in San Francisco on New Year's Eve. John makes a reservation in early March and seizes a lower price for the room since the hotel's demand for New Year's Eve reservations in March is still low. Unlike John, Sara makes last minute plans and waits until November to make her reservation. Because the hotel is likely to sell most of its inventory for New Year's Eve by November, Sara will pay a higher price for the same room compared to John, even though both are staying on the same date. Therefore, unlike other service-based businesses such as restaurants or spas, hotel prices are not pre-set in a menu but change rapidly, even several times in a single day for a future date. Precisely because of the hotel's opaque pricing model, the consumer has access to less information as compared to the hotel. This information disadvantage has the potential to further expand when hotels use powerful AI technology to set already-opaque prices. Consumers do not see what drives the AI algorithm to set the price and are unable to correct the data on which the decision is made because of their informational disadvantage.

In an effort to increase revenues, hotels will eventually leverage AI technology to process large data sets to understand a consumer's reservation price.[15] To understand a consumer's willingness to pay for a room, hotels can extrapolate from the consumer's behavior. For example, if a hotel has data about a consumer's previous brand purchases or websites she visited, hotels

14. *See id.*

15. *See* OXERA, *supra* note 1, at 2 (predicting that algorithmic pricing is likely to occur in markets where demand "fluctuates more rapidly than supply," e.g. hotels).

can learn about a consumer's price sensitivity.[16] One conclusion is that consumers with less price sensitivity, will be more accepting of a higher price for a hotel room, compared with another consumer with more price sensitivity. Studies show that hotels differentiating prices based on consumers' willingness to pay showed overall performance improvement.[17] One study of a hotel casino in Las Vegas that implemented price differentiation showed a ten percent increase in average daily rate and a six percent increase in occupancy.[18] Thus, it seems only natural that hotels will want to leverage AI technology to help them set prices closer to an amount a customer is willing to pay.[19]

III. FIRST DEGREE PRICE DIFFERENTIATION REQUIRES USE OF PERSONALIZED DATA AND ENTAILS RISKS TO CONSUMERS SUCH AS DISCRIMINATION

First degree price differentiation uses personal consumer data to predict the price a consumer will pay for the good or service.[20] Hotels can leverage this personal information to increase their revenues and occupancy by exercising data-driven price differentiation. However, aside from price discrimination being somewhat distasteful to the consumer who does not know what the hotel may know about them, larger risks arise in algorithm-driven pricing models such as perpetuating bias in data leading to discrimination.

A. What is First Degree Price Differentiation

First degree price differentiation[21] occurs when a company uses a customer's personal information to infer that customer's willingness to pay for the service or good.[22] Under this economic theory, two conditions must

16. *See* Zuiderveen Borgesius & Poort, *supra* note 7, at 350.

17. *See* Li et al., *supra* note 1, at 56 (referencing MORAG CUDDEFORD-JONES, EFFECTIVE REVENUE MANAGEMENT IN THE HOSPITALITY INDUSTRY (Carlos Marquez Salazar ed., 2013)); OECD, PERSONALISED PRICING IN THE DIGITAL ERA 9 (2018).

18. *Id.* at 56-57 (referencing MORAG CUDDEFORD-JONES, EFFECTIVE REVENUE MANAGEMENT IN THE HOSPITALITY INDUSTRY (Carlos Marquez Salazar ed., 2013)).

19. *See* Axel Gautier et al., *AI Algorithms, Price Discrimination and Collusion: A Technological, Economic and Legal Perspective*, 50 EUROPEAN J. L. & ECON. 405, 407 (2020).

20. *See id.* at 408; Zuiderveen Borgesius & Poort, *supra* note 7, at 351.

21. Some scholarly articles use terms such as 'price discrimination' or 'personalized pricing' that are synonymous with term 'price differentiation.' In this article, I will solely use the term 'price differentiation.'

22. *See* Gautier et al., *supra* note 19, at 408; Zuiderveen Borgesius & Poort, *supra* note 7, at 351.

be true for a company to implement price differentiation strategies.[23] First, companies must be able to set prices for their goods and services.[24] Second, buyers must not be able to resell the good or service purchased.[25]

Perfect first degree price differentiation would require a business to know everything about a customer to offer pricing as close as possible to a customer's willingness to pay. However, perfect first degree price differentiation is never possible simply because companies will never have enough information to know a customer's true willingness to pay.[26] Nevertheless, companies can attempt to perfect their prices with AI's analysis of larger data sets.

When a company personalizes prices, it can train AI based on customer data from many sources, such as internet connection data, third-party sources, and loyalty program accounts.[27] Any website visited can potentially collect information on a customer based on the customer's internet IP address.[28] Further, marketing companies can gather customer data based on cookies which build on a customer's online profile.[29] Moreover, hotel companies are likely to benefit most from information gathered as part of their loyalty programs.[30]

B. First Degree Price Differentiation in Hotels

Hotels can implement first degree price differentiation using AI. Both conditions require for first degree price differentiation, (1) ability to set prices, and (2) inability to resell the hotel room are satisfied. Hotels have full control over the prices they set, and once a reservation is made, a guest can rarely transfer the reservation to another person. Usually, the reservation must be rebooked by the new guest. Therefore, the theoretical requirements for first degree price differentiation in hotels are satisfied.

Hotels can use data from their loyalty program accounts to better predict a customer's reservation price. Hotels already contain a wealth of customer information stored in valuable loyalty-program accounts, such as dollars spent, brands preferred, and frequency of travel. Along with online

23. Gautier et al., *supra* note 19, at 408.

24. *See id.*

25. *See id.* (referencing Ramsi A. Woodcock, *Personalized Pricing as Monopolization*, 51 CONN. L. REV. 311).

26. *See* Zuiderveen Borgesius & Poort, *supra* note 7, at 351.

27. *See id.* at 350.

28. *See id.*

29. *See id.*

30. *See id.* at 350, 352 (this is an example of information which is "voluntarily and knowingly provided by a customer").

behavioral data from other sources, hotels can build a more complete customer profile, which can help hotels better exploit a customer's economic power.[31] Companies known as 'data brokers' provide consumer data sales directly to businesses,[32] and aid companies to complete digital profiles of individual customers.[33] Since first degree price differentiation is by definition a hyper-personalized effort, AI technology is best suited for such data-intensive analysis.

To demonstrate the feasibility of this approach, we can find the beginnings of personalized pricing in loyalty-based discounts.[34] For example, most hotel brands already offer discounts based on loyalty-program membership.[35] However, generic, across-the-board loyalty discounts do not capture customers with a low willingness to pay—customers that might be willing to spend money but the price offered after the discount is still too high. Therefore, with the use of AI and data on that consumer, a hotel may be able to tailor loyalty-pricing closer to a customer's willingness to pay. Instead of a generic discount, hotels will lower the price for those customers with low willingness to pay and increase prices for those customers with a higher willingness to pay.[36] While the practice may seem counterintuitive at first glance, hotels have an incentive to fill all rooms—a perishable service—and must strike a balance between rates and occupancy percentages. Therefore, often the more customers a hotel can attract, the more overall profit it can expect. In most situations, a hotel would rather sell a room at a

31. *See* Li et al., *supra* note 1, at 57.

32. *See* EXECUTIVE OFFICE OF THE PRESIDENT, BIG DATA: SEIZING OPPORTUNITIES, PRESERVING VALUES, 43 (2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.

33. *See id.* at 43–44.

34. *See* Joshua A. Gerlick & Stephan M. Liozu, *Ethical and Legal Considerations of Artificial Intelligence and Algorithmic Decision-Making in Personalized Pricing*, 19 J. REVENUE & PRICING MGMT. 85, 92 (2020) (referencing Doug Henschen, *Catalina Marketing Aims for the Cutting Edge of 'Big Data'*, INFO. WK. (Sept. 6, 2011), https://www.informationweek.com/machine-learning-ai/catalina-marketing-aims-for-the-cutting-edge-of-big-data-.).

35. *See* HILTON HONORS, https://www.hilton.com/en/hilton-honors-rewards-program/ (last visited Mar. 31, 2025).

36. *See* Gerlick & Liozu, *supra* note 34, at 93 (stating Boston Consulting Group names this strategy "optimizing a continuum of prices." This strategy raises prices for consumers willing to pay more and lowers the prices to those with less willingness to pay, specifically to "increase penetration toward those previously unserved market segments." Simply put, hotels aim to fill all rooms every night, therefore, hotels would rather lower a price of a room to entice a potential customer to stay, rather than leave the room vacant.).

slightly lower price than discourage a customer from booking by quoting a price out of the range of that customer's reservation price.[37]

Hotels may also use AI to personalize guest pricing by offering personalized deals and packages based on a guest's past purchase history. In facilities with many food and beverage offerings or resort-type amenities (spa, excursions), hotels may offer personalized add-ons to rooms that increase the total spend per guest. While such a situation does not neatly follow the theory of personalized pricing (same product but at different prices depending on a customer's willingness to pay), hotels can still change how the components of the package are priced in accordance with the guest's willingness to pay. Assuming that rooms are the "products" which stay constant in the offering, even though the potential customer may see a varied offering (room plus add-ons) the room itself may have a varied price. Therefore, the same core risks arise when a room rate is priced differently to match a guest's willingness to pay, even if the offering as a whole (room with the add-ons) is not a one-to-one match with another guest's price. If anything, such examples of personalized pricing are merely disguised as a variable offering to the public but have even larger potential for overtly set personalized pricing.

C. Benefits and Risks When Companies Use First Degree Price Differentiation

First degree price differentiation carries both benefits and risks.[38] One widely recognized benefit is the potential for better consumer wealth distribution, where consumers with lower willingness to pay are offered prices closer to their desired price.[39] However, an inherent risk in personalized pricing is the potential for consumer discrimination, such as charging higher prices for groups underrepresented in AI training data and perpetuating bias present in AI training data (e.g. charging higher prices for groups travelling less simply because they may not travel to that particular destination as often).[40]

---

37. A hotel would do this, because a potential guest's worth is not based solely on the rate they pay but also on the goods and services they purchase while on property which vary by hotel and destination.

38. *See* Li et al., *supra* note 1, at 56.

39. *See id.* at 57 (citing to Marco Botta & Klaus Wiedemann, *To Discriminate or not to Discriminate? Personalized Pricing in Online Markets as Exploitative Abuse of Dominance*, 50 EUR. J. L. & ECON. 381, 386).

40. *See* Rebecca Kelly Slaughter et al., *Algorithms and Economic Justice: A Taxonomy of Harms and a Path Forward for the Federal Trade Commission*, 23 YALE J. L. & TECH. 1, 35 (2021) (first referencing ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PERSONALIZED PRICING IN THE DIGITAL ERA – NOTE BY THE UNITED STATES (2018); then

1. Benefits

Scholars point out a few consumer benefits that theoretically exist in the presence of first-degree AI price differentiation, such as better wealth distribution and increased market competition.[41]

First, AI models in monopolistic markets with little competition may result in prices closer to the consumer's willingness to pay. In the example of the hotel market, AI models may draw on information about a consumer and, rather than exploit little competition and raise prices for the room, set the prices lower so that more consumers are able to book rooms at prices those consumers are willing to pay.[42] This type of AI behavior would also lead to more consumers having access to hotel rooms and hotel companies filling up more rooms, in turn generating more revenue.[43]

Second, the more responsive a hotel's pricing AI algorithm becomes to both consumers' reservation prices as well as to market demands, the more other competitors in the market will employ strategies to win the consumer over.[44] A hotel's knowledge of the individual consumer's price preferences helps avoid costly pricing mistakes and ending up with empty rooms. Scholars argue that faster AI algorithm response to market pricing makes markets more competitive than otherwise.[45] The more competition in the market, the better the consumer choices and likely the lower the prices as well.

These rather optimistic views on first degree price differentiation are overshadowed by the risks associated with its use.

2. Risks

Scholars agree that machine learning algorithms can perpetuate and increase bias in data, resulting in discrimination.[46] To accurately predict a

---

referencing Claire Kelloway, *Personalization or Price Discrimination?* OPEN MKT. INST. (Jan. 30, 2020), https://www.openmarketsinstitute.org/publications/personalization-price-discrimination; and then referencing Julia Angwin et al., *When Algorithms Decide What You Pay*, PROPUBLICA (Oct. 5, 2016), https://www.propublica.org/article/breaking-the-black-box-when-algorithms-decide-what-you-pay).

41. *See* Li et al., *supra* note 1, at 57 (referencing Botta & Wiedemann, *supra* note 39); OXERA, *supra* note 1, at 2.

42. *See* Li et al., *supra* note 1, at 57.

43. *See id.*

44. *See* OXERA, *supra* note 1, at 2.

45. *See* OXERA, *supra* note 1, at 2; Li et al., *supra* note 1, at 54; Gerlick & Liozu, *supra* note 34, at 89.

46. *See* Ellen P. Goodman & Julia Trehu, *Algorithmic Auditing: Chasing AI Accountability*, 39 SANTA CLARA HIGH TECH. L. J. 289, 299 (2023) (citing generally SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION (2018); then citing Solon Barocas & Andrew D. Selbst, *Big Data's*

consumer's reservation price requires vast amounts of data analysis and can lead to overgeneralizations and thus to discriminatory outcomes. Bias and discrimination in how past pricing decisions were made is prone to repetition because AI pricing decisions originate from training historical data.[47] Additionally, since training data sets the tone for how the AI model makes decisions, the integrity of training data can have a meaningful impact on outcomes.[48] There are two possible scenarios which may lead to discriminatory outcomes: (i) AI's decisions are skewed for groups under-represented in training data; and (ii) training data which contains bias perpetuates the bias.[49]

When training data is not representative of the entire population, AI's decisions will be skewed for under-represented groups. A notable risk here is for training data to contain historical data with patterns of prejudice or inequality.[50] This concept is best illustrated by a recent example of Amazon's failed attempt to create a hiring algorithm.[51] The algorithm was trained on data containing a predominantly male applicant pool, which showed a pattern the algorithm sought to repeat and thus exclude more women.[52] Amazon abandoned the effort because the algorithm systematically discriminated against women.[53]

Under-represented groups in global travel, may experience disparate impact if hotels implement AI to drive personalized prices. For example, according to the 2015 Domestic Travel Market Report, only five percent of domestic travelers in 2014 were Black/African American,[54] but the 2023 U.S. Census Bureau statistics show Black/African Americans make up over

Disparate Impact, 104 CAL. L. REV. 671, 674 (2016); then citing Pauline T. Kim, *Data-Driven Discrimination at Work,* 58 WM. & MARY L. REV. 857, 875 (2017)).

47. *See* OXERA, *supra* note 1, at 28.

48. *See* Barocas & Selbst, *supra* note 46, at 680.

49. *See id.*; *see also* Slaughter et al., *supra* note 40, at 7.

50. *See* Slaughter, *supra* note 40, at 7-8 (first referencing Barocas & Selbst, *supra* note 46, at 677-78 (2016); then referencing Nicol Turner Lee et al., *Algorithmic Bias Detection and Mitigation: Best Practices and Policies to Reduce Consumer Harms*, BROOKINGS INST. (May 22, 2019), https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and- policies-to-reduce-consumer-harms; and then referencing David Lehr & Paul Ohm, *Playing with the Data: What Legal Scholars Should Learn About Machine Learning*, 51 U.C. DAVIS. L. REV. 653, 676-77 (2017)).

51. *See id.* at 8.

52. *See id.*

53. *See id.*

54. U.S. TRAVEL ASS'N, 2015 DOMESTIC TRAVEL MARKET REPORT 6 (2016) [hereinafter U.S. TRAVEL ASS'N].

thirteen percent of the U.S. population.[55] Similarly, only seven percent of domestic travelers in 2014 were Spanish/Hispanic ethnicity,[56] but the 2023 Census reported that almost twenty percent of U.S. population is of Hispanic origin.[57] Training data for AI algorithms used in the hotel industry are likely to contain less data for these under-represented groups and thus produce possibly discriminatory results. Algorithms may show higher prices for Hispanic and African American travelers since there is less data on which AI could learn to perfect its algorithm to reach an individual consumer's reservation price. The overall risk is that the algorithm will perpetuate the under-representation of certain groups in the population in domestic hotel and travel markets.[58]

Another example of possible discrimination happening if AI algorithms are used to set prices, is the possibility of age discrimination. According to the 2015 Domestic Travel Market Report, while surprisingly two thirds of travelers over sixty-five years old relied on online sources for booking travel, only half of travelers aged eighteen to twenty-four used online booking sources.[59] To further decrease data on younger travelers, in 2014 travelers aged eighteen to twenty-four represented only seven percent of all travelers, whereas all other age groups fluctuated between eighteen to twenty percent.[60] Even AI systems that train on accurate past historical data can produce less accurate predictions in price willingness for younger travelers, which can decrease access to affordable travel because of the traveler's age.

When training data contains bias, the AI algorithm can perpetuate the bias. This issue may be one of training data labeling, where AI draws biased conclusions based on accurate but also biased data.[61] Here again, an example can best illustrate the concept of "garbage in, garbage out."[62] An algorithm created to improve access to care for high-risk patients disproportionately recommended extra care for white patients as compared to black patients.[63] The algorithm incorrectly used health care costs as a proxy for health needs.[64]

---

55. *Quick Facts: United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045223 (last visited Mar. 31, 2025) [hereinafter U.S. CENSUS BUREAU].

56. U.S. TRAVEL ASS'N, *supra* note 54, at 42.

57. *See* U.S. CENSUS BUREAU, *supra* note 55.

58. *See* Goodman & Trehu, *supra* note 46, at 299.

59. U.S. TRAVEL ASS'N, *supra* note 54, at 39.

60. *Id.* at 38.

61. *See* Barocas & Selbst, *supra* note 46, at 681-82.

62. *Id.* at 683.

63. *See* Slaughter et al., *supra* note 40, at 16-17.

64. *See id.* at 16 (stating that in using health care costs to predict healthcare needs the algorithm recommended white patients for more care).

Thus, when white patients spent more money on extra care unrelated to health needs, the algorithm recommended extra care for black patients only half the time.[65]

In the hotel context, algorithms may also draw biased conclusions from biased data. For example, on average, business travelers spend $320 more than leisure travelers per trip.[66] While seventeen percent of men travel for business (as opposed to pleasure), only twelve percent of women travel for business (as opposed to pleasure).[67] Since business travelers spend more money, a bias in historical data exists that likely shows male travelers being more likely to spend more on hotel rooms, increasing men's willingness to pay in the algorithm's proverbial eyes. However, a man's business trip spending may not accurately reflect their actual personal spending habits on leisurely trips. Such data, if used by an algorithm to learn could produce higher prices for men than women, without regulatory guardrails.

IV. THE FEDERAL GOVERNMENT NEEDS TO REGULATE AI SYSTEMS TO PREVENT SYSTEMIC DISCRIMINATION AND UNFAIR PRACTICES

As AI technology rapidly develops, swift federal action can ensure safety, trust, and fairness when hotel companies start using algorithm-based pricing. The federal government needs to regulate companies' use of AI-based algorithmic pricing because (i) antitrust regulation does not protect consumers, (ii) a federal standard will promote technology development, (iii) in monopolistic markets consumers do not have a choice to opt out of personalized pricing and (iv) consumers may be more accepting of personalized pricing in the hotel industry. In 2023, President Biden called federal agencies to regulate the development and use of AI technologies to manage risks present in AI.[68] The order broadly addresses the old administration's goals but requires much attention from federal agencies and industry leaders to strike a balance between regulation and innovation in AI development. The federal government, not individual states,[69] is best suited to address risks in AI technologies.

---

65. *Id.* at 16-17.

66. *See* U.S. TRAVEL ASS'N, *supra* note 54, at 19.

67. *Id.* at 161.

68. *See generally* The White House, *FACT SHEET: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence*, THE WHITE HOUSE: BRIEFING ROOM: STATEMENTS AND RELEASES (Oct. 30, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence/ [https://archive.ph/qGF9U] [hereinafter White House Fact Sheet].

69. *See generally* Hard Fork, *Can California Regulate A.I.? + Silicon Valley's Super Babies + System Update!,* N.Y. TIMES (Oct. 4, 2024),

A. Current Antitrust Laws Do Not Protect Consumers Against Risks Inherent in First Degree Price Differentiation

While current anti-trust laws govern some AI usage, none are aimed at protecting consumers against consumer discrimination in the hotel industry. Two laws govern antitrust concerns in U.S., the Robinson-Patman Act and the Sherman Antitrust Act.[70] Neither can address risks consumers face when a company prices goods using data-driven AI algorithms. The Robinson-Patman Act is only applicable to the sale of goods and not services, therefore the Act does not cover the hotel industry.[71] Whereas the Sherman Antitrust Act addresses concerns about practices firms implement that "may exert monopolistic or oligopolistic restraints on trade."[72] Since companies may implement AI-based pricing without exerting "widespread market influence," the Sherman Act is powerless to limit unfair behavior.[73]

B. One Federal Standard Will Aid Compliance and Facilitate Technology Development

The Federal government needs to institute one national standard for AI regulation to promote competition, foster technology development, and minimize legal uncertainty. One central regulation, as opposed to a patchwork of state-by-state standards, will minimize legal uncertainty in the field.[74] With one set of standards, AI companies will have less compliance obligations when developing AI technology. In turn, AI companies looking to invest in new AI features can make a better-informed decision as to whether the new feature is legally compliant and thus worthy of the investment.

