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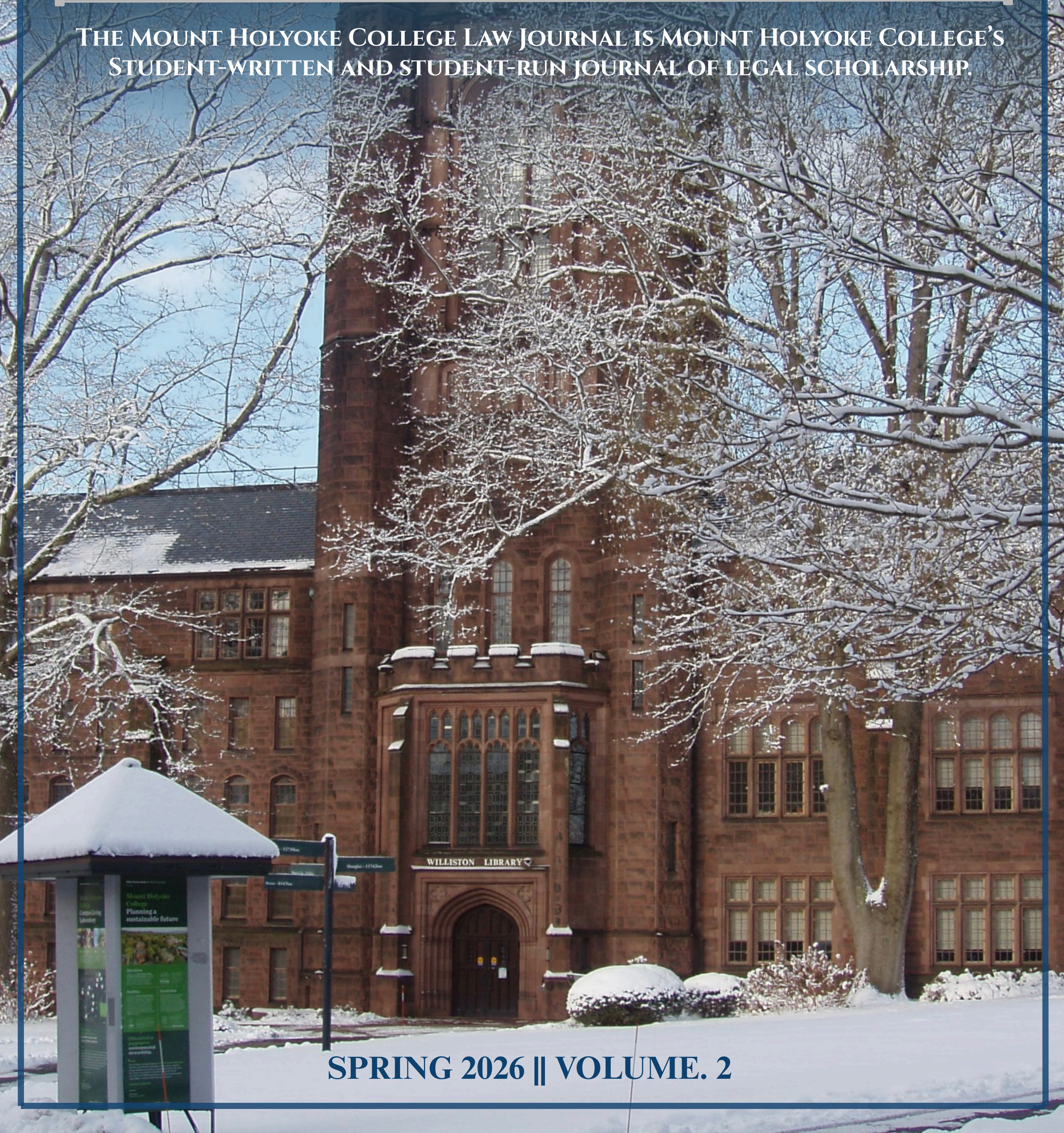

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Editors' Note

At a time when publishing critical scholarship is precarious, the Mount Holyoke Undergraduate Law Journal is proud to be a publication that protects students' right to free speech. We are committed to maintaining a platform that resists any attempts to censor academic authorship, and we will always serve as a journal that allows students to publish freely. Since our founding in Fall 2024, our mission has always been to uplift student authors and bolster opportunities for legal scholarship at the undergraduate level. We vehemently resist any attempts to obstruct this mission, and we will always stand behind this commitment.

We are and have been incredibly honored to have served as President and Vice President of the Undergraduate Law Journal. This was our second year in existence, and it was one where the aspiring legal community at Mount Holyoke grew by writing, engaging in pertinent discussions, and attending events with lawyers and academics alike. When we founded this organization, we could not have imagined such levels of support from the Mount Holyoke community and beyond. It has been such a privilege to witness the excitement surrounding the Mount Holyoke Undergraduate Law Journal.

To all the editors and contributors who took the time to write and rewrite, we are thankful for your time. This publication exists for you and because of you. We are grateful to have been a part of this organization, and we hope that it can continue to serve generations of Mount Holyoke students.

Signed,
Katherine Sloop & Myra Zia
Editors-In-Chief '26.

Special Mentions

We would like to thank the Career Development Center, the Nexus Program, the Weissman Center, Western New England Law School, and the President's Office for continuing to support us. Thank you to President Holley, for serving as our advisor for offering us advice as we navigated difficult situations. Professor Elif Babul, for your unequivocal support of our publication. Kelly Woods, for keeping legal organizations at Mount Holyoke connected with ours. Finally, thank you to all of our faculty, staff, and alumni who have taken interest in the Law Journal and continue to support the academic and professional development of our authors and editors.

Lastly, we would like to thank all the general members of this organization, who take the time to show up to workshops, panels, and writing circles. We appreciate your attendance and hope to grow this number in the coming years.

The Mount Holyoke Law Journal logo was designed by Diana Perez. Cover design and photography was spearheaded by Myra Zia. Compilation was done by Myra Zia, Bianca Rascon, and Ava Skidgel.

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Misoprostol, Midwifery, and Abortions: How Texas Abortion Laws Restrict the Practice of Midwifery

Katherine Sloop
Edited by: Olivia Toomey (Senior Editor) and Brianna Janeira (Senior Editor)

Abstract

Since the overturn of *Roe v. Wade* in 2022 with the United States Supreme Court's decision *Dobbs v. Jackson Women's Health Organization*, the reproductive rights movement has been primarily framed through the lens of abortion access. Drugs like misoprostol have come under controversy as abortifacients, despite their legitimate uses for sustaining life and reducing deadly complications during labor and delivery. In fact, recent campaigns by anti-abortion states to restrict public access to misoprostol pose grave consequences for midwifery practices, especially those in low-resource communities, that rely upon open access to this low-cost medication to lessen life-threatening risks during labor. Examining Texas abortion restrictions and the state's recent campaign to classify misoprostol as a Schedule IV drug, this article draws a connection between the stigmatization of misoprostol as an abortifacient and the growing threat to midwives' ability to provide safe healthcare to pregnant people in low-resource, rural communities. It explores abortion and midwifery laws on both a state and federal level, and how misoprostol's controversial status has severely impeded midwives and obstetricians' ability to practice via threatening arrest, incarcerations, and fines. The article then concludes with recommendations for the Texas legislature to clarify its position on misoprostol, in-line with the scientific safety and benefits of the drug, as well as the state's pro-life mission.

Introduction

Since the Supreme Court overruled *Roe v. Wade* in the summer of 2022, reproductive justice has been framed primarily through the lens of abortion and choice. In states like Texas where abortions are outlawed in almost every circumstance, except for life-threatening pregnancies, securing abortion rights has been the primary focus of pro-choice movements. However, reproductive justice is not simply the right to have a choice; rather, coined by women of color activists associated with the SisterSong organization, the concept of reproductive justice was developed in the 1990s as a way to combat the choice-based reproductive rights narratives put forth by white feminists.[1] SisterSong activists expanded upon this choice framework by establishing three primary principles defining reproductive justice: "(1) the right *not* to have a child; (2) the right to *have* a child; and (3) the right to *parent* children in a safe and healthy environment."[2] This definition of reproductive justice furthermore shows how the right to have an abortion and to have a child are fundamentally interlinked. Using this definition, this essay will establish a link between strict abortion laws and their impact on the safe practice of

[1] Loretta J. Ross and Rickie Solinger, *Reproductive Justice: An Introduction* (Oakland: University of California Press, 2017), 54–55.
[2] Ross and Solinger, *Reproductive Justice*, 9.

midwifery, demonstrating how the stigmatization of misoprostol as an abortion drug and subsequent efforts to restrict its availability may inadvertently reduce access to safe, affordable midwife-led birthing environments in low-resource areas.

Firstly, this essay will offer background on the midwifery and abortion laws Texas practitioners are currently subject to. Midwifery law will be centered on state-level legislation as there is currently no federal law governing or regulating midwifery across the United States. The latter will engage in a brief discussion on the federal laws regarding abortion as they relate to the current abortion legislation debates happening among obstetricians and gynecologists in Texas. Following this legal discussion, the recent arrest of Texas midwife Maria Margarita Rojas for allegedly illegally providing abortions will be brought up as a case study. This section will reveal how abortion legislation and midwifery legislation are fundamentally interlinked through the use and stigmatization of misoprostol as an abortion drug. Finally, I will offer my own reflections of this ongoing issue, and how further research needs to be done on how Texas midwives may be affected by the state's abortion laws, and how such restrictions may exacerbate a lack of access to safe birthing centers in low-resource communities.

While this essay will attempt to use gender neutral language when possible, in adherence with attempts to make reproductive discussions in anthropology more inclusive, Texas law tends to use extremely binary language in legislation related to abortion, pregnancy, and birth. Thus, to reduce confusion without completely sacrificing initiatives for inclusive language, this essay will use the definition of inclusivity set forth by Robbie Davis-Floyd and Melissa Cheyney (2018), where the use of both "gendered and gender-neutral terms" constitute inclusive language.[3]

The Practice of Midwifery in Texas: Rights, Obligations, and Restrictions.

Like many states, Texas previously did not have laws governing the practice of midwifery. It was not until *Banti v. State of Texas* (1956) that midwifery was recognized as a legitimate practice by the courts, distinguished from the practice of medicine because the Texas Legislature's definition of practicing medicine did not explicitly include care related to pregnancy or childbirth.[4] *Banti* allowed for midwifery to be legally practiced in the state as a non-medical practice; however, despite this distinction being made, it was not until the passage of the Lay Midwifery Act in 1983 that regulations for the practice of midwifery were set forth. The Lay Midwifery Act, now codified as the Texas Midwifery Act, defines a midwife as "a person who practices midwifery and has met the licensing requirements established by the chapter and commission rules"[5] and midwifery as the practice of "providing the necessary supervision, care, and advice to a woman during normal pregnancy, labor, and the postpartum period; Conducting a normal delivery of a child; and Providing normal newborn care."[6]

[3] Robbie Davis-Floyd and Melissa Cheyney, "Birth and the Politics of Knowledge in the United States," in *Birth in Eight Cultures*, ed. Robbie Davis-Floyd and Carolyn Sargent, 3rd ed. (Long Grove, IL: Waveland Press, 2018), 15.
[4] *Banti v. State*, 289 S.W.2d 244 (Tex. Crim. App. 1956).
[5] 3 Tex. Occ. Code § 203.002 (6)
[6] 3 Tex. Occ. Code § 203.002 (7)

The Texas Midwifery Act also outlines prohibited acts for lay midwives, such as the administration of a prescription drug without the supervision of a licensed physician, or the use of "a medical device or medicine" to help progress or delay labor.[7] However, physicians may delegate their medical authority to a "qualified and properly trained person" operating under their supervision,[8] even as it relates to the administering of "dangerous drugs."[9] This refers to drugs needing a prescription or special license to deliver.[10] Thus, midwives, acting under the supervision of a licensed physician, may administer prescription drugs to their patients.

In addition to the Texas Midwifery Act, lay midwifery in the state is regulated under 16 Tex. Admin. Code § 115.115. Subsection (d)(2) of this code restricts midwives from the "administration of oxytocin, ergot, or prostaglandins prior to or during first or second stage of labor." However, it does not outright restrict the use of these materials in the third stage of labor, during which potential postpartum conditions requiring the administration of prostaglandins, such as postpartum hemorrhaging (PPH), may occur.[11] In fact, the law requires midwives to "initiate immediate emergency transfer" in the event that uncontrolled hemorrhage occurs in subsection (e)(3). Similarly, 16 Texas Admin. Code § 155.116 (d)(1) requires that "the midwife shall initiate immediate emergency transfer, initiate emergency care as indicated by the situation, [and] continue care as needed" in the event of uncontrolled hemorrhage. Even the Texas Midwifery Act makes an exception for the administration of medication without physician supervision "in an emergency that poses an immediate threat to the life of a woman or newborn."[12] Thus, midwives are legally obligated to intervene in emergency situations, explicitly in cases where hemorrhaging may occur. They are not allowed to be passive witnesses to emergencies, even if a physician is not present.

Abortion in Texas: A Historical Account

The national fight for abortion in the United States has landmark roots in Texas, beginning with *Roe v. Wade* (1973). In 1973, a Texas woman using the pseudonym of Jane Roe sued the Dallas County District Attorney, Henry Wade, on the basis that Texas' abortion laws were an unconstitutional violation of her "right of personal privacy" established by the First, Fourth, Fifth, Ninth, and Fourteenth Amendment.[13] The Supreme Court, in a 7-2 decision, upheld Roe's claims that Texas' abortion laws were an infringement on her right of personal privacy. The *Roe* decision made it so that abortion was a constitutional right, rendering individual state laws, such as those in Texas which outright restricted abortion, unconstitutional and illegal. States were now constitutionally required to permit abortion; though, as stated in the Court's decision in *Roe*, were not prohibited from imposing regulations deemed important to state interests. *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) upheld states'

[7] 3 Tex. Occ. Code § 203.401
[8] 3 Tex. Occ. Code § 157.001
[9] 3 Tex. Occ. Code § 157.002
[10] 6 Tex. HSC § 483.001
[11] 16 Tex. Admin. Code § 115.115 (d)(2)
[12] 3 Tex. Occ. Code § 203.401
[13] *Roe v. Wade*, 410 U.S. 113 (1973).

rights to pass regulations on abortion so long as they followed the "undue burden standard."[14] This undue burden applied to laws created with the "purpose or effect [of placing] substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability."[15]

However, in June 2022, both *Roe* and *Casey*–and the subsequent right to an abortion–were overturned in *Dobbs v. Jackson Women's Health Organization* (2022). The case was brought to the Supreme Court over constitutionality concerns regarding Mississippi's Gestational Age Act, which was legislation that sought to restrict abortion after 15 weeks of gestational age, except for in emergency cases or "severe fetal abnormality."[16] In this landmark case, the Court held that the "Constitution does not confer a right to abortion; *Roe* and *Casey* are overruled; and the authority to regulate abortion is returned to the people and their elected representatives."[17] Overruling *Roe* returned the power to restrict and regulate abortions back to the states, allowing each state government to set laws as 'the people and their elected representatives' felt fit. More specifically, trigger laws–laws passed and set to come into effect once a particular event occurs[18]–aimed at reestablishing abortion bans came into effect as soon as the *Dobbs* decision was reached.

In Texas, the *Dobbs* decision allowed for the Human Life Protection Act (2021), also referred to as House Bill (H.B.) 1280, to come into effect. This trigger law was passed by the Texas Legislature to restrict abortion in all circumstances, except for instances when the birther's life or "major bodily function" is threatened by their pregnancy.[19] H.B. 1280 also outlines various penalties for physicians who administer an abortion, rendering a violation of § 170A.002 a second or first degree felony, if the violation results in an unborn child's death,[20] or a civil penalty resulting in a minimum $100,000 fine for each violation.[21] In Texas, a second degree felony can result in up to 20 years in prison,[22] while a first degree felony may result in up to 99 years in prison,[23] demonstrating how abortion is considered a major offense under Texas law.

However, the Human Life Protection Act indicates a much larger disconnect between physicians and legislators in Texas, with many physicians concerned that the exceptions for abortion outlined in the act are unclear and delay medical intervention for fear of legal repercussions. These concerns were reflected in *Zurawski v. State of Texas* (2024), a lawsuit brought forth by Texan women who experienced life-threatening pregnancy complications that would have permitted an abortion under Texas' exceptions, but received delayed treatment because their physicians "were hesitant to perform abortions that comply with the law for fear of legal consequences."[24] Plaintiffs therefore alleged that the existing life-of-mother exceptions

[14] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).
[15] Ibid.
[16] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. ___ (2022).
[17] *Ibid.*
[18] Texas State Law Library, 2025
[19] Tex. H.B. 1280 § 170A.002
[20] Tex. H.B. 1280 § 170A.004
[21] Tex. H.B. 1280 § 170A.005
[22] 3 Tex. Pen. Code § 12.33
[23] 3 Tex. Pen. Code § 12.32
[24] *Zurawski v. State of Texas*, 641 S.W.3d 396 (Tex. 2024).

under Texas abortion laws were unclear, and they sought clarification from the state on these exceptions.[25] More specifically, the Texas Supreme Court heard testimony from a Houston-based doctor that testified to going against normal practice of offering an abortion to patients with severe pregnancy complications due to the fear of being prosecuted under state abortion laws, regardless of if she believed that the patient's conditions warranted an exception under the law.[26] Ultimately, the Texas Supreme Court did not find that the existing language in the Human Life Protection Act was vague, asserting that the current language permitted life-saving abortions and medical intervention before "death or serious physical impairment are imminent."[27]

Following the failure of *Zurawski v. State of Texas* to clarify state abortion laws, Texas Governor Greg Abbot signed the Life of the Mother Act (2025), or Senate Bill (S.B.) 31, into effect on August 19, 2025 as an attempt to help clarify the abortion exceptions under the Human Life Protection Act and specify instances where physicians may legally administer an abortion. Most notably, S.B. 31 § 170A.002 was amended by subsections (c-1) and (c-2), both of which seek to clarify that a "physician may address a risk…before the pregnant female suffers any effects of the risk" and how a "life-threatening physical condition is not necessarily one actively injuring the patient," encouraging physicians to intervene with an abortion prior to their patients experiencing the most severe effects of their condition. These amendments can be found under 2 Tex. HSC § 170A.002, demonstrating how they have been codified into Texas law as of August 2025. Yet, due to how recently this bill has been signed into effect, its impact on clarifying abortion exceptions and comforting physicians' legal concerns is not entirely clear.

Discussion: The Intersection Between Abortion and Midwifery Law.

At this point, this essay has discussed abortion and midwifery laws as distinct realms of Texas legislation. While it is true that the laws explicitly address different matters related to pregnancy, reproduction, and delivery, these subjects intersect upon closer inspection of the medication misoprostol; more specifically, the stigmatization surrounding misoprostol as a potential abortifacient.

Firstly, in spite of misoprostol's popular reputation as an abortion drug, it is important to understand misoprostol's full scope of treatment. Officially, misoprostol was approved by the United States Food and Drug Administration (FDA) for "preventing and treating gastric ulcers induced by nonsteroidal anti-inflammatory drugs (NSAIDs)".[28] It has not been explicitly approved by the FDA for any procedures related to obstetrics and gynecology, with the exception for usage in abortions when combined with mifepristone.[29] For the purposes of cervical ripening, inducing labor, misoprostol-only abortions, and managing postpartum hemorrhaging (PPH), misoprostol is used off-label in these circumstances.[30]

[25] *Zurawski v. State of Texas*, 641 S.W.3d 396 (Tex. 2024).
[26] Ibid.
[27] Ibid.
[28] Marissa Krugh, Preeti Patel, Christopher V. Maani, "Misoprostol," National Library of Medicine, December 11, 2024.
[29] Ibid.
[30] Ibid.

Evidently, misoprostol has more uses beyond inducing an abortion; yet, it remains stigmatized as an abortion drug by the Texas Legislature. This stigmatization is made evident by proposed H.B. 1339, which seeks to designate mifepristone and misoprostol as Schedule IV drugs.[31] Being listed alongside mifepristone, a drug with the sole effect of being an abortifacient,[32] lawmakers seem to consider misoprostol complicit in the process of inducing abortion, notwithstanding misoprostol's many non-abortion related uses. Yet, perhaps most concerning, if this bill is to pass into law, then these two drugs will be subject to the Texas Controlled Substances Act and the Texas Prescription Monitoring Program (PMP) which ultimately constitute increased surveillance on those distributing and receiving mifepristone and misoprostol.

For instance, under the Texas Controlled Substances Act, people seeking to "manufacture, distribute, prescribe, possess, analyze, or dispense a controlled substance" in Texas must be registered with the Federal Drug Enforcement Administration.[33] Those who are registered with the Federal Drug Enforcement Administration must "keep records and maintain inventories" of the controlled substances that they "manufacture, distribute, analyze, or dispense" and maintain such records for at least two years.[34] Similarly, the Texas PMP collects data on all prescriptions for controlled substances whether dispensed by a pharmacy located in Texas or to a Texas resident out-of-state.[35] This data can be used to follow controlled substances to "the ultimate user," as well as to verify physician and pharmacist records, allow physicians and pharmacists to inquire about patients, and "generate and disseminate information regarding prescription trends."[36]. Although the ultimate goal of this program is to help prevent drug abuse, as many of the classified drugs in Texas are narcotics, it also entails a certain level of surveillance upon those prescribing, dispensing, and receiving certain controlled medications. In terms of misoprostol, this type of surveillance becomes dangerous, allowing for the state to monitor who is using misoprostol and base investigations for illegal abortions on the possession of misoprostol alone. This concern of one's possession of misoprostol warranting an investigation into illegal abortion practices is not merely speculation. Rather, it has already taken place in the State of Texas, even without the passage of Texas H.B. 1339.

Maria Rojas: A Case Study

On March 17, 2025, The Texas Attorney General's Office released a statement celebrating the arrest of Maria Margarita Rojas, a licensed midwife, for allegedly "providing illegal abortions" in her clinics located in the Houston-area (Attorney General of Texas, 2025). These clinics are located in Waller, Cypress and Spring, Texas, notably serving a dominant

[31] Tex. H.B. 1339 § 481.037
[32] "Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation," U.S. Food & Drug Administration, last modified February 2, 2026.
[33] 6 Tex. HSC § 481.061 (a)
[34] Tex. HSC § 481.067
[35] "Texas Prescription Monitoring Program," Texas State Board of Pharmacy, accessed December 12, 2025, 1.
[36] Ibid, 1.

Spanish-speaking population.[37] Waller County, where Rojas was initially arrested, is a "maternity care desert," defined as an area "without access to birthing facilities or maternity care providers."[38]

Though Rojas' case is ongoing, and much of the State's documents are hidden behind paywalls, Rojas' Defense Brief reveals how much of the State's case alleging that Rojas provided illegal abortions was based upon the seizure of a misoprostol bottle in Rojas' possession.[39] Specifically, the State's investigation of Rojas, conducted primarily by Lt. Wilkerson, did not consider any uses for misoprostol other than for abortion, speaking to a larger concern regarding the investigators' general lack of expertise in examining illegal abortion cases.[40] Further, investigators did not find mifepristone in Rojas' possession, nor did Witness 3–who the State alleges received an abortion from Rojas–take an amount of misoprostol consistent with a misoprostol-only abortion: Witness 3 was said to have taken a single tablet of misoprostol, which only come in 100 or 200 mcg dosages and is inconsistent with the needed 800 mcg to have a misoprostol-only abortion.[41]

Other than the discovery of misoprostol in Rojas' possession, the State provides the following evidence to support its allegation of illegal abortion taking place: $2,900 seized in cash, a lab order, a lab report, sign-in sheets, payment notes, WhatsApp messages, and Rojas' invocation of her Fifth Amendment rights in court–none of which made explicit reference to an abortion having taken place.[42] Thus, it is evident that the State's allegation that Rojas performed an illegal abortion is based primarily upon her possession of misoprostol, for which the Defense put plainly:

> "The State points to the seizure of misoprostol. But without evidence of how misoprostol is used, it does not show abortion–especially without mifepristone, the first drug in the two-drug medication-abortion protocol. Mrs. Rojas was a licensed midwife, and misoprostol is commonly used in labor and delivery. If possessing misoprostol were evidence of an abortion, then every hospital's labor-and-delivery ward would be accused of providing abortions."[43]

Rojas' case vividly demonstrates how misoprostol's reputation as an abortion drug among lawmakers and law enforcement can result in hasty investigations into illegal abortion claims, targeting individuals with this charge solely based upon their possession of misoprostol. The State lacked evidence explicitly connecting Rojas to the execution of an abortion aside from misoprostol, which was not proven to have been administered in the amount required for an abortion. Coupled with attempts at surveilling the distribution

[37] Ken Paxton, *Attorney General Ken Paxton Announces Arrest of Houston-Area Abortionist and Crackdown on Clinics Providing Illegal Abortions*, March 17, 2025.
[38] "Where You Live Matters: Maternity Care in Texas," March of Dimes, 2023, 1.
[39] Brief for Appellants Maria Rojas, et al., *Maria Margarita Rojas v. State* of Texas, no. 01-25-00268-CV (May 12, 2025): 17-18.
[40] Ibid, 6-7, 18, 20.
[41] Ibid, 21-22.
[42] Reply Brief for Appellants Maria Rojas, et al., *Maria Margarita Rojas v. State* of Texas, no. 15-25-00100-CV (September 5, 2025): 25.
[43] Ibid, 23.

of misoprostol through the Texas PMP, the drug's stigmatized, banalized reputation as an abortion medication may lead to an influx of cases such as Rojas', even when the possession and use of misoprostol is currently legal under Texas law.

Midwifery and Misoprostol

As brought forth by *Zurawski,* the concern of legal consequences for performing abortions under Texas' exception laws persists among physicians in the state. A survey conducted by Manatt Health found that 76% of Texas physicians "believe that they cannot practice medicine according to best practices/evidence-based medicine" and that 60% "fear legal repercussions from practicing according to evidence-based medicine."[44] In relation to lay midwives, this reluctance or perceived inability to practice evidence-based medicine is concerning for non-emergency situations when midwives may need physician supervision to administer a prescription of misoprostol during the first and second stages of labor per. 3 Tex. Occ. Code § 157.001. Misoprostol has a valid use in these situations for cervical ripening and inducing labor, especially as prolonged labor may increase a birther's risk of PPH.[45] PPH is of specific concern because it remains "the leading cause of maternal mortality" despite being a treatable condition.[46]

Outside of these regulations, lay midwives are permitted to administer prostaglandins, such as misoprostol, during the third stage of labor without the explicit supervision of a physician.[47] As primary PPH occurs during this third stage of labor,[48] midwives are legally permitted to treat PPH with prostaglandins. While oxytocin remains the gold standard treatment for PPH, misoprostol has cemented its reputation as a safe, cheap alternative for treatment, especially in low-resource areas.[49] Even the World Health Organization (WHO) recommends the self-administration of misoprostol in "settings where women give birth outside of a health

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[44] Alex Morin, et al., *The Texas OB/GYN Physician Workforce Early Assessment of the Impact of Abortion Restrictions on the Workforce Pipeline* (Manatt, October 2024), 6, https://assets-us-01.kc-usercontent.com/9fd8e81d-74db-00ef-d0b1-5d17c12fdda9/34392fc8-1c9a-48a2-be8f-3f79d8a4a7d5/FINAL-TX-OBGYN-Workforce-Study_2024-10_f.pdf.

[45] Prabhcharan Gill, Anjali Patel, and James W. Van Hook, *Uterine Atony*, National Institute of Health, last updated July 4, 2023.

[46] Jessica L. Morris and Samia Khatun, "Clinical guidelines—the challenges and opportunities: What we have learned from the case of misoprostol for postpartum hemorrhage," *International Journal of Obstetrics and Gynecology* 144*,* no. 1 (January 2019), 122.

[47] 16 Tex. Admin. Code § 115.115

[48] Kelly C. Wormer, Radia T. Jamil, and Suzanne B. Bryant, ""Postpartum Hemorrhage," National Institute of Health, last updated July 19, 2024.

