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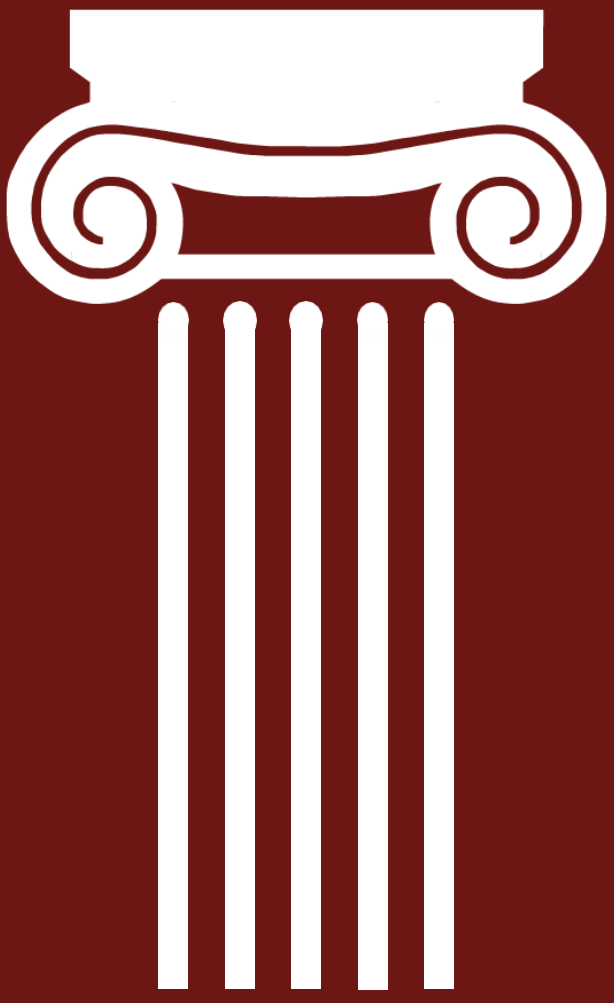

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The Evolution of Originalism: How and Why a Third Era is Emerging

Olivia Fish (CM ’23)

As a response to the liberal courts led by Chief Justices Earl Warren and Warren Burger, originalism emerged in the 1970s and 1980s as a defense by conservative Supreme Court justices against increasing liberalism. Given its roots, the originalist approach to constitutional interpretation has been viewed as a strictly conservative strategy, even though originalists argue for its nonpartisan nature. There is no single definition of originalism, but it began as a judicial philosophy that rejects the idea of a “living Constitution” and tries to follow the text as it was understood at the time or as the founders intended it to be understood. The application of originalism has shifted over time. Particularly in the first era of originalism, most originalists rejected judicial activism, a judicial philosophy that believes in going beyond the text of the Constitution using things like personal beliefs.[1] However, as originalism has evolved over the past several decades, its actual meaning has been heavily contested both within the judiciary and the academic community. Whether originalism is meant to focus on the founders’ intent, the public meaning at the time of the founding, or if originalism even supports the idea of a living Constitution is still up for debate. Further, many no longer see originalism as solely a conservative doctrine as more liberal originalists have emerged in recent years. I will argue that this is a change that marks the beginning of the third era of originalism. This third era serves to counter those assumptions and establish originalism as a sustainably long-term, nonpartisan constitutional approach that recognizes the need for multiple judicial philosophies in each decision.

Supreme Court Justice Antonin Scalia and Judge Robert Bork are seen as the figureheads of originalism, most famously known for their conservative outlooks. Because of their dominant roles as figureheads of originalism, there is a relatively narrow perception within the scholarly community of what originalism really is and what it can become. For the most part, this method of constitutional interpretation is associated with conservative values, even though this does not account for the full range of the judicial philosophy. Consider the recent case *Bostock v. Clayton County*,[2] in which historically conservative Supreme Court Justice Gorsuch cited the Fourteenth Amendment to determine that transgender workers are protected against workplace discrimination. There is a clear disconnect with originalist philosophy from the past to the present exemplified through Gorsuch’s decision in *Bostock*. There is less emphasis on solely conservative values, and more focus on the true meaning of the words. This case, among others, will be explored further throughout the paper to reflect this evolution.

In this paper I will analyze what I consider to be three distinct eras of originalism. Each section begins with a background section including an introduction to the era, and an overview of related literature. The first era will look at the time spanning from the 1960s to the 1980s, and unpack the challenges associated with this restrictive judicial approach. The second era will look primarily at the tension between Supreme Court Justices Antonin Scalia and Clarence Thomas, as they adopted different originalist approaches while sitting on the bench at the same time. I will then closely explore the possibility of a developing third era. I will look at the work of Justice Neil Gorsuch and Justice Amy Coney Barrett, as well as the writings of liberal scholars Jack Balkin and Lawrence Lessig. This section will continue by questioning where the future of originalism stands, as the current Supreme Court has a fragile balance of originalist thinkers in Justice Thomas, Gorsuch, and self-proclaimed originalist Justice Barrett. This paper ponders the possibility of a new, third era of originalism enduring into the future. In the case it does, it opens opportunities for progress and allows for originalism to be a helpful tool in maintaining stability and structure within the United States’ legal system.