When AI companies understand the legal regulation governing their work, investors can financially support companies with more confidence and drive growth in the industry. The longer the U.S. waits to implement

---

https://www.nytimes.com/2024/10/04/podcasts/hard-fork-newsom-ai-fertility.html. (discussing recent regulatory trends by individual states).

70. *See* Gerlick & Liozu, *supra* note 34, at 89 (first referencing Hagit Bulmash, *An Empirical Analysis of Secondary Line Price Discrimination Motivations*, 8 J. COMP. L. & ECON. 361,362 (2012); and then referencing Douglas M. Kochelek, *Data Mining and Antitrust*, 22 HARV. J. L. & TECH. 516, 523 (2009)).

71. *See Price Discrimination: Robinson-Patman Violations*, FEDERAL TRADE COMMISSION (last visited Mar. 31, 2025), https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/price-discrimination-robinson-patman-violations.

72. Gerlick & Liozu, *supra* note 34, at 89 (quoting 15 U.S.C. §§ 1-2).

73. *Id.*

74. *See European Commission Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonized Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, at 6, SEC (2021) 167 final (Apr. 21, 2021).

legislation governing AI technology, the longer investors may be less willing to invest in American companies governed by an uncertain legal regime and defer to a more certain regulatory framework like the EU. Therefore, innovation in the U.S. may be thwarted with investors choosing a safer investment abroad. To attract investors back, American companies may of course simply extend the EU governance standards to their global operations to offer a more secure investment because of regulatory compliance with international regulation.[75]

While EU legislation as a global standard is not a negative outcome per se, the world's leading hotel companies are U.S.-based and would benefit from legislation aimed at fostering innovation and competition tailored to the American legal system and market.[76] In fact, Congress' duty to regulate the hotel industry in the U.S. falls squarely within Congress' constitutional power to regulate interstate commerce.[77]

Congress should act as a response to former-President Biden's Executive order from October 30, 2023, which calls for advancing American leadership in AI technology and oversight.[78] The Executive Order calls for action to ensure a "safe, secure, and trustworthy" AI system.[79] The Executive Order recognizes that comprehensive American AI legislation can help U.S. legislators set the tone for regulating AI on the global stage. AI's use in national security and military aspects most highlights the need for Congress to act. While price personalization has significantly less critical risks than AI's military capabilities, civil liberties still need protection on both global and national scales. Notably, the Executive Order explicitly calls for action to address algorithmic discrimination in AI systems.[80]

75. *See generally* ANU BRADFORD, BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD (2020) (stating EU's laws may prevail as the global governance standard in AI due to the Brussels Effect).

76. *See 2022 Hotel Management Survey: Top Hotel Companies*, 237 HOTEL MGMT., Sept. 2022, at 48; BRAND FINANCE, HOTELS 50 2022: THE ANNUAL REPORT ON THE MOST VALUABLE AND STRONGEST HOTEL BRANDS 11 (2022), https://static.brandirectory.com/reports/brand-finance-hotels-50-2022-preview.pdf.

77. U.S. CONST. art. 1, § 8, cl. 3.

78. *See* White House Fact Sheet, *supra* note 68.

79. *Id.*

80. *See id.*

C. Consumers Faced with Fewer Choices Cannot Opt out of Algorithmic Pricing

Past examples of companies offering different prices to individual consumers, show market forces can discourage companies' bad behavior.[81] In 2000, an Amazon customer deleted a browser cookie, and saw a lower price for an item on Amazon.[82] Consumers responded with anger, and Amazon admitted to experimenting with "random discounts."[83] Even though Amazon did not use first degree price differentiation, consumers, as forces in the market, reacted negatively to an observable difference in price.[84] Some, including the federal government, believe that such "consumer backlash" serves itself as a market force to discourage companies from personalizing pricing.[85]

Consumers will boycott hotels they do not trust, which may serve to discourage companies from pursuing disfavored strategies such as price differentiation. Hotel services are not only unique but difficult to grasp in advance.[86] Therefore, the image or idea the market has of a hotel company can affect the hotel's performance more than the actual service the hotel offers.[87] When a hotel's image is tarnished, its performance will suffer because consumers make their buying decisions not based on actual quality of service, but rather on the perception of quality of service the hotel offers.[88] Research shows that when different prices stem from personalized pricing, consumers lost trust in the company—a key component of a company's

81. *See* Gerlick & Liozu, *supra* note 34, at 92 (referencing William W. Fisher III, *When Should We Permit Differential Pricing of Information*, 55 UCLA L. REV. 1, 30 (2007)); *see also* Zuiderveen Borgesius & Poort, *supra* note 7, at 349 (referencing Press Release, Amazon, Amazon.com Issues Statement Regarding Random Price Testing, (Sept. 27, 2000), https://press.aboutamazon.com/2000/9/amazon-com-issues-statement-regarding-random-price-testing (listing Amazon as an example)).

82. *See* Zuiderveen Borgesius & Poort, *supra* note 7, at 349.

83. *See id.* (referencing Paul Krugman, *Reckonings; What Price Fairness?*, N.Y. TIMES (Oct. 4, 2000), https://www.nytimes.com/2000/10/04/opinion/reckonings-what-price-fairness.html).

84. *See id.* (referencing Press Release, Amazon, Amazon.com Issues Statement Regarding Random Price Testing (Sept. 26, 2000)).

85. *See id.* (referencing OFFICE OF FAIR TRADING, ONLINE TARGETING OF ADVERTISING AND PRICES: A MARKET STUDY, 2010, at 48 (UK); and then EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, BIG DATA AND DIFFERENTIAL PRICING 13 (2015)).

86. *See* Juan Luis Nicolau & Ricardo Sellers, *The Quality of Quality Awards, Diminishing Information Asymmetries in a Hotel Chain*, 63 J. BUS. RSCH. 832, 833 (2010).

87. *See id.* (referencing Sundar G. Bharadwaj & Anil Menon, *Determinants of Success in Service Industries: A PIMS-Based Empirical Investigation*, 7 J. SERVS. MKTG. 19, 23 (1993)).

88. *See id.* (referencing Bharadwaj & Menon, *supra* note 87, at 19, 23, 24).

image.[89] Therefore, one can argue that the market itself will serve as a balancing means to discourage unfair practices in price personalization whether by public outcry or company boycott—decreasing the importance of AI regulation.

However, when a market presents limited choices, consumers will be forced to accept personalized pricing.[90] Even though competition can serve as a market force that limits bad company behavior,[91] not all markets in the hotel industry are arguably competitive enough. Some markets for hotel rooms offer comparatively few choices to consumers. For example, if you wish to visit Sequoia National Park, only four lodging accommodations with a total of 165 rooms exist inside the park.[92] Such a limited amount of lodging inventory severely impacts a consumer's ability to opt out of differential pricing if all four options use data-driven algorithmic pricing.

Furthermore, hotel markets are unique in the way that even choice-rich markets can shrink over time, limiting competition which forces consumers to choose from an extremely limited number of offerings and at times accept personalized prices. For example, cities often host city-wide conferences—such as the Consumer Electronics Show (CES) in Las Vegas. In 2022, Las Vegas had 150,857 hotel rooms available in the city.[93] However, when CES attendees flood Las Vegas every year in early January, lodging options are severely diminished for non-convention attendees.[94] In 2023, over 115,000 people attended the conference, which materially decreased available room inventory in the Las Vegas market. A prospective consumer looking at lodging options in Las Vegas during CES, would have extremely limited hotel choices. If the only available hotels use algorithm-driven AI pricing models, that consumer does not have a meaningful choice to opt out of personalized prices during her travel dates.

89. *See* Gerlick & Liozu, *supra* note 34, at 92 (referencing Ellen Garbarino & Olivia F. Lee, *Dynamic Pricing in Internet Retail: Effects on Consumer Trust*, 20 PSYCH. & MKTG. 495, 495-97 (2003)).

90. *See* Zuiderveen Borgesius & Poort, *supra* note 7, at 363.

91. *See id.* at 349.

92. *See* Nat'l Parks Serv., *Sequoia & Kings Canyon: Lodging*, https://www.nps.gov/seki/planyourvisit/lodging.htm (last visited Mar. 31, 2025).

93. *See* LVCVA*, Number of available rooms in Las Vegas in the United States from 2000 to 2022*, STATISTA (July 2, 2025), https://www.statista.com/statistics/221045/room-inventory-in-las-vegas/.

94. *See* Consumer Tech. Ass'n, ATTENDANCE AUDIT SUMMARY: CES 2023, at 2 (2023), https://cdn.ces.tech/ces/media/pdfs/attendee-audit-summary-2023.pdf.

D. Societal Stigma Associated with Personalized Pricing Will Not Work to Discourage Hotel Companies from Implementing Personalized Pricing

When personalized pricing economically benefits the consumer, consumers may be more likely to accept personalized pricing as a business practice. Negative consumer opinions about personalized pricing may be partially due to the extremely negative outcomes personalized prices can produce. Consumers do not want to pay higher prices simply because the hotel predicts the consumer can pay more. However, some studies show that in a competitive market, AI-enabled price differentiation can produce better competition in the market, potentially leading to an incentive to reduce prices since the seller knows better the limits of what the consumer will pay.[95] Rather optimistically, other studies contend that even in a monopolistic market with little competition, AI-determined prices will be lowered to meet the consumer at their reservation price.[96] Regardless of how AI-algorithms actually behave in the market, the mere possibility that consumers will not serve as a barrier to wide-spread adoption means legislators must act.

Hotels are in a unique advantage to implement personalized pricing because hotel consumers highly value personalization. A 2018 Deloitte study evaluated how hotels increase the value of their services in consumers' eyes.[97] Consumers identified five needs that move hotel services beyond basics and "provide excellent guest experiences:" (1) know me, (2) hear me, (3) engage me, (4) empower me, and (5) delight me.[98] Hotel guests actually value and want hotel companies to know and remember their preferences and needs, as shown by sixty-five percent of survey respondents.[99] Sixty-six percent of respondents want hotels to "engage [them] in a personalized authentic, and attentive way."[100] The survey results show the hotel industry is uniquely positioned where consumers want a hotel to obtain, retain and use personal data to enhance their experience at the hotel.[101]

The high-value consumers place on hotel services translates to increased tolerance for personalized hotel pricing. Hotel guests may be more open to

95. *See* Li et al., *supra* note 1, at 57 (referencing OECD, *Personalised Pricing in the Digital Era*, at 20 (Nov. 28, 2018)); Gerlick & Liozu, *supra* note 34, at 89 (referencing EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, BIG DATA AND DIFFERENTIAL PRICING 17 (2015)).

96. *See* Li et al., *supra* note 1, at 57 (referencing Botta & Wiedemann, *supra* note 39).

97. *See Next-gen Hotel Guests Have Checked In: The Changing Guest Experience*, DELOITTE 7, https://www2.deloitte.com/us/en/pages/consumer-business/articles/hotel-guest-experience-strategy.html (last visited Apr. 7, 2025).

98. *Id.*

99. *Id.*

100. *Id.*

101. *See id.* (listing the guest satisfaction scores in the hotel industry).

personalized service offerings such as service add-ons when they book hotels because these pricing methods demonstrate that the hotel knows the guest well. In fact, studies support that when hotels anticipate guest needs and offer individualized packages, guests will respond positively.[102] It follows then, that hotels using individualized packages in pricing AI algorithms will not face consumer backlash since personalization is key to the hotel industry already. As a healthy market behavior, consumer behavior and opinion will shape how companies serve their consumers.

However, limited governmental regulation in a healthy market can ensure an individual consumer's liberties are not abused by companies in pursuit of consumer needs and wants.[103] The largest hotel companies[104] are publicly traded[105] and aim to increase shareholder value, therefore the companies' primary purpose of any new process is presumably revenue maximization. Often companies can maximize revenue when they address consumers' needs and wants. Personalized pricing can lead to increased revenues in hotels[106] and aligns with consumers' need for personalized interactions in the hotel industry. This perfect convergence of interests requires governmental oversight to protect consumers from inherent risks present in personalized pricing because it is unlikely hotels will have enough incentive to self-govern against violations.

V. HOW THE FEDERAL GOVERNMENT SHOULD ACT

U.S. legislators should use the EU's risk-based approach and implement regular third-party algorithmic audits to govern AI in the United States. The EU AI Act's risk-based approach adjusts the stringency of regulation depending on possible risk in AI application.[107] The varied levels of regulatory oversight will not inhibit AI technology growth while protecting

102. *See id.*

103. *See* Gerlick & Liozu, *supra* note 34, at 88 ("[M]any foundational proponents recognize limited government intervention as an antecedent to preserve individual liberty.").

104. Hotel Management, *Leading hotel companies worldwide as of June 2023, by number of properties*, STATISTA (May 22, 2024), https://www.statista.com/statistics/197869/us-hotel-companies-by-number-of-properties-worldwide/.

105. *Wyndham Hotels & Resorts Inc.*, GOOGLE FINANCE, https://g.co/finance/WH:NYSE (last visited Mar. 24, 2025) (trading under 'WH'*); Marriott International Inc*., https://g.co/finance/MAR:NASDAQ (last visited Mar. 24, 2025) (trading under 'MAR'); *Choice Hotels Inc*., GOOGLE FINANCE, https://g.co/finance/CHH:NYSE (last visited Mar. 24, 2025) (trading under 'CHH'); and *Hilton Hotels Corporation Common Stock*, GOOGLE FINANCE, https://g.co/finance/HLT:NYSE (last visited Mar. 24, 2025) (trading under 'HLT').

106. *See* Li et al., *supra* note 1, at 56, 57 (referencing MORAG CUDDEFORD-JONES, EFFECTIVE REVENUE MANAGEMENT IN THE HOSPITALITY INDUSTRY 9 (Carlos Marquez Salazar ed., 2013)).

107. *See generally* EU AI Act, *supra* note 4.

against risks. Third party algorithmic audits will effectively regulate opaque and complex autonomous technology by focusing on outcomes, rather than simple transparency in data used.

A. The EU's AI Act Framework

The EU AI Act governs AI technologies depending on the risks associated with uses in each sector and provides for a voluntary code of conduct for non-high-risk AI systems.[108] In 2021, EU proposed, and subsequently enacted, AI legislation (The EU AI Act) and outlined the broad strokes for the purpose and the regulatory framework.[109] The framework takes a risk-based approach that categorizes AI technology into: (i) unacceptable risk, (ii) high risk, (iii) transparency risk, and (iv) minimal risk.[110] The Act lays out various requirements and obligations for development, placing on the market and use of AI systems in the EU."[111]

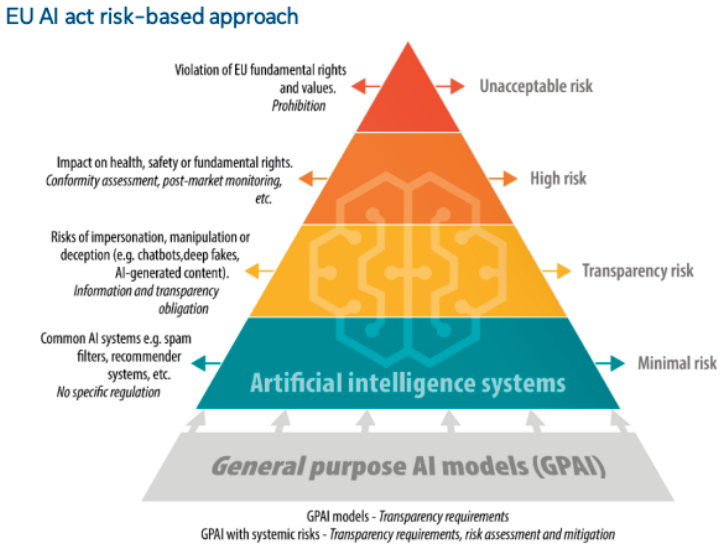

Figure 1 [112]

108. *See generally id.*

109. *See European Commission Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonized Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, at 1.1, SEC (2021) 167 final (Apr. 21, 2021).

110. EU Legislation in Progress, *supra* note 9, at 8, 9.

111. *See id.* at 3.

112. *See id.* at 8 (citing *Shaping Europe's Digital Future*, EUR. COMM'N, https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai) (last visited Apr. 7, 2025)).

Under the EU framework, risks associated with each AI system dictate the extent of regulation.

1. Unacceptable Risk

Systems in the 'unacceptable risk' category are "a clear threat to people's safety, livelihoods and rights, because of the 'unacceptable risk' they create."[113] Some examples in this category are: systems that exploit specific vulnerable groups, or governmental social scoring systems (such as those employed in China where the government assigns a social score based on a person's behavior).[114] Systems in this category are completely prohibited under the EU AI Act.[115]

2. High Risk

Systems in the 'high risk' category "create adverse impact on people's safety or their fundamental rights."[116] There are two general groups: (i) systems used in safety component products or those under the "health and safety harmonization legislation,"[117] such as medical devices; and (ii) systems containing biometric data, and those that manage critical infrastructure, used in education, employment, "essential private and public services," law enforcement, immigration, and justice.[118] Systems in this category are subject to more stringent regulation that requires ex-ante conformity assessment.[119] A high-risk system provider must register within an EU-wide database before deploying the system and carry out a fundamental rights impact assessment.[120]

3. Transparency Risk

Systems in the 'transparency risk' category are systems which interact with humans, recognize human emotion, categorize biometric data and "generate or manipulate image, audio or video content."[121]

113. *See id.* at 3.
114. *See id.*
115. *See id.*
116. *Id.*
117. *Id.*
118. *See id.* at 12 n. 13.
119. *See id.* at 9.
120. *See id.*
121. *See id.*

4. Minimal Risk

Systems in the 'minimal risk' category do not have any regulatory obligations, however the EU envisions creation of "codes of conduct."[122] Codes of conduct would serve to encourage the voluntary application of high-risk AI system's mandatory requirements.[123]

The EU AI Act creates administrative guidance for governance, enforcement, and sanctions.[124] Most notably, the Act establishes fines of varying scale which can reach "up to thirty-five million euros or seven percent of the total worldwide annual turnover" depending on the severity of infringement.[125]

The EU AI Act's risk-based structure aims to govern an ever-evolving technology while protecting EU values, fundamental rights, and principles.[126] The EU places the most stringent and restrictive regulation on technologies that most threaten EU values, fundamental rights, and principles. Such an approach allows regulators to protect citizens even without being able to anticipate future uses of AI technologies. The regulatory framework also leaves room for the EU member states' needs or wants, such as to implement more stringent regulation in the AI technology areas relevant to their regions.

While the EU AI Act seems to require auditing only of high-risk AI systems,[127] the EU makes up for its auditing gap of transparency-risk system with the Digital Services Act (DSA).[128] The DSA calls for annual independent audits of "very large online platforms,"[129] some of which could qualify as a transparency-risk system. Under the DSA, EU's regulatory reach for audits expands to platforms with at least forty-five million average monthly active users in the European Union.[130]

122. *See id.* at 3.

123. *See id.*

124. *See id.*

125. *Id.* at 13 n. 19.

126. *See European Commission Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonized Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, at 1, SEC (2021) 167 final (Apr. 21, 2021).

127. *See id.* at 14.

128. *See* Goodman & Trehu, *supra* note 46, at 291.

129. *See* Johann Laux et al., *Taming the Few: Platform Regulation, Independent Audits, and the Risks of Capture Created by the DMA and DSA*, 43 COMPUT. L. & SEC. REV. 3 (2021) (first quoting Commission Regulation 2022/2065, art. 25, 2022 O.J. (L 277); then quoting Commission Regulation 2022/2065, art. 37, 2022, O.J. (L 277)).

130. *See id.* (quoting Commission Regulation 2022/2065, art. 25, 2022 O.J. (L 277)).

B. U.S. Should Adopt EU's Risk-Based Approach with Algorithmic Audits and Require an Option for Consumers to Opt out of AI Pricing

EU's risk-based approach can serve to strike a balance between proactive regulation and innovation in the U.S. Regulating solely for existing AI systems today will be too narrow to capture future AI development. Therefore, the EU's risk-based approach offers general risk categories that aim at minimizing potential risks by looking at outcomes. This framework protects society from bad actors yet leaves room for risk-free or risk-minimum growth. Specifically, the regulation proscribes or heavily regulates certain AI uses but leaves the door open to innovation where such risk does not exist.

An effective AI regulation in the U.S. must require regular independent algorithmic audits for any AI system capable of discrimination or discriminatory impact. The EU Commission suggests that audits are required only for high-risk system.[131] However any system that has the potential to discriminate or have discriminatory outcomes should be regularly audited as this is arguably the most effective method to prevent discrimination.[132] While the EU may have addressed some part of this gap in the Digital Services Act,[133] the U.S. lacks a corresponding legislation and must expand any proposed AI regulation.

Independent algorithmic audits serve as the most effective tool for regulatory oversight because regulators can ensure fair outcomes despite the opacity of machine learning algorithms.[134] Algorithmic auditing is the process used to "review algorithmic processing systems."[135] The audit can entail checking governance documentation or testing an algorithm's outputs and inspecting the system's inner workings.[136] The overall goal in any algorithmic audit is to assure an algorithm's "safety, legality, and ethics."[137]

---

131. *See European Commission Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonized Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, at 14, SEC (2021) 167 final (Apr. 21, 2021).

132. *See* Goodman & Trehu, *supra* note 46, at 335.

133. *See id.* at 306.