[49] Madeline Flanagan, et al., "Misoprostol Versus Oxytocin for the Prevention of Postpartum Haemorrhage: A Systematic Review and Meta-Analysis Including Individual Participant Data," *BJOG* 132, no. 10 (September 2025), 1365; Karen Hobday, et al., "Preventing post-partum haemorrhage at home during COVID-19: what are we waiting for?," *The Lancet Global Health* 9, no. 3 (March 2021), e245; Meighan Mary, et al. "The Safety and Feasibility of a Family First Aid Approach for the Management of Postpartum Hemorrhage in Home Births: A Pre-post Intervention Study in Rural Pakistan," *Maternal and Child Health Journal* 17, no. 7 (September 2013), 119; Morris and Khatun, "Clinical guidelines—the challenges and opportunities: What we have learned from the case of misoprostol for postpartum hemorrhage," 123; Jeffery Michael Smith, et al., "Advance distribution of misoprostol for prevention of postpartum hemorrhage (PPH) at home births in two districts of Liberia," *BMC Pregnancy and Childbirth* 14, no. 189 (2014), 2.

facility and in the absence of skilled health personnel" to help treat PPH and reduce maternal deaths.[50] This is not to suggest that midwives are unskilled, but to demonstrate that the use of misoprostol is widely recognized as a safe, effective, and legitimate treatment for PPH. Thus, a midwife's possession of misoprostol and a physician's willingness to authorize a midwife to use misoprostol, especially in a low-resource area like Waller County, is consistent with non-abortion purposes and used to sustain life.

As misoprostol continues to be stigmatized as an abortion drug, midwives' access to this life-saving medication may become severely restricted. Without the ability to acquire prescribed medications alone, lay midwives are reliant upon licensed physicians to give them access to drugs like misoprostol. However, with existing fears of legal persecution, especially under circumstances where misoprostol may be classified as a Schedule IV drug, physicians may be increasingly reluctant to prescribe misoprostol knowing that their prescriptions are under surveillance and may be used to support an illegal abortion claim. This means that midwives like Rojas who work in maternity care deserts may have to resort to more expensive prostaglandins to uphold their legal obligation to intervene in life-threatening situations. Alternatively, they may outright avoid possessing prostaglandins in order to maintain the affordability of their services without the potential of facing illegal abortion claims that may shut down their businesses entirely. In either circumstance, midwifery is negatively impacted by misoprostol's stigma. Midwives either financially isolate their clientele—which is especially detrimental for low-income areas where access to birthing facilities and maternal care providers is already scarce—or reinforce the prevailing stigma that out-of-hospital births are inherently unsafe by lacking access to PPH treatments.

Conclusion

Abortion laws in Texas, specifically those seeking to restrict misoprostol, do not merely restrict one's ability to end a pregnancy, but also restrict midwives' ability to offer affordable maternity care in non-hospital settings. Exemplified by the case of Maria Rojas, misoprostol is regarded as an abortion drug by Texas officials, and its mere presence in a midwifery setting has warranted investigations into alleged illegal abortion practices. Additionally, the risk of criminal punishment and exorbitant fines for physicians suspected of performing illegal abortions has already restricted these providers' ability to practice evidence-based medicine in the state. Presumably, with these concerns, physicians would not want to extend their medical authority to allow for a lay midwife to possess and administer such a stigmatized drug. Thus, communities in which these midwives serve are potentially left without essential, affordable life-saving resources like misoprostol.

As the Texas medical community awaits the effects of the Life of the Mother Act to become fully realized, as well as to see if H.B. 1339 will come into fruition, we can only suspect how midwives will be impacted in the future. However, it remains apparent that misoprostol is

[50] "WHO Recommendation on Advance misoprostol distribution to pregnant women for prevention of postpartum haemorrhage," World Health Organization, 2020, 10.

under attack in Texas as an abortion drug, with the Texas Legislature neglecting to acknowledge its uses outside of inducing an abortion. This demonstrates a need for Texas law to clarify upon the use of misoprostol as an effective life-saving drug in accordance with the international medical community and the findings of the National Institute of Health. Especially in maternity desert communities like Waller County, access to misoprostol as an affordable regimen for PPH is necessary to maintain safe, nearby birthing environments.

Thus, the Texas Legislature must consider additional law to clarify the role of misoprostol and set up a system for accessing the drug for uses outside of abortion. While the Texas Legislature should ideally loosen its abortion restrictions for this purpose, allowing physicians and midwives to practice according to their expertise without fear of legal repercussions, it seems unrealistic to propose such a solution with the state's conservative political environment. Instead, the Texas Legislature should consider a law proposal similar to the Life of the Mother Act that seeks to clarify the use of misoprostol in obstetrics and gynecology and set forth standards that protect providers–OBGYNs and midwives alike–from potential illegal abortion investigations on the basis of misoprostol alone. Afterall, if Texas life is truly as sacred as Attorney General Ken Paxton claims (Attorney General of Texas, 2025), the state should recognize the necessity of clarifying misoprostol's role in promotion of the state's life-saving and life-promoting mission. We must work to destigmatize this drug and protect its use as a PPH preventative and treatment to ensure that pregnant Texans receive the safest care possible, regardless of where they choose to give birth. Pro-life legislation should not merely be about restricting abortions, but providing access to life-sustaining drugs and treatments especially as they relate to labor and delivery. The science is clear: misoprostol saves lives, especially in the low-resources communities that Texas midwives serve, and we should strive to protect its availability for that reason alone.

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Patriarchy Perpetuated by the Constitution: Gendered Governance in Pakistani Healthcare

Myra Zia
Edited by: Coco Chen (Senior Editor) and Prudence Sullivan (Junior Editor)

Abstract

Pakistan's Constitution formally guarantees equality before the law and the right to life, yet women's access to healthcare remains heavily mediated by familial, medical, and state authority. This Note argues that this contradiction is not merely cultural, but constitutional. Focusing on constitutional provisions such as Article 25, specifically, restrictive clause (3), this note demonstrates how the state's authority to make undefined "special provisions" for women and children collapses women's legal agency despite what is promised to them, failing to meet the intention of the equal protections article. Through analysis of Pakistani case law, including *Ms. Sarah Zaman v. Federation of Pakistan*, *Mst. Fehmida v. State*, *Asma Jillani v. Government of Punjab*, and *Abdul Waheed v. Asma Jahangir,* the note shows how courts invoke equality in principle while tolerating patriarchal assumptions in practice. Further, it highlights how these doctrinal patterns legitimize healthcare practices that prioritize paternal consent over women's informed decision-making.

Introduction

The Pakistani constitution pledges allegiance to an impressive number of fundamental human rights and principles. Committed to ensuring that the supreme law of the land purports Islamic values and democratic values, it promises to ensure "freedoms, equality, tolerance, and social justice."[51] With regard to gender, the constitution, under Article 25, specifically grants all citizens to be equal before the law, entitled to all equal protections that the law has to offer.[52] Further, various judicial decisions have enforced these constitutional protections, arguing that women deserve equal protection. Why is it then that women in Pakistan are prevented from receiving such equal treatment? In innumerable sectors and in lieu of country norms, women have long yearned for legal and social equality.

Like most developing nations, Pakistan has a long way to go in order to achieve gender equality. Pakistan ranks 151st out of 153 countries on the World Economic Forum's Global Gender Gap Index, reflecting entrenched disparities in healthcare access, education, employment, and political participation.[53] With specific regard to healthcare, women in Pakistan are often faced with barriers to accessing necessary medical care – especially at the direction of family members and doctors. Often, Pakistani women are accustomed to living in a society where their husbands, fathers, or brothers are trusted to consent to critical medical care, as

[51] Yefet, Karin Carmit, The Constitution and Female-Initiated Divorce in Pakistan: Western Liberalism in Islamic Grab (2011). Yefet, K. C. (2011). The Constitution and Female-Initiated Divorce in Pakistan: Western Liberalism in Islamic Grab. Harvard Journal of Law and Gender, 34(2), 555.
[52] Ibid. 564.
[53] Iqbal, Dr Nasir. "The Gender Gap." April 12, 2021.

opposed to them speaking for themselves. As a result of this, over the years, it has become embedded in Pakistani medical structures that male family members will be asked for express consent regarding female reproductive healthcare, bypassing the need for the express consent of women who require that treatment.[54] [55]

Claim

Though there seem to be laws that espouse equality, there is also a discrepancy in the societal norms and enforcement of these laws. Using the example of discriminatory medical healthcare treatment, this note argues that the constitutional calls for equality are not being addressed. Further, it highlights that the specific article in the constitution that establishes gender equality is accompanied by a restrictive clause that allows for "special provisions" to be made in favor of women's rights and freedoms – allowing for positive discrimination. However, there seem to be divergent judicial rulings regarding this clause, which leads to a lot of legal ambiguity and thus, differential applications of the affirmative clause. In addition to the domestic constitution, Pakistan is also a signatory of International laws such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), as a result of which, Pakistan must guarantee equal protection to women. Regarding medical healthcare and especially reproductive healthcare, Pakistani women must be guaranteed full access and support.

In healthcare practices, as a result of this legal ambiguity, physicians are allowed to operate within a 'gray area' that reverts to following patriarchal societal norms and prioritizes their clinical discretion. This note argues that in doing so, oftentimes, these healthcare treatments fail to grant women the positive discrimination special provisions as promised by Article 25, and further, that this legal ambiguity and consequential harm to women's rights and freedoms is illegal under CEDAW.

This essay will initially focus on explaining the legal background that these judicial decisions operate within–first highlighting the constitution's treatment of women's rights and freedoms alongside the international law, followed by the Pakistani courts. Furthermore, this essay will highlight important cases that have advanced the cause of women and expanded upon the jurisdictions of the clauses mentioned above–in the absence of constitutional explanations of certain provisions. Lastly, it will show how the reality of healthcare practices on women, and the legal direction given by the constitution, has a discrepancy. This points to a larger need for more judicial clarity to prevent malpractice and ensure legality with regard to the intentions of the constitution, and in accordance with international treaties.

Background Laws

Constitutional Provisions

The Constitution of Pakistan mentions women and women's rights at various points.[56] According to Article 25A, equality is to be granted to all citizens before the law, guaranteeing

[54] Qureshi, Eeman S. "When Women Need Permission to Heal, Everyone Pays." Dawn, September 26, 2025.
[55] Gondal, Abdul Qayyum, and Zulkarnan Hatta. "Women's Rights Laws in Pakistan: Challenges and Solutions." Annals of Human and Social Sciences 5, no. 2 (Special Issue) (April–June 2024): 336–343.
[56] The Constitution of the Islamic Republic of Pakistan (as modified up to the 28th February, 2012).

equal protection to all citizens on the basis of sex. Further, Article 26 addresses nondiscrimination in public spaces on the basis of religion, race, caste, sex, residence or place of birth. However, both of these articles are followed by restrictive clauses as follows:

> *Nothing in this Article shall prevent the state from making any special provisions for the protection of women and children.* [57]

Though legally there seems to be a clear call for equality, there is a restrictive clause that places women and children in a separate category from ordinary citizens.[58] This subclause can be broken up to consist of three elements: first, that of the state, which is explicitly permitted to make "special provisions." Secondly, these provisions seem to be for the purpose of "protection," and lastly, this restrictive clause applies specifically to women and children. No further details are provided within the constitution clarifying what these "special provisions" could be, how they can be used for or against women and children, and who constitutes "the state" when wielding these special powers.

Furthermore, with regard to representation of women in the constitution, Article 34 guarantees that women should be ensured full participation in all spheres of national life which in conjunction with Article 9 that states that all persons should not be deprived of life or liberty, allows women to be full citizens and persons according to the law who should not be barred from accessing anything in national life.[59] The constitution places special emphasis on this separate category of women as one to be uplifted as well, detailing how women can be represented in government. As with religious minorities, women are to be guaranteed reserved seats in the national and provincial assemblies, and be allowed access to all public spaces in a non-discriminatory fashion. These quotas and seat reservations ensure a space for women and minorities to be represented in elected government.

Lastly, women are mentioned in Article 35, which places value in the role of the family, and states that marriage, family, mother, and child are deserving of "protection." This article expressly states that:

> *The State shall "protect" the marriage, the family, the mother and the child.*[60]

Through the language in these articles and clauses, the state constantly tethers women to their role as mothers and as valuable concerning their roles as a member of the family, and legally deals with women in the same way that it deals with minorities and children. By doing so, it limits their agency as individuals of their own, allowing for the creation of exploitative special laws with regard to their safety. In healthcare, as a result of the arbitrary language in these constitutional provisions, the state legally enables an environment where decisions regarding a woman's health can be made with her well-being in mind, but not necessarily her express consent.

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[57] PAK. CONST. art. 25. PAK. CONST. art. 26.
[58] Abdul Waheed v. Asma Jehangir (Saima Waheed Case). Yearbook of Islamic and Middle Eastern Law 3 (1996): 518.
[59] PAK. CONST. art. 9. PAK. CONST. art. 34.
[60] PAK. CONST. art. 35.

International Law

In addition to domestic laws regarding women, Pakistan is a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), brought forth by the UN Women. Article 12 of CEDAW requires states to eliminate discrimination in healthcare and ensure access to services related to family planning and reproductive health. This law covers all kinds of medical procedures, public health programs, and more that women are legally entitled to access. Specifically mentioning treatments relating to healthcare that are affordable and accessible to all.[61] Not only does CEDAW mandate the enforcement of law and access to healthcare, but the UN Women also helps the Pakistani government provide resources to the Ministry of Human Rights by providing technical expertise and conducting trainings within the government and across the region, and supporting civil society organizations to play a valuable role in advocating and implementing CEDAW.

Both domestic and international laws work together to ensure that women in Pakistan are guaranteed the protections that are promised. Often, International Treaties like CEDAW, bridge gaps where the domestic law fails to elaborate more on the enforcement of equal protections and nondiscrimination.[62]

Relevant Cases

Having established the potential for broad interpretation, the focus now shifts to the domestic legal landscape and interpretations of these articles in case law. Thinking specifically about the problem of Pakistani healthcare providers needing male family members' consent for female reproductive healthcare procedures takes us to cases in which consent and the constitutional legal status of women is discussed at length.

In *Ishrat Batool vs Court of Punjab*, two petitioners argue against discriminatory hiring practices that have preferred and previously employed males in posts of educators at the National Testing Services (NTS).[63] The petition of these women in this case stood, and the court adjourned that they deserved the jobs they applied for but were discriminated against accessing. This was one of the few cases that provided clarification about Articles 25 and 27 and the clauses for special provisions regarding women and children, stating that these clauses guaranteed positive classification for the protection of women and children and that the state was mandated to provide them with benefits, but could not deprive them of the same.

In *Ms. Sarah Zaman v. Federation of Pakistan*, the Islamabad High Court reaffirmed that Article 25 of the Constitution guarantees equality before the law and prohibits discrimination on the basis of sex.[64] The Court acknowledged that women's unequal treatment is not merely incidental but structurally embedded within state institutions. Yet despite this recognition, the decision reflects a broader judicial pattern in which equality is articulated in principle while

[61] Convention on the Elimination of All Forms of Discrimination Against Women art. 12, Dec. 18, 1979, 1249 U.N.T.S. 13.
[62] Ishrat Batool v. Government of Punjab, PLC 2018 (C.S.) (Pak.).
[63] Ibid.
[64] Ms. Sarah Zaman v. Federation of Pakistan, PLD 2017 Islamabad 46 (Pak.).

remaining constrained in application. Rather than dismantling the social and legal mechanisms that limit women's autonomy, courts often stop short at declaratory equality, leaving patriarchal practices intact. In the context of public health governance, this gap allows women's access to medical decision-making, particularly in reproductive and preventive care, to remain mediated through family and state authority, rather than grounded in women's individual rights.

The Supreme Court's decision in *Mst. Fehmida v. State* illustrates how Article 25 is often applied selectively, reinforcing gendered assumptions under the guise of legal protection. In this case, the complainant who issued a rape charge was requested to bring four male witnesses to the act to attest as valid proof.[65] When the victim procured four female witnesses, her request was denied, and her charge turned from one of rape to one of adultery on her, with the proof of her pregnancy as an indicator that intercourse had occurred – implying that it was consensual. While the Court engaged with questions of women's criminal liability, its reasoning relied heavily on paternalistic narratives about women's morality, vulnerability, and social roles. Rather than treating the woman before the Court as a fully autonomous legal subject, the judgment framed her conduct through normative expectations of female behavior and punished her according to Islamic laws that govern the country.

Furthermore, in the case of Saima Waheed, a young woman who chose to marry a man of her own choosing, which sparked a legal battle in Pakistan, lawyer Asma Jahangir asserted that women over the age of 18 must be recognized as adults able to consent to their own fate. Twenty two year old Saima Waheed's father filed a petition of habeas corpus against his daughter, stating that based on Islamic jurisprudence, Saima's guardian – who would be her legal witness to the marriage – was not present and thus not only had she stepped into an illegal marriage, but she had committed adultery because her hand was promised by her family to another man. As a result of the landmark victory of this case of *Hafiz Abdul Waheed v. Asma Jehangir*, the court ruled that adult women can marry without the consent of a guardian.[6667] While her father, Abdul Waheed, contended that without the consent of her *wali* (guardian) her marriage was illegitimate, the courts adjudicated that adult women were capable of providing consent regarding matters of marriage and family law.[68] Judge Khalil ur-Rahman Ramday's dicta in this adjudication refers explicitly to the equal protection Article 25, stating that although it grants women equal rights, he believes there is a need for restrictions like those under clause (3), particularly because a lack of restriction leads a society to become morally akin to 'the West.'

In both the cases of Saima Waheed and Mst Fahmeeda, the court has reproduced patriarchal hierarchies in legal jurisprudence while trying to balance the creation of an equal legal status. By creating a different understanding of women's legal rights and legal reality, the courts illuminate a rupture between law and societal norms.

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[65] Mst. Fehmida v. State, PLD 1987 S.C. 302 (Pak.).
[66] College, Abu Bakar Khan |. U. Law, U. Punjab, and PK. "Pakistan Dispatch: Judges, Lawyers and Other Luminaries Gather to Celebrate the Legacy of Pakistan Human Rights Pioneer Asma Jahangir." April 30, 2024.
[67] "Pakistan - Abdul Waheed v. Asma Jehangir (the Saima Waheed Case)." Yearbook of Islamic and Middle Eastern Law 3: 518-534.
[68] Ibid.

On the other hand, Article 25 has also been invoked to ensure that medical procedures remain non-discriminatory with regard to equality based on gender. For instance, in *Sadaf vs Federation*, it was found that two-finger virginity tests were not permissible as they were carried out on the basis of gender, thus disproportionately affecting women who were subjected to such tests.[69] Under the protections offered by this article and Articles 9 and 14, two-finger virginity tests were banned entirely in Pakistan, to prevent further possibilities of discrimination against women at the hands of healthcare professionals.

While some of these cases represent increased interpretations of the constitution that provide equality to women, they still emphasize the need for some provisions to be restricted in order to 'protect' women.

Analysis

The Pakistani government faces many problems concerning female healthcare. For instance, although women constitute a significant proportion of medical school graduates, many are prevented from practicing medicine due to restrictions imposed by husbands or in-laws. This phenomenon reflects a broader societal assumption – implicitly sanctioned by law – that women's professional and bodily autonomy is subordinate to familial authority.[70]

In clinical settings, women frequently cannot consent independently to medical procedures, particularly those related to reproductive health. Empirical studies indicate that healthcare providers often require the approval of male relatives before proceeding with treatment, even when women are competent adults. This practice is not mandated by statute, but it is normalized by a legal culture that frames women as protected dependents rather than autonomous patients.[71] These restrictions are extremely unlawful under CEDAW, Article 25, and Article 9 of the Constitution, which allow women to have unadulterated access to healthcare, equality, and the right to life.

Cases such as Ishrat Batool set the precedent that "special provisions" of Article 25 clause (3) can only be interpreted as affirmative rather than exclusionary—stating explicitly that the state is barred from interpreting this discretionary power to provide negative provisions.[72] Turning to International law, Article 5 of the CEDAW requires that necessary provisions are made to progress regressive cultural and social practices to prevent perpetuation of stereotypes ascribed to the sexes.[73] Further, according to the CEDAW, the Pakistani government is mandated to set up policies that prevent discrimination against women.

On the other hand, cases like Mst. Fehmida reveals how equality jurisprudence continues to rely on moralized and gendered reasoning. Even landmark legal precedents articulated in *Hafiz Abdul Waheed v. Asma Jehangir,* though granting women autonomy to consent in family

[69] Sadaf Aziz vs. Federation, WP No. 13537 of 2020 (Pak.)
[70] Raza A, Jauhar J, Abdul Rahim NF, Memon U, Matloob S (2025) Correction: Unveiling the obstacles encountered by women doctors in the Pakistani healthcare system: A qualitative investigation..
[71] Memon, R., Asif, M., Shah, B.A. et al. Clinicians' experiences of obtaining informed consent for research and treatment: a nested qualitative study from Pakistan. BMC Med Ethics 25, 131 (2024).
[72] Ishrat Batool v. Government of Punjab, PLC 2018 (C.S.) (Pak.).
[73] Ibid.

law, have not been fully extended to contexts involving women's bodily autonomy in all cases. Despite the move forward pushing for legal equality for women, societal practices are slow to follow. If women have the right to consent to a marriage at the age of 18 and beyond, why does that right and validity in consenting not exist concerning their own medical procedures? The harmful impacts of this inability to accept the sole consent of a woman are plentiful. Daily, Pakistani women bear the impacts of decisions they did not consent to. For instance, to undergo an abortion, most Pakistani hospitals ask for the express consent of the husband. Not only is this harmful for most women in marriages because it robs them of their agency, but it also completely removes safe and legal avenues of healthcare access from unmarried women seeking such medical help. [74]

This tension in law and societal practices is exemplified by Article 25 and restrictive clause (3), which purports to give women equal rights but fails to explicitly discern what special provisions look like and how they will be enforced.

Conclusion

This note contributes to existing scholarship by identifying constitutional ambiguity as a central driver of gendered healthcare inequality in Pakistan. By authorizing undefined "special provisions," the Constitution enables governance that undermines women's legal status and the protections granted by citizenship. Reassessing this language is essential to ensuring that women are treated as autonomous legal subjects.

Meaningful reform requires constitutional clarification that special provisions must enhance women's autonomy – not restrict it. Further, the emphasis on the value of marriage and the family in the constitution can be detrimental to the autonomous decisions needed to be taken by a woman in lieu of her health. This note demands statutory guarantees of informed consent in healthcare, explicit protections for unmarried women, and judicial willingness to interrogate patriarchal assumptions embedded in constitutional text. Until women are recognized as rights-bearing individuals rather than protected dependents, Pakistan's healthcare system will continue to reproduce inequality under the guise of care.

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A History of Legal Exclusion and Predatory Inclusion: *Chy Lung v. Freeman* (1875)

Coco Chen
Edited by: Helene Weimbs (Senior Editor) and Cecile Horst (Junior Editor)

Abstract

Chy Lung v. Freeman (1875) is conventionally understood as an early federalist decision establishing exclusive federal authority over immigration regulation. This article argues that such an interpretation is incomplete. Situating *Chy Lung* within its historical and doctrinal context, this Article demonstrates that the Court's reasoning simultaneously ingrained a racialized and gendered regime of immigration control through what this article conceptualizes as predatory inclusion. Drawing on Keeanga-Yamahtta Taylor's framework, the article shows how Chinese migrants, particularly Chinese women, were formally incorporated into the legal order only under conditions that facilitated surveillance, criminalization, and exploitation rather than legal protection. Although the Court invalidated California's exclusionary statute, it did so without challenging the racialized assumptions that framed Chinese women as presumptively immoral or unworthy of due process. Notably, the Court declined to ground its holding in the Fourteenth Amendment, thereby leaving intact a legal architecture that permitted arbitrary detention and moralized exclusion. By centralizing immigration authority at the federal level without articulating substantive constitutional constraints, *Chy Lung* laid the groundwork for subsequent exclusionary regimes, including the Page Act of 1875 and the Chinese Exclusion Act of 1882. This article contends that *Chy Lung* reveals immigration law's early function as an instrument of racialized social control and highlights the enduring dangers of unchecked federal supremacy in immigration governance.

Introduction

Chy Lung v. Freeman (1875) represents a pivotal moment in the development of the United States' immigration law, where the Supreme Court asserted federal authority over immigration policy. While framed as a jurisdictional dispute, the case also illustrates a deeper pattern of exclusion and predatory inclusion, and the racialized denial of entry and rights to marginalized migrants, not just to keep them out, but to criminalize and dehumanize them. This paper focuses particularly on Chinese women and how this community was targeted as morally suspect and excluded under assumptions that reinforced their vulnerability to trafficking and exploitation.

This paper argues that the *Chy Lung v. Freeman* established exclusive federal authority over immigration while simultaneously creating a racialized, gendered framework of predatory inclusion that criminalized Chinese women, revealing early immigration law as a tool of social control. This paper will analyze the *Chy Lung* decision and its reasoning from a legal theorist perspective within its historical context. Additionally, I will apply the concept of predatory

inclusion to analyze the Court's reasoning and its implications, drawing on examples from other legal and political frameworks on immigration.

Conceptual Framework

Before getting into the case, I will explain the meaning of predatory inclusion and its applicability in this paper. Professor Keeanga-Yamahtta Taylor first proposed the concept of predatory inclusion to describe the racially exploitative housing market where Black American homebuyers were granted access to housing but on the conditional terms with risky, high-cost, contract sales rather than a conventional mortgage.[75] While Professor Taylor's work focused on Black housing rights, this concept is broadly applicable. In this paper, the term predatory inclusion will be used to refer to the process by which racialized subjects are incorporated into institutions and social systems from which they were previously excluded, but under terms that reproduce inequality and exploitation.

In the decades surrounding the *Chy Lung* decision, Chinese laborers were welcomed into the U.S. economy for their labor, particularly in railroad construction and agriculture, yet simultaneously subjected to racialized legal exclusion, social hostility, and state violence. By applying the framework of predatory inclusion, this paper reinterprets *Chy Lung v. Freeman* not only as a constitutional case about federal versus state control over immigration, but also as a pivotal moment when the legal system began to define and enforce the terms of predatory inclusion, particularly for Chinese immigrants. Through this lens, the case stimulates the understanding of how law facilitated both the commodification of Chinese labor and the racialized boundaries of American citizenship.

Historical Background

Historical developments frame *Chy Lung v. Freeman* as an early state-level effort to control and profit from the racialized labor and migration of Chinese subjects, preceding the outright national ban that would soon follow. In 1868, the Burlingame-Seward Treaty between the United States and Qing Dynasty China transformed that labor flow into a recognized channel of international migration.[76] Following the Burlingame-Seward Treaty, Chinese laborers were granted formal access to the U.S. labor market.[77] But this access was predicated on their utility to the United States' capital, Chinese men were welcomed as cheap, expendable workers for projects like railroad construction and mining, jobs deemed too dangerous or degrading for white laborers.[78] This selective inclusion allowed the United States to extract value from Chinese labor

[75] Keeanga-Yamahtta Taylor, "Introduction: Homeowner's Business" In *Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership* (University of North Carolina Press, 2019), 5.
[76] U.S. Department of State, *Burlingame-Seward Treaty, 1868*, Office of the Historian, accessed May 5th, 2025, https://history.state.gov/milestones/1866-1898/burlingame-seward-treaty.
[77] American Immigration Council, "New Americans: The Chinese American Population," May 7th, 2019, https://www.americanimmigrationcouncil.org/report/nae-chinese-americans/
[78] Anthony Baker, "Chinese Immigration to California: Welcomed Workers, Shunned Immigrants," *Journal of Humanities and Social Sciences Studies* 2, no. 5 (2020), 53, https://doi.org/10.32996/JHSSS.2020.2.5.7.

while systematically denying Chinese workers full legal rights, political representation, or social standing.

Economic desperation and the near-complete absence of female kin created fertile ground for predatory practices. Due to industries that demanded Chinese labor, like mining and railroad, exclusively hiring Chinese men.[79] The surplus of Chinese men and the exclusionary job market had produced a great demand for Chinese prostitutes.[80] Many Chinese women were sold to the United States by their families, out of filial piety and their lack of power and autonomy to oppose their families.[81]

By the time of *Chy Lung v. Freeman* in early 1875, Congress had already begun to roll back Burlingame principles through the Page Act, a product of economic anxieties and racial stereotypes. Passed in March 1875, the Page Act was the first restrictive federal immigration law that prohibited the importation of individuals from China, Japan, and other "Oriental" countries, particularly women, who were believed to be entering the U.S. for immoral purposes, such as prostitution.[82] Only seven years later, Congress enacted the Chinese Exclusion Act of 1882. That statute suspended virtually all Chinese immigration for ten years, prohibited those already here from naturalizing, and authorized deportation for any Chinese person deemed undesirable.[83] Whereas the Burlingame-Seward Treaty had treated Chinese migration as a mutually beneficial right, the Exclusion Act enshrined the notion that Chinese laborers, and especially Chinese women, were threats to public morality, labor markets, and the racial order.