134. *See id.* at 296-97.

135. *See id.* at 291 (quoting DIGITAL REGULATION COOPERATION FORUM (DRCF), AUDITING ALGORITHMS: THE EXISTING LANDSCAPE, ROLE OF REGULATORS AND FUTURE OUTLOOK 2 (2022)).

136. *See id.* (quoting DIGITAL REGULATION COOPERATION FORUM (DRCF), AUDITING ALGORITHMS: THE EXISTING LANDSCAPE, ROLE OF REGULATORS AND FUTURE OUTLOOK 2 (2022)).

137. *See id.* (quoting Adriano Koshiyama et al., *Towards Algorithm Auditing: A Survey on Managing Legal, Ethical and Technological Risks of AI, ML and Associated Algorithms* SSRN ELEC. J. 1, 2 (2021)).

An inherent issue in regulating AI technology is that data transparency alone considers only a limited component of an AI algorithm.[138]

Scholars argue that a well-designed audit can serve as a substitute for lack of transparency in AI by focusing on outcomes.[139] Machine learning uses data both to train and to make decisions, however how the machine converts what it learns into predictions and then decisions is not easy to render transparent.[140] In a previously discussed example where a machine algorithm recommended extra medical care less frequently to Black patients than to White patients because of bias in data, researchers only uncovered the issue by conducting a meaningful inquiry into the data.[141] Some scholars caution that even algorithmic audits may not always be feasible in practice because companies will fiercely protect the intellectual property behind the algorithms.[142] Therefore, U.S. regulators must ensure that the proprietary information companies seek to protect remains confidential. Without a meaningful inquiry into the AI system, regulators will not recognize nor mitigate discrimination or bias.

C. AI Technology: Addressing Discrimination in Hotel Industry Personalized Pricing

Hotels employing AI systems to set personalized prices qualify as high-risk systems and require regular algorithmic audits. The EU AI Act defines high-risk systems as those which "create adverse impact on people's safety or their fundamental rights," such as those that control "access to and enjoyment of essential private services and public services and benefits."[143] Since pricing algorithms can meaningfully impact access to hotel facilities for some under-represented racial and ethnic groups or because of existing data bias, such systems may adversely impact people's fundamental rights of equal treatment. Under Title II of the Civil Rights Act of 1960, places of "public accommodation" cannot discriminate "based on race, color, religion, or national origin."[144] In *Heart of Atlanta*, the Supreme Court held that hotels qualify under the provisions of this act.[145] Thus, an AI system violates fundamental rights when it disproportionally prevents access to hotel rooms

138. *See id.* at 300.
139. *See id.*
140. *See id.* at 300-01.
141. *See* Slaughter et al., *supra* note 40, at 16-17.
142. *See* OXERA, *supra* note 1, at 30.
143. *See* EU Legislation in Progress, *supra* note 9, at 3, 12 n.13.
144. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 245 (1964).
145. *See id.* at 249.

(because it sets the price too high) based on race, color, religion, or national origin.

Since AI systems employed in hotel pricing are high-risk systems, such systems would be subject to regular algorithmic audits. Algorithmic audits of systems used in the hotel industry would need to review outcomes with special attention to disparate impact on groups with any of the protected characteristics, race, color, religion, or national origin.

While algorithmic audits may exist as a periodic system health check against regulatory compliance, a stronger protection to fundamental human rights is to require an opt-out option. Some companies' Human Resources departments use AI to assist in resume screenings but allow the candidate to opt-out of AI review at no disadvantage to the applicant.[146] So it seems that giving consumers the power to completely take AI out of the pricing decision is a flexible way for companies to both prevent discriminatory outcomes and implement AI and observe early performance. This may not be ideal for hotels, however with AI technology being new to the market, a "fail-safe button" that allows users to opt out of AI pricing, may be just the remedy to give both consumers and legislators the time to observe outcomes and legislate with less uncertainty.

VI. CONCLUSION

United States Congress should look to the EU AI Act to implement a proactive regulatory framework for AI regulation in the United States that can protect consumers from discriminatory treatments when hotels implement personalized pricing strategies. With clear risks in AI usage such as under-represented populations in training data resulting in discriminatory outcomes and biased data outputs, it is up to legislators to protect consumers. While currently hotels do not automatically set prices for individual customers, AI systems will soon allow hotels to increase their revenues by setting a hotels' prices at a consumer's willingness to pay. If proper regulation is set in place, such hotel pricing systems will be subject to governmental oversight and regular independent algorithmic audits. Algorithmic audits are arguably one of the most effective tools to police AI systems, and in the context of hotels, audits can flag discriminatory outcomes for AI system developers to mitigate. Additionally, legislators should require that in the early adoption of AI in the new realm of consumer pricing, hotels

146. Caitlin Andrews, *How the US is Handling AI-Driven Hiring Practices*, IAPP (Dec. 4, 2024), https://iapp.org/news/a/how-the-us-is-handling-ai-driven-hiring-practices (stating that state-level regulations mandate opt-out provisions when companies use AI during as part of hiring processes).

give consumers the choice to opt out of AI pricing. As AI systems rapidly change, only forward-looking regulation will survive the test of time to foster growth in this exciting technological development.

PATENTABILITY AND REGULATION OF STEM CELLS – THE NEED FOR AN EU-WIDE COMPROMISE ON MORALITY

*Justine Barraza**

Abstract

Today, stem cell research is a swiftly growing area of medical research, with significant projected growth in the global stem cell market due to their diverse applications and increased funding and development efforts. Stem cells have a unique ability to self-renew and recreate functional tissues, receiving warranted attention from the public and the bio-pharmaceutical industry. However, with this great potential, there are also profound moral dilemmas as it relates to the use and destruction of human embryos. In the context of international patent law, the regulation and management of stem cell research presents a critical challenge in balancing the promotion of innovation with these ethical considerations, raising questions on the ethical boundaries of innovation and how each society places morally relevant status on the human embryo process.

This Note draws attention to the conflict between having a globally impactful research paradigm within an infrastructure that is designed to operate on a national basis. Due to this conflict, each territory can use "morality clauses", utilizing vague allusions to morally relevant status of the human embryo in law and practice, to establish confusing and albeit contradictory regulations and policies that are impacting human embryonic stem cell research and its patentability outcome. It recognizes that, although the E.U. and North America on its face have different patterns of regulation, patent law needs to adopt a form of standardization in their respective territories. Because of such, it highlights the need for a more coherent and navigable system to acknowledge and encourage legitimate

* Justine Barraza is a J.D. candidate at Southwestern Law School. She holds a B.A. in Neuroscience and Psychology, with a minor in Biology, and a concentration in Legal Studies from Macalester College. She served as a Lead Article Editor for the Southwestern Journal of International Law during the 2024-5 academic year. The author expresses gratitude to her family for their constant support and encouragement, as well as her lifelong coaches and teachers that have embraced and motivated her curiosity.

research, reduce discrepancies between countries, and enable policy guidance to supervise and monitor the implementation within each country to have positive effects on the international research field.

I. INTRODUCTION

Stem cell research is widely known for its positive influence on regenerative medicine and changing the way modern medicine approaches treating blood disorders, combating neurodegenerative diseases, drug development, and tissue engineering.[1] The research has rightfully received significant public attention because of its ability to revolutionize medicine through new perspectives, and with this heightened attention, it also emphasizes the profound moral dilemmas as it relates to the use of human embryos and the broader discourse of abortion.[2]

In the United States ("U.S."), patents are an exclusive right granted for invention, this right aims to promote innovation and development of new

1. *Stem Cells: What They Are and What They Do*, MAYO CLINIC, https://www.mayoclinic.org/tests-procedures/bone-marrow-transplant/in-depth/stem-cells/art-20048117 (last visited Feb. 2, 2024).

2. *See generally* Rebecca Dresser, *Stem Cell Research as Innovation: Expanding the Ethical and Policy Conversation*, 38 J. LAW, MED. & ETHICS 332 (2010).

products in our society through the protection of individual creations and intellectual property.[3] On the contrary, in Europe, patents are a privilege granted by the governments in pursuit of specific economic or technological objectives.[4] Each country independently governs patent law, and there is no single international patent that applies universally.[5] This allows each country to establish its own criteria for what it will grant patent protection over.[6] Due to the countries' different influences and motivations by seeing one as a fundamental right and the other as a privilege, there are naturally different approaches to the regulation of patents.

In the context of international patent law, the regulation and management of emerging technology, like stem cell research, presents a critical challenge in balancing the promotion of innovation with ethical considerations. As science and medicine have progressed, stem cell research has developed into a highly controversial method of innovation by extracting a human embryo at an early stage of development.[7] Because of stem cells' ability to self-renew and recreate functional tissues,[8] stem cells have gotten the attention of the public and the bio-pharmaceutical industry, raising questions on the ethical boundaries of innovation and how each society places morally relevant status on the human embryo process.[9]

This article does not aim to argue the morally relevant status of the human embryo, rather it argues that such vague allusions to it in law and practice often create confusing and diverse regulations and policies that impact human embryonic stem cell research and its patentability outcome. Unclear standards, especially within the E.U., should not create the precedent for this emerging and influential field because the protection of intellectual property is a field that encourages growth.

Therefore, although the E.U. and North America on its face have different patterns of regulating, patent laws, especially within the E.U., should adopt a form of standardization to modify patent law in their respective territories to have a more coherent and navigable system by: (1) acknowledging legitimate research, (2) reducing discrepancies between countries, and (3) enabling policy guidance to supervise and monitor the

3. *See Patents*, WIPO, https://www.wipo.int/patents/en/ (last visited Feb. 25, 2025).

4. COUNCIL OF THE ROYAL SOCIETY, KEEPING SCIENCE OPEN: THE EFFECTS OF INTELLECTUAL PROPERTY POLICY ON THE CONDUCT OF SCIENCE 7-8 (The Royal Society 2003).

5. WIPO, *supra* note 3.

6. *Id.*

7. *See generally* Deitmar Mieth, *Going to the Roots of the Stem Cell Debate*, 1 EMBO REP. 4 (2000).

8. *Stem Cell Basics*, NAT'L INSTS. OF HEALTH (NIH), https://stemcells.nih.gov/info/basics/stc-basics (last visited Feb. 2, 2024).

9. *See* Mieth, *supra* note 7.

implementation within each country to have positive effects on the international research field.

Section II will create a foundational understanding of stem cells. Following this, Section III will discuss the North American regulations of current federal and state embryonic stem cell patents. Section IV will then address the European Union's stem cell regulation through the E.U. Biotechnology Directive ("Directive") and European Patent Convention ("EPC") and how the E.U. should have harmonized their patent system. Lastly, Sections V through VII will address why the current practices in the U.S. and the E.U. fall short and thus do not reap the three benefits of standardization. This note will argue that by adopting a standard process, both the U.S. and the E.U. would benefit from the goals of patent law, which is progress and innovation.

II. STEM CELLS

Stem cells are cells that all other specialized cells in the body generate from.[10] Stem cells divide, either in the body or the laboratory, to form more cells.[11] These cells would then either be specialized cells or new stem cells.[12] Specialized cells have more specific functions in the body, such as blood, brain, liver, heart, or bone cells.[13] This is the only cell type capable of generating new cell types.[14]

Typically, there are two types of stem cells: embryonic and adult stem cells.[15] Embryonic stem cells come from embryos that are three to five days old when an embryo is a blastocyst made up of 150 cells.[16] These 150 cells are pluripotent, meaning that they can divide into more stem cells or into specialized cells.[17] This unique trait is what makes research with them so special and versatile. The versatility at this early stage of stem cell development allows for regeneration and or repairability of diseased tissue and organs.[18]

10. MAYO CLINIC, *supra* note 1.
11. *Id*.
12. *Id*.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id*.
17. *Id.*
18. *Id.*

Adult stem cells are undifferentiated cells that are essential for healing, growth, and replacement of lost cells.[19] Although these undifferentiated cells may be useful for specific areas of the body, they do not have the capability of differentiating into any cell type unless they have been genetically reprogrammed to act as embryonic stem cells.[20] Additionally, due to the artificial nature of reprogramming, there are unclear effects in humans and the cells are more susceptible to immune rejection.[21] This is a major disadvantage to researchers and often leads researchers to try to avoid them, even though it is the less controversial alternative because the use of them does not involve creating, using, or destroying human embryos.[22]

Opponents of embryonic stem cell research typically do not encourage patents because of ethical reasoning.[23] The reasoning is deeply rooted in public policy motivations, such as the argument against creating, using, or destroying human embryos.[24] However, allowing embryonic stem cell research does not mean disrespecting ethical and legal principles. There is a way to engage public policy and influence the opponents of stem cell research, while still encouraging legitimate research practices and reducing discrepancies between territories and nations.

III. HISTORY AND DEVELOPMENT OF UNITED STATES STEM CELL REGULATION

The history of United States stem cell regulation is marked by evolving policies shaped by scientific advancements. The United States Patent and Trademark Office ("USPTO") provides the statutory framework for the field and case law interprets such regulations and has recently developed to reflect the ethical considerations and societal concerns regarding the scope of stem cell patents.[25]

19. Wojciech Zakrzewski, Maciej Dobrzyński, Maria Szymonowicz & Zbigniew Rybak, *Stem Cells: Past, Present, and Future*, STEM CELL RSCH. THERAPY 10, 68, 3 (2019).

20. *Id.*

21. *Id.* at 16.

22. *Id.*

23. *See generally* Dresser, *supra* note 2.

24. *Id.*

25. Sarah E. Fendrick & Donald L. Zuhn Jr., *Patentability of Stem Cells in the United States*, 5(12) COLD SPRING HARBOR PERSPECTIVES IN MED. 1, 2 (2015).

A. United States Legal Framework

The USPTO shapes stem cell innovation because it provides the statutory framework that delineates the parameters for patentability.[26] Title 35 of the United States Code, titled "Patents," provides the USPTO the authority to perform its functions in examining applications, determining patentability, and issuing patents.[27] Additionally, Title 35 sets forth the comprehensive U.S. legal framework for the USPTO to enforce and define the rights and obligations of patent holders and the public. Specifically, section 101 defines what constitutes patentable subject matter, stating "Whoever invents or discovers any new and useful process, machine, manufacturer, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."[28]

The Leahy–Smith America Invents Act ("AIA")[29] addresses the patentability of stem cells. AIA states that a claim directed to or encompassing a human organism is not patentable.[30] Through its legislative history, the AIA further acknowledges that the "U.S. Patent Office has already issued patents on genes, stem cells, animals with human genes, and a host of non-biologic products used by humans, but it has not issued patents on claims directed to human organisms, including human embryos and fetuses."[31] This has allowed the Supreme Court to distinguish exceptions to section 101's broad patent-eligibility principles but statutorily establishes that stem cells are patent-eligible.[32]

B. Case Law

United States stem cell regulation has recently evolved through Supreme Court case law. A patent applicant who is dissatisfied with the final decision in an appeal to the Patent Trial and Appeal Board may appeal the Board's decision to the United States Court of Appeals for the Federal Circuit.[33] The

26. *Id.*

27. 35 U.S.C. § 1-390 (2018).

28. 35 U.S.C. § 101 (2018).

29. *See* Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 33(a), 125 Stat. 284, 340 (2011).

30. *Id.*

31. MPEP § 2105, at 2100-12 (9th ed. Rev. March 2014); 157 CONG. REC. E2417-01, at E1179 (daily ed. 2011) (statement of Rep. Dave Weldon, previously presented in connection with the CONSOLIDATED APPROPRIATIONS ACT, 2004, Pub. L. No. 108-199, § 634, 118 STAT. 3, 101, and later resubmitted regarding the AIA).

32. *Id.*

33. 35 U.S.C. § 141(a) (2018).

Supreme Court may also issue decisions that may narrow the patentability of the subject matter and even can impose new limitations.[34] *Funk Bros. Seed Co. v. Kalo Inoculant Co.* identifies three exceptions to the USPTO statutory framework.[35] This case establishes that laws of nature, physical phenomena, and abstract ideas are not patent-eligible.[36]

Previously, the USPTO had consistently accepted the patentability of stem cells or their related technologies.[37] In both *Chakrabarty*[38] and *In re Bergy*,[39] the USPTO and the United States Court of Customs and Patent Appeals ("CCPA"), respectively, facilitated a path and provided guidance for securing patent protection for innovations in the biotech industry.

The claims at issue in *Chakrabarty* was a genetically engineered *Pseudomonas aeruginosa* bacterium, which was determined to be patent-eligible because it had markedly different characteristics from any bacterium found in nature.[40] In claims at issue in *In re Bergy* related to the "biologically pure culture" of the microorganism *Streptomyces vellosus*, the CCPA held that the biologically pure culture was not a product of nature and patentability is not affected by the microorganism being alive.[41] Following the precedent and legal framework provided by these two cases stem cells were then found to be patent-eligible.[42] The first human embryonic stem cell patents were issued to James Thomson of the University of Wisconsin, nearly twenty-years after the rulings in *Chakrabarty* and *In re Bergy*.[43]

The United States Supreme Court's decisions in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*[44] and *Association for Molecular Pathology v. Myriad Genetics, Inc.*[45] further defined the bounds of patent-eligible subject matter under 35 U.S.C. Section 101. These recent decisions resulted in the USPTO issuing the *Myriad-Mayo* Guidance, implementing a new procedure involving a three-step analysis: (1) Is the claimed invention directed to one of the four statutory patent-eligible subject matter categories:

34. 35 U.S.C. § 144 (2018).

35. Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127, 130 (1948).

36. *Id.*; *see also* Diamond v. Diehr*,* 450 U.S. 175, 185 (1981).

37. Yvonne Shyntum & Edward Kalkreuter, *Stem Cell Patents—Reexamination/Litigation—The Last 5 Years*, 15 TISSUE ENG. PART B REV. 87, 87-88 (2009).

38. *See* Diamond v. Chakrabarty, 447 U.S. 303 (1980).

39. *In re* Bergy, 596 F.2d 952 (C.C.P.A. 1979).

40. *See* Diamond, 447 U.S. at 310.

41. *Bergy*, 596 F.2d at 975.

42. *See id.*; *See* Diamond v. Chakrabarty, 447 U.S. 303.

43. U.S. Patent No. 5,843,780 (filed Jan. 18, 1996); U.S. Patent No. 6,200,806 (filed June 26, 1998); U.S. Patent No. 7,029,913 (filed Oct. 18, 2001).

44. Mayo Collaborative Servs. v. Prometheus Labs., Inc., 566 U.S. 66 (2012).

45. Ass'n. for Molecular Pathology v. Myriad Genetics, Inc., 569 U.S. 576 (2013).

process, machine, manufacture, or composition of matter?[46] (2) Does the claim recite or involve one or more judicial exceptions identified by the Supreme Court in *Diehr* (i.e., laws of nature, physical phenomena, or abstract ideas)?[47] (3) Does the claim as a whole recite something *significantly different* than the judicial exceptions?[48]

The first major challenge to the patentability of stem cells came when the USPTO initially rejected the Wisconsin Alumni Research Foundation ("WARF") matters because independent inventors had already patented the embryonic stem cells.[49] Upon reexamination, the USPTO granted all three requests based on a "substantial new question of patentability" and subsequently rejected them as anticipated and/or obvious.[50] WARF then narrowed its patent claims to only include stem cells derived from preimplantation embryos and those were determined to be patentable subject matter.[51]

These matters were all independently viewed by the USPTO and decisions could not be appealed because they were ex parte reexaminations, which are final decisions.[52] During the reexamination period, the patents are presumed valid, allowing research to continue, and "increase its IP estate" by continuing to file follow-on inventions that further define the field, needing each one to strengthen the next.[53] Therefore, although public interest groups challenged stem cell patents, the three original WARF patents have been upheld.[54] By allowing follow-on patents, original, or base patents, may emerge in a stronger position if challenged within the USPTO because they are secured with additional patent protection resting on it.[55] However, the issue of patentability of stem cells has yet to be addressed in federal courts.[56]

---

46. U.S. PATENT & TRADEMARK OFFICE, GUIDANCE FOR DETERMINING SUBJECT MATTER ELIGIBILITY OF CLAIMS RECITING OR INVOLVING LAWS OF NATURE, NATURAL PHENOMENON & NATURAL PRODUCTS (2014).

47. *Id.*

48. *Id.*

49. Robert Williams and Bridget Hogan had already patented stem cells in 1992 or at least described them on applications in 1992 and 1994, respectively. Katja Triller Vrtovec & Christopher Thomas Scott, *Patenting Pluripotence: The Next Battle for Stem Cell Intellectual Property*, 26 NAT. BIOTECHNOLOGY 393, 393 (2008) (referencing U.S. Patent No. 5,166,065 (filed Aug. 3, 1989); U.S. Patent No. 5,453,357 (filed Oct. 8, 1992); U.S. Patent No. 5,690,926 (filed Mar. 25, 1994)).

50. Fendrick & Zuhn, *supra* note 25, at 5.

51. *Id.*

52. *Id.*

53. Vrtovec & Scott, *supra* note 49, at 394.

54. *Id.* (referencing Plomer, A., Taymor, K. & Scott, *Challenges to Human Embryonic Stem Cell Patents* C.T. STEM CELL 2, 13 (2008)).