Case Breakdown

Factual and Procedural History

In 1875, a group of Chinese women arrived in the Port of San Francisco aboard the steamship Japan from Hong Kong. Chy Lung, along with 21 other Chinese women, was detained by the California Commissioner of Immigration, Freeman, who claimed these women were "lewd and debauched" and would likely become a public charge simply based on the fact that these women traveled alone.[84] Under a California statute, any such person could be excluded from entry unless a bond was posted on their behalf.[85] Chy Lung and 21 other Chinese women were imprisoned without a judicial hearing; thus, they filed a writ of habeas corpus in the Circuit

[79] Hirata, Lucie Cheng, "Free, Indentured, Enslaved: Chinese Prostitutes in Nineteenth-Century America," *Signs* 5, no. 1 (1979), 5. http://www.jstor.org/stable/3173531.
[80] Hirata, Lucie Cheng, "Free, Indentured, Enslaved" 5.
[81] Hirata, Lucie Cheng, "Free, Indentured, Enslaved," 6.
[82] *The Page Act of 1875*, sec. 141, 18 Stat. 477 (U.S.)
[83] *Chinese Exclusion Act*, 1882, chap. 126, 22 Stat. 58 (U.S.)
[84] *Chy Lung v. Freeman* 92 U.S. 275, at 276 (1875).
[85] *Chy Lung,* 92 U.S. 275, at 276.

Court for the District of California.[86] The court discharged the petitioners, declaring the California statute unconstitutional. The case was appealed to the U.S. Supreme Court.[87]

The Issue and Holding

The Court confined that the issue in this case was whether the state of California, and by extension other states' governments, can enforce its own immigration restrictions, specifically by excluding and detaining foreigners as potential public charges, when such regulations affect foreign relations and international commerce. With a 9-0 decision, the Court unanimously held that immigration regulation and the exclusion of foreigners are matters for the federal government, not individual states. California's actions under its state law were thus deemed unconstitutional because they infringed upon the exclusive powers of the federal government over foreign commerce and international relations.[88] There were no separate concurring or dissenting opinions.

The Court Composition

Although there were not too many records about the Waite Court in 1875 due to the frequent movements in its composition, the Court was dominated by Republican appointees who were committed to preserving federal authority.[89] This perspective was shaped by the aftermath of the Civil War and Reconstruction, when central federal power was seen as essential to national integrity to guarantee full equality for black Americans.[90]

The Court's Opinion

The U.S. Supreme Court affirmed the lower court's decision in a unanimous opinion delivered by Justice Samuel Freeman Miller. Similar to the majority of justices who were appointed in this Court, Justice Miller was appointed by a Republican Party leader, President Abraham Lincoln.[91] Justice Miller's judicial ideology resonated closely with his appointer, as a central figure during the Reconstruction era, his jurisprudence often reflected the effort to rebuild and unify the country under a consistent legal and constitutional framework.[92] Therefore, Justice Miller was known for his support for a strong federal government; he consistently ruled in favor of centralized federal authority, particularly in matters concerning commerce, war powers, and

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[86] *Chy Lung,* 92 U.S. 275; United States Courts, "Habeas Corpus," *Glossary of Legal Terms*, accessed March 7, 2026, https://www.uscourts.gov/glossary-legal-terms/habeas-corpus. Habeas corpus refers to a court order requiring that a person who is being detained be brought before a judge so that the legality of the detention can be examined. If the court finds that the person is being held without proper legal justification, the judge can order their release.
[87] *Chy Lung,* 92 U.S. 275.
[88] *Chy Lung,* 92 U.S. 275, at 280.
[89] Kens, Paul. "After the Compromise." In *The Supreme Court under Morrison R. Waite, 1874-1888*, 53-61, University of South Carolina Press, 2010. https://doi.org/10.2307/j.ctv6wgn4d.10.
[90] Kens, Paul. "After the Compromise." In *The Supreme Court under Morrison R. Waite,* 53-61.
[91] Samuel F. Miller, Justia, accessed May 5th, 2025, https://sustates'rightspreme.justia.com/justices/samuel-freeman-miller/
[92] Samuel F. Miller, Justia.

constitutional interpretation following the Civil War.[93] In *Chy Lung*, this translated into a rejection of legal fragmentation: he believed that immigration law, like tariff policy or war powers, had to be administered federally to preserve the Union's coherence and international integrity.

Justice Miller's opinion heavily emphasized the nationally uniform policy over immigration issues. Justice Miller viewed immigration not just as a local concern but as an extension of foreign relations and international commerce, both domains constitutionally delegated to the federal government. "It is hardly possible to conceive a statute more skillfully framed, to place in the hands of a single man the power to prevent entirely vessels engaged in a foreign trade, say with China, from carrying passengers, or to compel them to submit to systemic extortion of the grossest kind."[94] This quote from Justice Miller's reasoning demonstrated a distrust of arbitrary state action. More specifically, Justice Miller was alarmed by the unchecked power exercised by California's immigration commissioner, who labeled the women as prostitutes without further knowledge and demanded a bond for their release.[95] The Court's ruling illustrated the dangers of allowing local officials to exercise near-absolute power over foreigners' rights. He saw such practices as both unconstitutional and diplomatically reckless, reinforcing his preference for federal oversight.[96]

Legal Exclusion: The Significant Limitation of the Court's Reasoning

The Overlook of the 14th Amendment

The very act of limiting the issue of *Chy Lung* to the debate over federal power versus states' rights, the court overlooked critical constitutional clauses and the fundamental issue of governmental procedural fairness. The Court's opinion lacks any meaningful invocation of the 14th Amendment, which had been ratified just seven years prior, or the 5th Amendment. Section 1 of the 14th Amendment explicitly states, "No State shall…deprive any person of life, liberty, or property, without due process of law."[97] Similarly, the 5th Amendment outlines that "No one shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury…nor be deprived of life, liberty, or property, without due process of law."[98]

Although the imprisonment of the Chinese women based on the unilateral discretion of a state immigration official was deemed unconstitutional, the Court failed to apply the Due Process Clause to protect them from arbitrary detention and stigmatization. Instead, the Court framed the case as a matter of federalism, deciding whether the state of California or the federal government had the right to regulate immigration. By not grounding its ruling in the 14th or 5th Amendment, the Court missed an opportunity to affirm that noncitizens, or by the exact language in

[93] Samuel F. Miller, Justia.
[94] *Chy Lung,* 92 U.S. 275, at 278.
[95] *Chy Lung,* 92 U.S. 275, at 280.
[96] *Chy Lung,* 92 U.S. 275, at 280.
[97] U.S. Const. amend. XIV, § 1.
[98] U.S. Const. amend. V.

aforementioned Amendments, "any person", including immigrants in transit, are entitled to basic constitutional protections, such as the right to a fair hearing before being branded criminals or deported.[99]

This omission also reflected the racial boundaries of who was considered deserving of constitutional protection. Chinese women, in this case, were considered aliens to the United States. Justice Miller's decision implied that the identities of these women could be compared to external issues related to foreign relations. Their exclusion from constitutional concern set a precedent for denying due process to immigrants for decades until *Yiko Wo v. Hopkins* (1886) shifted the narrative and decided the Fourteenth Amendment's protection extended to non-citizens.[100]

The Legal Reinforcement of Stereotypes

Another issue the Court failed to address was how women of color were frequently and disproportionately treated as morally suspect and legally inferior in the legal system. While the Court ultimately struck down the California statute, it did so without seriously challenging the inherently racist and sexist assumptions behind it. In fact, the opinion reinforced prevailing stereotypes, repeatedly referring to the plaintiffs as likely "lewd and debauched women" and treating their detention as reasonable given these allegations, even though no trial or evidence was ever presented.[101] Rather than questioning the discriminatory logic of the California law, which labeled Chinese women as presumptive prostitutes, the Court accepted the premise that some categories of migrants could be excluded based on moral character. This lent legitimacy to the view that Chinese women were inherently suspect, further entrenching racialized gender norms that would be codified in federal law with the Page Act of 1875.

One part of the reasoning written by Justice Miller stood out to me when he was arguing for the release of these detained women. "The woman whose error has been repaired by a happy marriage and numerous children, and whose loving husband brings her with his wealth to a new home, may be told she must pay a round sum before she can land, because it is alleged that she was debauched by her husband before marriage."[102] This reasoning resembles Justice Kennedy's emphasis on marriage in *Obergefell v. Hodges* (2015). The similarities between both justices' ideological groundwork are demonstrated through assuming marriage and domestication as the ultimate "happy ending" when women's or gay rights are being discussed in the Supreme Court.[103] The fact that this similar ideology came from two justices whose terms of service spanned more than 100 years is a symbol of the stagnation of the judicial philosophy and legal narrative around civil rights cases.

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[99] Julie A. Dahlstrom, "Commentary on *Chy Lung v. Freeman*," in *Feminist Judgments: Rewritten Immigration Law Opinions*, ed. Kevin Lapp and Kathleen Kim (2023), https://scholarship.law.bu.edu/faculty_scholarship/3369.
[100] Yick Wo v. Hopkins, 118 U.S. 356 (1886).
[101] *Chy Lung,* 92 U.S. 275.
[102] *Chy Lung,* 92 U.S. 275, at 281.
[103] *Obergefell v. Hodges*, 576 U.S. 644 (2015).

Predatory Inclusion: Criminalization and Sexual Commodification

Rather than being fully integrated into the United States' society, Chinese immigrants were incorporated under conditions that maintained their exploitation. They were included just enough to be used as low-cost workers who build infrastructure and create social space for local communities, but excluded just enough to be discarded in any talks of Constitutional rights.[104] For Chinese women, predatory inclusion took an even more violent and gendered form. The *Chy Lung* decision and the Page Act combined had created an especially predatory environment for female Chinese immigrants. The Page Act has explicitly stated that "any woman or girl for the purpose of prostitution or any other immoral purpose."[105] Federal inspectors at West Coast ports used the Page Law to detain or bar nearly all Chinese women under the presumption that they were either prostitutes or coerced into sex work.[106] The Page Act not only criminalized Chinese women's migration, but it also criminalized Chinese femininity itself, collapsing womanhood into hypersexuality and portraying female migrants as immoral.

These acts of legitimized depiction of immorality facilitated not only a hostile political space but also a predatory social space for Chinese women. Even as Chinese women were barred at the border, there existed a thriving underground economy that trafficked Chinese women into the U.S. sex trade.[107] Because Chinese laborers were denied naturalization and often barred by local ordinance from owning property or organizing labor unions, they had little recourse against abuse.[108] Chinese women, in particular, were trapped in a vicious cycle of debt bondage: sold upon arrival to brothel-keepers, or forced into servitude to repay passage.[109] This is a textbook example of predatory inclusion; Chinese women were excluded from legal migration and protection, but included in the U.S. economy as objects of profit through coerced labor and sexual exploitation. Their inclusion was not as rights-bearing individuals, but as commodified bodies.

The *Chy Lung* decision illustrates how predatory inclusion operated through both legal and extralegal means. The California immigration commissioner assumed the 22 detained women to be morally and legally suspect by virtue of their race and gender alone. Although the Supreme Court ruled that immigration was a federal, rather than state, power, Justice Miller's opinion did not challenge the assumption that Chinese women were inherently criminal or unworthy of due process. Instead, it centralized that discriminatory power at the federal level, paving the way for future policies like the Chinese Exclusion Act of 1882.

The Long-term Impact: The Rising Concern of Federal Power on Immigration Policy

Although the Court rejected California's unilateral control over immigration, it did so by centralizing this power in the federal government without establishing safeguards against racial

[104] Hirata, Lucie Cheng, "Free, Indentured, Enslaved: Chinese Prostitutes in Nineteenth-Century America."
[105] Act of Mar 3, 1875 (Page Law), ch. 141, 18 Stat. 477 (repealed 1974).
[106] Julie A. Dahlstrom, "Commentary on *Chy Lung v. Freeman.*"
[107] Julie A. Dahlstrom, "Commentary on *Chy Lung v. Freeman.*"
[108] Julie A. Dahlstrom, "Commentary on *Chy Lung v. Freeman.*"
[109] Hirata, Lucie Cheng, "Free, Indentured, Enslaved," 14.

or arbitrary enforcement. By framing immigration control as an essential component of federal power, linked to diplomacy, war, and commerce, the Court effectively set the stage for broad and often unchecked federal authority over noncitizens. This reasoning would later justify expansive exclusion and detention powers during the Chinese Exclusion era and beyond, where entire classes of people could be barred or removed with little to no judicial oversight. The Court's ruling firmly positioned immigration as a matter of national sovereignty and foreign relations, placing it outside the reach of states and, implicitly, allowing a centralized Federal authority to regulate immigration issues. This move had long-term consequences.

In the *Arizona v. United States* (2021) case, the Supreme Court cited the *Chy Lung* decision and ruled unconstitutional sections of Arizona's SB 1070, a law to devote state law enforcement resources to enforce some aspects of federal immigration law.[110] In the majority opinion of Arizona, Justice Kenney cited Chy Lung v. Freeman. "It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States. See *Chy Lung* v. *Freeman*, 92 U. S. 275, 279 – 280 (1876)."[111] This reasoning has reaffirmed the almost explicit federal power to regulate immigration under the Supremacy Clause, which states that states cannot regulate immigration in ways that conflict with federal law.

One alarming consequence of the centralized federal authority over immigration from the Chy Lung decision is the was implemented almost entirely through executive orders, presidential proclamations, and agency rule changes. He demonstrated how centralized authority enables sweeping exclusions without legislative input. The Trump administration's immigration policies illustrate how federal supremacy in immigration, left unchecked, can be used for racialized, exclusionary, and authoritarian ends.[112] As cases like *Chy Lung* and *Arizona* failed to build protections through constitutional means, due process for those targeted by immigration law, it laid the foundation for future administrations to wield that power aggressively.

The Trump administration took advantage of the federal power on the immigration issue, significantly expanding and weaponizing the centralized federal power over immigration. For example, by invoking Title 42 during COVID-19, Trump turned a public health statute into an immigration enforcement tool, allowing mass expulsions of migrants, including children, with no asylum hearings and no due process.[113] Legal and medical scholars viewed this as one of the most egregious examples of executive overreach in modern immigration history.[114] The rise of

[110] *Arizona v. United States*, 567 U.S. 387 (2012)
[111] *Arizona,* 567 U.S. 387, at 3.
[112] Leonardo Castañeda and Katie Hoeppner, "Five Things to Know About the Title 42 Immigrant Expulsion Policy," *ACLU of New Mexico*, accessed March 22, 2022. https://www.aclu-nm.org/en/news/five-things-know-about-title-42-immigrant-expulsion-policy.
[113] U.S. Customs and Border Protection, "Title 42," *FOIA Records*, last modified February 12, 2025, https://www.cbp.gov/document/foia-record/title-42.
[114] Leonardo Castañeda and Katie Hoeppner, "Five Things to Know About the Title 42 Immigrant Expulsion Policy," *ACLU of New Mexico*.

executive power abuse in the Trump administration has raised alarm about the dominance of federal power in the immigration legal narrative.

Conclusion

Though the Court rejected California's unilateral actions, its ruling laid the groundwork for centralized, federally sanctioned exclusion. Rather than protecting migrants, *Chy Lung* enabled a national immigration regime that used legal authority to enforce racial hierarchies, paving the way for laws like the Page Act (1875) and the Chinese Exclusion Act (1882). This paper concludes that the *Chy Lung* decision established the federal government's exclusive authority over immigration regulation and legitimized a racially and gendered framework of predatory exclusion, where legal mechanisms were used not merely to control entry, but to criminalize Chinese migrants, particularly women, as threats to public morality and order. This decision laid the constitutional groundwork for subsequent federal exclusionary policies, revealing how immigration law became a tool for codifying racial hierarchy under the guise of national sovereignty.

More importantly, this paper reiterates the importance of balancing the danger posed by an authoritarian federal power in shaping immigration policy with the need to prevent fragmentation and inequities. Law as a tool of ruling, with both the power, due to its universality and legitimacy, and the function of conveying knowledge. It is, therefore, that legal power should be treated with extreme discretion. Otherwise, we see the danger of biased legal language in *Chy Lung's* case, in the aftermath of the Page Act, and in the current administration's abusive executive power.

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Yick Wo v. Hopkins, 118 U.S. 356 (1886)

Buckley v. Valeo: The History of Money in Politics and Impacts of Campaign Finance Legislation

Olivia Toomey
Edited by: Bei Jia Viggiano (Senior Editor) and Norah Buzzeo (Junior Editor)

Abstract

Buckley v. Valeo changed the landscape of campaign finance and elections with the Court's 1976 decision establishing that campaign spending is a form of protected speech under the First Amendment. Fifty years later the ruling still stands and has influenced several cases that have succeeded *Buckley v. Valeo*. With political spending protected, political action committees have gained power and influence in the U.S. political system and wealth has shaped the country's electoral outcomes. The Bipartisan Campaign Reform Act attempted to regulate money in elections in 2002, banning unregulated donations that were being used for issue ads or party specific purposes. Cases like *Citizens United v. FEC* and *McCutcheon v. FEC* both further cite *Buckley v. Valeo* as precedent, overturning BCRA and enforcing the holding of *Buckley v. Valeo*.

Introduction

In 1976, the Supreme Court decided *Buckley v. Valeo*, holding that electoral spending functions as a form of protected speech under the first amendment. This piece will analyze the role that Buckley v. Valeo has had on modern campaign finance, who has access to running for public office, and the role that Political Action Committees play in electoral decision making. The case was fundamental in our understanding of the First Amendment and what qualifies as protected speech and the Appointments Clause, detailing who the Executive branch has the power to appoint. This article follows the factual and procedural history of the case, each opinion, and how the holding of this case has impacted current campaign finance legislation and cases after this decision, including Citizens United v. FEC. Buckley v. Valeo both fundamentally shaped our current campaign finance structure and empowered Political Action Committees to fund elections outside of what any one person can reasonably accomplish.

Historical Background

Buckley v. Valeo is a foundational campaign finance Supreme Court Case, decided in 1976, that established the precedent that held electoral spending is a form of protected speech under the First Amendment. It changed the basis of how federal campaigns run and acted as a basis for later cases such as *Citizens United v. FEC,* which expanded corporate independent spending rights. The decision in *Buckley v. Valeo* establishes that anyone can spend money on behalf of a candidate without a financial cap,[115] which allows wealthier individuals to spend money to influence campaigns and gain political power, while avoiding corruption. This has had a long-term impact on both the way campaigns are run and who they are catered to, but also who

[115] Buckley v. Valeo, 424 U.S. 1 (1976).

is actually elected into office. We see the impacts of this piece of campaign finance reform today when we look at how much money is being raised by campaigns and how much is being spent externally. The decision was a per curiam decision and it was made on January 30th, 1976. This paper will explore the facts, procedural history, and decisions made in *Buckley v. Valeo* and how these outcomes impacted campaign finance and campaign practice, along with politics as a whole, in the nearly fifty years since.

After the Watergate scandal revealed illegal campaign contributions to President Nixon's campaign, there were calls for major reform to prevent future corruption. In response to Watergate, FECA (Federal Election Campaign Act) was amended in 1974 with the goal of reducing the potential for corruption in Federal Elections[116], which attempted to fundamentally change the way that elections are conducted at the federal level. The amendments that passed through Congress in 1974 include limitations on individual contributions to campaigns, limitations on personal funding of a person's own campaign, expenditure limits which restricted how much money someone could spend on behalf of a campaign, implemented mandatory disclosure for all campaign contributions and expenditures, the creation of a public campaign financing program, and creation of the FEC and subsequent FEC board appointment process. The FEC (Federal Election Commission) was created with the purpose of enforcing these new requirements in FECA and to regulate and document federal elections in a continued effort to reduce corruption. The FEC appointment process was detailed as the President Pro Tem of the Senate would appoint two commissioners, the Speaker of the House would appoint two, and the President would appoint two, and then Congress would approve all six appointments. [117]

Key Issues

There are two key issues at stake in this case. The first is whether or not the amendments to FECA in 1974 limited campaign contributions, campaign expenditures, and altered disclosure agreements in a way that violated the freedom of speech and freedom of association clauses in the First Amendment.[118] The second issue is whether or not the creation of the Federal Election Commission, specifically the process for appointment of commissioners, structurally violated the Constitution's separation of powers, detailed in the appointments clause, based on the way these new board members were detailed to be appointed and approved.[119] These two issues have many moving parts, which lead to several different opinions shared by the Court, and with a per curiam opinion to uphold parts of each question and strike down others.

First, it's important to understand the definitions of some of the campaign finance vocabulary not commonly found in everyday conversation and the key differences between each of these types of spending. The first is an individual contribution. An individual contribution is a donation to a candidate, party, or PAC from one person. In 1974, the limitations on donating to a

[116] Buckley v. Valeo, 424 U.S. 1 (1976).
[117] Buckley v. Valeo, 424 U.S. 1 (1976).
[118] Buckley v. Valeo, 424 U.S. 1 (1976).
[119] Buckley v. Valeo, 424 U.S. 1 (1976).

candidate for federal office were $1000.[120] Similar to an individual contribution is an individual expenditure. This is money spent by a person on behalf of a candidate's election but not officially aligned with them. This was also limited to $1000 when FECA's amendments passed in 1974. The difference between an individual contribution and an individual expenditure is whether or not the money is going through the campaign officially, regardless of the fact that the money is being spent with the goal of sharing the same message. Another type of spending with similar wording but different guidelines is campaign expenditures. This is money that's spent by a campaign to support their candidate's election. This money can be spent on anything from direct mail to buying voter data to paying staff;[121] as long as it's coming out of a campaign's bank account for the purposes of furthering the goal of getting their candidate elected in some way, it's a campaign expenditure. In the FECA amendments, this spending was limited to ten million dollars in the primaries and twenty million dollars in the general election for a Presidential campaign.[122] Another type of spending related to federal campaigns is personal spending. This is money that the candidate spends themselves for their campaign. This was limited to $50,000 for a Presidential campaign, $35,000 for a Senate campaign, and $25,000 for a House of Representatives campaign. Additionally, these new amendments added more comprehensive guidelines to disclosure laws. Disclosures are when a campaign or individual reports how money was spent. So, a donation to a campaign of over a hundred dollars or a campaign making an expenditure over a hundred dollars would have to be publicly reported to the FEC under these new regulations.[123] Finally, the 1974 amendments to FECA also set up a program to publicly finance campaigns to avoid private citizens paying for campaign costs and risking corruption. This meant that major party candidates could receive funding from the government for their general election campaign if they agreed not to spend or accept any private money on behalf of their campaign. These amendments were all put in place to prevent corruption or the appearance of corruption in future federal elections.[124]

Case Breakdown: Buckley v. Valeo

As soon as the amendments to FECA were passed in 1974, Buckley filed to overturn a number of the amendments. Senator James Buckley from New York sued with a mix of plaintiffs who all wanted to have more freedom within campaign finance. This group included politicians, former candidates for office, political parties, advocacy groups, and political action committees. Buckley sued, arguing that restricting political spending was restricting free speech and that violated the First Amendment, because political spending was a form of political speech.[125] He also argued that the FEC appointment process violated the Appointments Clause in Article II of the Constitution. He filed against Francis R. Valeo, who was the Secretary of the Senate at the

[120] Buckley v. Valeo, 424 U.S. 1 (1976).
[121] Buckley v. Valeo, 424 U.S. 1 (1976).
[122] Buckley v. Valeo, 424 U.S. 1 (1976).
[123] Buckley v. Valeo, 424 U.S. 1 (1976).
[124] Buckley v. Valeo, 424 U.S. 1 (1976).
[125] Buckley v. Valeo, 424 U.S. 1 (1976).

time and a number of other defendants. Valeo was also an FEC member, and the rest of the defendants included the FEC as an organization, Pat Jennings, who was the Clerk of the House of Representatives, Elmer Staats, who was the Comptroller General, and Edward Levi, who was the Attorney General.[126] Buckley filed a case in the D.C. District Court and lost. The DC Court of Appeals then affirmed the District Court's decision after Buckley appealed it. The case was appealed again, and the Supreme Court then decided to hear it. The Court heard oral arguments on November 10th, 1975, and then a few months later issued its decision on January 30th, 1976.

The Court released a per curiam opinion, which translates to a 'by the court' opinion. This meant that rather than having one justice author the majority opinion, the Court as a whole wrote the opinion. It was joined in full by Justice Brennan, Justice Stewart, and Justice Powell. There were five justices who authored opinions dissenting in part and concurring in part with the per curiam opinion. This was Justice Marshall, Justice White, Justice Blackmun, Chief Justice Burger, and Justice Rehnquist.[127]

The per curiam opinion upheld limitations on individual contributions because restrictions on individual donations to campaigns prevent corruption or the appearance of corruption. This was important because the Court wanted to avoid another Watergate and they wanted to restore public faith in the government. The goal in restricting individual contributions is to prevent anyone from being able to utilize campaign donations for a quid pro quo and gain access to a high-influence position in a future government office based on their financial support, rather than their merit. The per curiam opinion also upheld the public financing system established in FECA. The reasoning for this was that government funding of candidates running for office doesn't prevent free speech; if anything, it expands it and therefore isn't unconstitutional. They also upheld but narrowed the disclosure rules for campaigns. Contribution disclosures make political corruption more apparent. The Court narrowed the requirements to just disclose contributions and expenditures that have to do with advocacy for or against a candidate.[128]

There were also several amendments to FECA that were struck down by the court in the per curiam opinion. The first, and most impactful, was the expenditure limits. The Court decided that restricting the amount of money an individual or campaign spends to express their views does reduce and restrict their access to free speech. The Court also argued that equalizing political influence isn't a compelling enough government interest to prevent people from accessing what they've deemed free speech.[129] This is one of the most impactful decisions in this case because it not only definitely divides expenditures from contributions, but it also allows anyone to circumvent the restrictions on campaign contributions by donating to a political action committee or running an ad themselves to further the interests of a campaign as long as it's not officially through the campaign. The other piece of the FECA amendments that the Court struck down was the FEC appointment process. The appointment process misaligns with the

[126] Buckley v. Valeo, 424 U.S. 1 (1976).
[127] Buckley v. Valeo, 424 U.S. 1 (1976).
[128] Buckley v. Valeo, 424 U.S. 1 (1976).
[129] Buckley v. Valeo, 424 U.S. 1 (1976).

Appointments Clause in Article II of the Constitution. The Court held that officers exercising executive authority must be appointed consistent with Article II. In this case FEC members are appointed by the President and approved by the Senate because it carries out Executive Branch Functions[130]

In terms of the rest of the Justices, there were five dissenting in part and concurring in part opinions. This case did not fall along ideological lines, and the opinions were scattered across the various elements of the case. Because at least five justices agreed with each individual element of the per curiam opinion, that became the holding of the case. However, each of the five justices who dissented in part had something that they disagreed with in the per curiam opinion. Chief Justice Burger rejected the distinction between expenditures and contributions; he wanted to uphold broader regulations overall to protect the process from excess influence of the wealthy.[131] Justice Blackmun felt that expenditure limits should have been upheld; he argues that striking them down would reduce the effectiveness of the rest of the court's protections around campaign finance.[132] Justice Marshall agreed with the majority that contributions and expenditures can be treated differently, but argued that a candidate's own expenditures to their campaign should be more restricted and should be treated like any other campaign contribution.[133] Justice Rehnquist agreed with the majority on the treatment of contribution and expenditure limits but dissented on the issue of disclosure and reporting rules. He argued that forced disclosure violated the right to privacy and would prevent people from participating in the political process.[134] And finally, Justice White disagreed with the distinction between contributions and expenditures. He saw no constitutional basis to treat the two limitations differently. Justice Stevens recused himself from the case because he had joined the Court after oral arguments had already been heard. He was replacing Justice Douglas, who also didn't participate in this case.

Implications and Discussion

This case is somewhat different from other foundational 14th Amendment cases. However, there are some similarities in the way that this case relates to freedom of speech and how precedent acts in future cases. Similar to Masterpiece Cakeshop, *Buckley v. Valeo* deals with freedom of speech. Both of these cases share a constitutional focus on the First Amendment, especially in protecting different kinds of speech that may interfere with each other. *Buckley v. Valeo* also sets a long-standing precedent, as *Roe v. Wade* did, and is cited similarly in cases following it. Both cases have a clear line of cases following them, attempting to or successfully overturning the precedent set. While *Buckley v. Valeo* has held strong for better or for worse, *Roe v. Wade* has been overturned. This makes me wonder what could be in store for *Buckley v. Valeo*

[130] Buckley v. Valeo, 424 U.S. 1 (1976).
[131] Buckley v. Valeo, 424 U.S. 1 (1976).
[132] Buckley v. Valeo, 424 U.S. 1 (1976).
[133] Buckley v. Valeo, 424 U.S. 1 (1976).
[134] Buckley v. Valeo, 424 U.S. 1 (1976).

and if there could be a change, or if the more recent polarization of the issues of campaign finance and speech rights would prevent this case from being overturned.