55. *Id.*

56. *See generally Consumer Watchdog v. Wisconsin Alumni Research Foundation*, 753 F.3d 1258 (2014) (showing the issue of the patentability of stem cells is yet to be addressed when

As seen through the development of case law and the statutory regulations, the USPTO seems to have fewer issues with the flow of information when deciding the patentability and reexamination. Coordination within the 50 states is less important in patent law because it does not respond to independent territorial court systems and is instead handled federally by the USPTO and the designated federal courts for appeal. This creates a unitary court procedure, bypassing the need for coordination with individual state law. This also allows states to create whatever restrictions on the research of embryonic stem cells they may choose, but the research is still capable of being done in another state and deemed patent-eligible by the same federally organized system in the U.S.[57]

IV. EUROPEAN UNION

The European Union's ("E.U.") patent system represents an attempt to harmonize intellectual property protection across member states.[58] Although it attempts to streamline and foster innovation and economic growth, the framework instead relies on loose morality clauses to define patent rights across the E.U.[59]

The legal guidance that governs patents on biotechnological inventions in Europe is the European Patent Convention and the E.U. Biotechnology Directive 98/44/EC on the legal protection of biotechnological inventions.[60] The European Patent Convention ("EPC")[61] is a multinational treaty protecting thirty-nine Member States of the European Patent Organization and providing an autonomous legal system for European patents to be

Consumer Watchdog appealed the *inter partes* reexamination decision to the United States Court of Appeals for the Federal Circuit because the '913 patent was ineligible subject matter as it fell within the "product of nature" exception, drawing similarities to *Myriad* and that WARF did not create or alter the properties of the claimed stem cells. The Federal Circuit dismissed the appeal for lack of Article III standing because it was not engaged in any activity involving human embryonic stem cells that could form the basis for an infringement claim, did not allege that it intended to engage in such activity, and did not allege that it was an actual or prospective licensee or that it had any other connection to the '913 patent or the claimed subject matter. In its decision, the question of stem cell patentability was not addressed); *see* U.S. Patent No. 7,029,913 (filed Oct. 18, 2001).

57. C.J. Murdoch, *Intraoperability Problems: Inconsistent Stem Cell IP and Research Regimes Within Nations*, 3 STAN. J. L. SCI. & POL'Y 49, 53 (2011).

58. *Id.* at 50.

59. *Id.* at 51.

60. Convention on the Grant of European Patents (European Patent Convention) art. 63, Oct. 5, 1973, 13 INT'L LEGAL MATS. 268 (1974), revised by Act Revising Article 63 EPC of Dec. 17, 1991, and Act Revising the EPC of Nov. 29, 2000 [hereinafter EPC]; Council Directive 98/44, Legal Protection of Biotechnological Inventions, 1998 O.J. (L 213) 13 (EC) [hereinafter Biotech Directive].

61. *See* EPC, *supra* note 60.

granted.[62] It serves as the E.U.'s attempt to harmonize patent law using transnational treaties to regulate the patentability of stem cells.[63] The most relevant sections to patent-eligibility of stem cells within the EPC are Rules 26[64] to 29, and so long as applications are in accordance, biotechnological inventions are typically patentable.[65] The Directive is used as a supplement for the interpretation of these rules.[66]

The Directive, implemented on July 6, 1998, was intended to systematize the laws of member states regarding the patentability of biotechnological inventions.[67] It also includes exceptions from patentability, stating that patents contrary to *ordre public* and morality are excluded from patentability.[68] In full it states:

> (1) Inventions shall be considered unpatentable where their commercial exploitation would be contrary to *ordre public* or morality; however, exploitation shall not be deemed to be so merely because it is prohibited by law or regulation.
>
> (2) On the basis of [the above] paragraph 1, the following, in particular, shall be considered unpatentable:
>
> (a) processes for cloning human beings;
>
> (b) processes for modifying the germ line genetic identity of human beings;
>
> (c) uses of human embryos for industrial or commercial purposes;
>
> (d) processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to man or animal, and also animals resulting from such processes.[69]

Relevant to stem cell research, Article 6, subsection 2(c) states that "uses of human embryos for industrial or commercial purposes" are excluded from patentability.[70] The intent at the time was to prohibit patents claiming techniques for the cloning of human beings, faced with intense political pressure from animal welfare activists and environmentalists in 1995 when

62. Member States of the European Patent Organization, EUROPEAN PATENT OFFICE, https://www.epo.org/en/about-us/foundation/member-states (last visited Feb. 16, 2025).

63. Murdoch, *supra* note 57, at 50.

64. EPC, *supra* note 60, at 348-50.

65. EPC, *supra* note 60, at 348-54.

66. Biotech Directive, *supra* note 60.

67. *Id.*

68. *Id*. at art. 6(1).

69. *Id.* at art. 6.

70. *Id*. at art. 6(2)(c).

it was first put before the European Parliament.[71] However, as stem cell research has increased, this article is now being used to exclude stem cell patents.[72]

All E.U. Member States also did not fully implement the Directive into national law until 2007.[73] This was because some Member States were not as keen to allow patents for biotech innovations.[74] The lack of uniformity among the Member States is due to different interpretations based on cultural and philosophical circumstances.[75]

Importantly, there is a morality clause included in Article 6, subsection 1 that makes it even more difficult to identify a uniform understanding of "*ordre* public" and "morality" across different jurisdictions because its interpretation varies from country to country.[76]

Brüstle vs. Greenpeace Case, Docket No. X ZR 58/07 is an important application of Article 6, subsection 2(c).[77] The German Patent Act adopted the Article 6, paragraph 2 directive of 98//44/EC on the legal protection of biotechnological inventions and the German Federal Supreme Court interpreted the directive in *Greenpeace* in 2012 when deciding whether neural precursor cells, originating from human stem cells, are patentable.[78] Brüstle filed for a patent in 1997 and received one in April 1999 from the German Patent and Trademark Office ("DPMA").[79] The patent was specific to the protection of neural precursor cells, which is a procedure to cultivate the cells and use them in therapies for neural defects in humans and animals.[80] According to the patent, the neural precursor cells were derived from embryonic stem cells and those could be obtained from an embryo at an early stage of development, resulting in the destruction of the embryo.[81] Greenpeace filed a nullity action against the patent based on public policy and common moral principles.[82] The German Federal Supreme Court on

71. Duncan Curley, *Stem Cell Patenting in Europe – the Twilight Zone*, 4 GENOMICS, SOC'Y & POL'Y 1, 2 (2008).

72. *See id.* at 5-6.

73. Murdoch, *supra* note 57, at 51 (citing Robert Fitt, *New Guidance on the Patentability of Embryonic Stem Cell Patents in Europe,* 27 NAT. BIOTECHNOLOGY 338, 338 (2009)).

74. *Id*.

75. *Id*. at 50.

76. *Id*. at 51 (citing Biotech Directive, *supra* note 59, at art 6).

77. Entscheidungen des Bundespatentgerichts [BPatGE] [Federal Patent Court] Dec. 17, 2009, X ZR 58/07 [hereinafter Brüstle Case] (Ger.).

78. Nicholas A. Zachariades, *Stem Cells: Intellectual Property Issues in Regenerative Medicine*, 22 (Suppl. 1) STEM CELLS & DEV. 59, 61 (2013).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

appeal requested a preliminary ruling by the Court of Justice of the European Union ("CJEU") on the interpretation of the terms "human embryo" and "use of human embryos for industrial or commercial purposes."[83]

The CJEU arrived at three conclusions regarding the "human embryo."[84] The first is that a "human embryo" is any ovum[85] once fertilized, including creation by transfer of a nucleus from another mature cell or stimulated to cell division by parthenogenesis.[86] The Court also held that harvesting cells from embryos that have fully and finally ceased to develop further is not what the directive targeted, and so they are patent-eligible.[87] Finally, the court concluded that human stem cells that are harvested without destroying an embryo are not embryos themselves because they lack the potential to develop a human being, and thus patent-eligible.[88]

However, in *International Stem Cell Corporation v. Comptroller General of Patents*, the European court said "in order to be classified as a 'human embryo,' a non-fertilized human ovum must necessarily have the inherent capacity of developing into a human being" and that "[t]he mere fact that [parthenogenetically-activated human ovum] commences a process of development is not sufficient for it to be regarded as a human embryo."[89] In effect, the press release differs from the decision in the Greenpeace case because the process of parthenogenesis was seen as a sufficient process of development to be sufficient to be regarded as a human embryo.[90] The ruling

83. *Id.*; BGH, Dec. 17, 2009, Xa ZR 58/07, (Ger.) https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2009-12&Seite=1&nr=50583&anz=288&pos=52&Frame=4&.pdf.

84. Zachariades, *supra* note 78, at 61.

85. *See* The Editors of Encyclopedia Britannica, *Ovum*, ENCYCLOPEDIA BRITANNICA (last updated Dec. 9, 2023), https://www.britannica.com/science/ovum (Ovum is a single cell released from either of the female ovaries that can develop into a new organism when fertilized with a sperm cell).

86. *See* The Editors of Encyclopedia Britannica, *Parthenogenesis*, ENCYCLOPEDIA BRITANNICA (last updated Nov. 13, 2023), https://www.britannica.com/science/parthenogenesis; Zachariades, *supra* note 78, at 61.

87. Zachariades, *supra* note 78, at 61-62.

88. *Id.*

89. Int'l Stem Cell Corp. v. Comptroller Gen. of Patents, Designs & Trade Marks, Case C-364/13, ECLI:EU:C:2014:2451, ¶ 28 (CJEU Dec. 18, 2014), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013CJ0364.

90. Court of Justice of the European Union, Press Release No. 181/14, Judgment in Case C-364/13, *Int'l Stem Cell Corp. v. Comptroller General of Patents, Designs and Trademarks* (Dec. 18, 2014), available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2014-12/cp140181en.pdf.

lifts the ban on obtaining patents for embryonic stem cells, as established in the 2011 judgement in *Brüstle vs. Greenpeace*.[91]

Other significant case law has established that patents are not permitted for stem cells that can only be obtained through the destruction of an embryo. In November 2008, a ruling by the EPO's highest appeal board, the Enlarged Board of Appeal ("EBA"), rejected an application from the Wisconsin Alumni Research Foundation ("WARF") for a patent of five stem cell lines.[92] Further, this decision makes clear that research on embryos or downward variants resulting from the destruction of embryos that carry the potential to develop into a human being is morally wrong and should not be protected.[93] Despite this decision coming directly from the EPO, there is no indication of whether derivative products originally derived from destructed embryos may be patent-eligible.

A. United Kingdom

Contrary to the E.U., the United Kingdom (U.K.) is more permissive with its patent laws and regulation of research. The U.K. Intellectual Property Office ("UKIPO") updated its policy in February 2009 to harmonize with the European Patent Office EBA's WARF decision, that no stem cells or procedures that come about exclusively by the destruction of embryos or that are derived therefrom may be patented.[94] The UKIPO also includes distinctions between totipotent and pluripotent stem cells.[95] Human stem cells not derived from human embryos, such as pluripotent cells and adult stem cells, are patent-eligible.[96] Meanwhile, because totipotent cells have the potential to develop into an entire human body, they are not patent-eligible.[97]

91. Ewen Callaway & Alison Abbott, *European Court Clears Way for Stem-Cell Patents*, 516 NATURE (2014), https://www.nature.com/articles/nature.2014.16610.

92. EUROPEAN PATENT OFFICE, ENLARGED BOARD OF APPEAL, Decision G 2/06 of 25 Nov. 2008, 2009 O.J. EPO 306, at 2 (EUR. PAT. OFF.), https://www.epo.org/boards-of-appeal/decisions/pdf/g060002ep1.pdf (citing Mats G. Hansson et al., *Isolated Stem Cells—Patentable as Cultural Artifacts?*, 25 STEM CELLS 1507, 1507 (2007), https://academic.oup.com/stmcls/article/25/6/1507/6402321).

93. Hansson, *supra* note 92, at 1508.

94. UK Intellectual Property Office, *Statutory Guidance: Inventions Involving Human Embryonic Stem Cells* (Mar. 25, 2015), https://www.gov.uk/government/publications/inventions-involving-human-embryonic-stem-cells-25-march-2015/inventions-involving-human-embryonic-stem-cells-25-march-2015.

95. Murdoch, *supra* note 57, at 52.

96. Aurora Plomer, *Stem Cell Patents: European Patent Law and Ethics Report*, 69 (July 28, 2006), https://www.nottingham.ac.uk/~llzwww/StemCellProject/project.report.pdf.

97. UKIPO, *supra* note 94.

V. STEM CELL PATENT REGULATION NEEDS TO ENCOURAGE LEGITIMATE RESEARCH PRACTICES

Stem cell patents are important for the future of medicine and if countries block those patents, they will also block research and find themselves left further behind in medical technology and lose out on economic opportunities.[98] Through recent years, the global healthcare innovation landscape has evolved, with the U.S. and Asia setting the pace by implementing policies that encourage innovative thinking by adopting a unitary patent system.[99] However, the E.U. relies on the UPC, adding another judicial layer,[100] encouraging the protection of what they deem to be a fundamental right, focused on the destruction or lack of, a human embryo.[101]

While fundamental rights are important, the balance between dignity and innovation is creating less than earnest research practices. The innovation is continuing, whether a country wants to protect it or not, because the funding and researchers are going to where it is allowed, creating monopolies.[102] The prevalence of patent restrictions not only undermines the intended incentives for innovation but also contributes to the creation of unjustified monopolies, posing a serious challenge to fair competition.[103]

Countries need to consider their statutory interpretations while acknowledging and considering the promotion of legitimate research practices. Legitimate research practices, including objectivity and respect for patents, can foster innovation and streamline the intellectual property landscape. Antitrust law seeks to promote and maintain market competition and if stem cell patents can further create monopolies, then competition will dwindle transnationally.[104] Patent and antitrust law must work together to achieve the proper balance to achieve stability in the field and become

98. COUNCIL OF THE ROYAL SOCIETY, *supra* note 4, at v.

99. Aurora Plomer, *The Unified Patent Court and the Transformation of the European Patent System*, 51 INT'L REV. INTELL. PROP. & COMPETITION L. 791, 795 (2020), https://doi.org/10.1007/s40319-020-00963-6 (citing European Patent Office, *EPO 2018 Statistics*, EUROPEAN PATENT OFFICE, https://www.epo.org/about-us/annual-reports-statistics/annual-report/2018/statistics/granted-patents.html (last visited Feb. 3, 2025); World Intellectual Property Organization, *WIPO Facts and Figures 2019: International Patent Applications* (2019), https://www.wipo.int/edocs/infogdocs/en/ipfactsandfigures2019/).

100. Plomer, *supra* note 99, at 796.

101. Myrthe G. Nielen, Sybe A. de Vries & Niels Geijsen, *European Stem Cell Research in Legal Shackles*, 32(24) EMBO J. 3107, 3108 (2013), https://www.embopress.org/doi/epdf/10.1038/emboj.2013.249.

102. *See* Plomer, *supra* note 99, at 794-95.

103. *Id.*

104. *See id.* at 796.

complementary, as both are aimed at encouraging innovation, industry, and competition.[105]

This balance is already inherent in the basic structure of the United States patent system by limiting the duration of the patent. "[T]he Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any accompanying advance in the 'Progress of Science and useful Arts.'"[106] According to a report by the United States Federal Trade Commission, questionable patents are a significant competitive concern and are ones that can harm innovation.[107] The high level of controversy surrounding stem cell patents makes this subject-matter contentious. Its validity is already in doubt as case law has been developing in both the U.S. and the E.U., creating reasonable doubt in the path forward for the field.

Additionally, poor-quality patents can harm innovation and competition by deterring rival groups from entering or continuing research within specific areas.[108] Although the patent system in the United States appears to be self-correcting and the U.S. Patent and Trademark Office is responsive to concerns raised in the industry, frequently updating guidelines and resources in the biotech field, adverse impacts of questionable patents are still developing.[109]

Alternatively, scholars have also argued that the development of anticommons can harm innovation.[110] Anticommons is when too many people own pieces of one thing, such that nobody can use it.[111] There is also the possibility of underuse when governments allow too many people the rights to exclude others through privatization.[112]

---

105. FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003), https://www.ftc.gov/sites/default/files/documents/reports/promote-innovation-proper-balance-competition-and-patent-law-and-policy/innovationrpt.pdf (quoting Atari Games Corp. v. Nintendo of Am., 897 F.2d 1572, 1576 (Fed. Cir. 1990)).

106. FTC, *supra* note 105, at 3, note 9; *see* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 147 (1989) (explaining that federal patent laws embody "a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy").

107. *See* FTC, *supra* note 105, at 5.

108. *Id.*

109. *Id.*

110. *Id.*

111. Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCI. 698, 698 (1998), https://www.science.org/doi/epdf/10.1126/science.280.5364.698.

112. *Id.* (citing Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets,* 111 HARV. L. REV. 621, 624 (1998)).

Biomedical privatization can lead to an increase in intellectual property rights leading to a stifling of life-saving innovation further downstream in the course of research and product development.[113] As the United States patent system has shifted, large research institutions, such as the National Institute of Health, and commercial biotechnological firms have the resources to privatize their research and heavily restrict their use.[114] The problem then forms when a user needs access to multiple patented inputs to create a single useful treatment or product.[115] This would also create monopolies, increase prices, and restrict the use at the top, not allowing others to benefit on the way down.[116]

The natural production of monopolies is possibly a side effect of patent law. By nature, it is more restricted in its ability to create a network to bundle multiple licenses compared to other fields of intellectual property, building corporate value in the 'knowledge economy.'[117] Patent law is more prevalent in the pharmaceutical and biotechnology industries, and these are also the industries that are worried about competitors undermining the gains from exclusivity and have a lack of substitutes for their biomedical discoveries.[118]

This creates diverging interests based on how the money is being distributed and the interests it carries. As Heller and Eisenberg note, a public and/or politically accountable government agency would want to use their intellectual property rights to ensure widespread availability and engage in transactions relevant to their ultimate governmental purpose.[119] By contrast, private dollars drive private institutions and firms and are more likely to use intellectual property to maintain a product monopoly to further block the strategies of others.[120] U.S. legislation has attempted to mitigate the stark differences we see between the two driving forces through the Bayh-Doyle Act.[121] The Act enables universities, small businesses, and non-profit

113. Heller & Eisenberg, *supra* note 111, at 698.

114. *Id*. (citing Rebecca S. Eisenberg, *Patents and the Progress of Science: Exclusive Rights and Experimental Use*, 82 VA. L. REV. 1663 (1996), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2223&context=articles; Martin Kenney, *Biotechnology: The University-Industrial Complex* 198–99 (Yale Univ. Press 1986)).

115. Heller & Eisenberg, *supra* note 111, at 699.

116. *Id.*

117. COUNCIL OF THE ROYAL SOCIETY, *supra* note 4, at 7 ¶ 3.1.

118. Heller & Eisenberg, *supra* note 111, at 700 (citing Richard C. Levin, Alvin K. Klevorick, Richard R. Nelson & Sidney G. Winter, *Appropriating the Returns from Industrial Research and Development*, BROOKINGS PAPERS ON ECON. ACTIVITY, at 783-84 (1987), https://www.brookings.edu/wp-content/uploads/1987/12/1987c_bpea_levin_klevorick_nelson_winter_gilbert_griliches.pdf).

119. Heller & Eisenberg, *supra* note 111, at 700.

120. *See id.* at 698.

121. *See* Bayh-Dole Act, 35 U.S.C. §§ 200-212.

research institutions and organizations to pursue ownership of their inventions that are developed under federally funded research.[122] This was very difficult to do beforehand and by mitigating the diversion of money interest, the U.S. has created a more equitable research practice.

The E.U.'s response to the threat of monopolies is the Directive.[123] The Directive is derived from European patent law aimed at preventing the grant of patent monopolies for inventions that would be morally repugnant to the public if exploited by the patentee.[124] The English Statute of Monopolies of 1624 declared all monopolies to be contrary to law and that any exceptions would be a privilege and determined by the common law.[125] As a general prohibition, patents serving a term of fourteen years or under were not to be prejudiced.[126] With the root of the Directive being in protecting against monopolies, the goal was to protect innovative interests but to balance against the possibility of over-protection and the creation of monopolies and unwanted side effects.

The creation and management of monopolies can also be rooted in the US and E.U.'s differing understanding of the purpose of a patent. In the United States, inventors generally view patents as an almost absolute or natural right.[127] On the contrary, in Europe, patents are a privilege granted by governments in pursuit of specific economic or technological objectives. Naturally, this makes the U.S. more patent-friendly than the E.U.[128]

When a country has stricter patent regulations on stem cell-based inventions, it reduces the country's competitive position against other economies that may more liberally apply morality exclusions. Researchers are then driven to apply for patents in the region that is the most flexible and liberal about their morality exclusions.[129] Countries, then that are losing prominent research, are bound to find ways to move around the laws and regulations.[130] For example, Japan includes a morality exclusion on patents but seems to not adhere to it when it comes to the patenting of human embryonic stem cell ("ESC") related inventions.[131] Similarly, the Court of

122. *See id.*

123. *See* Duncan Curley, *Stem Cell Patenting in Europe – the Twilight Zone*, 4(3) GENOMICS, SOC'Y & POL'Y Apr. 2008, at 2, 3.

124. *Id.* at 3.

125. *See* English Statute of Monopolies, 1624, 21 Jac.I, c.3.

126. Ronan Deazley, *Commentary on the Statute of Monopolies 1624*, in PRIMARY SOURCES ON COPYRIGHT (1450-1900) (Univ. of Birmingham, UK 2008), https://www.copyrighthistory.org.

127. COUNCIL OF THE ROYAL SOCIETY, *supra* note 4, at 7 ¶ 3.4.

128. *Id.* at 7-8 ¶ 3.4.

129. *See* Nielen et al., *supra* note 101, at 3109.

130. *Id.*

131. *See id.*

Justice of the European Union is being asked to clarify its decision to prevent the patenting of stem cell research involving the use and destruction of human embryos because the ban is claimed to be deterring investment in Europe, while competitors in Asia and the U.S. can continue unhindered research using embryonic stem cells.[132]

By driving the majority of patents in this area to centralized locations, innovative thinking is driven to be centered in these areas as well.[133] This creates future roadblocks for the ways our pharmaceutical industry interacts with different academic and research-based institutions.[134] Industries that exist in the international specter are lured by a level playing field with uniform standards of patentability between European and U.S. industries. However, one of the main differences preventing harmony is the fundamental importance that each assigns to patents, creating different priorities.

The monopolistic nature of patents means that patent holders are typically trying to capitalize off limiting the rest of the market's access to insulate the patent owners from competition, which with such sensitive subject matter, may result in unethical practice.[135] If stem cell regulation encouraged patent stability and rather encouraged competition and equitable research practices, stem cell patents would be part of a more standardized patent system because it would put more control in the government's hands, as "custodians of the public interest" to monitor the activities and utilize the licensing and competition law to engage in a moral approach from the beginning.[136] Additionally, it would create an environment for governments to work more closely together, not relying on individualized approaches to achieve responsible use of stem cells.[137]

Therefore, the E.U. should balance its morality clauses more leniently to be cautious of creating monopolies within the patent system. There are more flexible approaches, as seen in China and Japan to mitigate the morality clauses and embrace innovative thinking to still have the E.U. be another epicenter of innovation on the stem cell patent front.

132. *See* Zachariades, *supra* note 78, at 62.
133. *See* Nielen et al., *supra* note 101, at 3109.
134. *Id.*
135. *See* COUNCIL OF THE ROYAL SOCIETY, *supra* note 4, at 10 ¶ 3.19.
136. *Id.*
137. *See id.*

VI. THE E.U. SHOULD CREATE A MORE ACCESSIBLE PATENT SYSTEM TO AVOID CONFUSION BETWEEN COUNTRIES, RESEARCHERS, AND BIOPHARMACEUTICAL COMPANIES

The accessibility of the patent system is a frequent source of confusion between countries, researchers, and companies regarding the enforcement of such patents. The lack of a universal patent system results in non-harmonized laws that rely on individual countries engaging in patent disputes and accepting judgments from other nations' courts, particularly within the E.U. By creating a practice that encourages harmonizing protocols, patent applications, and patent disputes would be a more efficient, cheaper, and more realistic option for parties, leading to more consistency throughout governments.[138] Although this issue may be present in all areas of patent law, it is especially prevalent in matters concerning stem cell patentability because of the wide array of morality exclusions and application of the law that exists in the E.U.

The Patent Cooperation Treaty[139] ("PCT") is an attempt at addressing this problem.[140] The PCT allows for one patent application to apply simultaneously to several countries instead of filing separate national or regional patent applications.[141] The patents granted remain under the control of the national or regional patent offices and this is frequently referred to as the "national phase."[142] This saves time, work, and money for any person or firm seeking to protect an invention in more than one country.[143]

Despite the attempt to ease and regulate the application process, patent holders only have patent rights in the markets in which they have achieved territorial rights.[144] The complexity of regulation arises from companies in different countries adhering to specific territorial rights and having to know other nations' patent laws that will be regulating their valid patent.[145]

---

138. *See id.* at 13 ¶ 3.37 (Stem cells and DNA sequences frequently face similar debates because of their morality implications and heavy morality concerns. Although this researcher recommends them in turn, they are similar enough to discuss together attempting to clarify an approach to patenting in the bioscience field).

139. As of December 1, 2023, there were 157 PCT contracting states. *See* WIPO, *PCT System*, https://www.wipo.int/pct/en/pct_contracting_states.html.

140. Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231 reprinted in 9 I.L.M. 978 (1970).

141. *See* WIPO, *PCT FAQs*, https://www.wipo.int/pct/en/faqs/faqs.html#:~:text=155%20Contracting%20States.-,1,pay%20one%20set%20of%20fees; *see* Patent Cooperation Treaty, *supra* note 140, at art. 4.

142. *See* WIPO, *supra* note 141.

143. *See id.*

144. *See id.* at ¶¶ 8(c), 10.

145. *See id.* at ¶ 2.

Companies in different countries can follow specific territorial rights linked to the country or region where they filed and granted the patent.[146]

The patent system in the E.U. and the U.S. present different legal challenges, as seen through the developing case law. Through the E.U. Directive on Biotechnological Inventions, the E.U. was attempting to harmonize patent laws with its member states, illustrative of the existing consensus on the types of inventions that were morally unpatentable at the time.[147] Unfortunately, this attempt to harmonize has instead generated legal uncertainty and obscured the patenting process because of the fragmentation of national and European courts' jurisdiction.[148]

A. European Patent System Challenges

Within the E.U. alone, there is confusion as to the interpretation and implementation among E.U. member states. The judgments of the Court of Justice of the European Union ("CJEU") on the interpretation of Directive 98/44/EC are not binding on the European Patent Office ("EPO").[149] The EPO member states and the E.U. member states serve different populations, as the EPO is an independent organization from the E.U., with thirty-nine EPO Contracting States and the European Commission as observers.[150]

Although there is separation, the judgments may still be considered persuasive.[151] Mere persuasion provides that success under the national laws of individual European nations is not guaranteed, and instead, judgments on stem cells are dependent on how each nation understands these terms. Europe does not have a consistent understanding of biotechnology patents, exemplified by the 1998 Directive not fully implemented into national law by all E.U. members until 2007.[152] The interpretation continues to vary and change across nations and with it, the weight of the EPO patent can yield heterogeneous results across national IP landscapes.[153]

146. *See id.*

147. Aurora Plomer, Kenneth S. Taymor & Christopher Thomas Scott, *Challenges to Human Embryonic Stem Cell Patents*, 2 CELL STEM CELL 13, 15 (2008).

148. *Id.*

149. European Patent Office, *Guidelines for Examination in the European Patent Office* (Dir. 5.3.1 – Patent Law & Processes, EPO 2024) (ISBN 978-3-89605-361-9).

150. *See id.* ¶ 6.

151. EPC, *supra* note 60.

152. *See* Murdoch, *supra* note 57, at 51.

153. *Id.* at 50.

In *International Stem Cell Corporation v. Comptroller General of Patents*, the CJEU held three conclusions regarding the "human embryo."[154] The CJEU defined "human embryo", clarified that the directive did not target harvesting cells from embryos that have fully and finally ceased to develop further, and concluded they are not embryos when human stem cells are harvested without destroying an embryo.[155]

Although these were the assigned meanings by the CJEU, they only act as persuasive to the European Patent Office. The Unified Patent Court Agreement ("UPCA") is a treaty creating an "international" court that obeys European Union law exclusively for the enforcement of ''European Patents with Unitary Effect'' ("EUPE"), created by E.U. legislation but granted and administered by the EPO and is an autonomous and international organization existing outside the E.U.[156] This approach is to facilitate European patent integration into a single market[157] but fails to do so because it simultaneously fractures the E.U. market between the twenty-five participating states.[158] Aurora Plomer, the Director of the Sheffield Institute of Biotechnology, Law and Ethics at the University of Sheffield, asserts that the attempt to integrate "has since proved stubbornly resistant to integration within the E.U. legal order, whilst implementing E.U. law (notably the Biotech Directive)."[159] The EPO has developed into a quasi-judicial body, interpreting eligibility requirements and patent exclusions, including stem cells.[160]

The E.U. attempted to remove confusion within its nations and territories and instead resulted in a complex judicial system exacerbating the fragmentation and creating an uncertain legal environment.[161] The Directive is responsible for governing the patent law in all territories and court systems within the E.U., but when individual national and territorial courts attempt to define the terms important in the stem cell patent process, the result is a lack

154. Int'l Stem Cell Corp. v. Comptroller Gen. of Patents, Designs & Trade Marks, Case C-364/13, ECLI:EU:C:2014:245 1, ¶ 28 (CJEU Dec. 18, 2014), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013CJ0364.

155. Parthenogenesis, *supra* note 86; *see* Zachariades, *supra* note 78, at 61-2.

156. *See* Plomer, *supra* note 99, at 794.

157. The value of the UPC is largely dependent on the UK's continued participation. *See* Matthias Lamping & Hanns Ullrich, *General Introduction*, in *The Impact of Brexit on Unitary Patent Protection and Its Court*, MAX PLANCK INSTITUTE FOR INNOVATION & COMPETITION RESEARCH PAPER NO. 18-20, at 18-20 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3232627.

158. *See generally* Ritu Padmakant Pandey & Samantha Marzullo, *The Unitary Patent System Sparking Innovation & Collaboration*, UPPSALA UNIVERSITET, 2, 31 (2024).

159. Plomer, *supra* note 147, at 795.

160. *Id.*

161. *Id.* at 796.

of cohesion. Valid patents need to be respected on a global scale and not consistently under threat, so researchers and patent holders are engaging with a more simple and comprehensible patent system, allowing parties to engage with and expand on research, rather than stifle it in the legal process.

B. United States Patent System Challenges

The United States has been more consistent and clearer than the E.U. regarding stem cell patents. They include basic criteria that must be met for patentability. Patents are exclusive to eligible subject-matter, new, useful, and nonobvious inventions.[162] Eligible subject-matter does not include laws of nature, natural phenomena, and abstract ideas.[163] The United States Patent and Trademark Office has frequently recognized inventions including stem cells.[164] However, patents protecting discoveries related to stem cells are now in question. On June 13, 2013, the Supreme Court issued a landmark decision in *Association for Molecular Pathology, et al., Petitioners v. Myriad Genetics, Inc., et al*.,[165] addressing whether DNA is patent-eligible.[166] In *Myriad Genetics*, the Supreme Court further defined the scope of the subject matter eligibility requirement of 35 U.S.C. Section 101, and held that naturally occurring DNA is not patent-eligible, but cDNA is, because it is not naturally occurring.[167]

Further defining subject matter eligibility, in *Mayo Collaborative Services v. Prometheus Laboratories Inc*,[168] decided the year before *Myriad Genetics*, the United States Supreme Court's decision stressed the need to "balance access to research tools for innovation versus innovation itself" and held that the steps of testing for proper drug treatments are unpatentable laws of nature.[169] The Court's concern was that allowing patents of laws of nature would unnecessarily inhibit further discovery.[170] Although this case involved isolated nucleic acids and not stem cells, the standard would still apply.[171] To surpass the standard manifested from this case, it is theorized that a stem cells

162. *See* 35 U.S.C. § 101 (2022).

163. Ass'n for Molecular Pathology v. Myriad Genetics, Inc., et al., 569 U.S. 576 (2013).

164. *See* Zachariades, *supra* note 78, at 60.

165. Ass'n for Molecular Pathology v. Myriad Genetics, Inc., et al., 569 U.S. 576 (2013).

166. *Id.* at 1. There are four statutory categories of invention that are interpreted by the courts: process, machine, manufacture, or composition of matter and improvements thereof. 35 U.S.C. § 101 (2022).

167. *Id.*

168. Mayo Collaborative Services v. Prometheus Laboratories Inc., 566 U.S. 66 (2012).

169. *See generally id.*; Zachariades, *supra* note 78, at 60.

170. Zachariades, *supra* note 78, at 60.

171. *Id.*

patentability will depend on the extent of human manipulation of the stem cell in the laboratory to fit within the subject matter and not as the exclusion of being more analogous to a product of nature.[172]

Although case law is still developing, there is not as much confusion in the U.S. regarding when certain standards apply. Naturally, there are continuing statutory interpretation challenges regarding the patent eligibility of stem cells. The Leahy–Smith America Invents Act does offer some clarifications, which can then be used in tandem with the USPTO regulations and standards.[173] Further, the AIA legislative history acknowledges USPTO patent precedent and does not aim to conflict with that but is clear in its language to serve as a supplement.[174]

VII. CLEAR MORALITY CLAUSES ALLOW FOR POLICY GUIDANCE IN SUPPORT OF STEM CELL PATENT LAW

The central argument against the existence of stem cell patents comes from the ethical concerns surrounding the destruction of human embryos.[175] The response to this issue varies, with nations adopting diverse approaches to morality exclusion clauses. This introduces a difficulty in interpretations as it deviates across cultures. Despite the variability that exists, the need for certainty is essential in demanding policy guidance to shape directives and statutes.[176] Contributing largely to the complex interplay between patent systems, ethical considerations, and the global landscape of stem cell research, is that the E.U. has a stance against patents involving the destruction of human embryos, which contrasts with the diverse approaches taken by individual European countries.[177] The governing patent law needs to have a more cohesive approach to applying over EPO and E.U. countries.

172. *Id.*

173. *See generally* Jacob S. Sherkow & Christopher Thomas Scott, *Stem Cell Patents after the America Invents Act*, 16 CELL STEM CELL 461, 461 (2015).

174. "U.S. Patent Office has already issued patents on genes, *stem cells,* animals with human genes, and a host of non-biologic products used by humans, but it has not issued patents on claims directed to human organisms, including human embryos and fetuses." 157 Cong. Rec. E1177-04 (testimony of Representative Dave Weldon previously presented in connection with the Consolidated Appropriations Act, 2004, Pub. L. 108-199, 634, 118 Stat. 3, 101, and later resubmitted with regard to the AIA; see 149 Cong. Rec. E2417-01).

175. Bernard Lo & Lindsay Parham, *Ethical Issues in Stem Cell Research*, 30 ENDOCR. REV. 204 (2009), https://pmc.ncbi.nlm.nih.gov/articles/PMC2726839/.

176. *See generally* Zachariades, *supra* note 78, at 59.

177. *See generally* Andrew Sheard, *Patenting Stem Cell Technologies in Europe*, 5 COLD SPRING HARBOR PERSPECTIVES IN MED. 1, 10 (2014).

The primary argument for why stem cell research patents should not exist is that it is unethical to destroy a human embryo.[178] Countries have taken unique and individualized approaches to this issue, creating a wide range of moral exclusion clauses, some with no moral exclusions.[179] In this context, individuals exclude others from their moral community through a moral exclusion clause, perceiving them as outside the realm of accepted moral values, rules, and considerations of fairness.[180] Because these clauses can be interpreted differently based on different cultures, the results of a singular invention with multiple patent applications in various territories or countries may yield a different patent status in different areas. However, despite this difference, there is still a need for certainty, while still respecting other countries' will. Policy guidance is what shapes the directives and statutes' meaning.[181] Yet, this guidance by policymakers and lawmakers around the world is what has created the highly variable and confusing governance of stem cell research.[182] Morality and patentability of human embryonic stem cell research operate at an interoperable and intraoperable level, with individual territories and national governance over the issue. Legal diversity is inevitable with embryonic stem cell regulation at the state and territorial level, but legal reconciliation is essential.[183]

When it comes to the weight different cultures put on the morality of a human embryo, there are different moral concerns that each group considers when creating their individual laws and practices. Although the rules of reciprocity require a country that issues a patent to provide the foreign national with the same rights as a patent owner that is a citizen of that country,

178. *See Stem Cell Research*, THE CENTER FOR BIOETHICS & HUMAN DIGNITY, https://www.cbhd.org/issues/stem-cell-research (last visited Feb. 22, 2025).

179. Moral exclusion clauses are more specific in declaring unpatentable moral grounds when it comes to this work versus previous international law. *See generally* Plomer, *supra* note 98, at note 4.

180. In a study, researchers examined how people perceive AI's action in moral dilemmas, finding a tendency to lean more towards utilitarian choices, which prioritize practicality and emphasize the consequences of actions and decisions. According to this study of how people perceive AI, which is another example of advancements in technology akin to stem cell patents and research accompanied by moral dilemmas and conflict, how people interact and perceive the work has important implications. If people tend to lean towards utilitarian choices, there should be a utilitarian approach to the patentability of stem cells. Zaixuan Zhang, Zhansheng Chen, & Liying Xu, *Artificial Intelligence and Moral Dilemmas: Perception of Ethical Decision-Making in AI*, 101 J. EXPERIMENTAL SOC. PSYCH. 1 (2022).

181. *See generally* Dan L. Burk & Mark A. Lemley, *The Patent Crisis and How Courts Can Solve It* (2009); Murdoch, *supra* note 57, at 50.

182. Li Jiang, *Will Diversity Regulations Disadvantage Human Embryonic Stem Cell Research: A Comparison between the European Union and the United States*, 25 DEPAUL J. ART, TECH. & INTELL. PROP L. 53, 55-6 (2014).

183. *Id.* at 56, 90.

there is no guarantee that each researcher will be granted that right if their application does not abide by the morality clause. Because of this, there is growing concern that inconsistent authority within legal jurisdictions can potentially put researchers work in a perilous position.[184] By having statutory support as to the lines drawn by public policy, the laws governing stem cell patents would most accurately reflect the public opinion for each territory and should be respected.

In the United States, the WARF patents have raised concerns more to do with scientific and economic issues. The WARF patents involve claims on embryonic stem cells and processes to make such cells and competitors are concerned with the broadness of their patents keeping competitors out of the U.S. market.[185] There is clear precedent from the USPTO that patents on embryonic stem cells or the processes for isolating, purifying, or culturing embryonic stem cells are all patent eligible.[186]

However, in the E.U., the primary source of issues and controversies in Europe is regarding these morality clauses. According to *Brüstle vs. Greenpeace* (CJEU C-34/10), it established that the EPO will not be issuing patents for stem cells that have been obtained through the destruction of human embryos, irrespective of whether that is relevant to the patent.[187] Despite the clarity to that issue, there is no clear answer as to whether or not this moral exclusion will extend to downstream derivative products. The E.U. allows anything to be patented so long as a human embryo is not destroyed at any point in the process.[188] The Directive includes a clause protecting against patents that are contrary to public morality, such as those that offend human dignity.[189] The result of such a clause allows the government to refuse to issue patents on moral grounds, without providing further clarification as to what those moral grounds will consistently be.

Further, because of the patent system design in Europe, not all European countries are following the EPO's moratorium.[190] Researchers have begun filing applications directly to national patent offices, hoping to bypass the

184. *Id.* at 54 (citing Murdoch, *supra* note 57, at 55).

185. David B. Resnik, *Embryonic Stem Cell Patents and Human Dignity*, 15 HEALTH CARE ANALYSIS 211, 211 (2007).

186. *See* Fendrick & Zuhn, *supra* note 25, at 2; Resnik, *supra* note 185, at 211.

187. Case C-34/10, *Oliver Brüstle v. Greenplace eV*, 2011 E.C.R.

188. This is like the Canadian approach, allowing for research on stem cells that cannot develop further into an entire animal, however Canada does not include any morality provision. Case C-34/10, *Brüstle v. Greenpeace* eV, 2011 E.C.R. I-9821, ¶ 20.

189. *See generally* Resnik, *supra* note 185, at 212.

190. For example, the U.K. will grant patents on pluripotent and multipotent embryonic stem cells but not on totipotent embryonic stem cells, which have the potential to develop into human beings and Sweden, which has some of the most liberal embryonic stem cell research laws in Europe, also allows patents on human embryonic stem cells. Resnik, *supra* note 185, at 212.

EPO, which may not reflect their own national moral beliefs.[191] These secretive filings are trying to protect research, but ultimately pushing research into only favorable environments.[192]

VIII. CONCLUSION

As medical advancements continue to thrive with new developments in technology and medicine, protection of innovation should always be at the forefront. The E.U. should modify their patent laws to be more standardized in their respective territories to encourage a coherent and competitive system. It is important that Member States are represented by national system of regulation, so the field continues to encourage innovation and a greater understanding of diseases and illnesses. This would reduce discrepancies between Member States and countries and allow for policy guidance to supervise and monitor the implementation within each country guided by clear principles rather than loose phrasing to leave up to independent national and transnational organizations interpretations.

191. *See generally* Nayana Siva, *Stem Cells Caught in Morality Clause*, 27(2) NATURE BIOTECHNOLOGY 1, 109 (2009).

192. *See id.* As a way of keeping up, China has also shifted from strict moral standards to an ethically neutral approach to allow for limited recognition of hESCs' patentability.

THE DEDURO CASE: RED-TAGGING AS A THREAT TO HUMAN RIGHTS AND THE PHILIPPINES' MOVE TOWARDS A SOLUTION

*Ramon J. Sison**

Abstract

In a democratic society, the ability to advocate for causes one believes in or to express dissent from government policy is a right that is often protected and deemed fundamental. In the U.S., freedom of speech is highly protected by the Constitution. Similarly, the Philippines' Constitution offers the same protection. In reality, the ability to speak or associate freely in the Philippines is jeopardized by red-tagging.

Red-tagging is a practice commonly perpetrated by government and military actors reminiscent of the blacklisting of public figures during the McCarthyism era. It began in the mid-twentieth century with the start of a communist insurgency that continues today. It is characterized by the labeling of individuals and organizations as members of the Communist Party of the Philippines without any substantial evidence. Most, if not all, red-tagging victims have no association with communist or guerrilla activities. Those who are red-tagged are typically activists, journalists, attorneys, and protesters. When red-tagged, individuals often face harassment, threats, assault, and even death.