Buckley v. Valeo has had a dramatic impact on not only the way that campaigns are run but also the way that we as a society think about the political power of wealthy individuals and the ethics around buying into a campaign. Legally, *Buckley v. Valeo* preceded new campaign finance legislation and set the foundation for a number of cases addressing how the FEC manages and restricts campaign donations and spending. In 2002, the Bipartisan Campaign Reform Act, also referred to as BCRA, was passed.[135] Nearly 30 years after the original passing of FECA, Congress moved to continue addressing corruption and regulate campaign finance. BCRA established several key restrictions in campaigning. It banned 'soft money,' which is money that isn't subject to disclosure requirements, from being used for campaigning purposes. This cracked down on one of the major loopholes that *Buckley v. Valeo* created. BCRA also restricted minors and Foreign Nationals from contributing to campaigns to prevent corruption. And the act created provisions around leveling the playing field where they allowed higher personal contribution limits for individuals running against candidates with multiple millions of dollars in their personal accounts, along with restricting fundraising in Federal buildings. [136]

Important Cases and Impacts

The Court proceeded to take several cases against the FEC to continue clarifying the rules around campaign finance. In 2003, just a year after BCRA was passed, the Court released the decision in *McConnell v. FEC*. This case banned soft money in elections and upheld BCRA. Senator Mitch McConnell argued that BCRA was unconstitutional under the First Amendment.[137] The Court upheld both BCRA and *Buckley v. Valeo*, with specific emphasis on restrictions against corporations' funding campaign activities. Seven years later, *Citizens United v. FEC* was decided, striking down limitations on independent expenditures by corporations and unions, which continued to change the landscape of campaign finance. *Citizens United v. FEC* was decided after the corporation produced a documentary against Senator Hillary Clinton in 2008, which brought the rules of BCRA into question.[138] *Citizens United v. FEC* and another campaign finance case in 2014, *McCutcheon v. FEC*, have restructured the provisions against corruption that were established in *Buckley v. Valeo* and FECA, and allowed the rich to fund campaigns and shape political activity in dramatic ways with relative ease. *McCutcheon v. FEC* struck down the overall campaign donation limits to multiple candidates that were established in *Buckley v. Valeo*, allowing an individual to contribute to any number of candidates' campaigns across the playing field.[139] This allows donations to drown out one candidate or fund a

[135] "Bipartisan Campaign Reform Act," Congress.gov, 2002, https://www.congress.gov/107/plaws/publ155/PLAW-107publ155.htm.
[136] "Bipartisan Campaign Reform Act," Congress.gov, 2002, https://www.congress.gov/107/plaws/publ155/PLAW-107publ155.htm.
[137] McConnell v. Federal Election Commission, 540 U.S. 93 (2003)
[138] Citizens United v. Federal Election Commission, 558 U.S. 310 (2010)
[139] McCutcheon v. Federal Election Commission, 572 U.S. 185 (2014)

candidate's opponents just to take one campaign down, rather than just supporting the candidate a donor feels should win.

One of the biggest and most widely known impacts of *Buckley v. Valeo* is that it functionally established money as having speech rights. While the court didn't specifically equate money with speech, it did reason that "limitations on how much one could spend to speak were limitations on how much one could speak". Most forms of political advertising other than volunteers and word of mouth advertising, require some form of physical elements or services to be provided, which can become expensive quickly. The Court's decision separating expenditures from contributions created this equality of money and speech.[140] This decision has reached far farther than within politics itself, equating speech and money in any sector where money is necessary to function.[141] The effect of this definition between contributions and expenditures is that spending for the purposes of communication has become protected under the First Amendment, which can become problematic if used in a morally or ethically dubious manner.

These limits on different types of campaign spending also had a major impact on utilizing soft money in campaigns.[142] *Buckley v. Valeo*'s ruling led to a significant rise in unregulated donations on behalf of parties and campaigns. After the ruling in this case, both major parties nearly doubled their earnings in soft money. [143] Issue ads have also become a huge part of campaigns outside of the legal entity of the campaign itself. Parties and other groups have used soft money to advertise on a specific issue, while clearly but not explicitly advertising for or against a certain candidate. Soft money is more prevalent in presidential campaigns because they are such expensive ventures in the modern era of campaigning, but soft money is also used in lower-level campaigns throughout the political system.[144] Soft money has also been used to effectively undermine the limits set in *Buckley v. Valeo*. Soft money allowed individuals to contribute to a campaign or candidate, essentially in an unlimited way, through spending money around a campaign rather than directly donating to it.[145] This has also allowed corporations and unions to make donations and spend money around campaigns rather than directly through them to circumvent the restrictions on direct campaign funding.

PACs or Political Action Committees have also become a major funding source for campaigns after *Buckley v. Valeo*. When this case increased restrictions on individual

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[140] Buckley Valeo and Joel Gora, "VALEO: A LANDMARK of POLITICAL FREEDOM," 2000, https://www.uakron.edu/law/lawreview/volumes/v33/docs/gora331.pdf.
[141] Brennan Center for Justice, "A Critical Look at Buckley v. Valeo," 1998, https://www.brennancenter.org/our-work/research-reports/campaign-finance-reform-constitution-critical-look-buckley-v-valeo.
[142] Buckley Valeo and Joel Gora, "VALEO: A LANDMARK of POLITICAL FREEDOM," 2000, https://www.uakron.edu/law/lawreview/volumes/v33/docs/gora331.pdf.
[143] John Dunbar, "Soft Money Primer," Center for Public Integrity, September 26, 2002, https://publicintegrity.org/politics/soft-money-primer/.
[144] Brennan Center for Justice, "A Critical Look at Buckley v. Valeo," 1998, https://www.brennancenter.org/our-work/research-reports/campaign-finance-reform-constitution-critical-look-buckley-v-valeo.
[145] Brennan Center for Justice, "A Critical Look at Buckley v. Valeo," 1998, https://www.brennancenter.org/our-work/research-reports/campaign-finance-reform-constitution-critical-look-buckley-v-valeo.

contributions but not expenditures, it allowed people to pour money into PACs and Super PACs, which could support candidates externally.[146] While PACs and Super PACs have allowed large-dollar donors to get around campaign funding restrictions, they also allow a large number of small-dollar donors to contribute to a campaign or set of campaigns without being widely involved in the political process. PACs allow individuals who are interested in supporting a specific issue or group of people to donate to the PAC, and then that PAC spends on behalf of whoever they feel deserves their support. PACs can also have negative impacts on corruption. Candidates are now increasingly worried about gaining PAC support rather than support from the public. This is because of how much money PACs can spend on their behalf in a completely unlimited way. [147] This can create situations where an issue becomes more or less important to a candidate because of their funding. Special interest PACs have also risen, allowing PACs to spend a large amount of money on a candidate, hoping they will support their issue area once in office. And then candidates are motivated to support that issue area in hopes that the PAC will support them again when it comes time for reelection. PAC money has become a completely separate funding stream for campaigns that the justices didn't imagine when the decision was made on *Buckley v. Valeo* in 1976. PACs alone contributed 452.8 million dollars to candidates running for Federal office in the 23 - 34 campaign cycle.[148]

Conclusion

Buckley v. Valeo was fundamental to shifting the U.S. political campaign system by establishing external spending on behalf of a candidate without a cap. This case directly allowed individuals to gain political power and influence electoral outcomes with their dollars and gave wealthy individuals and corporations incredible amounts of power. When linking speech and campaign spending, the holding in *Buckley v. Valeo* changed who gets to make political decisions in this country and influenced several cases and policies after the case's decision. BCRA attempted to reverse this holding by banning soft money which was then upheld a year later by McConnell v. FEC. Donation limits were later struck down with McCutcheon v. FEC and the campaign finance landscape continued to change. PACs and SuperPACs today have given power to large dollar donors and allowed them to circumnavigate these contribution limits to influence elections.

Overall, *Buckley v. Valeo* created the foundation for campaign finance regulation along with FECA, and it changed the way that we understand the connection between speech and money in politics. The way that funding operates and the control that the wealthy have over our

[146] Brennan Center for Justice, "A Critical Look at Buckley v. Valeo," 1998, https://www.brennancenter.org/our-work/research-reports/campaign-finance-reform-constitution-critical-look-buckley-v-valeo.
[147] Brennan Center for Justice, "A Critical Look at Buckley v. Valeo," 1998, https://www.brennancenter.org/our-work/research-reports/campaign-finance-reform-constitution-critical-look-buckley-v-valeo.
[148]"Statistical Summary of 24-Month Campaign Activity of the 2023-2024 Election Cycle - FEC.gov," FEC.gov, 2023, https://www.fec.gov/updates/statistical-summary-of-24-month-campaign-activity-of-the-2023-2024-election-cycle/.

government today can be traced right back to Buckley v. Valeo, and hopefully the Court will someday readdress this complicated issue area to continue regulating campaign finance and maintain integrity in our electoral system.

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Judicial Abuse of Authority and Otherness: Dred Scott v. Sandford, 60 U.S. 393 (1856)

Ruth Poku
Edited by: Hannah Model (Senior Editor)

Abstract

This article explores the legal architecture established by *Dred Scott v. Sandford (1856)*. Using the constitutional conflicts central to *Dred Scott v. Sandford,* this article explores how judicial interpretation and theories of state sovereignty established enduring precedents. By examining the systemic link between application of common law precedents and modern judicial, this article dissects the mechanisms by which constitutional interpretation can be weaponized for political gain. This article focuses on Chief Justice Taney's categorical denial of African American citizenship, specifically how his opinion utilized a 'result-oriented originalism' to enact a significant historical revision. This case illustrates how this judicial approach serves as a form of historical revision, setting a precedent for using 'original intent' to justify contemporary exclusionary policies. Using *Dred Scott v. Sandford* as a case study to explore the erosion of the 'apolitical' judiciary, this article identifies how 'result-oriented originalism' reflects a systemic pattern, both historical and contemporary, wherein the Supreme Court, despite its theoretical position as a non-partisan arbiter, is utilized as a tool by the executive branch during times of contested doctrine of birthright citizenship.

Introduction

Dred Scott v. Sandford, 60 U.S. 393 (1856) is arguably the most infamous case out of the Supreme Court. The result-oriented originalism applied in this case has left a profound mark on American jurisprudence and culture. Born into enslavement in Virginia in 1799, Dred Scott's travels through free territories would become the focal point of one of the most consequential jurisdictional disputes in American legal history. By assuming a quasi-legislative function, the Court exceeded its traditional jurisdictional boundaries, attempting to resolve deep-seated sectional antagonism through judicial fiat rather than constitutional arbitration. Legal historians often characterize *Dred Scott v. Sandford* as a departure from the more restrained application of judicial review seen in the wake of *Marbury v. Madison*, setting the contentious precedent of the Court as a primary actor in partisan socio-political conflicts. The Court's establishment of rigid racial demarcation codified a system of racial stratification that continues to reverberate in American society.

Key Facts & Procedural History of the Case

When John Emerson purchased Scott in 1820, Scott would accompany Emerson on his travels to Illinois and Wisconsin, both territories that outlawed slavery in accordance with the Missouri Compromise of 1820. Scott, along with his wife Harriet Scott and their two children, followed John Emerson back to Missouri and remained enslaved. When John Emerson died, his

widow Irene Emerson inherited Dred Scott and his family. Scott attempted to buy his family's freedom from Mrs. Emerson, and she refused. As a result, Dred and Harriett Scott filed separate freedom suits to the St. Louis Circuit Court in June of 1847, and their suits would be combined into one, with Scott being the sole plaintiff. Scott contended that, under the Missouri Compromise of 1820, since he had spent significant time in free states, he was a free man.

Like all freedom suits, the question that approached the St. Louis Circuit Court was one of emancipation: was Dred Scott and his family free or enslaved? The St. Louis Circuit Court initially ruled against Scott, as the court could not prove that Scott was enslaved illegally. Three years later, the Missouri Supreme Court ordered the circuit to take on the case again, and the circuit court then ruled in favor of Dred Scott. This decision upheld the circuit court's dying "once free, always free" precedent, established in *Winny v. Whitesides* (1824), which held that once enslaved people entered free territory, they were free even if they returned to Missouri.[149]

Two years later, The Missouri Supreme Court reversed the circuit court's decision, overturned the "once free, always free" precedent,and the Scotts lost their freedom. The Court felt that Missouri did not have to honor the emancipation laws in other states that opposed its own. As public opinion shifted and Missouri became more pro-slavery, the judge reversed the lower court's decision with the following statement: "Times now are not as they were when the former decisions of this subject were made." [150]

When ownership of Scott's family was transferred to Emerson's brother, John Sanford of New York, Sanford filed a lawsuit in federal court, invoking diversity jurisdiction. The diversity jurisdiction principle can be applied provided specific requirements are met, including that the parties are citizens of different states. John Sanford argued that Dred Scott had no right to sue under Article III of the Constitution because Scott was not a citizen. The jury held that it must accept Missouri's decision, as Scott was already deemed a slave in Missouri law. Scott appealed to the United States Supreme Court in a nine-year legal battle.

The Supreme Court

Dred Scott v. Sandford reached the Court in February 1857 under the leadership of Chief Justice Roger B. Taney, a former slaveholder who viewed the preservation of Southern social structures as a constitutional imperative. The Court's alignment in the Dred Scott case was deeply influenced by sectional loyalties and personal connections to slavery,[151] a reflection of how polarizing the slavery question was. The composition of the Taney Court itself reflected this polarization: seven of the nine justices–Chief Justice Roger B. Taney, and Justices Wayne, Catron, Daniel, and Campbell–were appointed by pro-slavery presidents. Five of those seven were elected by the same president, Andrew Jackson, who quietly owned enslaved people during his tenure. Five justices on the court had come from slaveholding families, and four owned enslaved people when they had decided on *Dred Scott.*

[149] It, Missouri Secretary of State -. n.d. "Before Dred Scott History of Freedom Suits." https://www.sos.mo.gov/archives/education/aahi/beforedredscott/history_freedomsuits.
[150] Dred Scott v Irene Emerson
[151] "Roger B. Taney," Oyez, accessed December 18, 2026, https://www.oyez.org/justices/roger_b_taney.

The Issue Posed

Rather than addressing the substantive legal arguments regarding Scott's status in free territory, the Court reframed the litigation as a threshold question of jurisdictional standing and constitutional citizenship.[152] Authoring the opinion, Chief Justice Taney states that the only matter before the court is "whether the descendants of such slaves [...] are citizens of a State."[153] In a 7-2 opinion, the Court held that Dred Scott was not included in the original meaning of "citizen" and therefore could not sue in federal court.[154]

The Majority Opinion

Justice Taney looks to the Constitution and English common law to determine the holding. The legal basis of his argument lies within the first eight words of the Constitution: "We the People of the United States…" Taney held that African enslaved people could not have been included in the "people" the Framers' intended to address because they were regarded solely as property at the time the Constitution was ratified[155]. Throughout his reasoning, Chief Justice Taney
states that Black inferiority is a key reasoning as to why the Framers' did not include enslaved Africans:

> "They had for more than a century before been regarded as beings of **an inferior order**, and altogether unfit to associate with the white race, either in social political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and **lawfully be reduced to slavery for his benefit** [emphasis added]."[156]

In his opinion, Taney weaponized common law precedents to portray a pro-slavery constitutional order. This characterization rested on the logic that the Framers' failure to explicitly define citizenship for African Americans constituted a deliberate and perpetual denial of their legal personhood. Justice Taney proceeds to take the decision one step further to review the constitutionality of the Missouri Compromise–a law that had already been repealed by the Kansas-Nebraska Act.[157] Justice Taney reframes the initial issue of emancipation into one of property rights, another sidestep from the initial issue of emancipation. Justice Taney held that The Missouri Compromise was unconstitutional

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[152] Dred Scott v Sandford, 60 U.S. 469 (1856)
[153] B. Taney, Roger. Dred Scott v Sandford (U.S. Supreme Court March 6, 1854). Baker, Jean H. *James Buchanan: The American Presidents Series: The 15th President, 1857-1861*. Macmillan, 2004.
[154] Dred Scott v Sandford, 60 U.S. 469 (1856)
[155] Dred Scott v Sandford, 60 U.S. 469 (1856)
[156] Dred Scott v Sandford, 60 U.S. 469 (1856)
[157] *Kansas-Nebraska Act (1854)*. (2021, July 12). National Archives. http://www.archives.gov/milestone-documents/kansas-nebraska-act

because it impeded on the Fifth Amendment rights of slaveholders.[158] Dred Scott, therefore, could not be free if he went to another state, as his freedom had the equivalency of revoking Sanford's property.

Dissenting Opinions

Justice Curtis and Justice McClean write similar but separate dissents. First, they note the gross overstep of the Court. In his dissent, Justice McClean writes that much of the decision was non-binding *obiter dicta*[159]. Mclean argued that once the court determined Scott lacked jurisdictional capacity to sue, it was procedurally obligated to dismiss the action rather than issue a substantive ruling on the Missouri Compromise.[160] McClean dismantled Tany's historical narrative by highlighting the fact that African-American men possessed the right to vote in five out of thirteen states.[161] McClean argues that the Framers could not have intended a categorical exclusion from citizenship if they simultaneously permitted states to grant rights of citizenship to African Americans.[162]

In his dissent, McClean utilized the Northeast Ordinance as evidence of a historical consensus regarding congressional jurisdiction over the territories.[163]In the Northwest Ordinance, Congress laid out the process of admitting new states and guaranteeing civil liberties, as well as limiting the expansion of slavery into new territories. He posited that the Framers' failure to challenge the Ordinance's anti-slavery provisions served as a tactic endorsement of federal power to regulate such institutions, validating the constitutionality of the Missouri Compromise. This rebuttal was complemented by Justice Curtis' jurisdictional analysis, which rejected Taney's racial litmus test for citizenship.[164] Curtis maintained that the *jus soli* principle precluded the Court from denying Scott's status based on ancestral origins, writing: "Every free person born on the soil of a State, who is a citizen of a State by force of its Constitution or laws, is also a citizen of the United States."[165] Under this framework, because Dred Scott was born on American soil, his citizenship was a matter of constitutional fact, regardless of racial classification.

Concurrences

All six Justices who joined the opinion wrote a separate concurrence varying in proslavery rationales. Justice Grier, whose concurrence was only three-sentences long and lacked in detail, joined the majority under the pressure of President Buchanan. Justice Nelson slightly differed slightly from the majority opinion; while he did not explicitly disagree that Dred Scott

[158] Dred Scott v Sandford, 60 U.S. 469 (1856)

[159] Dred Scott v Sandford, 60 U.S. 469 (1856)
[160] Dred Scott v Sandford, 60 U.S. 469 (1856)
[161] Dred Scott v Sandford, 60 U.S. 469 (1856)
[162] Dred Scott v Sandford, 60 U.S. 469 (1856)
[163] Dred Scott v Sandford, 60 U.S. 469 (1856)
[164] Dred Scott v Sandford, 60 U.S. 469 (1856)
[165] Dred Scott v Sandford, 60 U.S. 469 (1856)

should remain enslaved, he argued that Taney's denial of Black citizenship was unnecessary to the case.[166] When faced with the broader constitutional question, Nelson avoided it altogether, stating it is "not necessary to pass upon the question."[167] The remaining four Justices were largely aligned with Chief Justice Taney, reaffirming his holding with focuses on different legal facets, such as property rights and federal overreach. [168]

A common theme within all concurrences, however, is the assertion that every argument made in the opinion was necessary. Justice Grier writes in his three-paged concurrence: "The record shows a prima facie case of jurisdiction, requiring the court to decide all the questions properly arising in it."[169] In a similar vein, Justice Wayne asserts that every element is of equal importance, and that "nothing was not necessary for the judicial disposition of it, in the way that it has been done, by more than a majority of the court." [170]

Questions of necessary judgement pervade the concurrences and dissents alike. The concurring justices likely found it vital to include these notes on "necessary judgement," for it was clear to them and the American people that Chief Justice Taney had exceeded his judicial mandate.

Overstepping Judicial Bounds

After determining the Court lacked jurisdiction on the grounds that Scott, as a Black man, was not recognized as a citizen,Taney nonetheless proceeded to rule on the constitutionality of the Missouri Compromise. Why would Justice Taney go as far to overturn the Missouri Compromise without the authority? History explains the overstep in authority: Justice Taney sought to keep the Union alive. Historians claim that President-elect James Buchanan began working to influence the outcome of the Dred Scott decision as early as February 1857.[171] Buchanan, who was already aware of the holding two days prior to its release, sent letters to Justice Grier and Catron to ensure they would sign on to the decision.[172] Taney's narrow interpretation of the Constitution, in addition to his disregard for the historical arguments presented in the dissent, exemplifies what legal scholars refer to as "result-oriented originalism," or the practice of selectively invoking the Framers' words to justify a predetermined outcome.[8] Judicial abuse becomes easy when a judge substitutes personal interests for genuine constitutional analysis under the guise of original intent. The collusion with the executive branch, as well as the result-oriented originalism Taney evokes, puts the legitimacy of the Supreme Court in a precarious place and establishes a trend of judicial abuse.

Trend of Judicial Abuse of Authority

[166] Dred Scott v Sandford, 60 U.S. 469 (1856)
[167] Dred Scott v Sandford, 60 U.S. 458 (1856)
[168] Dred Scott v Sandford, 60 U.S. 469 (1856)
[169] Dred Scott v Sandford, 60 U.S. 469 (1856)
[170] Dred Scott v Sandford, 60 U.S. 469 (1856)
[171] Baker, J. H. (2004). *James Buchanan: The American Presidents Series: The 15th president, 1857-1861*. Macmillan.
[172] Harvard Law Review. "The Anticanon." *Harvard Law Review*, 24 Mar. 2023, harvardlawreview.org/print/vol-125/the-anticanon.

Dred Scott's decision begins a trend of the Court exceeding its proper judicial role to deeply influence political issues under the guise of judicial review, especially in times of polarization. Political scientists would describe the decisions and context surrounding Scott as somewhat similar to *Dobbs v. Jackson Women's Health Organizations, 597 U.S. 212 (2022)*.[173] In an article titled "The Supreme Court, Abortion, and the New Dred Scott," Professor David Hultz writes on the parallels of the Dred Scott and Dobbs decision,particularly that both cases contract individual rights and are born in highly polarized moments in history.

Both cases evoke result-based originalism, as they justify the removal of rights by appealing to history and tradition while disregarding colonial histories that support those rights.[174] Additionally, both cases had collaborative efforts with the executive branch. Both the Trump administration in 2022, which actively sought a Justice who would overturn *Roe v. Wade*, and the Buchanan administration, before the Civil War, turned to the Supreme Court to resolve highly contentious political issues.[175] In both cases, the Court issued decisions that aligned with the executive branch's objectives on these divisive issues. The pattern marks a trend of the Court exceeding its proper judicial role by intervening in deeply political disputes under the guise of judicial review.

Blackness as Otherness

Justice Taney uses concepts of Blackness to contrast with national ideas of America, marking Black people as America's 'Other.' Through judicial abuse and ahistorical interpretations of the Constitution, the Court fragments national identity by a rigid color line, a legacy that will persist for years. Benedict Anderson defines national identity as an "imagined political community" that is imagined as being "both limited and sovereign." These communities are "limited" by "finite, if elastic, boundaries, beyond which lie other nations." According to Anderson, this sense of limitation relies on an "Other," as nations define their own identity by differentiating themselves from those outside their boundaries.[176]

Chief Justice Taney raises fundamental questions about the nature of American national identity in his opinion. He writes, "The question before us is, whether the class of persons described in the plea in abatement compose a portion of [We the People], and are constituent members of this sovereignty?"[177] The seemingly simple question of whether Dred Scott, a man born on American soil, was a citizen ultimately reinforced the prevailing public view that Black people were the 'Other' in American society. By denying African-Americans a place within American national identity, Justice Taney explicitly defined the boundaries of nationhood such that whiteness became an essential criterion for citizenship and belonging in the United States.

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[173] *Dobbs v Jackson Women's Health Organizations*, 597 U.S. 215 (2022)
[174] Amanda Trau, The Superficial Application of Originalism in Dobbs: Could a More Comprehensive Approach Protect Abortion Rights?, 50 Fordham Urb. L.J. 867 (2023) Anderson, Benedict. *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. Verso Books, 2006.
[175] "Trump Promised Judges Who Would Overturn Roe V. Wade." *Washington Post*, 22 Mar.
[176] Trau, "Superficial Application of Originalism," 870.
[177] Dred Scott v Sandford, 60 U.S. 469 (1856)

To predicate citizenship based on race meant there was no possible naturalization process that African-American people could go through. 'Proving oneself worthy' of or entitled to citizenship was an impossible task, leaving African-Americans forever bound to the periphery of imaginary communities that is the United States. Not only does it predicate whiteness as the in-group of American society, but the paternalistic language reestablishes whiteness at the top of the racial hierarchy.

The Otherness imposed on African-Americans materializes itself clearly in *Plessy v Ferguson*, 163 U.S. 537 (1896), which upheld state-imposed racial segregation 42 years after *Scott v Sandford*. Plessy is one of many cases that, while not explicitly citing *Dred Scott*, rely on its principles to further marginalize Black people in America. One could even theorize the ratification of the Fourteenth Amendment as proof of Blackness as Otherness in society. The Constitution is a document founded on principles of individual rights and liberties. If America has to include an amendment to secure Black rights within the framework of the Constitution, one could conclude that Black people were not included in the Constitution in the first place.

Conclusion

Dred Scott v. Sandford (1856) has had an immense impact on the Court and society. In a landmark decision, the Court ruled that African-Americans, regardless of free or enslaved, were not citizens, marking African-Americans a nationless people. Fortunately, Dred Scott died free, but the case spans much more than individual freedom. In colluding with President Buchanan and evoking result-based originalism, the Taney Court began a trend of abuse of judicial review that has had a history of harming marginalized people, especially in times of heightened polarization. As a result of the blatant judicial abuse of authority, the Court fragmented national identity based on race. As identities like immigration status and ethnicity continue to threaten Taney's notions of white America, monitoring judicial trends of the Court and the role it plays in creating national identity will be crucial for marginalized people and their rights in America.

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Making Illegals: The Law's Role in Shaping Perceptions of Illegality

Natasha Nagarajan
Edited by: Clara Tupitza (Senior Editor) and Mia Wolniak (Junior Editor)

Abstract

This essay investigates the social construction of legality, specifically the project of "making illegals" in which immigrants have the identity of illegality imposed upon them. The essay uses the idea of "the social" -behavior, attitude, perception, and ways of understanding the world- to demonstrate how the illegality is not natural, but something created by both the government and the population. The essay argues against the innateness of illegality, and shows that people are imagined as being undocumented or non-citizens regardless of actual legal status. The conflation of race with illegality has produced a belief that certain populations are not part of the citizenry, specifically Mexicans and Central Americans in the current context, but at one point this sentiment was also directed mainly towards South and East Asians. The U.S. government, whether that be Congress, the President, or the Supreme Court are all participants in forging illegality in the American imagination. Their role should not be forgotten, as it is their actions that have facilitated the rise of anti-immigrant ideology and the misconception of being an undocumented immigrant that has resulted in their dehumanization.

Introduction

The social construction of legality encompasses the question of who gets to decide what is legal, and more specifically, *who* is legal. The courts, Congress, and the President are exclusively powerful in determining legality, and in turn, illegality because the general population does not have the ability to create legislation or decide on the legal standings of executive orders or laws. In the context of immigration law, the power to sort human beings using the language of legality produces the separation of human beings into categories of "illegal" or "legal". Through assigning morality to the labels of "legal" and "illegal" the conflation of lawfulness with goodness shapes people's attitudes towards immigrants, making it more difficult to build concern about the human rights of undocumented immigrants who are portrayed negatively on the basis of their unlawful status. The social construction of legality links itself to race, ethnicity, and country of origin. As a result, legislation, executive orders, Supreme Court cases, and immigration law enforcement reveal racial biases that hinder fairness and equality, and provide the grounds for racial profiling and discrimination. Given the many concrete examples of times the law, executive orders, and the justice system targeted marginalized populations, for example Dred Scott v. Sanford, Executive Order 9066 which resulted in the internment of Japanese Americans, or the Chinese Exclusion Act of 1882, it seems important that as members of the American polity and society, we continue to question existing laws. In simple terms, the United States has historically passed laws that explicitly discriminate against people on the basis of their race, religion, gender or sexuality, shaping public perceptions of good versus bad, and illegal versus legal. The government and courts have

enacted legal violence onto these populations by denying them their human rights that they should have access to on the basis of their humanity. Historical retrospection allows us to acknowledge the harsh reality of the U.S.'s past, yet this effort must be continued into the present.

The Social Construction of Law

Douglas Litowitz argues that the perception of migrants as "illegal" is both a social and legal construction. When scholarship refers to something as a social construction, it typically means that a practice or institution is not innate.[178] The law is more than just a top down approach; it is the force that creates social relationships, and molds the community into behaving in specific ways.[179] If we can understand that law is created, then we can begin to explore how the quality of being "illegal" is also something created and assigned to undocumented people. René D. Flores and Ariela Schachter expand upon this idea by invoking the term "social illegality" in which people are imagined as illegal regardless of their actual legal standing in the United States.[180] Similarly, Evelyn Nakano Glenn introduces the concept of "liminal legality" which is a space that many undocumented individuals, particularly students, occupy. They have some legal protections, but also cannot be cleanly defined in terms of their legal status because of the nature of being an undocumented person in a nation with constantly changing legislation about undocumented individuals.[181]

Citizenship, marital status, employment, housing, and property are all connected to legality in some form.[182] The law brings a specific social arrangement into being, and as a result is also interconnected to other forms of belief and relationship-making, such as religion and ideology.[183] The law, which is produced by Congress with collaboration from the Executive, is also reaffirmed by the Supreme Court, and so the law is a state-supported entity that determines a specific way of existing and being in a society.[184] This specific way of being is threatened by illegal immigration because, as Doty explains, the process of unregulated immigration unsettles political authority, social life, and the law itself, transgressing upon the institutions the state would like to define as given.[185] As ideology cannot be separated from law making, as exemplified by the Dred Scott ruling that denied citizenship and governmental protection to enslaved people, one of the most momentous ideological impacts is that of racism within the law.

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[178] Ian Hacking, *The Social Construction of What?* (Harvard University Press, 1999), 6.
[179] Doug Litowitz, "The Social Construction of Law: Explanations and Implications," *Studies in Law, Politics, and Society* 21 (2000): 218, 219
[180] René D. Flores and Ariela Schachter, "Who Are the 'Illegals'? The Social Construction of Illegality in the United States." *American Sociological Review* 83, no. 5 (2018): 840, https://www.jstor.org/stable/48588674.
[181] Evelyn Nakano Glenn, "Constructing Citizenship: Exclusion, Subordination, and Resistance," *American Sociological Review* 76, no. 1 (2011): 12, http://www.jstor.org/stable/25782178.
[182] Litowitz,"The Social Construction of Law: Explanations and Implications," 219.
[183] Litowitz, "The Social Construction of Law: Explanations and Implications," 220.
[184] Litowitz, "The Social Construction of Law: Explanations and Implications," 222.
[185] Roxanne Lynn Doty, "The Double-Writing of Statecraft: Exploring State Responses to Illegal Immigration." *Alternatives: Global, Local, Political* 21, no. 2 (1996): 178, http://www.jstor.org/stable/40644967.

Depending on one's physical appearance, they are assumed as illegal based on stereotypes and regardless of their actual legal status.[186]

Making Illegals

Flores and Schachter's study tests this theory by asking participants to determine from a set of two random photos who is "illegal/undocumented," and who is not. The results show that immigrants from Latin American countries, the Caribbean, Africa, and the Middle East are viewed as suspicious while those from Europe and Asia are less likely to be perceived as an undocumented individual.[187] Illegality and foreignness are something that people attempt to infer from the outside. The idea of something being a social construction, as with race or legality, implies that it is created by people's behavior. As evidenced by the study from Flores and Schachter, behavior and how people interact with and construe specific populations effectively make them illegal, or make them of a certain race. Flores and Schachter argue that many members of the U.S. public, especially white Americans, are distanced from knowing and socializing with undocumented immigrants. Therefore, they rely on social stereotypes from their community as well as from political figures to educate themselves on undocumented individuals, leading to skewed and unrealistic understanding of who is actually undocumented in the United States.[188]

Another manner of "making illegals" stems from the construction of the border between two nation-states and the legislation that enforces the border. The state, according to Doty, is reproduced as a permanent, naturally existing entity, while in actuality it is being continuously transformed and changed.[189] Immigration law assists in reproducing ideas about what and who exists beyond the imagined safety of the United States border by using legislation as a way to determine who can be incorporated into the population and who is a potential danger. The making of the "illegal alien" as an abstract concept distinct from individual personhood has created hysteria surrounding who could be an illegal alien. For example, the Border Patrol can identify when someone physically crosses the border between the United States and Mexico if they patrol a specific area of land. The concern surrounding how to determine illegality within U.S. borders originated from the Border Patrol's perceived inability to determine illegality based on physical appearance once an undocumented individual is within domestic territory.[190] As the United States was, and remains, a nation of diverse peoples from different ethnic backgrounds, the issue of determining who is an alien and who is not has become more complicated because it is impossible to distinguish between non-citizen and citizen in a nation where the two classes could reside in the same community.[191] The border thus grows beyond a physical landmark, and into a parasitic attachment that embeds itself within the bodies of people who *could* be

[186] Flores and Schachter, "Who Are the 'Illegals'? The Social Construction of Illegality in the United States," 840.
[187] Flores and Schachter, "Who Are the 'Illegals'? The Social Construction of Illegality in the United States," 848.
[188] Flores and Schachter, "Who Are the 'Illegals'? The Social Construction of Illegality in the United States," 843.
[189] Doty, "The Double-Writing of Statecraft: Exploring State Responses to Illegal Immigration," 185.
[190] Mae M. Ngai, "Deportation Policy and the Making and Unmaking of Illegal Aliens," In *Impossible Subject: Illegal Aliens and the Making of Modern America - Update Edition*, Mae M. Ngai (Princeton University Press, 2004), 63.
[191] Ngai, "Deportation Policy and the Making and Unmaking of Illegal Aliens," 63.

immigrants, or could be unlawfully in the United States. This directly correlates with Medovoi's topic of ensoulment, in which it is impossible to truly know who belongs and who does not, and as a result we must act with caution regarding everyone that we interact with.[192]

Ngai goes on to argue that the immigration legislation of the 1920s also yielded the creation of illegal immigration by reaffirming the U.S-Mexico border in new and more restrictive ways.[193] The Border Patrol can be credited with producing the conditions of racism that led to the formation of Mexicans as illegal aliens, an idea that persists in the collective imagination of U.S. citizens when conceptualizing immigrants and immigration. The Border Patrol originated the interrogation and deportation of Mexicans, regardless of the fact that in most cases their actual legal status allowed them to work in the United States on a temporary basis, they did not need a passport or visa to enter the United States, and they were considered part of the Western Hemisphere and not bound to the immigration quotas that Europeans and Asians were held to based off of the 1924 Johnson-Reed Act.[194] The prosecution of Mexican laborers in the early 1920s led to the conception of the undocumented Mexican immigrant, who crossed the border for employment opportunities and to make a better life than what was possible in their country of origin. This portrayal persists today, with racial profiling being a prolific issue in 21st century immigration law enforcement that targets certain populations under the assumption of their imagined illegality.[195] The border supersedes its physicality, and becomes a shifting label that attaches itself to the bodies of immigrants who are perceived as illegal. Even space is determined as a "social construction", but Doty argues it is forced to appear as natural, lest it begin to reveal the state's fear of any challenge to its legitimacy.[196]

Aside from the judicial system, another form of control that is considered important as a case study in this article are the roles of executive orders. The failures of Congress to create reforms in immigration law that address the legal visa system has left the President to insert their values on immigration policy through executive orders.[197] The role of the President in "making illegals" should not go unrecognized. The President has a prominent role in shaping the perception of migrants through their language and attitude toward immigration, and this history of the President's role is analyzed by Donato and Amuedo-Dorantes. The authors argue that as Congress has been stagnant in passing comprehensive legislative reforms to accommodate the changes in immigration to the United States, the President has used their unique power of legislating through executive orders to make changes that reflect their specific beliefs.[198] Their

[192] Leerom Medovoi, "Introduction: Ensoulment: A Strategy of Racial Power," in *The Inner Life of Race: Souls, Bodies, and the History of Racial Power* (Duke University Press, 2024), 23.
[193] Ngai, "Deportation Policy and the Making and Unmaking of Illegal Aliens," 67.
[194] Ngai, "Deportation Policy and the Making and Unmaking of Illegal Aliens," 70, 71.
[195] Vargas, Edward D., and Gabriel R. Sanchez. 2025. "Racial profiling by ICE will have a marked impact on Latino communities | Brookings." Brookings Institution. https://www.brookings.edu/articles/racial-profiling-by-ice-will-have-a-marked-impact-on-latino-communities/.
[196] Doty, "The Double-Writing of Statecraft: Exploring State Responses to Illegal Immigration," 175-176.
[197] Katharine M. Donato and Catalina Amuedo-Dorantes. "The Legal Landscape of U.S. Immigration: An Introduction," *RSF:The Russell Sage Foundation Journal of the Social Sciences* 6, no. 3 (2020): 2, https://doi.org/10.7758/RSF.2020.6.3.01.
[198] Donato and Amuedo-Dorantes, "The Legal Landscape of U.S. Immigration: An Introduction," 1.

earliest example begins with President Truman in 1945, who allocated visa quota as a result of the war's displacement on many communities abroad.[199] Other presidents include: Eisenhower and his policies on refugees in the 50s and 60s, John F. Kennedy's decisions with respect to Cuban refugees, and President Gerald Ford and Jimmy Carter who used executive orders to open the United States to refugees from Southeast Asia.[200] More recent examples also include Ronald Reagan protecting minor children and Nicaraguans from deportation, George H. W. Bush protecting Chinese nationals from deportation, and Bill Clinton giving Temporary Protected Status (TPS) to Salvadoran and Haitian refugees.[201] From 2003 - 2020 when this article was written, the authors include President Obama's creation of DACA in 2012, and then Donald Trump's 2017 plans to change policy on border security, expand deportation proceedings, and deny visas to individuals on the basis of their country of origin.[202] This is to show how the ability of the President to alter immigration policy is not a novel idea, and that presidents across spectrums of belief have all utilized this power to address the specific immigration issues of their time.

Conclusion

Different populations have been categorized as "illegal" over time, and while the targets have changed, the United States perpetuates an idea that immigrants bring crime, disease and disorder to the country, while also siphoning away resources that more "deserving" U.S. citizens are then deprived of. In Asian American studies, scholars agree that anti-immigrant sentiment towards Chinese immigrants in the late 1880s has been revitalized to target Mexicans and Central Americans in the 1990s and onwards.[203] In the present context, the U.S. government's deployment of Immigration and Customs Enforcement (ICE) agents to target and round up undocumented immigrants has proven how illegality is socially understood to have a "look". Not only is ICE complacent in blatant racial profiling, but even people who are U.S. citizens are targeted and taken into custody by ICE regardless of their legal status.[204] The fact that race is used as a greater indicator of U.S. citizenship status than actual documentation is telling of how relevant social attitudes towards immigrants are in influencing governmental actions that produce severe consequences. Current events have only proven how the law can be used as a weapon by the government to enforce the specific type of population they deem valuable and worthy of being a part of the citizenry.[205]

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[199] Donato and Amuedo-Dorantes, "The Legal Landscape of U.S. Immigration: An Introduction," 3.
[200] Donato and Amuedo-Dorantes, "The Legal Landscape of U.S. Immigration: An Introduction," 2, 3, 4.
[201] Donato and Amuedo-Dorantes, "The Legal Landscape of U.S. Immigration: An Introduction," 5.
[202] Donato and Amuedo-Dorantes, "The Legal Landscape of U.S. Immigration: An Introduction," 7, 8.
[203] Kathryn K. Imahara, "We Are the 'Illegal Immigrants,'" *Asian Pacific American Law Journal* 2, no. 1 (1994): 107, http://www.jstor.org/stable/45456725.
[204] American Immigration Council, "How ICE Went Rogue: A Brief Analysis of the Legal Authorities Governing ICE and CBP Operations — and How They're Being Undermined and Violated by Policy and Practice" (American Immigration Council, 2026), https://www.americanimmigrationcouncil.org/fact-sheet/ice-cbp-legal-analysis/.
[205] "Khalil v. Trump" aclu.org. March 11th, 2025. https://www.aclu.org/cases/khalil-v-trump ; McCormack, Kathy. "Judge releases Tufts University student Rumeysa Ozturk who was detained by ICE" pbs.org. May 9th, 2025. https://www.pbs.org/newshour/politics/judge-releases-tufts-university-student-rumeysa-ozturk-who-was-detained-by

While the law is treated as fact, it is important not to undermine the social component of legality, and how the law is not neutral but influenced by social attitudes towards different people, lifestyles, and ways of being. Immigration law has *always* targeted people on the basis of race, ethnicity, or religion, as exhibited in the Chinese Exclusion Act of 1882, or Executive Order 9066 that forced Japanese Americans and Japanese immigrants into internment camps. No human is born illegal; instead, the government constructs illegal identities to sanitize the complexities of migration, stripping the citizenry of their capacity to empathize and recognize mutual humanity before legality.

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US Military Aid to Israel: Memorandum of Understanding and Leahy Law

Kainoa ChesemoreWalling
Edited by: Emma Taylor (Senior Editor) and Samantha Rogers (Junior Editor)

Abstract

Israel first received aid from the United States (US) in 1948, after the US had officially recognized Israel as a state. Until 1961, this aid was primarily economic, to support the development of the state. 1961 marked the start of US military aid to Israel with the sale of Hawk missiles to Israel. The US has continued to supply Israel with arms and military aid, most notably marked by the ten-year Memorandum of Understanding agreements first signed in 1999. Since late 2023 and the start of the 'War on Gaza,' the US has increased military aid to Israel to support the genocide against the Palestinian people, as determined by the UN and other human rights organizations. Leahy Law, first passed in 1997, prevents the US from providing any aid to countries it finds in violation of Human Rights. The application of Leahy Law has failed to hold Israel accountable for the grave violation of human rights in Gaza and has allowed the US to continue aid to uphold its strategic relationship with Israel. Together, the US' differential treatment gives Israel unique privileges, resulting in continued US funding of genocide and human rights violations by Israel in Gaza, as found by the UN, US State Department, and other human rights organizations.

Introduction

The Israeli government is the largest cumulative recipient of United States (US) assistance since 1946. This assistance can be broken down into two categories: economic aid and military aid. Together, the aid amounts to over $330 billion as of FY 2024, receiving $86 billion in economic aid and $244 billion in military aid. With the signing of the ten-year Memorandum of Understanding (MOU) between the US and Israel in 1999, the US shifted its aid given to Israel from being largely economic to largely military based through the Foreign Military Financing (FMF) program that funds Israel's ability to purchase military equipment and services.[206] Since the 1999 MOU there have been two more agreements outlining the military aid given to Israel which signifies the countries' commitment to each other and their shared goals in the Middle East. With the start of the 'War on Gaza' in late 2023, the US has increased military aid to Israel, leading the US to complicity in the genocide against Palestinian people in Gaza found by the UN.[207]

The continuation of military and economic aid has been a cornerstone of the US relationship with Israel due to the significant strategic, technological, and economic benefits that come with the partnership for the US. Laws in place to prevent US complicity in violations of

[206] Jonathan Masters, "U.S. Aid to Israel in Four Charts | Council on Foreign Relations," *Cfr.org,* October 7, 2025, https://www.cfr.org/articles/us-aid-israel-four-charts.
[207] United Nations, "Israel Has Committed Genocide in the Gaza Strip, UN Commission Finds," *OHCHR*, 2025, https://www.ohchr.org/en/press-releases/2025/09/israel-has-committed-genocide-gaza-strip-un-commission-finds.

human rights have been continuously ignored in the case of Israel, allowing large sums of military aid to continue. This paper will first use a historical approach to determine the way Israel is awarded military funding through ten-year Memoranda of Understanding (MOU) agreements, a unique way to receive funding from the US with the goals of upholding US and Israeli relations for US benefit. Then this paper will address how the US' approach to Leahy Law, fails to hold Israel accountable over human rights concerns which allows the continuation of aid through MOU. Together, the US' differential treatment gives Israel unique privileges, resulting in continued US funding of genocide and human rights violations by Israel in Gaza, as found by the UN, US State Department, and other human rights organizations.[208]

Historical Relations Between the US and Israel

US relations to Israel have dated back to the beginnings of the Zionist movement in 1917 with US President Woodrow Wilson endorsing the Balfour Declaration supporting a nation for Jewish people in Palestine. With the entrance of the US into World War II, American Zionists called for unrestricted Jewish immigration and US support for Zionism due to the atrocities Nazis were committing against Jewish people. In 1947, President Harry Truman endorsed the 1947 UN Partition Plan for Palestine and became the first world leader to recognize the state in 1948.[209] The US supported the creation of the Israeli ethnonationalist state because "it was the only proper response to the holocaust and would benefit American interests."[210] Although President Truman was the first to recognize the state, during the 1948 Arab Israeli War the US maintained an arms embargo against all participants, including Israel.[211] While reluctant to sell arms to Israel as the US didn't want to alienate Arab oil producers, at this point the US gave exclusively economic aid to Israel to support the state.[212] From 1949-1959 the US gave $652.9 million in aid and only .06% was military aid,[213] the rest of this aid was primarily special assistance, Agricultural Trade Development and Assistance, and Development Loan funds.[214]

In 1961, after much deliberation with his staff, President Kennedy authorized the sale of Hawk missiles to Israel, as Israel claimed it was vulnerable to a surprise air attack.[215] In the following years, the US provided Israel with increasing amounts of military and economic aid to

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[208] United Nations, "Israel Has Committed Genocide in the Gaza Strip, UN Commission Finds," *OHCHR*, 2025, https://www.ohchr.org/en/press-releases/2025/09/israel-has-committed-genocide-gaza-strip-un-commission-finds.
[209] United Nations, "Palestine Plan of Partition with Economic Union - General Assembly Resolution 181," Question of Palestine, November 29, 1947, https://www.un.org/unispal/document/auto-insert-185393/.
[210] National Archives, "Recognition of Israel | Harry S. Truman," *Trumanlibrary.gov*, 2014, https://www.trumanlibrary.gov/education/presidential-inquiries/recognition-israel.
[211] United States Department of State, "The Arab-Israeli War of 1948," *Office of the Historian,* 2020, https://history.state.gov/milestones/1945-1952/arab-israeli-war.
[212] Jewish Virtual Library. "History & Overview of U.S. Foreign Aid to Israel." *Jewish Virtual Library,* 2026. https://jewishvirtuallibrary.org/history-and-overview-of-u-s-foreign-aid-to-israel.
[213] Martha Wenger, "US Aid to Israel - MERIP," *Middle East Research and Information Project,* May 4, 1990, https://www.merip.org/1990/05/us-aid-to-israel/.
[214] United States Department of State, "The Arab-Israeli War of 1948," *Office of the Historian,* 2020, https://history.state.gov/milestones/1945-1952/arab-israeli-war.
[215] David Tal, "Symbol Not Substance? Israel's Campaign to Acquire Hawk Missiles, 1960–1962," *The International History Review* 22, no. 2 (June 2000): 304–17, https://doi.org/10.1080/07075332.2000.9640900.

combat Soviet influence in the Middle East, which is reflective of US goals to promote democracy and maintain control in the Middle East.[216] Since the Cold War, the US has only increased its aid to Israel, in 1999 the US shifted from primarily economic aid to military aid with an emphasis on FMF aid due to Israel's industrial rise. The most recent shift in aid has been to support Israeli genocide effort in its war on Gaza. As of October 7th, 2025, over $21.7 billion in military aid has gone to Israel to support their efforts in Gaza, which is well exceeding the $3.8 billion per year agreed upon in the MOU.[217]

The US benefits extraordinarily from security intelligence on terrorism, nuclear proliferation and politics in the Middle East. With Israeli cooperation, the US is able to pursue its counterterrorism and security agenda in the Middle East.[218] Through bilateral defense cooperation agreements, the US in partnership with Israel has funded and developed advanced defense technologies like the Iron Dome and autonomous weaponry. These weapons have been able to counter and "contain" US threats in the region, like nuclear powered Iran.[219] Additionally, the US participates in joint training exercises with Israel. Overall, the US-funded aid supplied to Israel for military purchases is returned to the US economy. The US sets strict parameters in their agreement on how and where Israel can spend this aid, spending the majority of the aid on US companies. US defense contracting companies like Lockheed Martin, Rayton, and L3 Harris have significantly profited from supplying arms to Israel along with corporate actors like Microsoft, Alphabet Inc., and Amazon who support Israeli systems and surveillance efforts.[220] The US benefits significantly from Israeli partnership, but in doing so the US is in clear violation of international and domestic laws that prevent aid in situations of human rights violations and genocidal actions.

Memorandum of Understanding between the US and Israel

A MOU serves as a unique point of agreement between two governments to prevent a lengthy negotiation process from happening year by year, rather the two countries come together every 10 years to negotiate the aid package. A MOU is not a legally binding document, as the US congress must decide to approve the funding from year to year and can choose to increase or decrease assistance. The first MOU signed in 1999 between the US and Israel provided Israel

[216] Jim Zanotti, "Israel: Major Issues and U.S. Relations," *Congress.gov,* 2025, https://www.congress.gov/crs-product/R44245.
[217] Jonathan Masters, "U.S. Aid to Israel in Four Charts | Council on Foreign Relations," *Cfr.org,* October 7, 2025, https://www.cfr.org/articles/us-aid-israel-four-charts.
[218] Michael Eisenstadt and David Pollock, "Friends with Benefits: Why the U.S.-Israeli Alliance Is Good for America," *The Washington Institute,* November 7, 2012, https://www.washingtoninstitute.org/policy-analysis/ friends-benefits-why-us-israeli-alliance-good-america.
[219] Bureau of Political-Military Affairs. (2023, October 19). *U.S. Security Cooperation with Israel*. United States Department of State. https://www.state.gov/u-s-security-cooperation-with-israel/
[220] Federica Marsi, "UN Report Lists Companies Complicit in Israel's 'Genocide': Who Are They?," *Al Jazeera*, July 2025, https://www.aljazeera.com/news/2025/7/1/un-report-lists-companies-complicit-in-israels-genocide-who- are-they.

with $26.7 billion dollars in military and economic spending over ten years.[221] These agreements have continued over the past 26 years and are a display of the US' unique commitment to Israel, as no other country receives aid in this manner.

Prior to the 1999 MOU, the Reciprocal Defense Procurement MOU between the US and Israel facilitated cooperation of defense industries by allowing companies in both Israel and the US to equally compete in defense procurement. The 1999 MOU expanded on defense cooperation between governments into intelligence sharing through the mechanisms of intelligence exchange conferences and ad hoc meetings to provide. The US aimed to gather extensive military intelligence on Syria, Iraq, Libya, Iran, Lebanon, and North Africa through this agreement according to a now released classified document.[222] In exchange of information each state agreed "to undertake the combined exploitation of military material and material having potential military use, by making such material available to each other and by sharing the technical exploitation results."[223] In a Joint Statement by President Clinton and Israeli Prime Minister Ehud Barak released in 1999, they referred to this MOU as raising their strategic partnership to achieve a "new era of peace" in the Middle East. This deal represented the partners' political commitment to each other through a deal worth $26.7 billion of aid, of which $21.3 was military aid.[224] This MOU was the template for the phasing out of general economic assistance to Israel.

The 10-year deal was revised and renewed in 2009. With the US' focus on the "War on Terror," the second MOU reflected the US' goals in the Middle East. This deal was a key transition point away from any economic assistance to Israel, giving $30 billion in military aid over the ten years.[225] The MOU allowed Israel to use the FMF aid to produce and purchase Israeli military equipment, and 26.3% of the 2009 MOU was approved to be used in the Off-Shore Procurement Program.[226] The most recent deal signed in 2016 (to be implemented starting in 2019) has been the largest among the two states, pledging $38 billion in military aid from FY2019 to FY2028. The military aid consists of $33 billion in FMF grants along with an additional $5 billion in defense appropriations for missile defense programs.[227] This MOU projected the phasing out of Off-Shore Procurement by Israel, which had been a large sum of aid in the past, along with the restriction of purchasing fuel or other consumables.[228] This agreement

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[221] Yale Law School Lillian Goldman Law Library "Joint Statement by President Clinton and Prime Minister Ehud Barak," *Yale.edu,* 2025, https://avalon.law.yale.edu/20th_century/mid031.asp.
[222] ACLU. "Israel US 1999 Agreement | American Civil Liberties Union." *American Civil Liberties Union,* 2025. https://www.aclu.org/documents/israel-us-1999-agreement.
[223] Ibid.
[224] Sharp, Jeremy. "U.S. Foreign Aid to Israel: Overview and Developments since October 7, 2023." *Congress.gov*, 2023. https://www.congress.gov/crs-product/RL33222#ifn133.
[225] Ibid.
[226] Ibid.
[227] Ibid.
[228] Obama White House Archives. "FACT SHEET: Memorandum of Understanding Reached with Israel." *whitehouse.gov,* September 14, 2016. https://obamawhitehouse.archives.gov/the-press-office/2016/09/14/fact-sheet-memorandum-understanding-reached-israel.

echoes the previous MOUs, reaffirming the US and Israel's security-based partnership that allows the two countries to work closely together to achieve their goals in the Middle East. The US' commitment to the security of Israel rests on "their shared and enduring commitment to the values of democracy, human rights and the rule of law…"[229] providing the US cause to continue to support Israel with military aid. While the money outlined in these agreements is not guaranteed to Israel, the US has been consistent about delivering at minimum the proposed amounts from the MOU. If the US doesn't follow through with at least the minimum aid, it could jeopardize its partnership with Israel.

Through analyzing the history of these three MOU's 1999, 2009 and 2019, they highlight four unique privileges in how Israel receives and uses military funding from the US. First, the very structure of the MOU is unique to the US relationship with Israel. This decennial negotiation between the governments of Israel and the US is something no other country does in partnership with the US. Through this process, the US puts extraordinary time and resources into these negotiations as they span on average two years.[230] Second, the sheer magnitude of aid given to Israel has amounted to being the largest continuing military aid granted to any country. Israel is the largest recipient of US FMF, in FY2019 FMF funding for Israel encompassed approximately 61% of all requested FMF funding worldwide.[231] Third, the Cash Flow Financing program allows Israel to not pay for its military acquisitions entirely up-front but rather using the FMF to finance their purchases. Fourth, implemented in 1977 the Off-shore Procurement Program that allows Israel to purchase Israeli-made military weapons, is a one-of-a-kind program totaling $819 million as of 2019.[232] The 2019 MOU has projected the phasing out of this program by FY2028 through the slow reduction of percentage allowed to be spent on Israeli military weapons. The phasing out of this program is a strategic step by the US to pressure Israeli defense companies to merge with US companies or open US subsidiaries to continue to be eligible for FMF. While strategic, the US has also been generous with its ten-year phasing out allowance, without any real reduction until FY2024.[233] Overall, US partnership with Israel rests on the military aid they are granted through these MOUs. As the leading global recipient of military aid and security assistance, the US has been successful in maintaining this relationship through military aid to advance its position in the Middle East.

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[229] U.S. Department of State, "Foreign Assistance: Agreement Between the United States of America and Israel," signed December 30, 2021, 21-1230.1, https://www.state.gov/wp-content/uploads/2022/05/21-1230.1-Israel-Foreign-Assistance-1.pdf.

[230] Jacob Nagel, "Negotiating the MOU from the Perspective of the Head of the Israeli Negotiating Team," n.d., https://www.inss.org.il/wp-content/uploads/2020/08/Memo202_e-53-61.pdf.

[231] Sharp, Jeremy. "U.S. Foreign Aid to Israel: Overview and Developments since October 7, 2023." *Congress.gov*, 2023. https://www.congress.gov/crs-product/RL33222#ifn133.

[232] Dov Zakheim, "Treat Poland, Ukraine like Israel with an Offshore Weapons Procurement Program," *The Hill,* October 10, 2025, https://thehill.com/opinion/national-security/5547162-treat-poland-and-ukraine-like-israel-give-them-an-offshore-procurement-program/.