This article focuses on a seminal Philippine Supreme Court case: Deduro v. Vinoya, where the Court ruled that red-tagging threatened human life and violated international law to which the Philippines was obligated to adhere. In the context of physical harm, the Court triumphed. Additionally,

* Ramon J. Sison is a SCALE II student at Southwestern Law School graduating in May 2025 and a staff editor for the Journal of International Law. He has a bachelor's degree in English and American Literature from New York University, specializing in creative writing. The author thanks Professor Jonathan Miller, faculty advisor to the Journal, for his help in developing the paper topic and providing extensive notes following the first draft. He also thanks his parents, Reuven Sison and Pauline Jose, for their limitless support and engaging conversation about the issue and the family's relationship to Jose Maria Sison.

the Court established itself as an independent judiciary, making space for itself within the separation of powers necessary for a healthy functioning democracy. However, the Court fell short in its lack of discussion of freedom of speech. The government effectively uses red-tagging to quell political dissent and silence voices critical of the government. This article discusses several ways that, going forward, the Court could develop legal doctrines to combat red-tagging and protect freedom of speech.

I. INTRODUCTION

In *Deduro v. Vinoya*, the Supreme Court of the Philippines ruled that "red-tagging, vilification, labeling, and guilt by association constitute threats to a person's right to life, liberty, or security."[1] Red-tagging involved labeling a person or group of people as Communist extremists or leftist terrorists without any substantial evidence.[2] In the Philippines, the practice occurs

1. *Deduro v. Vinoya*, G.R. No. 254753 1, 24 (July 4, 2023) (Phil.), https://sc.judiciary.gov.ph/254753-siegfred-d-deduro-vs-maj-gen-eric-c-vinoya-in-his-capacity-as-commanding-officer-of-the-3rd-infantry-division-philippine-army/.

2. Ruby Rosselle L. Tugade, *Persistent Red-tagging in the Philippines as Violation of the Principle of Distinction in International Humanitarian Law*, 95 PHIL. L. J. 560, 562 (2022).

when government agents falsely label someone as a member of the Communist Party of the Philippines-New People's Army (CPP-NPA).[3]

The history of red-tagging in the Philippines began when the Communist Party of the Philippines (CPP) formed in the late 1960s and started an insurgency that continues today.[4] The CPP formed the New People's Army (NPA) with the hope of overthrowing the government as part of its "people's democratic revolution."[5] The group rapidly expanded during the late twentieth century and has now amassed a sizable membership which operates in several guerrilla fronts throughout the country.

Beginning with the Duterte administration, the Philippine government used red-tagging as a tactic to quell political dissent.[6] Government and military officials would publicly label activists, journalists, educators, and lawyers as ranking officials in the CPP-NPA.[7] The result of such action was discrimination and even death.[8] The authoritarian tactic surged during Duterte's presidency but did not stop with the election of the current president, Ferdinand Marcos Jr., who continues to employ and permit red-tagging.[9]

The *Deduro* decision benefits Philippine society because red-tagging threatens human life and liberty, and it allows the judiciary to push back against a history of authoritarian tactics by the executive branch. At the same time, the Court left out any discussion regarding the implications of freedom of expression and left unanswered the question of how the government should comply with its condemnation of red-tagging. This note will explore the positive implications of the decision and develop ideas for how the government and the judiciary should proceed. Specifically, the Court should adopt balancing tests in controlling both private and government speech that creates a high risk of danger for individuals. The note begins by exploring the Philippines' modern political history, which set the stage for red-tagging today. The next section focuses on the case itself, outlining the Court's reasoning and why the ruling bolsters the fundamental rights to life, liberty, and security. The following section discusses the judiciary's role in the Philippine government and the significance of its ruling in the separation of powers. Finally, the last section criticizes the case for its lack of discussion

3. *Id.* at 560.

4. *See id.* at 562.

5. *Basic Rules of the New People's Army*, PHIL. REVOLUTION WEB CENT. (June 29, 1969), https://philippinerevolution.nu/1969/06/29/basic-rules-of-the-new-peoples-army/.

6. Gabrielle Carissa Marie A. Paras, *The Politics of Red-Tagging in Philippine Media: Framing the "Red October" Ouster Plot Controversy*, 5 S.E. ASIAN MEDIA STUD. J. 63, 64 (2023).

7. *Id.*

8. *Id.* at 65.

9. *Id.* at 64.

of freedom of speech and provides suggestions for how the Court could have developed legal standards to combat red-tagging.

II. BACKGROUND

Red-tagging has deep roots in the Philippines' modern history, leading to the human rights crisis today. A combination of corrupt leadership and susceptible citizenry contributes to a political landscape where voices critical of the government are often hushed through fear tactics and violence.

A. Historical Context

The Philippines's colonial history contributes to a longstanding tradition of corruption and authoritarian rule in the government.[10] Systems of colonial control and governance brought by Spain shaped the way Filipinos understand and operate in the political sphere.[11] Psychologists posit that a preference for political authoritarianism may stem from this colonial history as well as from Filipino family structures and dynamics.[12] Once Spain left and the United States (U.S.) took over, the U.S. did not remove the systems that gave large amounts of land to a few wealthy families.[13] Instead, the US bolstered its economic growth and colonial stability in the region by working with and providing incentives to the elite class.[14] By the time the Philippines gained its independence, most people were susceptible to authoritarian conservatism.[15] Additionally, U.S. colonialists and Filipino political elites

10. *See* Cristina Jayme Montiel & Victoria Marie Chiongbian, *Political Psychology in the Philippines,* 12 INT'L SOC'Y POL. PSYCH. 759, 762-63 (1991) (referencing RICHARD LEE STONE, PHILIPPINE URBANIZATION: THE POLITICS OF PUBLIC AND PRIVATE PROPERTY IN GREATER MANILA (1973)) (explaining how Filipino culture allows political transgression because it espouses the idea that there is no public property and that public officials own their office and anything attached to it).

11. María Dolores Elizalde, *Colonial Government and Social Organization in the Spanish Philippines: Interactions and Ruptures*, in (POST-) COLONIAL ARCHIPELAGOS: COMPARING THE LEGACIES OF SPANISH COLONIALISM IN CUBA, PUERTO RICO, AND THE PHILIPPINES 238, 238 (Univ. Mich. Press, 2022).

12. Montiel & Chiongbian, *supra* note 10, at 764.

13. Colleen Woods, *Seditious Crimes and Rebellious Conspiracies*, 53 J. CONTEMP. HIST., 61, 66 (2018).

14. *See id.* at 66-67 (explaining how elite class Filipinos in the sugar industry benefited from access to the U.S. market, expanding their production capacities to the detriment of poor Filipinos).

15. *See* Joshua Uyheng & Cristina Jayme Montiel, *Cognitive Polyphasia in a Global South Populist Democracy: Mapping Social Representations of Duterte's Regime in the Philippines*, 8 J. SOC. & POL. PSYCH., 30, 32-33 (2020) (discussing how President Duterte's populist message against "entrenched political elite" contributed to his popularity amongst ordinary Filipino people).

worked together to promote anti-communist politics to encourage capitalism and colonial rule.[16]

Shortly after Ferdinand Marcos Sr. became president in 1965, Jose Maria Sison founded the Communist Party of the Philippines (CPP).[17] The Party's mission was to overthrow the Philippine government through a violent revolution that would expel U.S. influence and favor the working-class proletariat.[18]

The practice of red-tagging began during the Marcos period alongside the growth of the CPP. The postwar era of the Philippines saw immense growth in wealth for the landed elite class, who capitalized from the wartime destruction of the country by profiting from its rebuilding.[19] During this time, people from the elite and working classes moved from the countryside to the capital city of Manila.[20] Many of the working-class youth began attending the city's universities, which were privately owned and financially supported by the wealthy elite.[21]

The Philippines entered a period of immense civil unrest leading into the 1970s, characterized by students protesting and workers striking to voice their dismay with the country. Students were aggrieved by increasing tuition and fees, and workers were displeased with low wages and insufficient working conditions.[22] Coinciding with this growth of dissent from the working classes was the development of the CPP's nationalist mission. The CPP attempted to align its mission with that of protesting students in order to strengthen its legitimacy, but the students' goals did not align with what the CPP wanted for the country.[23] Nevertheless, when Ferdinand Marcos was elected for his second term, student unions and student activist groups became synonymous with communist ideology in the Philippines.[24] This set the stage for red-tagging and the government and military's united attack on communist ideology in the country, aiming not only at the CPP but at any other defiant voices in range.

---

16. *See* Woods, *supra* note 13, at 67.

17. *Communist Party of the Philippines - New People's Army*, *Narrative*, MAPPING MILITANTS PROJECT (Aug. 1, 2018), https://mappingmilitants.org/profiles/communist-party-of-the-philippines-new-peoples-army#narrative.

18. *Id.*

19. JOSEPH SCALICE, THE DRAMA OF DICTATORSHIP: MARTIAL LAW AND THE COMMUNIST PARTIES OF THE PHILIPPINES 23 (Cornell Univ. Press 2023).

20. *See id.* at 24.

21. *Id.*

22. *Id.* at 43.

23. *Id.* at 47.

24. *See id.* at 183.

On January 26, 1970, student organizations that fought for government reform and supported democratic ideologies protested Ferdinand Marcos' second term during the first session of the Seventh Congress.[25] This marked the beginning of what is known as the First Quarter Storm.[26] The Marcos administration swiftly and forcefully shut down the demonstrations with police brutality.[27] Reports indicated that around 300 students were injured and several arrested.[28] Following the riot, President Marcos released a statement claiming that while legitimate student protestors largely attended the demonstrations, infiltrators from the CPP also attended, which warranted the use of forceful police tactics.[29] Marcos did not mention, however, that many of the supposed infiltrators were undercover police agents sent to provoke the riot that ensued.[30] This labeling as support for subsequent police action represents the genesis of the modern problem of red-tagging that persists today.

At the same time, the CPP took advantage of the labeling of student protests as part of the communist revolution it sought. The CPP recruited students and pushed its communist message onto student activist groups. The CPP's mission appealed to youth starving for change, and it developed the political ideology of the student protests through a nationalist message that resonated with the students.

However, when Marcos declared martial law in 1972, the CPP and its associate organizations had lost much of their urban muster.[31] The CPP moved into the countryside, where Sison continued to push for a revolution that did not happen.[32] He was eventually arrested and, when released, self-exiled to the Netherlands, where he lectured at universities and maintained the role of ideological leader of the CPP.[33] Leadership and reorganization of

25. *Id*. at 64.

26. The First Quarter Storm was a period of civil unrest in the 1960s and 70s in the Philippines that stemmed from increasing poverty, increasing debt of government, and concerns of imperialism, fascism, and feudalism. The period consisted of several public demonstrations, protests, and marches organized by student led movements advocating for systemic change. The protests led to violent conflict between demonstrators and police in the beginning of 1970 when Ferdinand Marcos was elected for a second term. *Appendix: A History of the Philippine Political Protest*, OFFICIAL GAZETTE https://www.officialgazette.gov.ph/edsa/the-ph-protest-appendix/ (last visited Apr. 16, 2025).

27. SCALICE, supra note 19, at 66.

28. *Id*. at 67.

29. *Id*. at 69.

30. *Id*.

31. *Id*. at 173.

32. *See id.*

33. *Id.* at 260.

the CPP continues today, and the party has engaged in guerrilla warfare and terrorism to stay relevant, but the revolution has largely stagnated.[34]

B. Present Political Climate

Despite the CPP's lack of power and influence today, the Philippine government remains at war and aims to destroy the CPP and its armed wing, the New People's Army (NPA).[35] The conflict between the Philippine military and the NPA exists primarily in remote areas of the countryside.[36] The government has largely weakened the NPA forces, which have dwindled to between 1,200 and 2,000 in number.[37]

At the beginning of his presidency in 2016, Rodrigo Duterte sought to end the conflict peacefully and engaged in peace talks with CPP leadership.[38] Duterte and the CPP engaged in several rounds of peace talks where they discussed ceasefires and potential agreements to reach peace.[39] In early 2017, Duterte called off the peace talks amidst a surge of violence in the southern region of the Philippines, where the Philippine army and communist insurgents battled.[40] Later that year, Duterte declared the CPP and NPA terrorist organizations through an official proclamation.[41]

In December 2018, Duterte issued Executive Order 70, which created the National Task Force to End Local Communist Armed Conflict (NTF-ELCAC).[42] According to the Task Force, the CPP continues to recruit "idealistic and aggressive youth" through mass demonstrations and pseudo-educational discussions.[43] While the Philippines does have a legitimate interest in ending the communist insurgency that has existed since the CPP's

---

34. Georgi Engelbrecht, *Following the Red Star: Tracking the Communist Rebellion in the Philippines*, INT'L CRISIS GRP. (Nov. 18, 2024), https://www.crisisgroup.org/asia/south-east-asia/philippines/following-red-star-tracking-communist-rebellion-philippines.

35. *Id.*

36. INT'L CRISIS GRP., Calming the Long War in the Philippine Countryside at i (2024).

37. *Id*.

38. Kathy Quiano, *Philippines' Duterte calls ceasefire to 48-year battle with communist insurgents*, CNN (July 25, 2016, 10:05 AM), https://www.cnn.com/2016/07/25/asia/state-of-nation-address-duterte/index.html.

39. INT'L CRISIS GRP., *supra* note 36.

40. *Id*.

41. Office of the President, Declaring the Communist Party of the Philippines (CPP) – New People's Army (NPA) as a Designated/Identified Terrorist Organization under Republic Act. No. 10168, Pres. Proc. No. 374 (Dec. 5, 2017), https://www.officialgazette.gov.ph/2017/12/05/proclamation-no-374-s-2017/.

42. *About*, NAT'L TASK FORCE TO END LOC. COMMUNIST ARMED CONFLICT, https://www.ntfelcac.org/ (last visited Apr. 17, 2025).

43. *Recruitment of Minors and Students,* NAT'L TASK FORCE TO END LOC. COMMUNIST ARMED CONFLICT, https://www.ntfelcac.org/recruitment (last visited Apr. 20, 2025).

founding, the NTF-ELCAC operates through overly broad and punitive means.

The NTF-ELCAC and its constituents identify and label individuals and organizations as part of the CPP without any substantial evidence.[44] One such target organization is the Bagong Alyansang Makabayan, also known as Bayan; Bayan is an alliance of left-wing organizations that espouses an anti-imperialist and national democratic ideology but is not affiliated with the CPP or NPA.[45] Bayan is particularly critical of the Philippine government and expresses its opposition through demonstrations and protests, but its leadership openly denies any association with the communist front.[46] As support for labeling Bayan as a communist front organization, Duterte has said, "I know because I know."[47]

In 2020, Duterte signed into law the Anti-Terrorism Act of 2020.[48] This bill increased the government's ability to act with impunity to advance its goal of supplanting communist and terrorist organizations.[49] The Act partially defines terrorism as engagement in acts "intended to cause death or serious bodily injury to any person, or endangers a person's life."[50] Additionally, the Act allows police to arrest individuals suspected of perpetrating terrorism without a warrant and to detain them for fourteen days before delivering them to the proper judicial authority.[51] Critics of the bill argue that it infringes on human rights by potentially allowing unreasonable searches and seizures and prolonged warrantless detention.[52]

Perhaps the most defining characteristic of Duterte's presidency was his "war on drugs," which has resulted in the deaths of thousands of Filipinos in extrajudicial killings and enforced disappearances.[53] While Duterte only

44. INT'L CRISIS GRP., *supra* note 36, at 7-8.

45. *What is Bayan?,* BAGONG ALYANSANG MAKABAYAN, https://bayan.ph/site/about/ (last visited Apr. 20, 2025).

46. *Id.*

47. Azer Parrocha, *Not red-tagging, we are identifying you, PRRD to CPP-NPA fronts,* PHIL. NEWS AGENCY (Dec. 1, 2020, 1:30 AM), https://www.pna.gov.ph/articles/1123408.

48. The Anti-Terrorism Act of 2020, Rep. Act No. 11479, (July 3, 2020) (Phil.), https://www.officialgazette.gov.ph/2020/07/03/republic-act-no-11479/.

49. *See id.*

50. *Id.* § 4(a).

51. *Id*. § 29.

52. Julie McCarthy, *Philippines' High Court Upholds Most of a Terrorism Law, but Strikes Down a Key Point,* NPR, (Dec. 12, 2021, 6:03 PM), https://www.npr.org/2021/12/10/1062937692/philippines-supreme-court-rules-parts-of-the-countrys-terrorism-law-unconstituti.

53. Sui-Lee Wee & Camille Elemia, *Years Later, Philippines Reckons with Duterte's Brutal Drug War,* N.Y. TIMES (June 29, 2024), https://www.nytimes.com/2024/06/29/world/asia/philippines-drug-war-duterte-justice.html.

claimed responsibility for the death of 6,252 "drug suspects," rights groups estimate the death toll to be closer to 30,000.[54]

Duterte's authoritarian rule operated on a populist message that carried his approval ratings amongst voters exceptionally high, even in the face of heinous acts.[55] Yuko Kasuya and Hirofumi Miwa hypothesize that the reason for Duterte's high level of popularity throughout his presidency is likely social desirability bias (SDB).[56] Kasuya and Miwa argue that when answering surveys about Duterte, respondents have no incentive to criticize or present truthful opinions about him.[57] In light of the vindictive action he takes against those who oppose him, respondents would prefer to give safe answers that would not subject them to such action.[58] Duterte's presidency contributes to a "climate of fear" characterized by pressure to conform to societal norms he promotes.[59] The fact that Duterte's daughter Sara was elected as Vice President to Marcos Jr. further illustrates the Filipino people's willingness to accept leadership from authoritarians and their heirs.[60]

Red-tagging is simply a device Duterte employed in his presidency to maintain the "climate of fear." By amplifying the frequency and severity of red-tagging, Duterte silenced opposition and instilled fear in people who dissented from his reign.

Duterte's successor, Ferdinand Marcos Jr., son of the infamous dictator who declared martial law in 1972, promised to protect human rights as president.[61] Marcos Jr. claimed that he would ensure a high level of accountability for human rights violations.[62] Despite his promises, Marcos Jr. has not dismantled the institutions Duterte put in place, such as the NTF-ELCAC.[63] Red-tagging persists in Marcos Jr.'s administration, and while

---

54. *Id*.

55. Yuko Kasuya & Hirofumi Miwa, *Pretending to Support? Duterte's Popularity and Democratic Backsliding in the Philippines*, 23 J. E. ASIAN STUD. 411, 414 (2023) (discussing the suspicious nature of Duterte's high approval ratings throughout his presidency).

56. *Id*. at 412.

57. *Id*. at 415 (referencing Bulatlat Contributors, *Surveys and the Fear Factor*, BULATLAT (Oct. 17, 2020, 5:34 PM), https://www.bulatlat.com/2020/10/17/surveys-and-the-fear-factor/).

58. *Id*.

59. *Id*.

60. *See* Sheila S. Coronel, *Philippine Elections 2022: The End of Accountability? Impunity and the Marcos Presidency*, 44 CONTEMP. S.E. ASIA 367, 368 (2022) (arguing that in the Philippine context, political heirs to controversial leaders vindicate their parents' legacies when running for office, allowing politicians like Rodrigo Duterte to evade accountability).

61. Ruth Abbey Gita-Carlos, *Marcos Vows to Protect Human Rights,* PHIL. NEWS AGENCY (June 10, 2022, 4:16 PM), https://www.pna.gov.ph/articles/1176399.

62. *Id*.

63. Jean Mangaluz, *NTF-Elcac Won't Be Abolished by Marcos, Says Security Council Exec*, INQUIRER.NET (May 13, 2024, 1:12 PM), https://newsinfo.inquirer.net/1940034/ntf-elcac-wont-be-abolished-by-marcos-says-security-council-exec.

Marcos Jr. has spoken about his commitment to justice and human rights, his actions or omissions say otherwise.

C. Instances of Red-tagging in the Country

In October 2024, Amnesty International released a report documenting several instances of red-tagging in the Philippines, beginning with Rodrigo Duterte's presidency and continuing through the present administration.[64] The report begins by laying out the landscape for freedom of expression in the Philippines and the importance of student protests throughout the country's modern history.[65] The report then discusses how the State's use of red-tagging creates a hostile environment for young human rights activists and produces a chilling effect on human rights advocacy.[66] The comprehensive report includes in-depth interviews and accounts of red-tagging, almost all of which happen to dissenting youth.

Hailey Pecayo is a young student whose school was forced to close during the Covid-19 pandemic.[67] At the time, she took an interest in human rights as a way to raise awareness about inequality in the education system.[68] Hailey then joined a human rights organization and began to attend rallies.[69] Pecayo was red-tagged by a military officer when she was nineteen years old.[70] The officer accused her of being part of a rebel group that engaged in a shootout with the military.[71] The military then filed a complaint against her under the Anti-Terrorism Act.[72] The red-tagging continued once her name and face appeared on a pro-government television station and Facebook troll pages.[73] Pecayo explained to Amnesty that although the criminal charges against her were dropped, she continues to get harassed and labeled as a terrorist.[74] She argues that the Anti-Terrorism Act is so vague that it acts as a state-sponsored weapon against progressive groups.[75]

---

64. *See generally* AMNESTY INT'L, "I TURNED MY FEAR INTO COURAGE": RED-TAGGING AND STATE VIOLENCE AGAINST YOUNG HUMAN RIGHTS DEFENDERS IN THE PHILIPPINES 15 (2024), https://www.amnesty.org/en/documents/asa35/8574/2024/en/ [hereinafter AMNESTY INT'L REP.].