[233] Josh Ruebner, et al., "Bringing Assistance to Israel in Line with Rights and U.S. Laws," *carnegieendowment.org,* May 12, 2021, https://carnegieendowment.org/research/2021/05/bringing-assistance-to-israel-in-line-with-rights-and-us-laws?lang=en.

Military Aid to Israel 2023-2025

On October 7th, 2023, Hamas, a Palestinian militant and resistance group, attacked Israel killing 1,195 people along with taking 251 hostages.[234] Israel responded with an offensive bombing campaign along with an invasion of Gaza on October 27th. In their two-year campaign against Gaza, over 70,000 Palestinians in Gaza have been killed through direct and indirect bombing along with the displacement of over 2.3 million Palestinians from the Gaza Strip and the West bank. The extent of the destruction and violence against Palestinian people has led to the declaration of a genocide and numerous human rights violations by the United Nations and other entities.[235] Since 2023, US aid to Israel has increased exceeding the standing MOU. Following the October 7th attacks against Israel, President Biden announced additional military support including munitions and weapons systems through an emergency supplemental budget which provided Israel with Foreign Military Sales (FMS) and Direct Commercial Sales (DCS). These emergency weapons for the first six months came from the US stockpile "War Reserve Stocks for Allies-Israel" which allowed the Biden Administration to only publicly acknowledge two major arms sales even as "near daily" deliveries of US weapons had been received by Israel.[236] Even with the continuation of violations of international law by Israel, the US has continued giving military aid to Israel. In March 2024, Congress passed the Further Consolidated Appropriations Act (P.L. 118-47) which distributed $3.3 billion in FMF and $500 million in missile defense funding per the 2016 MOU.[237] After strikes on Israel from Iran on April 13th, 2024, Congress passed an act for additional emergency funding, "making emergency supplemental appropriations for the fiscal year ending September 30, 2024, and for other purposes."[238] The US' increasing support for Israel is a reflection of the US priorities to maintain their strong allyship with Israel with little concern for Israeli actions against Palestinians.

The Biden Administration had taken a few steps to ease concerns over human rights violations including freezing a shipment of 1,800 MK-84, 2,000-pound bombs, 500-pound bombs and Caterpillar D9 bulldozers, over worries they would be used in Gaza against civilians. In late January 2025, the Trump Administration had released these shipments to Israel, stating they were rightfully Israel's as they had paid for them.[239] At the same time, the Trump

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[234] Human Rights Watch, "October 7 Crimes against Humanity, War Crimes by Hamas-Led Groups | Human Rights Watch," *Human Rights Watch,* July 17, 2024, https://www.hrw.org/news/2024/07/17/october-7-crimes-against-humanity-war-crimes-hamas-led-groups.

[235] United Nations, "Israel Has Committed Genocide in the Gaza Strip, UN Commission Finds," *OHCHR*, 2025, https://www.ohchr.org/en/press-releases/2025/09/israel-has-committed-genocide-gaza-strip-un-commission-finds.

[236] John Ramming Chappell and Sarah Harrison, "The 'War Reserve Stockpile Allies - Israel' Explained & Why Congress Should Not Expand It," *Just Security,* January 16, 2024, https://www.justsecurity.org/91213/the-war-reserve-stockpile-allies-israel-explained-why-congress-should-not-expand-it/.

[237] Jeremy Sharp, "U.S. Foreign Aid to Israel: Overview and Developments since October 7, 2023," *Congress.gov,* 2023, https://www.congress.gov/crs-product/RL33222#ifn133.

[238] Text - H.R.815 - 118th Congress (2023-2024): Making emergency supplemental appropriations for the fiscal year ending September 30, 2024, and for other purposes, H.R.815, 118th Cong. (2024), https://www.congress.gov/bill/118th-congress/house-bill/815/text.

[239] Steve Holland et al., "US to Resume Shipping 500-Pound Bombs to Israel, US Official Says," *Reuters*, July 10, 2024,

Administration, through executive order, froze all US Foreign Aid with three exceptions to keep aid for Israel, Egypt and any additional life-saving global humanitarian food aid.[240] This case points to the US dedication to Israeli partnership, even with changes of US administration. Military aid for Israel in 2025 increased through the Trump Administration sale of $8.4 billion in FMS/DCS along with the introduction of H.R. 1229 and S.554 the "United States-Israel Defense Partnership Act of 2025" proposing an increase in funding for specific US-Israeli programs.[241] Since the October 7th attacks, the Israeli Defense Ministry has reported that over 90,000 tons of armaments and equipment has been delivered from the US through 800 transport planes and 140 ships even in the face of confirmed human rights violations and genocide allegations, proving the US unwavering support for Israel.[242]

Leahy Law

As international scrutiny of Israel's actions against Palestinians during its War on Gaza has risen, US application of domestic law has failed. Military aid to Israel has continued despite domestic laws in place, prohibiting US military aid in the face of human rights violations like genocide, leading to additional expections in the case of US-Israeli relations. Leahy Law in accordance with Israel demonstrates inconsistency in the application of the law, resulting in special treatment of Israel. Leading to the continuation of US military aid to Israel, making the US complicit in genocide as they disregard domestic safeguards that ensure military aid given by the US does not violate international law and human rights.

Leahy Law forbids the US from providing assistance to foreign security forces if there is credible information that the unit has committed a "gross violation of human rights (GVHR)."[243] Leahy Law consists of two prohibitions, one under the State Department and the other under the Department of War. The State Department's Leahy Law falls under section 620M of the Foreign Assistance Act of 1961 and states the prohibitions of assistance, with the exception that the Secretary of State can determine and report that the government receiving assistance "is taking effective steps to bring the responsible members of the security forces unit to justice."[244] The Department of War (DoW) law is codified at 10 U.S.C. §362, stating that the DoD is not allowed to provide any funding to be used for training, equipment, or other assistance, if found in violation.[245] Under extraordinary circumstances, the Secretary of Defense can waive Leahy Laws

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https://www.reuters.com/world/middle-east/us-resume-shipping-500-pound-bombs-israel-us-official-says-2024-07-10/.

[240] Edward Wong, "U.S. Halt to Foreign Aid Does Not Apply to Arms to Israel and Egypt," *The New York Times*, January 25, 2025, https://www.nytimes.com/2025/01/25/us/politics/us-foreign-aid-egypt-israel.html.

[241] Joe Wilson, "H.R.1229 - 119th Congress (2025-2026): United States-Israel Defense Partnership Act of 2025," *Congress.gov,* 2025, https://www.congress.gov/bill/119th-congress/house-bill/1229.

[242] Emanuel Fabian, "Israel Marks 800th Planeload of US Guns, Bombs and Ammo as War Nears Day 600," *Timesofisrael.com,* 2025, https://www.timesofisrael.com/liveblog_entry/israel-marks-800th-planeload-of-us-guns-bombs-and-ammo-as-war-nears-day-600/.

[243] Michael Weber, "Global Human Rights: Security Forces Vetting ('Leahy Laws')," *Congress.gov,* 2025, https://www.congress.gov/crs-product/IF10575.

[244] Weber, "Global Human Rights."

[245] Weber, "Global Human Rights."

prohibitions, and in cases where the foreign government has taken corrective steps or assistance is required for disaster relief, humanitarian assistance, or national security emergencies, the DoD can continue to provide assistance.

Under public law 112-74 passed December 23, 2011, amendments to the State Department's Leahy Law were passed. This amendment included making public the units that have been denied assistance through the process of Leahy Law.[246] The expectation lies in cases that would pose risk to US national security at the discretion of the Secretary of State. The state published their first annual list six years after this amendment had passed in 2017.[247] Public reports from 2017-2022 account for 113 units that have been denied, out of thousands of denials reported by Charles Blaha, who worked for the State Department.[248] He claims that "When [he] was working in the State Department, [they] vetted over 200,000 requests for assistance annually and prohibited assistance to thousands of units from countries all over the world even from NATO ally Turkey."[249] Out of the five public reports with regard to Leahy Law restrictions, Israel has not been publicly denied assistance through the Leahy vetting process. Although there is a chance Israel has been denied and is underprotection of public law 112-74, based on the confirmed military aid Israel has received, experts assume that no assistance has been denied privately.[250] Even if some assistance has been denied privately, this denial has not been significant enough to play a role in deterring Israeli violations of human rights in Gaza.

Additionally the amendment passed in 2011 changed the language of the law slightly by striking "evidence" and inserting "information," allowing the prohibition of assistance to rely on credible information rather than credible evidence.[251] According to the training guidance of the State Department, credible information "need not be admissible in a court of law [and] should be deserving of confidence as a basis for decision-making".[252] The State Department outlines seven criteria for evaluating credible information: past accuracy and reliability of sources; how the information was obtained; political agenda; corroborative information; potential contradictions; history of known patterns of abuse 7; and level of detail of violations.[253] Under this definition of credible information, the US has continuously ignored credible information with regard to human rights violations by Israeli security forces. The most significant rejection of credible information was a report released in 2023 by the State Department titled "West Bank and Gaza

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[246] US Congress, "Consolidated Appropriations Act," December 23, 201,. https://www.congress.gov/112/plaws/publ74/PLAW-112publ74.pdf#page=432.
[247] Suchita Uppal and Adam Keith, "Transparency in the Leahy Laws: Who Is Banned? - Human Rights First," *Human Rights First,* 2025, https://humanrightsfirst.org/library/transparency-in-the-leahy-laws-who-is-banned/.
[248] Uppal and Keith, "Transparency in the Leahy Laws."
[249] Charles O Blaha, "Except for Israel: US Military Aid Forbidden to Human Rights Violators by the Leahy Law," *Informed Comment,* April 19, 2025, https://www.juancole.com/2025/04/military-forbidden-violators.html.
[250] Ellen Knickmeyer, "U.S. Military Aid for Israel Tops $17.9 Billion since Last Oct. 7," *PBS News,* October 7, 2024, https://www.pbs.org/newshour/world/u-s-military-aid-for-israel-tops-17-9-billion-since-last-oct-7.
[251] US Congress, "Consolidated Appropriations Act."
[252] US Department of State. "Leahy Law Fact Sheet - United States Department of State." *United States Department of State,* January 17, 2025. https://www.state.gov/bureau-of-democracy-human-rights-and-labor/releases/2025 /01/leahy-law-fact-sheet.
[253] Ibid.

2023 Human Rights Report." The report lists twelve different violations in regard to Israeli security forces in occupied Palestinian Territories, as well as additional human rights violations by the Palestinian Authority, Hamas, Palestinian civilians, and Israeli civilians. The 148-page report distributed by the State Department detailing the incidents did not serve as enough credible information for the application of Leahy Law, as assistance persisted after the report was released in early 2024.[254] Additionally other reports outlining the Israeli government's GVHR have been made by a number of sources, including news outlets, international NGO's, the United Nations, and other internal sources from the US government, as Israel has killed nearly 70,000 Palestinians in the past two years.[255]

Under Leahy Law, the US is required to investigate any country who will be getting any form of assistance from the US. Both the State Department and DoW are required to vet all assistance going to any country, and these processes are overseen by the State Department's Bureau of Democracy, Human Rights and Labor and the DoW's Office of the Deputy Assistant Secretary of Defense for Stability and Humanitarian Affairs.[256] This vetting process begins in the unit's home country at the US embassy where they conduct "consular, political, and other security and human rights checks".[257] Additional reviews might also be conducted by the State Department looking at the record of units and individuals. According to Josh Paul, a former State Department official, within this process "a single objection from an official is sufficient to withhold assistance from a military unit."[258] The review process for foreign assistance to Israel involves the unique Israel Leahy Vetting Forum (ILVF). Created in 2020, the ILVF is made up of Middle East and human rights experts and is to serve as a review board with regard to Leahy Law. There are three elements apart of the review process making the approach different from other Leahy Law vetting processes. First, in the review process of the ILVF, all parties involved must reach a consensus that a potential violation has occurred. Second, the Israeli government is consulted about any incident that the ILVF has marked as a GVOF, allowing the Israeli government 90 days to respond to their request.[259] The Israeli government is then allowed consultation to see if any corrective actions have been taken which would restore US assistance.

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[254] US Department of State, "U.S. Security Cooperation with Israel," *United States Department of State,* October 19, 2023, https://www.state.gov/u-s-security-cooperation-with-israel/.
[255] Nidal Al-Mughrabi and Emma Farge, "Explainer: How Many Palestinians Has Israel's Gaza Offensive Killed?," *Reuters,* October 7, 2025, https://www.reuters.com/world/middle-east/how-many-palestinians-has-israels-gaza-offensive-killed-2025-10-07/.
[256] Michael Weber, "Global Human Rights: Security Forces Vetting ('Leahy Laws')," *Congress.gov,* 2025, https://www.congress.gov/crs-product/IF10575.
[257] Bureau of Democracy, Human Rights, and Labor. (2025, January 17). *Leahy Law Fact Sheet - United States Department of State*. United States Department of State. https://www.state.gov/bureau-of-democracy-human-rights-and-labor/releases/2025/01/leahy-law-fact-sheet
[258] John Hudson, "Classified U.S. Report Finds Backlog of Hundreds of Possible Israeli Human Rights Violations," *The Washington Post,* October 30, 2025, https://www.washingtonpost.com/national-security/2025/10/30/state-department-report-israel-gaza-human-rights-violations/.
[259] Hudson, "Classified U.S. Report Finds."

Third, it must then be approved by the Deputy Secretary of State.[260] With regard to the ILVF, a former State Department office remarked, "'nobody said it, but everyone knew the rules were different for Israel. No one will ever admit that, but it's the truth'"[261] This is because all these steps are not required of any other countries' or units' vetting processes, making Israel a special case with regard to this process.

Additionally, the high levels of formality for the Forum prolongs any avenues for justice because of the lengthy process. In 2024, the ILVF had recommended to then Secretary of State Anthony Blinken, the State Department should disqualify the Israeli military and police units from receiving assistance, due to finding in cases regarding extrajudicial killings and rape cases qualifying the actions of the IDF as GVHRs.[262] According to an investigation by the Guardian some members of the ILVF found the killings of Shireen Abu Akleh and Omar Assad who were both Palestinian Americans as GVHR's by Israeli officers.[263] Recommendations were then sent to Secretary of State Blinken in December of 2023 and according to ProPublic's anonymous source, "'They have been sitting in his briefcase since then'"[264] This suggests that the Secretary of State is not concerned about the recommendations of the ILVF, bringing into question the application of Leahy Law in the case of Israel. The Biden Administration has justified the non action in the case of Leahy Law because "…the United States had not yet reached 'definitive conclusions' on whether US weapons were used in the killings."[265] Leahy Law does not require use of US military weapons in the GVHR but rather the application of the law is in the case of any grave violation of human rights. The killings of Shireen Abu Akleh and Omar Assad qualify as a GVHR because they were civilians targeted by Israeli forces. In direct contrast to the Biden administration's justification, the US suspended military aid for twelve years to a special force group in the Indonesian Army on the grounds of Leahy Law in 1999 due to the kidnapping of activists and other human rights abuses that were not in direct connection with US weapons. This case demonstrates that US weaponry is not required to invoke the law, the countless of recorded acts of GVHR's of the Israeli forces should invoke the Law and prevent aid to Israel.

Conclusion

With significant denial of assistance in accordance with Leahy Law, Israel would be prompted to address these GVHR due to their significant reliance on their partnership with the US for military aid. Abu Akleh, an advocate for Leahy Law, states "'If the US had been willing to apply the Leahy law in Israel the IDF would presumably have been more inclined to hold their

[260] Stephanie Kirchgaessner, "'Different Rules': Special Policies Keep US Supplying Weapons to Israel despite Alleged Abuses," *The Guardian,* January 18, 2024, sec World news, https://www.theguardian.com/world/2024/jan/18/us-supply-weapons-israel-alleged-abuses-human-rights.
[261] Kirchgaessner, "'Different rules': Special Policies."
[262] Brett Murphy, "Blinken Is Sitting on Staff Recommendations to Sanction Israeli Military Units Linked to Killings or Rapes," *ProPublica*, April 17, 2024, https://www.propublica.org/article/israel-gaza-blinken-leahy-sanctions-human-rights-violations.
[263] Kirchgaessner, "'Different rules': Special Policies."
[264] Murphy, "Blinken is Sitting on."
[265] Missy Ryan, "U.S. Declined to Sanction Israeli Military Units over Abuse Finding," *The Washington Post,* March 2025, https://www.washingtonpost.com/national-security/2025/02/28/state-department-idf-blinken-leahy-abuse/.

soldiers accountable, which would have helped deter killings of civilians like Shireen Abu Akleh and many others, and what we are seeing today.'"[266]Leahy Law is in place for the protection of civilians like Shireen Abu Akleh. With the application of Leahy Law, Israel would either be forced to comply with US law and stop the conviction of violations of human rights or continue without significant funding from the US. Either outcome is a step in the right direction for the US to prevent further deaths in Gaza and stop their complicity in the genocide of Palestinian people. Through a historical analysis, this paper has established that US-Israeli relations is reliant on continuous military aid, leading the US to ignore domestic law preventing military aid from being sent to countries in violation of human rights. Leahy Law would ensure accountability for the state of Israel, but through unique measures the US has not formally found Israel in violation of Leahy Law. This analysis establishes that it is clear the US would rather prioritize supporting its own gain through maintaining US-Israeli relations, over the law and the pursuit of justice for Palestinians.

[266] Stephanie Kirchgaessner, "'Different Rules': Special Policies Keep US Supplying Weapons to Israel despite Alleged Abuses," *The Guardian,* January 18, 2024, sec World news, https://www.theguardian.com/world/2024/jan/18/us-supply-weapons-israel-alleged-abuses-human-rights.

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Human Rights and Islam: An Analysis of the Influence of Regional and International Political Developments on Islamic Human Rights Declarations

Mary Torgerson
Edited by: Christine Niu (Senior Editor) & Grace Medrano (Junior Editor)

Abstract

This paper begins by articulating the history of Islamic human rights declarations, noting the involved states, the general nature of these documents, and the relationship between Islamic states and the broader international system. An analysis of the contents of these declarations follows this history, focusing on the status of women's rights, freedom of expression, freedom of religion, and the importance given to *sharī'a* and international law. This paper concludes by synthesizing the impact of international developments on the most recent declaration and its overall significance in the relationship between international human rights and Islamic law.

Introduction

The question of the relationship between human rights and Islamic politics is one of great interest to many. Since 1981, Islamic nongovernmental organizations have issued three key declarations of human rights in Islam, with the most recent issued in 2020, creating more questions than they answer regarding this relationship. These three documents are: The Universal Islamic Declaration on Human Rights (UIDHR) in 1981; the Cairo Declaration on Human Rights in Islam (CDHRI) in 1990; and the Cairo Declaration of the Organization of Islamic Cooperation on Human Rights (CDOHR) in 2020. Between the three documents, little remains consistent in the rights present, the rhetoric used, or the importance placed on Islamic law. A tentative explanation for the variations can be found, however, in studying the historical developments and political forces at work during the drafting of each declaration. Through analyzing these three declarations and studying their political context, it becomes possible to answer the question: to what extent do the political interests of Islamic states impact the application of Islamic law to human rights? From this analysis, it becomes evident that Islamic states support greater compatibility between international human rights and Islamic law when the consequences of strict adherence to Islamic law jeopardize their government's political interests.

Before embarking on this analysis, it merits establishing key concepts of Islamic law and human rights. The term *sharī'a* refers to Islamic law and is best understood as "the path of correct conduct that God has revealed through his messengers" rather than a strict juridical code,*sharī'a* is recognized as the Islamic principles of ethics and morality.[267] While a number of different spellings are used throughout the aforementioned human rights declarations, this paper will use the spelling *sharī'a* in its arguments. Islamic jurisprudence, or *fiqh*, refers to the application of *sharī'a* to legal codes, the specifics of which vary across the five major schools of

[267] Jonathan E. Brockopp, "Shari'a," in *Encyclopedia of Islam and the Muslim World*, ed. Richard C. Martin et al. (Macmillan Reference, 2004), 2:618.

Islamic law.[268] As the human rights declarations discussed set forth the ethical aspirations of participating states rather than legal codes and standards, this paper focuses on *sharī'a* over *fiqh*. While this paper makes no effort to categorize the entirety of the Islamic world by political ideology, references to conservative states denote those that wish to enact a government based entirely on Islamic legal principles.

Contextualizing Islamic Declarations on Human Rights

The history of human rights declarations in the Islamic world began in 1981 when the Islamic Council of Europe in London issued the UIDHR, a non-binding legal document.[269] The Council was a branch of the Muslim World League, a nongovernmental, international organization based in Saudi Arabia that now primarily represents the political interests of conservative Muslims.[270] This being said, the Islamic Council of Europe's decisions and declaration remain limited to a consensus among its participants, not the broader Muslim World. Representatives from Egypt, Pakistan, Iran, and Saudi Arabia participated in the drafting of the UIDHR alongside members of Islamist groups belonging to opposition parties across the Middle East.[271] These opposition groups included those in exile for protesting repressive regimes in their home countries, a dynamic that created a striking blend of moderate, progressive, and conservative articles in the UIDHR, although its contents trend towards the latter.

Nine years after the UIDHR was issued, the Organization of Islamic Cooperation (OIC) released an updated declaration with the CDHRI. This document emerged as an updated version of the UIDHR and, like its predecessor, remains non-binding in the eyes of international law.[272] The Cairo Declaration aimed to bring the principles found in the UIDHR into closer alignment with principles of Islamic law, a goal reflected in its more conservative text. In 1992, the CDHRI was presented to the UN and accepted in the Human Rights Commission's Compilation of International Instruments in 1997, an action widely viewed as an official recognition of the document by the UN, although the Declaration remains non-binding.[273] Despite this acceptance in the UN, however, the contents of the CDHRI dramatically diverge from the UDHR, with key provisions on freedom of expression, religion, and movement missing, among many other essential rights. This document, therefore, is a continuation of the justification of human rights violations that began with the UIDHR. The CDHRI superficially appears to reflect a greater consensus among the OIC member states on Islam's impact on human rights; however, dramatic

[268] Ebrahim Moosa, "Ethics and Social Issues," in *Encyclopedia of Islam and the Muslim World*, ed. Richard C. Martin et al. (Macmillan Reference, 2004), 2:226; Muhammad Jawad Mughniyya, "The Five Schools of Islamic Law," September 6, 2016, https://al-islam.org/five-schools-islamic-law-muhammad-jawad-mughniyya.
[269] Kathleen Cavanaugh, "Narrating Law," in *Islamic Law and International Human Rights Law: Searching for Common Ground*, ed. Anver M Emon et al. (Oxford University Press, 2012), 48.
[270] Ann Elizabeth Mayer, *Islamic and Human Rights: Tradition and Politics* (Pinter Publishers, 1995), 22.
[271] Muhammad Khalid Masud, "Clearing Ground: Commentary to 'Shari'a and the Modern State,'" in *Islamic Law and International Human Rights Law: Searching for Common Ground?*, ed. Anver M Emon et al. (Oxford University Press, 2012), 113.
[272] Cavanaugh, "Narrating Law," 48.
[273] Olayemi et al., "Islamic Human Rights Law: A Critical Evaluation of UIDHR and CDHRI in Context of UDHR," 32.

divergences in the actual stances taken on human rights negate this perception.[274]

Thirty years after issuing the CPHRI, the OIC revised the principles contained therein and released a new declaration on Islamic human rights in 2020.[275] The CDOHR aimed to update the CDHRI as part of a decades-long project to bring the organization into greater compatibility with regional and international systems that began with its 2005 Ten Year Program of Action (TYPoA-2005).[276] Rather than continuing to perpetuate a parallel system of Islamic human rights, the CDOHR began the development of an alternate structure of complementary coexistence between the two frameworks. This project was undertaken by the Independent Permanent Human Rights Commission (IPHRC) established by the OIC in 2011, although relatively little is known about the revision process or the involved players.[277] The tasks undertaken by the IPHRC included both a general revision of OIC documents and a refinement of the CDHRI, aiming to bring its contents into greater adherence with international human rights standards. However, while the OIC internally adopted the revised CDOHR, the organization has taken no effort to translate the document into any obligatory conventions or implement it in any meaningful way.[278] The CDOHR, therefore, signifies a substantial development in Islamic human rights rhetoric, but it would be foolhardy to assume an advancement in actual practice.

More global in scope and first in chronology is the 'war or terror.' Beginning in 2001 as a response to September 11 and continuing into the present day, these military operations, primarily those of the US, often appropriate a pretext of curtailing human rights violations as a justification for their counter-terrorism agendas. In their actions in the Middle East, many pointed to an incompatibility between Islam, democracy, and human rights. Yet these agendas themselves violated human rights, with the US detaining thousands of people in Iraq, Afghanistan, the US, and many other countries under the label "unlawful enemy combatants" instead of "prisoners of war" so as to bypass obligations to the Geneva Conventions, other international treaties, or domestic law. In circumventing international humanitarian law in armed conflict, counter-terrorism activities effectively displaced international human rights regimes. The focus of these abuses on the Middle East and North Africa provided a powerful incentive to articulate a concurrence between international human rights norms and Islamic law to deter the continuation of such rhetoric. Such a connection is evident in the adoption of the TYPoA-2005 just four years after September 11 and the beginning of the CDHRI revisions in the following decade.

The second development demonstrating a significant change in Islamic conceptions of human rights appears in the OIC's responses to the Arab Spring, a series of popular uprisings and

[274] Mayer, *Islamic and Human Rights: Tradition and Politics*, 24.
[275] Arab News, "Organization of Islamic Cooperation to Adopt Cairo Declaration on Human Rights in Islam," Arab News, February 28, 2020, https://arab.news/8jjme.
[276] Mohammad Hossein Mozaffari, "From Separation to Re-Engagement: The OIC Revised Declaration on Human," *The Journal of Human Rights* 16, no. 32 (2021): 113.
[277] Kayaoglu, "The Organization of Islamic Cooperation's Declaration on Human Rights," 5.
[278] Namin, "Revision of the Cairo Declaration on Human Rights in Islam and the Future of Sharia in the Islamic World," 68.

protests against authoritarian regimes across the Middle East and North Africa beginning in 2010. While the success of these protests varied between states, the event demonstrated significant popular support for democracy and human rights across Islamic states. A key indicator of this ideology appeared in the OIC's response to the Arab Spring. During this period the OIC emerged as a powerful voice in the defense of the dignity and equality of its citizens. As mentioned earlier, the Organization suspended Libya's membership for violent responses to protestors and launched investigations into human rights violations in Syria. The OIC even went as far as to establish the IPHRC, which emphasized the events in Syria and called for international aid to Somalia. While acknowledging that modern Islamic states had limited experience with democracy, the Organization stressed a compatibility between Islam and democracy in its laws and history. Such a statement highlighted a growing desire to bring Islamic political rhetoric into greater proximity to existing human rights instruments. These desires came into fruition less than ten years after the IPHRC was established, when the OIC accepted the CDOHR as its official human rights instrument.

In the 44 years since the introduction of the UIDHR, the official status of human rights in Islamic political rhetoric has changed significantly. The UIDHR demonstrates an enthusiasm to participate in international human rights systems, yet its contents reflect concerns regarding the lack of consideration given to cultural norms in the standards present in the UDHR.[279] Its contents Islamized provisions of the UDHR, bring them in much closer proximity with conservative Islamic principles, although the UIDHR managed to retain several key components of international human rights standards. The CDHRI took this adherence to Islamic law a step further, abandoning many of the more moderate principles in the UIDHR. This change might be viewed as a response to the UIDHR rather than the UDHR, as the UIDHR's commitment to *sharī'a* and Islamic law appeared too temperate for the drafters of the 1990 Cairo Declaration.[280] By contrast, CDOHR represents a stark divergence from the strong Islamist threads of the UIDHR and CDHRI. Although the CDOHR retains a commitment to interpreting international human rights in a manner compatible with Islamic principles, its primary goal is greater compliance with international law.[281] These changes in motivations appear clearly in the text of the three documents.

The Status of Rights in Islamic Human Rights Documents

The variations in the political, social, and cultural circumstances of the Muslim world inevitably impacted the contents of human rights declarations. Most apparent across the three aforementioned documents are significant developments in conceptions of women's rights and the relationship of Islamic states with *sharī'a* and international law. By tracing these topics across the three documents, clear differences emerge surrounding the importance placed on

[279] Zia H. Shah, "Universal Declaration of Human Rights and Not the Cairo Declaration!," The Muslim Times, May 27, 2012, https://themuslimtimes.info/2012/05/27/universal-declaration-of-human-rights-and-not-the-cario-declaration/.
[280] Masud, "Clearing Ground: Commentary to 'Shari'a and the Modern State,'" 114.
[281] Kayaoglu, "The Organization of Islamic Cooperation's Declaration on Human Rights," 7.