65. *Id.* at 6, 7, 8.

66. *Id*. at 8.

67. *Id*. at 36.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

Gene Roz Jamil de Jesus, nicknamed Bazoo, was a young student activist who advocated for the right to free education.[76] After he graduated, Bazoo joined the Philippine Task Force on Indigenous Peoples' Rights.[77] After being red-tagged in both public spaces and on Facebook, Bazoo disappeared in April 2023, when he was forcibly taken by individuals who had previously identified themselves as police agents.[78] The enforced disappearance of activists such as Bazoo profoundly affects other activists.[79] Many activists must adjust their daily lives by concealing their locations or implementing buddy systems.[80] At the same time, many activists choose to abandon the causes they fight for.[81] Some point to the decision to the strain on their mental health, and others' parents force them to leave or transfer schools.[82]

Amnesty's numerous interactions and interviews with Filipino student activists suggest that red-tagging affects not only human rights defenders and activists but also the entire political landscape.[83] Activists report struggles recruiting volunteers and members, who hesitate to join movements for fear of government action.[84] Additionally, red-tagging jeopardizes independent journalism because of a fear that reporting against the government will lead to harassment or threats.[85]

Red-tagging effectively discourages any form of dissent or critique of the government and threatens democratic values. The Philippines protects freedom of speech and expression in its Constitution,[86] but the government faces little accountability for its malicious practices that stifle these enumerated rights. With its recent ruling in the *Deduro v. Vinoya* case, the Supreme Court of the Philippines has taken a step forward in establishing accountability for the physical harm red-tagging causes. Still, it falls short of

76. *Id*. at 40.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 40-41.
82. *Id.* at 41.
83. *See id*. at 43.
84. *Id*. at 44.
85. *Id.*; *see* Sarthak Gupta, *Red-Tagging in the Philippines: The Modern McCarthyism Threatening Freedom of Expression*, COLUMBIA UNIV. GLOB. FREEDOM OF EXPRESSION (Aug. 22, 2024), https://globalfreedomofexpression.columbia.edu/publications/red-tagging-in-the-philippines-the-modern-mccarthyism-threatening-freedom-of-expression/ (outlining the numerous instances of red-tagging throughout Duterte's presidency as part of his "war on drugs," leading to the deaths of dozens of human rights activists and journalists).
86. CONST. (1987), art. III, § 4 (Phil.).

recognizing the broader threats red-tagging poses to democratic values such as freedom of speech and expression.

III. THE DEDURO DECISION OFFERED AN EXCELLENT APPROACH IN THE PHILIPPINES CONTEXT BECAUSE OF THE RISKS TO HUMAN LIFE

In *Deduro v. Vinoya*, the Supreme Court of the Philippines reviewed a lower court's decision to dismiss the petitioner's *writ of amparo* stemming from allegations of red-tagging against a high-ranking military official.[87] The lower court claimed the allegations were baseless, unsupported by evidence, and insufficient for the writ.[88] The Supreme Court reversed the dismissal and declared that under the auspices of international law, red-tagging constituted threats to a person's right to life, liberty, and security, and such allegations were worthy of the issuance of the *writ of amparo*.[89]

A. The Decision

The petitioner, Siegfred Deduro, was an activist from Iloilo who was the founding member and elected officer of several organizations and activist groups.[90] Deduro supported causes such as environmental and agricultural reform.[91] The respondent was Major General Eric C. Vinoya, the commanding officer of the Third Infantry Division of the Philippine Army.[92]

On June 19, 2020, Vinoya and his agents gave a presentation and discussion where they alleged that specific individuals, including Deduro, were part of the NPA hierarchy.[93] After the event, a news agency circulated photographs of Deduro from the presentation, and the Philippine News Agency publicized his alleged connection with the NPA.[94] This false association led to further red-tagging and surveillance against him.[95] Some of these instances included posters of his image in public alongside other activists, lawyers, and NGO members.[96] Specifically, posters contained captions labeling Deduro and other activists as "criminal, extortionists,

87. *Deduro v. Vinoya*, G.R. No. 254753 1 (July 4, 2023) (Phil.), https://sc.judiciary.gov.ph/254753-siegfred-d-deduro-vs-maj-gen-eric-c-vinoya-in-his-capacity-as-commanding-officer-of-the-3rd-infantry-division-philippine-army/.

88. *Id*. at 10.

89. *Id*. at 24.

90. *Id*. at 2.

91. *Id.*

92. *Id*.

93. *Id*. at 2-3.

94. *Id*. at 3.

95. *Id.*

96. *Id*. at 3-4.

syndicates, terrorists."[97] Deduro was also explicitly named as part of the NPA on Facebook posts.[98] The government primarily utilizes the social media platform Facebook to red-tag, as it is the most widely used platform in the Philippines.[99] Aside from being personally red-tagged, organizations Deduro was involved with were also red-tagged as front organizations for the CPP.[100] Deduro even described instances where unidentified men followed him and his colleagues.[101] Unknown assailants killed two other people that Deduro was red-tagged with, further exacerbating his distress.[102]

At the trial court level, Deduro filed a *writ of amparo*, which asks for relief based on constitutional violations.[103] In his petition, Deduro sought a hearing for interim relief, at which a production order would be issued directing the respondent to produce all records and documents related to Deduro and associated red-tagging activities.[104] Afterwards, Deduro requested a judgment enjoining the respondent and his agents from red-tagging him and directing him to destroy all materials related to the red-tagging.[105]

The Regional Trial Court (RTC) immediately dismissed the case due to a lack of support for the red-tagging allegations.[106] As a basis for its ruling, the RTC found that the petitioner's allegations were "baseless, unsupported by evidence, and insufficient for the grant of the extraordinary writ."[107] The RTC explained that the *writ of amparo* was a special judicial remedy that expeditiously provides relief for "violations of a person's constitutional right to life, liberty, and security…"[108] Specifically, the writ addressed remedial action for victims of extralegal killings and enforced disappearances.[109] As such, the RTC found that the factual allegations Deduro posed as threatening his right to life, liberty, and security were "totally untenable."[110]

---

97. *Id*. at 4.
98. *Id*. at 6.
99. AMNESTY INT'L REP., *supra* note 64, at 27.
100. *Deduro,* G.R. No. 254753 at 5.
101. *Id.*
102. *See id*. at 6.
103. *See id*. at 7; *see generally* Paulo Cardinal, *The Writ of Amparo: A New Lighthouse for the Rule of Law in the Philippines,* 87 PHIL L.J. 229 (2012) (discussing the application of the writ of amparo across different jurisdictions as varying in scope but commonly focusing on protection of either a fundamental or constitutionally recognized right).
104. *See Deduro,* G.R. No. 254753 at 7.
105. *See id*.
106. *Id*. at 8.
107. *Id*.
108. *Id*.
109. *Id*.
110. *Id*. at 9.

In his appeal to the Supreme Court, Deduro asked the Court to determine if he was eligible for relief under the *writ of amparo* and if the lower court erred in dismissing his claim without a hearing or requiring Vinoya to comment or answer the petition.[111] The Supreme Court required Vinoya to comment on the petition in early 2021.[112] In his response, Vinoya claimed that Deduro failed to establish by substantial evidence that he or any of his agents or subordinates participated in or authorized the threats to his right to life, liberty, and security.[113] Vinoya challenged the veracity of Deduro's evidence, saying that the documents, posters, and social media posts were all made by accounts not run or influenced by the military.[114] Vinoya explained that the posters were not sponsored by the military but by the Panay Alliance of Victims of the CPP-NPA-NDF.[115]

In its review of the decision, the Supreme Court began by outlining the history and purpose of the *writ of amparo* in the Philippines.[116] It explained that the issuance of the writ must be distinguished from the granting of the privilege of the writ.[117] Because the writ was meant to provide an expeditious remedy to any person who experiences violations of the right to life, liberty, and security, the writ may be issued immediately on its face.[118] For the initial evaluation of the petition, the petitioner need only outline the ultimate facts.[119] Afterwards, the court may evaluate the petition based on a substantial evidence standard to determine if the privilege should be granted or denied.[120] The Court recognized that the writ was meant to apply to extralegal killings and enforced disappearances or threats thereof.[121] In recognizing threats as a type of harm that warranted the writ, the Court explained that in protecting the rights to life, liberty, and security, security could exist independently of the right to liberty.[122] Therefore, a person's right to security could be threatened even if they maintain their freedom and are not in the government's or persecutors' custody.[123]

111. *See id*. at 10.
112. *See id*. at 11.
113. *Id*.
114. *See id*.
115. *See id*.
116. *See id*. at 12-13.
117. *See id*. at 14.
118. *See id*. at 14-15.
119. *See id*. at 28.
120. *See id*. at 31.
121. *Id*. at 15.
122. *Id*. at 20.
123. *Id*.

Continuing their analysis, the Court determined that red-tagging was a form of harassment and intimidation and that, in many instances, threats led to death.[124] The Court declared that red-tagging by the government constituted threats to a person's right to life, liberty, or security.[125] Analysis of accounts of red-tagging show that it is "a likely precursor to abduction or extrajudicial killing."[126]

For Siegried Deduro, redress would be possible because the lower court erred in dismissing his petition.[127] The petition for a *writ of amparo* does not require the specific and detailed factual allegations that the RTC claimed the petitioner was missing.[128] Realistically, the petitioner may not have all the details of the respondent's violations because the respondent would naturally keep them hidden.[129] As such, requiring a high level of specificity and detail would make the *Amparo* Rule a "*token gesture* of judicial concern."[130]

The Court reversed the RTC's dismissal and held that petitioner Deduro was entitled to at least the issuance of the writ based on his factual allegations.[131] Although he had not been subject to an enforced disappearance or extralegal killing, the circumstances surrounding his red-tagging constituted threats that could lead to his harassment, assault, or death.[132] The Court issued the *writ of amparo* in favor of Deduro and remanded the case to the RTC to hold a summary hearing to determine whether Deduro should be granted the privilege of the writ.[133] While the Court ultimately left final judgment in the hands of the RTC, the decision means the Philippines has taken a sizable step forward in addressing one of its most significant human rights issues.

Furthermore, the Supreme Court's ruling in *Deduro* marks a turning point in the judicial branch's movement toward independence. In ruling that a normalized government practice violates human rights, the Court demonstrates its willingness to invalidate unchecked executive authority and protect constitutional emplacements. To support its findings, the Court looked to international law.[134] The Court noted that as early as 2007, the UN Human Rights Council observed the prevalence of red-tagging of left-leaning

124. *Id*. at 21.
125. *Id*. at 24.
126. *Id*. at 22.
127. *See id*. at 12, 33, 35, 36.
128. *Id*. at 28, 33, 34.
129. *Id*. at 28.
130. *Id*.
131. *Id*. at 33.
132. *Id*. at 33-34.
133. *Id*. at 36, 37.
134. *See id.* at 21.

individuals and organizations.[135] The Court then refers to the UN special rapporteurs who made a public plea for the Philippines to stop the practice of red-tagging.[136] To further strengthen the Court's recognition of the problem of red-tagging, the opinion cites Senior Associate Justice Marvic M.V.F. Leonen's dissenting opinion in *Zarate v. Aquino,*[137] a case from 2015 involving red-tagging, in which the majority dismissed the petitioner's *writ of amparo*.[138] Leonen's dissent in that case provided the most comprehensive definition of red-tagging at the time: "to make it easy for military and paramilitary units to silence or cause untold human rights abuses on vocal dissenters, government agents usually resort to stereotyping or caricaturing individuals."[139] The stereotyping results in physical danger to the victims as well as a chilling effect on political dissent. According to Leonen, communist ideology has long been used as a "bogey to create nonexistent exigencies for purposes of national security."[140] He noted that perhaps a better way to debunk "worn-out ideologies" such as communism would be to have tolerance and the creation of wider-deliberative spaces.[141]

IV. THE DECISION ADDRESSED THE PHILIPPINES' PROPENSITY FOR AUTHORITARIAN LEADERSHIP BY REASSERTING THE JUDICIARY'S ROLE IN SEPARATION OF POWERS

Democracies with separation of powers function best when the judiciary can perform judicial review independently. In countries with a history of authoritarian leadership, like the Philippines, the judiciary's willingness to rule against the executive branch helps to maintain a healthy democracy and prevents democratic backsliding into authoritarianism. By declaring red-tagging a human rights violation, the Supreme Court of the Philippines demonstrated its independence by condemning a practice perpetrated mainly by government officials.

---

135. *Id*.; Philip Alston (Special Rapporteur on extrajudicial, summary or arbitrary executions), *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council,"* § 3 ¶ 8, U.N. Doc. A/HRC/4/20/Add.3 (Mar. 22, 2007).

136. *See Deduro,* G.R. No. 254753 at 21; Press Release, Special Procedures, Philippines: Drop murder charge against indigenous rights defender, UN experts urge (Jan. 28, 2021), https://www.ohchr.org/en/press-releases/2021/01/philippines-drop-murder-charge-against-indigenous-rights-defender-un-experts?LangID=E&NewsID=26696.

137. Direct citation of this case has been omitted as the decision is not officially published by the Supreme Court of the Philippines. The *Deduro* decision, however, directly quotes and cites the relevant portions of the *Zarate* case.

138. *See Deduro,* G.R. No. 254753 at 22-23.

139. *Id.* at 22.

140. *Id*.

141. *Id*.

A. Judicial Independence

Although red-tagging had been a practice in the Philippines since the beginning of the communist insurgency, its frequency and gravity increased during the Duterte presidency. The country had moved away from authoritarianism when it ousted Marcos, but when Rodrigo Duterte became president, it began to shift back.[142] Duterte's presidency constituted a renewed campaign of red-tagging, threats, and harassment against defenders of human rights and political activists.

Moreover, Duterte's presidency threatened judicial independence. The Philippine constitution explicitly grants the Supreme Court judicial review,[143] but Duterte's strong-arm leadership tactics caused the Court to diminish its function as a check on executive power.[144]

Article VIII of the 1987 Philippine Constitution outlines the powers of the Judicial Department of the Philippines.[145] The judicial power is vested in one Supreme Court and lower courts as established by law.[146] Part of the judicial power includes determining "whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."[147] Additionally, while Congress maintains the power to "define, prescribe, and apportion" the jurisdiction of various courts, Congress may not deprive the Supreme Court of its jurisdiction over cases enumerated in Section 5.[148] In a country like the Philippines, with a history of authoritarian leaders both internally and through colonialism, judicial independence is essential for maintaining its relatively new democracy. Without judicial independence, the country risks returning to authoritarianism and unchecked executive power.

A judiciary is independent when a neutral third party impartially resolves a conflict.[149] In 2011, Douglas M. Gibler and Kirk A. Randazzo conducted a study to explain that strong independent judiciaries bolster democratic regimes and prevent them from backsliding toward

142. *See* SCALICE, *supra* note 19, at 264.

143. CONST. (1987), art. VIII, § 1 (Phil.).

144. Edcel John A. Ibarra, *The Philippine Supreme Court under Duterte: Reshaped, Unwilling to Annul, and Unable to Restrain,* SOC. SCI. RSCH. COUNCIL, (Nov. 10, 2020), https://items.ssrc.org/democracy-papers/democratic-erosion/the-philippine-supreme-court-under-duterte-reshaped-unwilling-to-annul-and-unable-to-restrain/.

145. CONST. (1987), art. VIII (Phil.).

146. *Id*. § 1.

147. *Id*.

148. *Id*. § 2.

149. Douglas M. Gibler & Kirk A. Randazzo, *Testing the Effects of Independent Judiciaries on the Likelihood of Democratic Backsliding*, AM. J. POL. SCI. 696, 697 (2011).

authoritarianism.[150] They claim that independent judicial systems ensure peaceful transitions of power, assist in maintaining the rule of law, and protect individual rights within democracies.[151] In determining whether a judiciary is independent, Gibler and Randazzo emphasize the importance of insulation from other political actors.[152] While protections such as lifetime appointments and salary guarantees exist to ensure such insulation, examples from countries such as El Salvador and even the U.S. show that political influence seeps through these measures.[153]

In posing their hypothesis that independent judiciaries decrease the likelihood of regime conversions toward authoritarian governmental systems, Gibler and Randazzo qualify the hypothesis by stating that newly independent judiciaries do not affect the likelihood of regime reversions towards authoritarianism.[154] New courts have a strong interest in establishing their legitimacy, and in doing so, they tend to focus on constitutional issues over which the majority of a given society agrees. New courts dislike resolving hotly contested issues because executive branches can easily challenge unfavorable decisions if the court is new and dependent on them.[155] Therefore, a judiciary can only become independent as it builds legitimacy over time and makes decisions outside of political influence.

Gibler and Randazzo suggest several causes for democratic backsliding into authoritarian regimes.[156] One such reason pertinent to the context of the Philippines is the role of military crises as a response to external threats.[157] The executive branch seeks increased political power to deal with threats in

150. *Id.* at 696.

151. *Id*.

152. *Id.* at 697.

153. *Id*. (explaining how executive branches in certain countries entice the judiciary to act in conformity with their objectives either through incentives or intimidation by threatening action).

154. *Id*. at 696.

155. *Id*. at 698; Russia and Ukraine provide strong examples of the role of independent judiciaries in emerging democracies. In elections that took place in the years soon after the dissolution of the U.S.S.R., courts in Russia and Ukraine heard thousands of cases regarding electoral disputes. *See* MARIA POPOVA, POLITICIZED JUSTICE IN EMERGING DEMOCRACIES: A STUDY OF COURTS IN RUSSIA AND UKRAINE 68 (2012). An independent judiciary is extremely important when it is highly involved in the electoral process as Russian and Ukrainian courts were. *Id*. at 69. Although new formal institutions were meant to ensure that politicians could not pressure judiciaries to conform to their will, "informal practices" from the Soviet era continued to allow politicians to strategically pressure the judiciary. *Id*. at 128 and 146. Popova's research seems to suggest that judiciaries often lack the ability to review independently if they are newly formed. *Id.* at 146; *see also* John E. Finn, *The Rule of Law and Judicial Independence in Newly Democratic Regimes*, 13 THE GOOD SOC'Y 12, 14 (2004) (arguing that independent judiciaries are paramount to forming the rule of law in democracies, but that in nascent democracies, judiciaries often reflect elite self-interests until the process of becoming independent develops over long periods of time).

156. Gibler & Randazzo, *supra* note 149, at 699.

157. *Id*. at 699-700.

these contexts.[158] What follows is a sense of nationalism and public pride surrounding the response to the threat, and the increase in power in the executive branch quells dissent through a centralized military force.[159]

B. Philippines Application

The *Deduro* decision displayed the Supreme Court's willingness to defy the executive and condemn state action that violated human rights. However, as Gibler and Randazzo point out, a judiciary's ability to prevent democratic backsliding largely depends on the length of its independence.[160] In previous cases, specifically under Duterte's presidency, the Supreme Court lacked the willingness to rule against the government. Edcel John Ibarra, assistant professor at the Department of Political Science at the University of the Philippines Diliman, examined several Philippine Supreme Court cases to determine its willingness to rule against the executive.[161] Ibarra found that during Duterte's presidency, the Supreme Court mostly ruled in favor of his executive actions or orders.[162]

In 2016, Duterte ordered the late President Ferdinand Marcos' body moved into the Libingan ng mga Bayani, or the "Cemetery of the Heroes."[163] This order was met with backlash, with several petitioners filing oppositions to the burial as a "grave injustice" to victims of Marcos' martial law.[164] The Supreme Court dismissed the petitions, holding that Duterte's decision to bury Marcos at the Heroes' Cemetery was neither against the law nor a grave abuse of discretion.[165] Critics argued that while it is possible that Duterte's order was not unconstitutional, the Court's decision to allow the infamous dictator a hero's burial was puzzling, given his grave transgressions against the country.[166] Under the Gibler and Randazzo framework, this decision shows the judiciary's lack of independence and deference to executive power, even though public opinion may differ.

---

158. *Id.* at 700 (referencing Karen Rasler, *War Accommodation, and Violence in the United States, 1890-1970*, 80 AM. POL. SCI. REV. 921 (1986)).

159. *Id.*

160. *Id.* at 707.

161. Edcel John Ibarra, *Is There Judicial Independence in Duterte's Philippines?*, DEMOCRATIC EROSION CONSORTIUM (Dec. 2, 2019), https://democratic-erosion.org/2019/12/02/is-there-judicial-independence-in-dutertes-philippines/.

162. *See id.*

163. Efigenio Toledo IV, *Supreme Court Allows Libingan Burial for Marcos*, PHILSTAR GLOBAL (Nov. 8, 2016, 2:18 PM), https://www.philstar.com/headlines/2016/11/08/1640905/supreme-court-allows-libingan-burial-marcos.

164. *Id.*

165. *Ocampo v. Enriquez*, 798 PHIL. REP. 227, 353 (Nov. 8, 2016).

166. *See* Toledo IV, *supra* note 163.

Another example of the Supreme Court's lack of independence occurred when the Supreme Court ousted Chief Justice Maria Lourdes Sereno based on a quo warranto petition filed by Solicitor General Jose Calida.[167] Under the Philippine Constitution, members of the Supreme Court can be removed through an impeachment process initiated by the House of Representatives and tried by the Senate.[168] Sereno was a critic of Duterte's war on drugs who openly spoke out against his blatant use of force and lack of due process.[169] The House of Representatives had already initiated impeachment proceedings against Sereno before Calida filed the quo warranto petition.[170] The representatives who endorsed her impeachment claimed that Sereno failed to fully declare her financial assets before entering office as Chief Justice.[171] Sereno's supporters argue that her work in criticizing Duterte impeded authoritarian policies and that the impeachment process was a "pathetic telenovela."[172] However, rather than wait for the impeachment process to potentially remove Sereno, the executive branch filed the quo warranto petition to have Sereno ousted immediately.[173] The quo warranto petition is a legal procedure to challenge an individual's right to authority over a position in public office.[174] When Calida filed the petition, critics, including the former Solicitor General, argued that the measure was unconstitutional and that the only way to remove a Justice was through the formal impeachment process.[175] Nevertheless, the Supreme Court held oral arguments on the petition, and the Court ruled in favor of the petition, ousting Chief Justice Sereno.[176] Sereno was the first judicial officer removed from office without an impeachment trial.[177] In his dissenting opinion, Justice

167. *See* Tetch Torres-Tupas, *Peers Kick Sereno Out Via Calida's QW*, PHILIPPINE DAILY INQUIRER (May 11, 2018, 10:57 AM), https://newsinfo.inquirer.net/989390/justices-remove-sereno-from-sc; *see generally* Calida v. Sereno*,* 831 PHIL. REP. 271 (May 11, 2018).

168. CONST. (1987), art. XI, § 3 ¶¶ 1, 4 (Phil.).

169. *Philippine Chief Justice Sereno, Duterte's Critic, Removed*, AL JAZEERA (May 11, 2018), https://www.aljazeera.com/news/2018/5/11/philippine-chief-justice-sereno-dutertes-critic-removed.

170. *See* Felipe Villamor, *She Stood up to Duterte. Now She Faces Impeachment*, N.Y. TIMES (Mar. 2, 2018), https://www.nytimes.com/2018/03/02/world/asia/philippines-chief-justice-duterte.html.

171. *Id.*

172. *Id*.

173. *See* Torres-Tupas, *supra* note 167.

174. RULES OF CIVIL PROCEDURE, R. No. 66, as amended (Phil.).

175. Nicole-Anne C. Lagrimas, *Law Profs Say Quo Warranto vs. Sereno Unconstitutional*, GMA NEWS ONLINE (May 10, 2018, 2:38 PM), https://www.gmanetwork.com/news/topstories/nation/652911/law-faculties-let-sereno-impeachment-trial-begin-quo-warranto-petition-unconstitutional/story/.

176. Torres-Tupas, *supra* note 167.

177. *Id*.

Marvic Leonen stated that the precedent set by the Court that the executive's petition could override the impeachment process was a "legal abomination."[178] He further explained that the decision showed the Court's complete lack of judicial independence.[179] The campaign against Sereno appeared on its face to be based on her unfitness to hold office for financial misgivings, but Duterte retaliated against Sereno for her harsh criticism of him. The fact that the Supreme Court was willing to go along with Duterte's motives shows the lack of independence Leonen was appalled by.

Rodrigo Duterte's presidency mirrored the type of crisis that caused the democratic backsliding described by Gibler and Randazzo. By ending peace talks with the CPP, installing a punitive task force, signing legislation to override due process, and designating the CPP as a terrorist organization, Duterte consolidated power within the executive branch. This consolidation allowed Duterte to ignore constitutional rights under the guise of a military crisis. Duterte crafted a narrative that ostensibly inflated the issue of communism in the country, espousing a nationalist message attacking communism but also dragging political dissent along with it. Even though Duterte is no longer president, the new president, Ferdinand Marcos Jr., has not removed the institutions his predecessor left in place, even though, he claimed he would shift the Task Force to more peaceful tactics in its campaign to end the communist insurgency.[180] Marcos Jr. has even reversed Duterte's policy of ending peace talks with the CPP-NPA.[181] However, the Philippine government remains engaged in military operations against the CPP.[182]

Similarly, under Marcos Jr., the problem of red-tagging persists. The reason the Task Force is shifting to a "bringers of peace" strategy is because the military has already weakened a majority of the NPA's guerrilla fronts in

178. *Calida v. Sereno,* 831 PHIL. REP. 271, 911 (May 11, 2018) (Leonen, J., dissenting).

179. *Id.* at 911-912.

180. John Eric Mendoza, *NTF-Elcac Switches From 'Aggressive' Strategy to Become 'Bringers of Peace,'* INQUIRER.NET (May 11, 2023), https://newsinfo.inquirer.net/1767664/under-marcos-administration-ntf-elcac-switches-from-aggressive-strategy-to-become-bringers-of-peace; *see also Philippines: Marcos Rights Gains Fall Short*, HUMAN RIGHTS WATCH (Jan. 16, 2025), https://www.hrw.org/news/2025/01/16/philippines-marcos-rights-gains-fall-short; *see also Philippines: Marcos Failing on Rights*, HUMAN RIGHTS WATCH (June 28, 2023), https://www.hrw.org/news/2023/06/28/philippines-marcos-failing-rights.

181. *See* News Release, Office of the President of the Philippines, Presidential Communications Office, PBBM admin optimistic about sign peace deal with CPP-NPA-NDF (Sept. 2, 2024), https://pco.gov.ph/news_releases/pbbm-admin-optimistic-about-sign-peace-deal-with-cpp-npa-ndf/.

182. Mikhail Flores & Karen Lema, *Philippine Government, Rebels Agree to Peace Negotiations*, REUTERS (Nov. 28, 2023, 1:59 AM), https://www.reuters.com/world/asia-pacific/philippine-government-rebels-agree-peace-negotiations-2023-11-28/.

the countryside.[183] Had this not been the case, it is unclear whether Marcos would have supported such a policy or granted amnesty to former members of the CPP.[184] In the shadow of his father's authoritarian regime, Marcos Jr. has not yet declared martial law or exerted brash executive authority, but he still refuses to acknowledge or take responsibility for the harm his father's regime inflicted on the country.[185]

Although the Court in *Deduro* appeared to reclaim space in the separation of powers in a political sphere that seems to be dominated by the executive role, time will tell if the Court has a high enough level of independence to prevent a reversion to authoritarianism. It is possible that under the new administration, the Supreme Court may feel more freedom to exercise its independence. The current leadership is not as brazen as Duterte's administration, but the Court must continue to ignore political influence and rule against Marcos Jr. in pertinent issues in the future.

V. THE APPROACH FAILS TO ADDRESS RED-TAGGING'S IMPLICATIONS IN FREE SPEECH CASE LAW AND TO PROVIDE FUTURE GUIDANCE

The practice of red-tagging threatens the democratic right to freedom of speech and freedom of expression. The Court focused solely on the threats to life, liberty, and security but disregarded the threats to freedom of expression. The Philippines guarantees freedom of speech and expression through its Constitution and international law instruments, so it has an obligation to protect these rights. Foreign jurisdictions may provide guidance the Court could use to develop legal standards to prevent red-tagging in the future.

A. Chilling Effect on Freedom of Expression

The Supreme Court's decision developed human rights law because it directly acknowledged the physical danger red-tagging poses to its victims. However, the decision fails to address all the freedom of expression aspects of red-tagging. Red-tagging has numerous implications for free speech, as it primarily consists of neither direct threats nor calls for illegal action that still produce enormous danger. Aside from the legitimate fear of violent death,

183. Mendoza, *supra* note 180.

184. *See* News Release, Office of the President of the Philippines, Presidential Communications Office, PBBM Orders Implementation of Amnesty Program to Communist Rebels (Apr. 4, 2024), https://pco.gov.ph/news_releases/pbbm-orders-implementation-of-amnesty-program-to-communist-rebels/.

185. Jim Gomez, *Marcos Takes Helm in Philippines, Silent on Father's Abuses*, AP (June 30, 2022), https://apnews.com/article/covid-health-asia-kamala-harris-82d6fee9838271d030fbd1b46e9927d1.

victims of red-tagging often discuss the chilling effect it has on freedom of expression, for victims become afraid to voice their opinions or political dissent.[186]

As discussed, the Philippine Constitution protects the right to freedom of expression.[187] Additionally, the Philippines is a party to several instruments of international law that protect free speech and freedom of expression. The Universal Declaration of Human Rights grants freedom of expression, which includes the right to seek, receive, and impart information and ideas through any media, regardless of frontiers.[188] Article 19 of the International Covenant on Civil and Political Rights contains the same rights.[189] The Philippines is obligated to protect the right to freedom of expression from international law devices and through the language of its constitution.[190] The Philippine Constitution guarantees press freedom, and the numerous cases of red-tagged journalists expose the country's mass violation of this right.[191] Red-tagging also implicates the rights to information and privacy, which are both recognized in the Philippines through its constitution or international law.[192] When state actors red-tag individuals, they violate those individuals' rights to privacy because their private information is often disseminated publicly.[193] Perpetrators violate people's right to information because red-tagging creates an environment where people feel less inclined to share different and contrasting opinions.[194]

In *Deduro*, the Court declined to rule that red-tagging threatened freedom of speech and expression. However, the Court's review focused on the *writ of amparo*, which is a remedy solely for threats to physical life, liberty, and security in the Philippines. The Court had no obligation to address freedom of speech in the scope of *Deduro*. Yet by citing Justice Leonen's dissenting opinion in *Zarate*, the Court acknowledged that red-tagging had a "chilling effect on dissent."[195] So, the Court could have

186. Gupta, *supra* note 85 (discussing the numerous violations of international human rights law the practice involves regarding freedom of expression).

187. CONST. (1987), art. III § 4 (Phil.).

188. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 19 (Dec. 10, 1948) [hereinafter UDHR].

189. International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

190. *See* Gupta, *supra* note 85; CONST. (1987), art. III § 4 (Phil.).

191. *Id*.; CONST. (1987), art. III § 4 (Phil.).

192. Gupta, *supra* note 85 (referencing CONST. (1987), art. III, § 7 (Phil.); then referencing UDHR, *supra* note 188; and also referencing ICCPR, *supra* note 189).

193. *Id*.

194. *Id*.

195. *Deduro v. Vinoya*, G.R. No. 254753 1, 22 (July 4, 2023) (Phil.), https://sc.judiciary.gov.ph/254753-siegfred-d-deduro-vs-maj-gen-eric-c-vinoya-in-his-capacity-as-

developed its doctrine further by incorporating international standards on freedom of expression to guide lower courts in dealing with future cases. The following section will discuss possible solutions based on international law that the Supreme Court should develop in future cases.

B. Balancing Acts for Both Private and Public Speakers

Red-tagging, especially in contexts where consequences may not be as grave as in the Philippines, begs the question of whether it is protectable under free speech case law. The discussion of this question splinters into two types of speech: speech by private parties with close ties to the government and speech by the government itself.

The Court seemingly declared that private acts of red-tagging are not protected under free speech. In ruling for the petitioner, the Court ordered that he join the two private organizations that participated in his red-tagging through posters and social media.[196] For the Court, red-tagging prohibitions apply both to private and public actors.[197] As such, the Court covers situations in which the government may try to hide red-tagging through private entities, as the respondent did in its denials of the petitioner's allegations.[198]

At the same time, the Court did not determine a standard or test in regulating private red-tagging speech, which leaves open the possibility that private red-taggers can invoke the right to free speech as a defense to prosecution. If the U.S. is used as a model, under *Brandenberg*, the U.S. bans speech based on an "imminent lawless action" standard,[199] under which the red-tagging done in the Philippines would still be protected. When private parties red-tag individuals, they label them as members of the CPP but do not directly call for attacks against them. In Deduro's case, the private organizations he was ordered to join allegedly caused the circulation of tarpaulins and posters with his name on them.[200] However, this action alone still falls short of an "imminent lawless action" standard. Interestingly, the Philippines has enumerated laws prohibiting sedition, which is defined as a crime committed by persons who "rise publicly and tumultuously in order to attain by force any of the following objects: … To commit, for any political or social end, any act of hate or revenge against private persons or any social

commanding-officer-of-the-3rd-infantry-division-philippine-army/ (Zarate v. Aquino, G.R. No. 220028 (Nov. 10, 2015) (Leonen, J., dissenting)).

196. *Deduro,* G.R. No. 254753 at 12, 36.

197. *Id.* at 24.

198. *Id.* at 24, 36.

199. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that hate speech by Ku Klux Klan members was lawful so long as it did not directly incite violence or call for lawless action).

200. *Deduro,* G.R. No. 254753 at 36.

class…."[201] This presents a legal standard like *Brandenberg* because language that incites harmful action against private parties can be criminalized. Still, it likely would not apply in the context of red-tagging because it is not inciting enough. In fact, Senator M.A. Madrigal, during the Thirteenth Congress, introduced a bill suggesting repealing this provision of the penal code, explaining that the law acted as another device for the overzealous executive to stifle freedom of expression.[202] Ultimately, a *Brandenberg* standard may likely prove inadequate in the Philippines context, which sustains a much higher level of political violence and lacks a tradition of tolerance in comparison to the U.S.

When regulating private acts of red-tagging, the Philippines needs to adopt a balancing test that weighs the value of protecting speech but considers the legitimate state interest with the possibility of harm it may cause to the target of such speech. The Philippines has pertinent case law on restrictions on freedom of speech, such as the *Chavez v. Gonzales* case.[203] In that case, the Court admitted that not all types of speech were protected under the country's constitution.[204] The Court articulated three different tests related to the restraint of free speech: (a) the dangerous tendency doctrine, (b) the balancing of interests tests, and (c) the clear and present danger rule.[205] The clear and present danger rule has been adhered to the most by the Court and states that speech may be restrained if there is a substantial danger that the speech will likely lead to an evil the government has a right to prevent.[206] The Court continues by describing content-neutral and content-based regulation and explains that when government restriction is content-based, the act must survive a strict scrutiny standard and overcome the clear and present danger rule.[207] This framework presents a very clear kind of balancing test that the Philippine government could use to pass anti-red-tagging legislation, which has already been introduced by Congress.[208] The widespread frequency of red-tagging in the country and its detrimental results

201. Revised Penal Code, art. 139, Act No. 3815, as amended (Phil.).

202. *See* An Act Amending Republic Act 3815, Otherwise Known as The Revised Penal Code of the Philippines, by Repealing Sections 139, 140, 141, and 142 Therein, S.B. No. 25 (June 30, 2007) (Phil.).

203. *See Chavez v. Gonzales,* 569 PHIL. REP. 155 (Feb. 15, 2008).

204. *Chavez*, 569 PHIL. REP. at 157; *see generally* Thomas Hochmann, *Why Freedom of Expression is Better Protected in Europe Than in the United States,* 2 J. FREE SPEECH L. 63 (2022) (arguing that the EU's method of government restricting speech better serves the public's ability to exercise freedom of expression than the US's lack of government restricted private speech because the EU's method affords greater protection against private actors).

205. *Chavez*, 569 PHIL. REP. at 200.

206. *Id.* at 200-01.

207. *Id.* at 204-05, 206.

208. *See* An Act Defining and Penalizing Red-Tagging, S.B. No. 2121 (Mar. 24, 2021).

warrant passing a law restricting red-tagging as a form of speech, and the restriction would overcome the clear and present danger rule. It would be in Marcos Jr.'s best interest as a supposed human rights advocate to sign a law bill criminalizing red-tagging and denying free speech protection to private red-tagging perpetrators. The law would ideally criminalize falsely associating a person with a group deemed so unpopular that alleged membership with such a group would lead to that person's endangerment.

The more challenging issue in combating red-tagging is restricting the government as a speaker. Given the country's history and tendency to afford government actors great latitude in official action, the solution must be creative. Looking to the United States for guidance is helpful, yet the U.S. Supreme Court has historically hesitated to restrict government speech unless it is used to coerce private parties.[209] In *NRA v. Vullo*, the Court held that a government speaker violates free speech if they engage in conduct that amounts to coercion of private parties to suppress views the government disfavors.[210] In that case, the director of a government agency coerced financial institutions from doing business with the NRA following a tragic school shooting.[211] The Court reasoned that such action could reasonably be understood to convey a threat of adverse government action to punish or suppress speech.[212] Such a rule in the Philippines context could prove helpful because the government does engage in conduct that amounts to coercion when it red-tags people. The government labels people, and then the red-tagging influences undercover government actors or private parties. Their actions can reasonably be understood to convey a threat of government action, especially given the fact that many victims of red-tagging have faced detrimental action. One such instance of red-tagging by the NTF-ELCAC consisted of a photo collage on Facebook titled "Scholars turned NPA."[213] The post depicted six students who supposedly joined the CPP, and all were subsequently killed by the Philippine army.[214] The post served as a reminder that students who join activist groups will die. This kind of red-tagging post fits well within the coercion framework that *Vullo* prohibits because it aims to coerce private parties to conform with viewpoints the government supports.

Another framework for restricting government speech comes from the European Court of Human Rights (ECHR). The Court held in *Sanchez v.*

209. *See NRA of Am. v. Vullo*, 602 U.S. 175, 180 (2024).
210. *NRA of Am*., 602 U.S. at 198.
211. *Id*. at 180.
212. *Id*. at 191, 198.
213. AMNESTY INT'L REP., *supra* note 64, at 28.
214. *Id*.

France that an individual could be criminalized for failing to control the acts of third parties in relation to their speech.[215] The applicant, a mayor in France who was running for parliament, created a public forum on Facebook where his followers could leave comments regarding the incumbent seat he was running for.[216] Numerous people left comments that expressed hate and discontent with the Muslim community.[217] The applicant was charged with numerous crimes, including incitement of hatred of a specific group of people.[218] He appealed to the Court, claiming his right to freedom of expression was violated.[219] The Court declared that his freedom of expression rights were not violated and reasoned that even if he was unaware of hateful comments on his page, he had an obligation to monitor the comments and remove any unlawful ones, mainly because his use of the forum was in a public and political capacity.[220] The ECHR has effectively developed a standard by which public intermediaries who speak, even if not personally engaged in unlawful hate speech, can be held liable for the hate speech of third parties under their influence.

This ruling would fit particularly well in the Philippines context, especially since Facebook has become the primary platform of red-tagging for the government. Under a similar rule, the courts could hold state actors liable for inciting hatred towards a group based on comments that third parties leave on red-tagging posts. In Deduro's case, Vinoya could be held liable for the actions of third parties who circulated Deduro's image after his initial red-tagging by the military. The Court in *Sanchez* recognized that when imposing liability in such a context, careful examination would be required to not infringe on self-expression and create a chilling effect.[221] After all, the Philippines' executive often justifies its speech in the context of combating the communist insurgency. Therefore, in the Philippines, the Supreme Court should develop a standard for determining the level of liability a state actor should be held to, considering both the risks involved and the actor's level of influence. The Court could go further and extend liability beyond comments left on a Facebook page. Inciting hatred in the Philippines has uniquely drastic results, as extrajudicial killings and enforced

215. *Sanchez v. France*, App. No. 45581/15, ¶ 209 (May 15, 2023), https://hudoc.echr.coe.int/eng?i=001-224928.

216. *Id.* ¶¶ 13-14.

217. *Id.* ¶¶ 15-16.

218. *Id.* ¶¶ 24, 25.

219. *Id.* ¶ 33.

220. *Id.* ¶¶ 32, 37, 200.

221. *Id.* ¶ 184.

disappearances have become more commonplace.[222] In building upon the *Sanchez* standard, the Court could hold state actors liable for the disappearance or death of a red-tagging victim. The perpetrators of these acts are often never identified, so it best serves the interests of justice to hold the public official criminally liable, especially if they are a person of high influence.

While no international standard from the E.U. or the U.S. offers a perfect solution, these recommendations provide interesting approaches that the Philippines could look to in developing rules that discourage red-tagging and hold perpetrators accountable.

VI. CONCLUSION

The Philippine Supreme Court's decision in *Deduro* addressed serious human rights violations in the country, especially in the shadow of the authoritarian leadership at that time.[223] The Supreme Court imposed its authority by showing judicial independence, but a stronger showing of judicial independence must come from more similar rulings. Finally, while the ruling addresses the physical harm of red-tagging, it stops at a point where it could have identified and acknowledged the harm red-tagging causes more broadly to a democratic society's freedom of expression.

The Court granted Deduro his requested writ, but Deduro could be denied the privilege of the writ upon remand. The Court should have used the opportunity to create more substantial legal doctrines that deal with red-tagging and more clearly guide the lower courts. Ideally, the Court will utilize future red-tagging cases to develop a precedent that discourages the government from red-tagging, preserving safety and freedom of expression in Philippine society.

222. *Philippines: Events of* 2023, HUMAN RIGHTS WATCH: WORLD REPORT 2024, https://www.hrw.org/world-report/2024/country-chapters/philippines.

223. On March 11, 2025, Rodrigo Duterte was arrested based on an International Criminal Court (ICC) warrant for charges of murder as a crime against humanity. Duterte currently sits in custody at the Hague awaiting trial. By arresting Duterte and surrendering him to the custody of the ICC, the Philippines has taken another small yet firm step to demonstrate its willingness to uphold international law and protect human rights.