Islamic law as opposed to international standards of human rights. While pursuing this exercise, it merits noting the differences between the original Arabic text of the documents and their English translations. As this author is not fluent in Arabic, this paper will refer to the English versions of all documents and acknowledges that this analysis may not hold true when applied to the original texts.

Women's Rights

No consensus on the status of women's rights emerged in the three documents. The UIDRH offers statements on the rights of married women and the right to found a family; however, nothing is established regarding equality of the sexes.[282] Moreover, no provisions are articulated regarding the protection of women from violence and discrimination. In limiting the inclusion of women, the document implies a belief in the superiority of men over women in all arenas but marriage and child-rearing. For example, Article 19.g states that "Motherhood is entitled to special respect, care and assistance on the part of the family and the public organs of the community (*Ummah*)" yet it makes no claims regarding the protection of women from violence, discrimination, or abuse in marriage or society.[283] Article 20 is equally sparse in protections; while it ensures women enjoy rights central to *sharī'a* in marriage, such as the right to financial support from her husband, mutual respect between spouses, and the right to retain her own earnings, it again neglects to articulate provisions against discrimination or violence.[284] Regarding women's rights, therefore, those enshrined in the UIDHR remain far behind international human rights standards.

The status of women's rights in the CDHRI presents an equally bleak picture. While the Cairo Declaration includes some statements on the equality of men and women and women's rights in marriage, little is said to address the protection of women against discrimination or violence.[285] Indeed, women's rights in Islam experienced a backslide in the CDHRI. The first article to explicitly reference women—Article 5—details the rights of the family and the right to marriage as understood under Islamic law.[286] This article's contents largely resemble those of the UIDHR, although notably absent are the right to respect between spouses, the rights to communal support for mothers, and the right to choose one's spouse.[287] The CDHRI likewise neglects to discuss the rights of married women, contrasting the UIDHR, which, as previously discussed, dedicated an article to the subject.

When defending the absence of women's rights in the CDHRI, many point to Article 6 of the Cairo Declaration stipulating the equality of men and women.[288] Article 6.a states, "Women is equal to man in human dignity, and has rights to enjoy as well as duties to perform; she has her

[282] Universal Islamic Declaration on Human Rights (1981).
[283] *Ibid.*
[284] *Ibid.*
[285] Zaheer Iqbal Cheema et al., "CDHRI and International Human Rights Frameworks," *Pakistan Social Sciences Review* 4, no. 2 (2020): 900.
[286] Cairo Declaration on Human Rights in Islam (1990).
[287] Universal Islamic Declaration on Human Rights.
[288] Mozaffari, "From Separation to Re-Engagement: The OIC Revised Declaration on Human," 128.

own civil entity and financial independence, and the right to retain her name and lineage."[289] This article indeed indicates conceptions of equality among the sexes; men and women are equal in dignity, and women enjoy some degree of financial and civil independence. The extent of these freedoms, however, is unclear. What are the bounds of "financial independence"? What does it mean to have one's "own civil entity"? What is entailed by equality in "human dignity"? The ambiguity of these terms provides little hope for women's rights. Absent are statements on the protection of women from violence and discrimination, a condition that allows states significant latitude in their treatment of women in law and in practice. The CDHRI, therefore, fails to protect women's rights in any meaningful way.

Starkly contrasting the CDHRI and the UIDHR's provisions on women's rights is the CDOHR. In its mission to come into greater compliance with international human rights standards, the writers of the CDOHR significantly reformed statements on the rights and protections entitled to women. These developments appear in Article 1 of the Declaration, which states: "All human beings form one family. They are equal in dignity, rights and obligations, without discrimination on the grounds of race, color, language, sex, religion, sect, political opinion, national or social origin, fortune, age, disability or other status."[290] By including an explicit statement on gender equality, the OIC abandoned its prior history of implicitly enabling discrimination against women in its human rights declarations. Women now enjoy equal rights, dignity, and obligations to men, free from any legalized forms of discrimination. These newfound rights are further elaborated upon in Article 6, which addresses the rights of women without any limitation based on marital status, as is done in the UIDHR. In Article 6.c, the CDOHR articulates a clear obligation to states to protect women and girls "against all forms of discrimination, violence, abuse and harmful traditional practices."[291] This article dramatically differs from the contents of the UIDHR and CDHRI, which have no such provisions. These significant developments in the status of rights of women underline the CDOHR's intent to bring Islamic human rights into stricter adherence with international standards.

Sharī'a and Islamic Law

Inseparable from the range of acceptances of international law present in these three documents is their professed adherence to *sharī'a* and principles of Islamic law. Throughout the UIDHR, the document frequently refers to 'the Law' as a higher power to which its contents are subordinate, with the term mentioned nearly forty times throughout the twenty-three articles.[292] This reference is clarified in the document's explanatory notes, stating that "the term 'Law' denotes the Shari'ah, i.e. the totality of ordinances derived from the Qur'an and the Sunnah and any other laws that are deduced from these two sources by methods considered valid in Islamic jurisprudence."[293] In using 'Law' rather than *sharī'a*, the authors intended to present an

[289] Cairo Declaration on Human Rights in Islam.
[290] Cairo Declaration of the Organization of Islamic Cooperation on Human Rights (2020).
[291] *Ibid.*
[292] Universal Islamic Declaration on Human Rights.
[293] *Ibid.*

inoffensive front of accepting preexisting international norms while bringing them closer to Islamic principles.[294] The original Arabic, however, uses *sharī'a* explicitly when referring to Islamic law, creating a document where the rubric for justice is not public law or universal justice, but rather *sharī'a.* The UIDHR, therefore, does not adhere to international human rights law in any meaningful way; rather, it professes a commitment to *sharī'a* over other legal structures.

This obligation becomes more definitive in the CDHRI. Rather than using the ambiguous 'Law' to refer to *sharī'a*, the Cairo Declaration explicitly declares Islamic law as the ultimate guide for Islamic human rights. The CDHRI explicitly states this doctrine in Article 24 and Article 25. The former article declares that "all the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah," and the latter states "the Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration."[295] The adherence to *sharī'a* therefore becomes more explicit in the Cairo Declaration, leaving no ambiguity surrounding the superior legal system in the eyes of the OIC. International human rights norms have little to no authority over Islamic states under the provisions of the CDHRI, as their allegiance belongs solely to Islamic legal principles.

Compared to its predecessors, the CDOHR presents a complex relationship between international law and *sharī'a*. While the Declaration supports many principles of Islamic law, such as the prohibition of usury in Article 15, their role is significantly diminished.[296] The document explicitly affirms the preeminence of international law and norms over the principles confirmed therein, stating in Article 25.b "Nothing in this Declaration may be interpreted in such a way as to undermine the rights and freedoms safeguarded by the national legislature or the obligations of the Members States under international and regional human rights treaties as well as their sovereignty and territorial integrity."[297] The CDOHR signifies a significant departure from the absolute adherence to *sharī'a* in former documents; nowhere in the document are the *sharī'a* or Islamic law found. Drawing from the English translation of the CDOHR, it seems evident that the OIC departed from its principles of strict adherence to Islamic law over all to support international law in much more explicit terms.

This transition, however, remains limited to the official English translation of the document. As the OIC originally wrote the CDOHR in Arabic, the Declaration was consequently translated into English for the benefit of the international community. In comparing the original text to this translation, it appears its language was likewise adapted to suit the demands of this community. While the English translation contains no mention of *sharī'a*, the same cannot be said for the original Arabic text.[298] The CDOHR's original text refers to provisions of *sharī'a* throughout, indicating that the aforementioned shift to supporting international law was not as

[294] Austin Dacey and Colin Koproske, "Islam and Human Rights: Defending Universality at the United Nations," *Free Inquiry* 29, no. 1 (2009), https://secularhumanism.org/2009/01/cont_daceykoproske_29_1/.
[295] Cairo Declaration on Human Rights in Islam.
[296] Cairo Declaration of the Organization of Islamic Cooperation on Human Rights.
[297] *Ibid.*
[298] Mozaffari, "From Separation to Re-Engagement: The OIC Revised Declaration on Human," 122.

dramatic as it may seem. However, while the OIC's rhetoric remained consistent between 1990 and 2020, the contents of Article 25.b remain, an inclusion which permits states to differ from *sharī'a* so long as they remain compliant with international human rights instruments.[299] The CDOHR, therefore, recognizes the authority of both international law and *sharī'a* as equivalent in the realm of human rights.

Conclusions

Evidently, the contents of Islamic human rights declarations have evolved since the UIDHR in 1981. While the CDOHR does not completely reflect international human rights standards, the provisions contained therein reflect a genuine enthusiasm for and contemporary understanding of international human rights norms and their compatibility with *sharī'a*.[300] No longer are OIC declarations accepted as justification for human rights abuses; rather, member states are encouraged to recognize the UDHR's principles and refrain from appropriating *sharī'a* as an excuse for such restrictions.[301] This transition was first articulated by the OIC in 2005, when it adopted the TYPoA-2005, and manifested with the CDOHR in 2020.[302] Understanding the need for this change, however, requires an analysis of the external developments influencing the actions of the OIC: the 'war on terror' and the Arab Spring.

While it becomes clear that international developments significantly influenced the emergence of the CDOHR as an alternative to the CDHRI and UIDHR, the impact of this document on the practice of human rights remains limited. Although accepted by the OIC as its official human rights instrument, no action has been taken to implement the document.[303] Without any authoritative organization enforcing the CDOHR, its significance as a non-binding document is limited to a change in rhetoric in the Islamic world.[304] Moreover, as they attempt to legislate the status of human rights in a religion rather than a geographical area, many scholars bring into question its practicability in international law.[305] While this focus is less prevalent in the CDOHR than in the UIDHR or CDHRI, the question of religious unity over regional unity remains.[306] Should Islamic states be empowered to legislate human rights based on their religious beliefs, that right must be summarily granted to other religions.[307] Taking into consideration the multitude of faiths and religions across the planet and the lack of geographical consolidation, such a system would be impossible to put into practice. However, the role of the OIC as an intergovernmental organization enforcing the CDOHR brings the document into better alignment with other regional human rights instruments and alleviates a number of these concerns.[308]

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[299] *Ibid*.
[300] Kayaoglu, "The Organization of Islamic Cooperation's Declaration on Human Rights," 7.
[301] *Ibid.,* 8.
[302] Mozaffari, "From Separation to Re-Engagement: The OIC Revised Declaration on Human," 113.
[303] Namin, "Revision of the Cairo Declaration on Human Rights in Islam and the Future of Sharia in the Islamic World," 68.
[304] Kayaoglu, "The Organization of Islamic Cooperation's Declaration on Human Rights," 1.
[305] Ebadi, "Islam, Human Rights, and Iran," 14.
[306] Kayaoglu, "The Organization of Islamic Cooperation's Declaration on Human Rights," 5.
[307] Ebadi, "Islam, Human Rights, and Iran," 14.
[308] Kayaoglu, "The Organization of Islamic Cooperation's Declaration on Human Rights," 5.

Although the CDOHR's status as an international human rights declaration remains partial, it demonstrates significant steps in the Muslim world towards enacting such a document. The evidence provided then suggests that the jeopardization of Islamic governments' political interests through strict adherence to Islamic law push these states toward better affinity between international human rights and Islamic law.

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Is There Such a Thing as Search Without Google?: United States v. Google LLC Search Monopoly Case

Saanvi Maurya
Edited by: Zivai Jaravaza (Senior Editor) and Ellie Clark (Junior Editor)

Abstract

This article argues that *United States v. Google LLC* represents a pivotal reorientation of American antitrust law, signaling a necessary revival of structural enforcement. Following decades of adherence to the consumer welfare standard, this case, covering themes of antitrust law as well as exclusionary agreements within the digital economy, reasserts the judicial necessity of addressing concentrated market power. By analyzing the precedent established in the *United States of America v. Microsoft Corp.*, this study deconstructs the broader implications of this precedent for the future efficacy of antitrust enforcement in an economy dominated by monolithic technology firms. Tracing the historical development of the United States antitrust law, this article illustrates how *United States v. Google LLC* deviates from historical precedent and examines how the judiciary balanced modern economic realities with foundational Sherman Act doctrines.

Introduction

Antitrust law, in the United States, has historically served as a safeguard against excessive concentrations of economic power, seeking to preserve competitive markets and prevent dominant firms from excluding rivals. Enacted at the end of the 19th century, statutes were designed not only to prevent price hikes but also to protect the competitive process itself. However, over time, the interpretation and enforcement of these laws narrowed, often limiting legally cognizable harm to price effects.

In the digital economy, the relevance of a recalibrated antitrust framework has reemerged with renewed urgency. Market concentration has increased across industries, particularly in technology, where scale, data, and network effects reinforce the dominance of a small number of firms. Traditional antitrust tools, shaped for the industrial age, are ill-equipped to address the new forms of power emerging in the digital space: power that manifests not through higher prices but through control over access, information, and market structure. Nowhere are these concerns more pronounced than in the markets for general search services.

A "general search engine" is a tool that one uses to search the worldwide web using queries.[309] It attempts to answer all queries by providing search results that are relevant to those queries.[310] To understand why search markets matter, consider the mechanics of a simple query. Type the words "running shoes" into a general search engine, and sellers of running shoes will compete with one another in a split-second auction to place an ad on the results page, which if

[309] Memorandum Opinion, United States v. Google LLC, No 1:20-cv-03010-APM Document 1033 (D.D.C. Aug. 5, 2024), 14.
[310] Memorandum Opinion, 14.

clicked takes the user directly to the seller's website.[311] This process underpins a highly lucrative business model: in 2021 alone, advertisers spent approximately $150 billion to reach users through general search engines.[312] Control over search, therefore, is not merely control over information, but control over one of the most valuable advertising markets in the global economy.

Since the early 2000s, Google has maintained an overwhelming dominant position in the United States market for general search services. The brand has become synonymous with search itself.[313] Yet the degree of dominance in this market may surprise some.[314] As one of the wealthiest companies in the world, Google, at the time the suit was filed in October 2020, accounted for nearly 90% of all search queries conducted on computers in the United States[315] and 95% of searches conducted on smartphones.[316]

Against this backdrop, *United States v. Google LLC* (Aug. 5, 2024) has emerged as one of the most consequential antitrust cases of the modern era. This case marks the first successful antitrust action against a major technological firm since the Justice Department's 1998 case against Microsoft. Thus, it has sparked widespread debate regarding the appropriate scope of remedies, the prospects of appeal, and what it means for future antitrust enforcement in the digital market. This article argues that the Google search monopoly case represents a pivotal reorientation of American antitrust law, signaling a much-needed revival of structural enforcement. After decades of consumer-welfare-centered policy, this case reasserts the importance of addressing concentrated market power and calls into question whether current antitrust frameworks can adequately protect the public interest in an era dominated by tech giants.

Antitrust Law Framework

Antitrust law is designed to regulate competition by preventing firms from using unfair or anticompetitive tactics to gain and maintain market power. Unfair competition occurs when a firm leverages its dominant position to exclude rivals, suppress competition, or prevent new entrants from accessing the market. Common examples of unfair competition include price fixing, monopolistic conduct, and anticompetitive mergers.

Federal antitrust enforcement in the United States is primarily governed by the Sherman Act and the Clayton Act, both of which are enforced by the Federal Trade Commission (FTC) and the Department of Justice Antitrust Division. The Sherman Act prohibits monopolization, attempted monopolization, or conspiracy or combination of both to monopolize.[317] To be considered exclusionary in this sense and thus illegal, a monopolist's conduct must harm the

[311] Memorandum Opinion, 1.
[312] Memorandum Opinion, 1.
[313] Memorandum Opinion, 1.
[314] Purdue Global Law School, "U.S. v. Google: A Landmark Case and Warning Shot to Big Tech."
[315] U.S. Department of Justice, "Justice Department Sues Monopolist Google For Violating Antitrust Laws."
[316] Purdue Global Law School, "U.S. v. Google: A Landmark Case and Warning Shot to Big Tech."
[317] Federal Trade Commission, "The Antitrust Laws."

competitive process itself and thereby harm consumers.[318] The Clayton Act supplements the Sherman Act by addressing specific practices that the Sherman Act does not clearly prohibit,[319] such as anticompetitive mergers and unlawful tying arrangements, in which consumers are forced to purchase one product as a condition of obtaining another, both from the same seller.

Market definition is another foundational step in antitrust analysis, as it identifies the precise competitive arena in which dominance is alleged. A court must first determine whether a relevant market exists and then define its boundaries before evaluating whether a firm has engaged in anticompetitive conduct within that market. In the case of digital markets, this process is particularly critical as the definition of what constitutes the "market" can be far less obvious than in traditional industries. Closely related to market definition is the concept of barriers to entry. High barriers can prevent rivals from entering or expanding within a market, allowing monopoly power to persist even in the absence of price increases. In the digital economy, barriers to entry can take the form of network effects, data control, and platform lock-ins.These visions of antitrust enforcement form the doctrinal backdrop against which *Google LLC* (Aug. 5, 2024) must be understood. The case tests whether existing monopolization doctrine can effectively address the economic power and market structure of firms like Google, in digital markets.

Plaintiffs' Arguments

The United States of America, acting under the direction of the Acting Attorney General of the United States, and the States of Arkansas, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, South Carolina, Texas, and Wisconsin, acting through their respective Attorneys General, bring this action under Section 2 of the Sherman Act, 15 U.S.C. § 2, to restrain Google LLC from unlawfully maintaining monopolies in the markets for general search services, search advertising, and general search text advertising in the United States through anticompetitive and exclusionary practices, and to remedy the effects of this conduct.[320]

The plaintiffs' central claim was that Google allegedly maintained its monopoly by "locking up the most significant distribution channels for general search engines"[321] through a web of exclusionary agreements. They argued that Google entered into long-term contracts with browser developers, mobile devices manufacturers, and wireless carriers to stay the default search engine across the majority of the United States, thereby foreclosing rivals from achieving the scale necessary to compete. As a result, Google receives billions of daily queries through these preset access points, reinforcing its dominance.

[318] Kai-Uwe and Miroslava, "The Battle for Search: United States v. Google LLC and Its Implications for Antitrust Law," 2.
[319] Federal Trade Commission, "The Antitrust Laws."
[320] Amended Complaint, United States v. Google LLC, No. 1:20-cv-03010-APM Document 94 (D.D.C. Jan. 15, 2021), 2-3.
[321] Amended Complaint, 27.

However, Google's default placements are not incidental; they are the product of massive financial inducements. Google paid billions of dollars annually to secure default status on Apple devices, Android smartphones, and major browsers such as Mozilla Firefox.[322] These agreements were typically structured as revenue-sharing arrangements, under which Google "remits partners a percentage of the advertising revenue"[323] generated from searches conducted through the default access points (pre-installed, primary locations on a device where a user enters a search query). In exchange for these payments, Google's partners agreed not only to make Google the default search engine, but also not to preload any competing general search engine on their devices. As a result, most mobile devices and browsers in the United States came preloaded exclusively with Google search. These contractual restraints barred rivals from the market and when all of Google's proprietary platforms were combined, nearly 80% of all search queries flowed through Google or channels controlled by Google.

The plaintiff's second major contention builds directly on the first. Google's exclusionary distribution agreements did not merely disadvantage competitors, but they prevented rival search engines from achieving the scale necessary to compete entirely. At every stage of the search process, user data is a critical input that directly improves quality[324] and because quality improves with scale, the denial of user traffic deprived rival search engines of the data necessary to refine algorithms and improve regardless of their technical competence or investment. Meanwhile, many users simply stick with default options, allowing Google to receive billions of daily queries through these access points.[325] Google has used its scale advantage to improve the quality of its search product,[326] reinforcing Google's scale advantage and further strengthening its dominance. Additionally, the plaintiffs introduced evidence demonstrating that Google faced limited competitive constraints in this market, enabling it to charge supracompetitive prices.[327] These prices constituted direct anticompetitive harm. Advertisers paid more than they would have in a competitive market, while rival advertising platforms lacked the user volume necessary to exert meaningful price discipline.

The plaintiff's final claim was that Google's conduct did not merely preserve its existing dominance, but actively constructed a durable and self-reinforcing monopoly that entrenched its power over time. Crucially, the plaintiffs framed this conduct as structural exclusion that Google shaped in the market itself. The challenged agreements didn't merely reflect Google's superior product; rather, they ensured that rivals were denied meaningful access to users regardless of quality or innovation. Legally, this distinction is critical.

Defendant's Arguments

[322] Amended Complaint, 4.
[323] Amended Complaint, 26.
[324] Memorandum Opinion, 35.
[325] Memorandum Opinion, 2.
[326] Memorandum Opinion, 35.
[327] Memorandum Opinion, 190.

Section 2 of the Sherman Act critically distinguishes between monopoly power acquired through exclusionary conduct and monopoly power achieved through competition on the merits, and it does not punish the latter. Google's principal defense in this case rested squarely on this foundational principle of American antitrust law.

Citing *United States v. Grinnell Corp*. (June 13, 1966), the company argued a monopolization claim requires proof of not only the possession of monopoly power in the relevant market, but also the "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic incident."[328] Google used this as its defense, arguing that it had secured default distribution, not through exclusionary conduct, but by developing a "superior product" through constant innovation.[329] Google claimed that any "scale benefits achieved from winning customers' business based on competition on the merits [do not]turn[]an otherwise lawful agreement into an unlawful one."[330]

Repeatedly, Google argued that innovation in search undermines claims of durable monopoly power. It cited the emergence of new entrants[331] such as DuckDuckGo and Neeva, as evidence to undercut the plaintiffs' claim that entry barriers were prohibitive. Google further argued about the advances in artificial intelligence. New technologies may lower, or even demolish, barriers to entry, but such innovation is meaningful only if it can change the market dynamic in the "foreseeable future."[332] While AI may not yet fully replace core functions such as web crawling and indexing, Google contended AI may someday fundamentally alter search.[333] Google further emphasized its own history of dethroning Yahoo[334] as proof that dominance in search is contestable and that today's market leader can be unseated by a superior product tomorrow. Framed this way, Google's position seemed not merely that it had competitors, but that the search market remains dynamically contestable, with innovation serving as a recurring disruptive force.

Google's third argument focused on its distribution agreements with Apple, Android's original equipment manufacturers (OEMs), and browser developers that the plaintiffs alleged were exclusionary. The company argued that these agreements were neither exclusive nor anticompetitive, but rather a legitimate form of competition for distribution in digital markets. Google emphasized that these contracts didn't prevent competitors from developing or offering rival search engines, nor did they bar users from accessing or switching to alternative search services. The company emphasized that the browser agreements do not prohibit a user from changing the default to a different search engine. As Google observed in a 2018 strategy document, "People are much less likely to change [the] default search engine on mobile."[335] Even

[328] U.S. Department of Justice, "Competition And Monopoly: Single-Firm Conduct Under Section 2 Of The Sherman Act: Chapter 3."
[329] Memorandum Opinion, 198.
[330] Memorandum Opinion, 198.
[331] Memorandum Opinion, 161.
[332] Memorandum Opinion, 163.
[333] Memorandum Opinion, 163.
[334] Memorandum Opinion, 163.
[335] Amended Complaint, 18.

where users can change the default, they rarely do,[336] showing that consumer choice remains intact, reinforcing Google's superior product service. Therefore, the company asserted that these agreements didn't substantially foreclose rivals from the market, but that the agreements reflected competition for distribution.

Their last claim strongly disputed the plaintiffs' definition of the relevant product and geographic markets targeted, arguing that the proposed markets were artificially narrow and inconsistent with established antitrust principles. In addition to critiquing DOJ's attempt to limit the relevant market, Google rejects the idea that the ad tech space in which it competes should be trifurcated into distinct ad exchange, ad server, and ad network markets.[337] With respect to advertising, Google argued that it competes with a broader market for digital advertising.[338] The company asserted that all forms of digital advertising "provide advertisers the ability to connect with potential customers," and points to advertisers' regular movement of spend among various ad types as evidence that, within the broader market of digital advertising, ad dollars are fungible and will be spent on the channel with the strongest return on investment, or ROI.[339] Thus, consumers and advertisers have access to a wide array of alternatives, including specialized search services, e-commerce platforms, social media, and other digital tools, that compete for user attention and advertising revenue. In Google's view, the plaintiffs' market definitions improperly excluded reasonable substitutes, giving Amazon's product-page ads as an example, and, in doing so, overstated Google's alleged market power.

In conclusion, Google maintains that its success reflects the quality and efficiency of its products. The company argues that its advertising technology remains "simple, affordable, and effective," with fees that are lower than industry averages undermining claims of exploitative behavior.[340] It further contends that government intervention risks unintended consequences, including "raising fees for advertisers and lowering returns for publishers,"[341] ultimately harming small businesses and online platforms. According to Google, efforts to restructure its ad tech ecosystem could distort competition by arbitrarily "picking winners and losers in a highly competitive industry."[342] More broadly, Google argues that regardless of its market share and any barriers to entry, its lack of monopoly power is confirmed by the dramatic growth in search output and its numerous innovations that have increased search quality.[343]

Court's Ruling

The Supreme Court ruled in favor of the plaintiffs and held that Google violated Section 2 of the Sherman Act by unlawfully maintaining monopoly power in the markets for general

[336] Amended Complaint, 3.
[337] Coniglio., "Crunch Time in DOJ v. Google: An Ad Tech Market Definition Cluster?."
[338] Memorandum Opinion, 167.
[339] Memorandum Opinion, 167.
[340] Belanger, "DOJ claims Google has "trifecta of monopolies" on Day 1 of ad tech trial."
[341] Belanger, "DOJ claims Google has "trifecta of monopolies" on Day 1 of ad tech trial."
[342] Belanger, "DOJ claims Google has "trifecta of monopolies" on Day 1 of ad tech trial."
[343] Memorandum Opinion, 164.

search services and general search text advertising.[344] After "carefully consider[ing] and weigh[ing] the witness testimony and evidence," the court concluded that "Google is a monopolist, and it has acted as one to maintain its monopoly."[345]

First, the Court determined that general search services and general search text advertising constitute "relevant product markets," applying the market definition framework articulated in *Brown Shoe Co. v. United States* (June 25, 1962).[346] Second, relying on both "direct and indirect evidence," the court found that Google possessed a monopoly in each relevant market.[347] Then the court evaluated Google's default distribution agreements under the exclusive-dealing framework established in *United States v. Microsoft Corp* (June 28, 2001). Although the agreements did not expressly prohibit rivals such as Bing or DuckDuckGo from competing, the Court held that they were sufficiently exclusive in practice.[348] Lastly, the Court rejected Google's procompetitive justifications for its default agreements.[349] As a result, the Court held that Google unlawfully maintained monopoly power in violation of the Sherman Act.[350]

The court ordered a series of forward-looking remedies designed to restore competitive conditions. One was the requirement that Google make certain portions of its search index and user-interaction data available to rivals and potential rivals.[351] In addition, Google was ordered to offer search and search text advertising syndication services to certain competitors, allowing rivals and potential entrants to deliver high-quality search results and ads while they develop their own independent capacity.[352] Under the remedies ordered in September 2025, Google will be barred from entering into or maintaining exclusive contracts related to the distribution of Google Search, Chrome, Google Assistant, and the Gemini app.[353] Together, these remedies reflect an aggressive attempt to reopen competition in search and adjacent markets by dismantling structural barriers to entry, loosening Google's control over critical distribution channels, and enabling rivals to compete on quality rather than access.

Conclusion

Although the Court ruled in Google's favor on certain issues, including the absence of a general duty to deal with rivals and the denial of sanctions, the decision was widely viewed as a significant defeat for Google. The Court's decision against Google marks a watershed moment in modern antitrust enforcement, signaling a renewed willingness by courts to apply traditional monopolization doctrine to dominant digital platforms. The ruling represents more than a loss for Google; it reshapes the legal terrain for Big Tech as a whole.

[344] Memorandum Opinion, 4.
[345] Purdue Global Law School, "U.S. v. Google: A Landmark Case and Warning Shot to Big Tech."
[346] Harvard Law Review, "United States v. Google, LLC.," 893.
[347] Harvard Law Review, "United States v. Google, LLC.," 893.
[348] Harvard Law Review, "United States v. Google, LLC.," 893.
[349] Harvard Law Review, "United States v. Google, LLC.," 894.
[350] Harvard Law Review, "United States v. Google, LLC.," 894.
[351] U.S. Department of Justice, "Department of Justice Wins Significant Remedies Against Google."
[352] U.S. Department of Justice, "Department of Justice Wins Significant Remedies Against Google."
[353] U.S. Department of Justice, "Department of Justice Wins Significant Remedies Against Google."

For Google's competitors, the decision presents both opportunity and uncertainty. On the one hand, restrictions on Google's default distribution agreements could lower barriers to entry and provide rivals with greater access to users and query volume. On the other hand, increased exposure does not guarantee competitive success. Rivals must still persuade users to switch and demonstrate meaningful product differentiation in a market long shaped by Google's dominance. The ruling also raises significant questions for Google's commercial partners. Revenue-sharing arrangements with Google have historically generated billions of dollars annually, supporting device pricing strategies, platform development, and ecosystem investment and curtailing those payments may force partners to rethink their business models or seek alternative revenue sources.

Beyond Google, the decision carries broader implications for other major technology companies. The federal government is suing Meta (Facebook), Amazon, and Apple, as well as an additional case against Google.[354] The Court's analysis in *Google LLC* may serve as a roadmap for future cases confronting similar claims of platform dominance and exclusionary conduct. If adopted elsewhere, this framework could make it more difficult for Big Tech firms to rely on innovation narratives or consumer choice arguments to defeat monopolization claims. Ultimately, as remedies are debated and appeals proceed, *Google LLC*will likely shape not only the future of search engines, but also the legal standards governing platform competition in the digital economy. Whether this renewed enforcement produces more competition or merely restructures, existing power dynamics remains one of the defining questions for the next chapter of Big Tech regulation.

[354] McArdle, "(Anti)Trust Issues."

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Cheap Transportation and Expensive Education: How the MBTA Communities Act Represents Educational Divides in Massachusetts

Molly Norris
Edited by: Brianna Janeira (Senior Editor) and Anna Cook (Junior Editor)

Abstract

Though the Commonwealth of Massachusetts is known for its prestigious public education system, divides between educational quality run rampant. The inability for movement into wealthy towns for those who are economically underprivileged is often determined by the lack of transportation to those places. The MBTA Communities Act was passed to expand low-income housing into wealthier suburbs, potentially offering an opportunity for low-income families to break the cycle of poverty through prestigious education. A student's ability to receive a strong education often determines their future financial status, and segregating education based on one's wealth disallows the change of this system.

Introduction

The Commonwealth of Massachusetts contains some of the most prestigious higher education institutions in the country: Harvard, the Massachusetts Institute of Technology (MIT), and Amherst College. Given its small population and geographical size, higher education is one of the leading industries in Massachusetts. In the United States – where the college you go to is often indicative of the quality of your primary education – education is money. Massachusetts is also ranked number one in the country for primary education, coinciding with its number one ranking in state economy. In small Massachusetts municipalities, industry is often sparse, resulting in a heavy reliance on taxpayer dollars to fund public education. This, of course, leads the best public school districts in Massachusetts – and the country in general – to be small, wealthy towns.

In this Note, I will be focusing on twenty-two communities in Massachusetts who are arguing against – or downright refusing – compliance with the MBTA Communities Law[355]. I intend to draw a connection between their wealth and educational performance, determining whether 'Prestigious' public school districts in Massachusetts ultimately harm the expansion of affordable housing into wealthy Boston suburbs.

Legal Landscape

As of 2021, the percentage of U.S. adults over the age of 25 who have a Bachelor's degree or higher was 34.9 percent while the percentage of Massachusetts adults who had such

[355] Paula Ebben, "15 Massachusetts towns are not in compliance with the MBTA Communities Act. Will they face legal consequences?" CBS (Boston), October 29, 2025, https://www.cbsnews.com/boston/news/mbta-communites-act-towns-not-comply/.

degrees was 50.62 percent.[356] To dive deeper, the percentage of adults in Norfolk – the wealthiest town in Massachusetts by per-capita income – who had a bachelor's degree or higher was 61.6%.[357] In towns similar to Norfolk in terms of wealth, the percentage of adult residents who have a Bachelor's Degree or higher is similarly higher than the state average. These people are employed in fields that offer higher salaries, with their degrees making their income even larger. Because of Massachusetts' focus on education, the children of these adults will live in wealthier school districts, in turn giving more opportunities for prestigious higher education. As a result, these students work in higher paying jobs as adults, perpetuating the importance of familial wealth in higher education.

Unfortunately, most Massachusetts residents do not live in these extremely wealthy towns, many of which have populations under 100 residents[358]. Their public school districts are still some of the best in the country due to their location in Massachusetts, but the education these students receive is significantly less prestigious than that students in wealthier districts receive. These students go to prestigious, expensive schools much less often, ending up in lower-paying jobs that force them to live in poorer towns, like those they grew up in, as adults. This is where housing emerges as a crucial component.[359] Massachusetts is the only state in the country to have a "right to shelter" law, requiring them to provide housing for families with children who would otherwise be homeless.[360] This means that Massachusetts has a very high population of low-income individuals who live in state-sponsored housing. However, these housing units rarely fall within the Commonwealth's wealthier towns. Underprivileged students will turn into underprivileged adults due to the cycle of poverty, partly determined by their quality of education. In an attempt to expand access to affordable housing outside of the city, Governor Maura Healey passed the MBTA Communities Law in 2021, requiring towns with MBTA (Massachusetts Bay Transportation Authority) stations to have dense, multi-family housing within 0.5 miles of those MBTA stations.[361] In theory, this housing would be cheaper, allowing low-income individuals to live farther from the city while continuing to have work opportunities throughout the state. The MBTA Communities Law will be the precedent for the case we are discussing.

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[356]Wikipedia, s.v. "List of Massachusetts locations by per capita income," last modified April 6, 2026, https://en.wikipedia.org/wiki/List_of_Massachusetts_locations_by_per_capita_income#:~:text=Many%20of%20the%20state's%20wealthiest%20towns%20are,and%20towns%20just%20to%20the%20west%20of.

[357] U.S. Census Bureau, *QuickFacts: Norfolk town, Norfolk County, Massachusetts*, accessed March 5, 2026, https://www.census.gov/quickfacts/fact/table/norfolktownnorfolkcountymassachusetts/PST045224.

[358] Wikipedia, s.v. "List of U.S. States and Territories by Educational Attainment," last modified December 20, 2025, https://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_educational_attainment.

[359] The Education Trust, "The State of Funding Equity in Massachusetts," accessed April 10, 2026, https://stateofeducationfunding.org/state/massachusetts/.

[360]Mass. Gen. Laws ch. 23B, § 30 (2024), https://malegislature.gov/Laws/GeneralLaws/PartI/TitleII/Chapter23b/Section30.

[361]Commonwealth of Massachusetts, "Multi-Family Zoning Requirement for MBTA Communities," *Mass.gov*, accessed March 5, 2026, https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities.

As of October 29, 2025, fifteen Commonwealth municipalities had failed to meet the requirements of the MBTA Communities Law,[362] with another seven publicly expressing their unhappiness with the requirements.[363] In order to discuss the relationship between wealth and education, I will be using per-capita income and graduation rates to determine a municipality's state ranking for wealth and education, respectively. Out of these twenty-two communities, twelve fall into the 75th percentile for per-capita income of Massachusetts municipalities as of 2021.[364] Out of these twelve, eight fall within the 75th percentile for graduation rates of Massachusetts municipalities.[365] This means that 36.4% of the originally discussed twenty-two municipalities that were unhappy with the MBTA Communities Law are in the 75th percentile for both wealth *and* educational opportunity. This is a large percentage, considering that only 177 of the total 351 municipalities in the Commonwealth of Massachusetts are required to follow the MBTA Communities Law.

Legal Interpretations of the MBTA Communities Law

To truly understand the effect prestigious public schools have on a town's population of low-income residents, I will discuss an ongoing legal case occurring in the wealthy Massachusetts town of Concord: *Symes Development & Permitting LLC v. Concord ZBA*.[366] This case originally began due to a dispute over how much control the Concord Planning Board had over specific lots in an 18-lot plot purchased by Symes Development & Permitting LLC which sits behind the West Concord MBTA Commuter Rail Station, intended for the development of housing units. We will focus on one of Symes' arguments in this case; the Concord Planning Board's condition requiring the reservation of three lots for affordable housing purposes exceeded the planning board's authority. The Concord Planning Board claimed that they were authorized to require subdivision lots to be reserved for possible, town-sponsored affordable housing, with a three year period to decide. They claimed that they were authorized to do so under Article 61 of Section 6.21 of the Subdivision Rules and Regulations, determined in an April, 1992 town meeting. Under these laws, they asserted, the three years of land restriction did not require backpayment to the subdivision owner if the town did not choose to purchase the land.

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[362] Paula Ebben, "15 Massachusetts towns are not in compliance with the MBTA Communities Act. Will they face legal consequences?" *CBS* (Boston), October 29, 2025, https://www.cbsnews.com/boston/news/mbta-communites-act-towns-not-comply/.

[363] Andrew Brinker, "'It's an invasion.' In towns across Eastern Mass., resistance grows against ambitious state housing law," *The Boston Globe*, June 25, 2024, https://www.boston.com/news/the-boston-globe/2024/03/08/its-an-invasion-in-towns-across-eastern-mass-resistance-grows-against-ambitious-state-housing-law/.

[364] "List of Massachusetts locations by per capita income," Wikipedia, last modified January 26, 2026, https://en.wikipedia.org/wiki/List_of_Massachusetts_locations_by_per_capita_income.

[365] "2024 Graduation Rates (District) for All Students 4-Year Graduation Rate," DESE, last modified May 1, 2025, https://profiles.doe.mass.edu/statereport/gradrates.aspx.

[366] *Symes Dev. & Permitting, LLC v. Ferguson*, No. 000021 (Mass. Super. Ct., Middlesex Cnty. 2021), https://www.massdirtlaw.com/wp-content/uploads/2024/06/Symes-Development-Permitting-LLC-v.-Town-of-Concord-Planning-Board.pdf.-LLC-v.-Town-of-Concord-Planning-Board.pdf.

Symes had an easy counterargument to this point, based on state law itself; under Article 89 of Section 6 of the Amendments to the Massachusetts Constitution, known colloquially as the Home Rule Amendment, Concord's Planning Board did not have the authority to require the reservation of lots for affordable housing purposes. Under G. L. C. 41, Section 81Q, a planning board may adopt rules requiring reservations of land for some specific purposes, such as parks, and, "any other public purpose(s)." Symes argued that affordable housing did not qualify as one of these "other public purposes," as it was not related to the provision of subdivision improvements, a requirement under the Subdivision Control Law of Section 81Q. This meant the Planning Board's requirement held no weight. Along with the lack of authority to reserve land for affordable housing purposes in the first place, Symes argued that neither Section 81Q, nor 81U, allowed the reservation of lots without compensation during the allotted three year period. Because state law outweighs town law, the Concord Planning Board's argument held, in Symes' view, no validity.

The Concord Planning Board's counterarguments to Symes' claims lacked sufficient evidence to prove misuse of the land. Despite the lack of clarification in Article 61 of Section 6.21 of the Subdivision Rules and Regulations that could theoretically aid in the Planning Board's case, Massachusetts' state law gave the Planning Board no such authority. Justice Howard P. Speicher ordered that the Concord Planning Board did not have the authority to reserve lots of Symes' property for affordable housing, stating specifically that the lots were Symes' private property to do with as they pleased.

Even with the Judge's ruling, residents of Concord wanted the town to appeal the decision.[367] In the public comment portion of a Town Meeting, residents shared their concerns regarding increased noise from the train, environmental impact of the project, and dust pollution, each of which the town clarified were being regulated.[368] Despite constant repetition that these were not aspects of the project residents had to worry about, public commenters continued to come to the microphone and share the same concerns.. One man even mentioned his concern that the dense housing may result in "engine idling," citing pollution as his main concern. However, the man's arguments sounded similar to those prohibiting loitering in poorer, more urban areas, insinuating that the low-income groups moving into this new housing would be bad for the community.[369]

Concord published their decision not to appeal, saying, "The Town is committed to increasing housing stock, particularly near commuter rail stops, aligning with the MBTA Communities Act. The Symes development falls within the Town's MBTA Communities Multi-Family Overlay District, and the Town acknowledges the state's focus on addressing the

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[367] Dakota Antelman, "Judge sides with developer in West Concord subdivision fight," *The Concord Bridge*, February 19, 2025, https://concordbridge.org/index.php/2025/02/19/judge-sides-with-developer-in-west-concord-subdivision-fight/.
[368]Zoning Bd. of Appeals, Town of Concord, Meeting Minutes (Apr. 10, 2025), https://www.minuteman.media/AgendaCenter/ViewFile/Minutes/_04102025-12825.
[369]1 National Homeless Law Center, *2021 Housing Not Handcuffs State Criminal Legal System Supplement*, February 2022, 10, https://homelesslaw.org/wp-content/uploads/2022/02/2021-HNH-State-Crim-Supplement.pdf.

housing crisis."[370] This ignores the fact that, after five years, the case is still ongoing. In those five years, Symes has been unable to build twenty housing units that would have opened up opportunities for lower-income individuals to live in Concord; but they were not built. These residents of denser housing would not offer the town as much tax revenue. Concord is known for its schools, being considered one of the best public school districts in the country. They rely on the tax revenue of wealthy residents to keep standards high and opportunities exclusive. Even if only twenty units were built – with only twenty new, low income families – that would mean twenty less households who could "pay their way" in the Concord education system. This, in the eyes of the privileged, is simply unacceptable.

Conclusion and Implications

There are inequalities in Massachusetts' wealth distribution, which this law was meant to address. However, as is seen in *Symes Development & Permitting LLC v. Concord ZBA*, pushback from local communities makes this difficult. Future cases similar to *Symes* have the potential to further educational and wealth inequality across Massachusetts.

Concord does have good public schools, as is evident by their consistent, high-scoring testing results. However, houses in Concord can be five times as expensive as those in lower-income towns, with five times less space. Residents in Concord live there to send their children to good schools. That is what keeps the town special. The town of Concord, along with other towns fighting the MBTA Communities Law, needs to push for community acceptance of underprivileged citizens through the expansion of low-income housing. The simple notion of prestigious schools makes it nearly impossible for lower income individuals to move into these towns. It is not that they cannot find housing, it is that the housing does not exist. This is why affordable housing is so uncommon in Boston suburbs, compared to in the Boston area. It is not a lack of space or resources. It is a deliberate choice made by towns whose names invoke wealth and educational superiority.[371]

[370] Town of Concord News Flash, [Archived] Information: Symes Development & Permitting LLC v. Concord ZBA (Mar. 6, 2025), https://www.concordma.gov/CivicAlerts.aspx?AID=1813&ARC=2254.
[371] Ethan Varian, "Too much affordable housing? Concord rejects low-income project downtown, draws state scrutiny," *The Mercury News*, June 11, 2024, https://www.mercurynews.com/2024/06/11/too-much-affordable-housing-concord-rejects-low-income-project-downtown-draws-state-scrutiny/.

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Unitary Executive Theory: The Rise of Constitutional Originalism in Modern America

Ruhi Bhojani
Edited by: Helene Weimbs (Senior Editor), and Samantha Rogers (Junior Editor)

Abstract

Though the ruling in *Trump v. United States* (2024) may seem unprecedented and like a departure from democracy, the history and legal progression of ideas indicate a trend towards traditional interpretations of the Constitution. Unitary Executive Theory, or the belief that the President should have full and exclusive control of the entire executive branch of the US government contextualizes the intent behind the actions of the current administration. This paper seeks to lay out the history of Unitary Executive Theory through issues and events already prevalent in the national consciousness, foundational and modern legal cases, and a final case analysis and list of solutions mainly regarding redistribution of branch power to escape the trend of authoritarianism.

Introduction

The dangers that political unrest continue to pose to the essence of American democracy are impossible to ignore. To demystify the actions of the current administration and provide clarity in this time of uncertainty, this paper will provide the definition, history, legal progression, and analysis of the Unitary Executive Theory. Based on the vesting clause of the executive branch in the Constitution, Unitary Executive Theory (UET) is the idea that the entire United States Executive Branch should remain under the sole control of the president. Under UET, all executive functions, including appointments to government agencies, legislation regarding individual rights, and national security belong to the president alone. As time has progressed, the US federal court has made decisions increasingly aligned with the principles of UET, which have perpetuated the ongoing shift towards authoritarianism under the Trump Administration. In order to prevent American democratic erosion, presidential accountability must be strongly reinforced, and jurisprudential power should be redistributed to the legislative branch.

Important Issues, Historical Context, and Modern Impact

Appointment and Removal Power

The Constitution states that the nation's "executive power shall be vested in a President of the United States of America."[372] Under UET, on the other hand, "the President may remove appointed executive branch officials without approval from Congress or the courts,"[373] suggesting that the president would have decision-making power independent of the other

[372] U.S. Const. art. II, § 1. cl. 2.
[373] *Unitary Executive Theory (UET)*, Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/wex/unitary_executive_theory_%28uet%29.

branches of American government. However, the Constitution also states that Congress is in control of the appointment of inferior officers whose hiring is not directly delegated to the president.[374] The extent of removal power has long been a point of discussion within American politics, exemplified by the temporary impeachment of President Andrew Johnson. His attempt to remove Cabinet member Stanton and the controversy that ensued illustrate early debates regarding executive jurisdiction over officer removal.[375] In a modern context, in *Wilcox v. Trump* (2025), President Trump fired National Labor Relations Board member Gwynne Wilcox without citing neglect of duty or malfeasance. Wilcox sued, claiming her removal was unconstitutional, and after a win appealed by President Trump, the D.C. Circuit Court ruled in his favor, establishing the President's appointing power under UET.[376]

Independent Agencies

UET claims that Congress should not be able to create agencies with individual leaders who are protected from removal. However, this complicates the formation of agencies because all agency-leading government officers cannot be placed under executive authority without jeopardizing the inter-branch checks and balances of the government. If Congress is unable to create agencies where leadership is free of executive influence, then the president will be able to disproportionately influence legislation and national welfare. This is exemplified by a memo from Assistant Attorney General Samuel Alito, under Ronald Reagan's presidency, which pushed for signing statements for each law, and attempted to formalize presidential interpretations of congressional intent.[377] This would have effectively allowed the President to control the appearance and enactment of every single law created by Congress. The same values have continued to exist under the current administration through the expansion of the Office of Information and Regulatory Affairs jurisdiction into independent agencies and newly required reporting to the Office of Management and Budget.[378] The modern alignment of American democracy with UET has continued to decrease the legitimacy and independence of the entire legislative branch with every enactment of executive power.

National Security Measures

The questions that UET poses directly relate to matters of national security, and the extent of executive decision-making regarding privacy, detention, intelligence, and more. The Unitary Executive perspective is that the President's power is sweeping and comprehensive, so much so that it may have the ability to infringe upon the civil liberties of citizens regarding national security. This first occurred with the passage of the Patriot Act during the Bush Administration. The Patriot Act controversially expanded governmental surveillance activities

[374] U.S. Const. art. II, § 2. cl. 2.
[375] Andrew Johnson, Order Removing Edwin M. Stanton (Feb. 21, 1868), National Archives and Records Administration, https://www.archives.gov.
[376] *Trump v. Wilcox*, 604 U.S. ___ (2025).
[377] Mem. of Law from Samuel Alito to The Litigation Strategy Working Group (February 5, 2026).
[378] Exec. Order No. 14215, 3 C.F.R. (2025).

after the events of September 11, such as unwarranted internet record collection, loosening boundaries between foreign and domestic criminal investigations, and normalizing a lack of probable cause in legal investigations.[379] In accordance with UET, the President's ability to protect the nation was used to justify typically unconstitutional practices within intelligence collection.[380] Effectively, the President's power took priority over popular opinion, a practice which is still prominent in the modern day with regards to Immigration and Customs Enforcement (ICE) actions under the Trump administration.[381] ICE's infringement on citizens' safety, security, and lives in the name of national security perfectly exemplifies how easily UET can be used to facilitate autocratic behaviors within the government.

Analyzing Related Cases

Foundations of UET

Myers v. United States (1926) and *Humphrey's Executor v. United States* (1935) are landmark legal cases that introduced discussions about UET, mainly in consideration of the reach of Presidential power in the federal government. In *Myers*, Woodrow Wilson removed Frank Myers, an Oregon postmaster, from his post without approval from the Senate.When Myers filed a complaint with the Supreme Court of the United States (SCOTUS), they ruled that the President had full authority over executive officers.[382] This was the first case where the President's officer removal power was called into question: it established that the President and the Executive Branch should have power over all executive functions in order to uphold the Constitution.[383] Soon thereafter, the precedent that *Myers* set was challenged by *Humphrey* when President Franklin Delano Roosevelt attempted to remove Federal Trade Commission (FTC) Commissioner William Humphrey due to their disagreements regarding New Deal policies.[384] When his executor claimed his removal was unconstitutional and filed for back-pay, it was taken to the Supreme Court. In this case, the ruling mandated "for-cause removal," meaning there had to be cited reasons for dismissal, such as neglect of duty, malfeasance, or treason.[385] In addition, Congress now had to be consulted prior to Presidential decisions to remove someone from office.[386] As a check on UET ideas, *Humphrey* established that not all organizations could be treated the same as they were in *Myers*, and the FTC became an example of governmental and independent agencies that could not be placed entirely under executive jurisdiction. Under *Humphrey*, employees at the FTC and other organizations revolving around finances, regulations,

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[379] *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 279 (2001).
[380] USA PATRIOT ACT, 115 Stat. 279.
[381] Matt Loffman, *Poll: Nearly Two-Thirds of Americans Say ICE Has Gone Too Far in Immigration Crackdown*, PBS NewsHour (Feb. 5, 2026, 5:00 AM), https://www.pbs.org/newshour/politics/poll-nearly-two-thirds-of-americans-say-ice-has-gone-too-far-in-immigration-crackdown.
[382] *Myers v. United States*, 272 U.S. 52 (1926).
[383] *Myers*, 272 U.S.
[384] *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).
[385] *Humphrey*, 295 U.S.
[386] *Humphrey,* 295 U.S.

etc. were protected from executive removal.[387] As a result of these rulings, it was determined that while the President will act as the head of the executive branch, the influence of the executive branch's jurisdiction does not equally impact all agencies in the United States. Ultimately, this set a new framework for the distribution of power in the United States government in accordance with the principles of UET.

Modern Developments

The debate surrounding UET remains relevant in the modern day. It has appeared in cases such as *Morrison v. Olson* (1988) and *Seila Law LLC v. Consumer Financial Protection Bureau* (2020), both of which demonstrate the ideological shift in American legal courts and serve as a precursor for the current administration's approach toward UET. In *Morrison*, the House Judiciary Committee believed that President Ronald Reagan's Solicitor General, Theodore Olson, had withheld documents during testimony, and wanted to appoint an independent counsel, Alexia Morrison, to investigate further.[388] When Olson argued that it was unconstitutional for the counsel to be appointed independent of the executive branch, since it would qualify her as a principal officer, SCOTUS ruled that this was not the case, and upheld the precedent set by *Humphrey* of the heads of independent agencies being independent from the President.[389] Similarly, under the *Ethics in Government Act* (1978), it was ruled that independent counsel did not truly impair executive functions and could thus continue to exist as a valid check to the power of agency leaders.[390] Despite these rulings, the dissenting opinion presented by Justice Scalia gained significant traction and revived the original debate about some of the UET principles that were prominent during the Reagan administration. He proposed that prosecutorial power should be entirely executive and that the SCOTUS ruling defies separation of powers.[391] Furthermore, Scalia argued that if this independent counsel and all independent agencies were not held accountable by the President, their power would become totally isolated from the other branches of the American government.[392] Scalia's proposal of UET was endorsed by *Seila*, where Seila Law LLC was investigated by the Consumer Financial Protection Bureau (CFPB) and sent a subpoena for documents, which they refused to comply with. Immediately after, Seila Law LLC sued the CFPB, claiming the "for-cause" provision of presidential removal power was unconstitutional, and that the CFPB should not be allowed to continue to exist as an independent agency with only one director.[393] SCOTUS ruled that the provision was in fact unconstitutional, and let the CFPB continue to operate under the direct supervision of the President.[394] Significantly, the ruling in *Seila* placed even non-executive agencies under presidential control,

[387] *Humphrey,* 295 U.S.
[388] *Morrison v. Olson*, 487 U.S. (1988).
[389] *Morrison v. Olson*, 487 U.S.
[390] Ethics in Government of 1978, Pub. L. No. 95-521, § 601(c), 92 Stat. 1867 (codified as amended at 28 U.S.C. § 591 et seq.) (1982); *Morrison v. Olson*, 487 U.S. 654, 672 (1988)
[391] *Morrison v. Olson*, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting).
[392] *Morrison v. Olson*, 487 U.S.
[393] *Seila Law LLC. v. Consumer Financial Protection Bureau* 591 U.S. 1 (2020).
[394] *Seila,* 591 U.S.

concluding nearly a century of debate regarding executive appointment and removal. Along with the success regarding UET and a massive increase in executive power, *Seila* effectively reshaped the structure of agencies created by Congress, no longer allowing the existence of leaders insulated from presidential removal. With agency leaders reporting to the President, political influence is inextricably intertwined with social agencies. As a result, policy will now be entirely dictated by administration political priorities and not objectivity. The demonstrated progression of rulings in favor of Unitary Executive Theory and the connoted rise in conservatism set the stage perfectly for the overreach of power of the Trump administration that now characterizes the current political climate.

Current Administration

As just shown, an exploration of UET through the years has uncovered a convergence toward conservatism which serves as a precursor for a shift towards authoritarianism. In order to place this development in a modern context, I will analyze *Trump v. United States* (2024) in order to characterize ongoing democratic erosion and identify an effective solution.

Trump v. United States (2024)

In *Trump v. United States* (2024), President Donald Trump was investigated and indicted by Special Counsel Jack Smith for conspiracies and obstruction of justice related to the January 6th riots.[395] In this case, President Trump insisted that the president should have absolute immunity from criminal prosecution.[396] The Supreme Court then ruled that a tiered system for categorizing the immunity of actions in office should exist.[397] For actions falling in line with conclusive and preclusive constitutional authority, absolute immunity was granted; for official acts that did not impede on significant government functions, presumptive immunity was granted; and for personal acts that were unofficial and unrelated to the presidency, no immunity was granted.[398] Under this broad framework, President Trump was granted immunity from the aforementioned charges of conspiracy and obstruction of justice from the January 6th riots. While the ruling was supported by the intention of protecting presidents from politically motivated prosecution, this ruling proved to be controversial because it allowed for executive overreach of power, forgoing accountability measures in regard to social agencies. The ruling in *Trump* (2024) functionally puts the president in control of both the other branches of government, and allows the president to not be held to the same legal standard as other American citizens and members of government. UET's most prominent supporters cite the vesting clause to argue that the executive branch needs to be able to enforce the law, but, as highlighted in Justice Sotomayor's dissenting opinion, the precedent *Trump (2024)* set enables the president to work independently of the very Constitution the executive branch is meant to protect.[399] As a result of

[395] *Trump v. United States*, 603 U.S. ___ (2024).
[396] *Trump,* 603 U.S.
[397] *Trump,* 603 U.S.
[398] *Trump,* 603 U.S.
[399] Sonia Sotomayor, dissenting in *Trump*, 603 U.S.

Trump (2024), the president now has the potential to abuse their executive powers, a popular grievance listed against the Trump administration's actions such as deployment of federal troops into cities, undermining of the Constitution and Congress, compromise of national security, and attack on judicial independence.[400]

Implications and Solutions

Concentrated executive power comes largely at the expense of the legislative branch. The most effective way to distance our current administration from a unitary executive framework is to give legislative power back to the legislative branch. The in-depth historical analysis of the debate surrounding independent agencies in this paper has established that they are now effectively under the president's control, as per recent Supreme Court decisions.[401] All branches of government have contributed to the growth of the unitary executive system: the executive by reaching for power well beyond what was constitutionally intended, the judicial by ruling in allowance of executive overreach, and the legislative by continuing to place power in the hands of agencies controlled by the president. Court decisions, particularly in removal and supervisory authority cases, reflect a greater judicial trend toward strengthening unitary executive principles as discussed prior. If Congress were to significantly reduce the outsourcing of broad policymaking to independent agencies and conform more strictly to Constitutional bounds of legislative power,[402] decision-making authority throughout the government would be reallocated and the government would shift away from a unitary executive structure.

[400] New York City Bar Ass'n, *The Abuse of Presidential Power and Breach of Public Trust* (Dec. 18, 2025), https://www.nycbar.org/reports/the-abuse-of-presidential-power-and-breach-of-public-trust/.
[401] *Trump*, 603 U.S.
[402] U.S. Const. art. I.

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