I. Defining Originalism and Associated Terms

In discussing the evolution of originalism, the tensions between judicial restraint, judicial activism, and judicial review are constantly evolving as well. This section will explicitly define these terms to clarify the tensions between them. Judicial review, as established in the Supreme Court case *Marbury v. Madison*, is the power of the courts to strike down laws, statutes, or other related government actions that they deem unconstitutional. Accordingly, judicial restraint is the refusal to exercise judicial review in deference to the process of ordinary politics. Judicial activism, the opposite of judicial restraint, is the process whereby the courts go above and beyond the laws in consideration and

[1] Constitutional Originalism and History, PROCESS: A BLOG FOR AM. HIST. (2017), https://www.processhistory.org/originalism-history/ (last visited Jul 26, 2021).
[2] Bostock v. Clayton County, 590 U.S. (2020).

look to broader societal or political implications in their decisions. Judicial activism is most closely associated with liberalism, and the first era of originalism therefore served as a defense against judicial liberal activism in favor of conservative judicial restraint.

While there are no universally agreed-upon definitions of originalism, there are general ways to understand the meaning and how it is typically applied. Originalism is an approach to constitutional interpretation aiming to follow how the Constitution would have been understood or interpreted at the time of its founding. Of course, what this objectively means is subject to debate. To earlier first-era originalists, this meant something very similar to judicial restraint and simultaneously was applied by attempting to understand the founders' intent. Second and even third-era originalists understand this judicial philosophy as a method that utilizes whatever the public meaning was at the time of the founding, meaning an emphasis on what the layman would consider constitutional provisions to mean. Other originalists also question whether the functional definition of originalism itself is too restrictive. There is debate over whether the meaning can change over time or how originalism can be applied to modern-day situations that were not in existence at the time of the founding.

II. The First Era of Originalism: Judicial Restraint and Conservative Philosophy

A. Background

Originalism has only been popularized as a judicial philosophy in the United States. Nowhere else has this methodology emerged and subsequently sustained its popularity with the same success. This can be attributed to several factors. First, the United States Constitution is the oldest living constitution in the world. Second, there are distinct socio-political circumstances that led to the rise of originalism. The direction of both the Burger and Warren Courts provoked a strong response from conservatives, and this is how originalism first became popularized. For the first time, the Supreme Court was addressing issues including abortion in the landmark case *Roe v. Wade*, capital punishment, and even pornography in the case *Miller v. California*.[3] Minority groups were gaining unprecedented rights, and the Warren court left a legacy of activism and civil rights progress. The emergence of originalism as a counter to this was organic and specific to 1960s America. Third, most Americans strongly value the Constitution, so much so that constitutionalism is sometimes called America's "civic religion."[4] A 2020 survey performed by Harvard University's Carr Center for Human Rights Policy found that eight in ten Americans believed that "without our [Constitutional] freedoms America is nothing."[5] The American people, particularly those in the government, value the Constitution's words above all else. It is respected as the literal "supreme law of the land" by many and therefore prioritizing the words of the Constitution as a method for making judicial decisions seems logical.

Most scholars identify two key eras of originalism, defined by the work of Justice Scalia and Judge Bork. The first era of originalism, or "old originalism," came about in the 1960s and lasted through the 1980s as a response to liberal courts. The most prominent figures of the first era are former Attorney General Edwin Meese and Judge Robert Bork, whose appointment to the Supreme Court in 1987 was infamously rejected. Among other reasons, Bork's appointment was rejected due to his perceived willingness to roll back the civil rights rulings of the Warren and Burger courts. Due to this, originalism was perceived as a judicial approach in opposition to civil rights. Senator Ted Kennedy led an aggressive campaign against Bork's confirmation, even declaring on the Senate floor that "Robert Bork's America, is a land in which women would be forced into back-alley abortions, black [people] would sit at segregated lunch counters, [and] rogue police could break down citizens' doors in midnight raids."[6] Thus, originalism became synonymous with Robert Bork's contentious conservative views.

Furthermore, Keith Whittington, constitutional scholar and Princeton University professor, explains that first-era originalism is exemplified by a focus on judicial restraint to compensate for what conservatives saw as over-the-top judicial activism.[7] Additionally, first-era originalists looked at the founders' intent, which grounded the approach in

[3] Examining the legacy of Chief Justice Warren Burger, NAT'L CONST. CTR., https://constitutioncenter.org/blog/examining-the-legacy-of-chief-justice-warren-burger (last visited Jul 27, 2021).
[4] Jamal Greene, *On the Origins of Originalism*, TEX. L. REV., VOL. 88, 1, 7, 2009; COLUMBIA PUB.L. RES. PAPER NO. 09-201 (2009), https://scholarship.law.columbia.edu/faculty_scholarship/1574.
[5] Poll: Americans united on a slew of issues, despite contentious election season, POLITICO, https://www.politico.com/news/2020/09/15/election-season-americans-united-issues-poll-414687 (last visited Jul 27, 2021).
[6] Sarah Pruitt, *How Robert Bork's Failed Nomination Led to a Changed Supreme Court*, HISTORY, https://www.history.com/news/robert-bork-ronald-reagan-supreme-court-nominations (last visited Jul 27, 2021).
[7] Keith Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013).

historical knowledge.[8] In the following section, I will first discuss the key traits associated with first-era originalism, and will then look at the challenges associated with this judicial philosophy.

B. Key Traits

First-era originalism is defined by judicial restraint and a focus on the intent of the founders. Understanding the founders' intent meant that, to a degree, first era originalists needed to work as true historians. They had to get inside the minds of figures like James Madison and Alexander Hamilton, trying to use what they were thinking at the time to shape present-day decisions. By conflating the idea of originalism with the idea of judicial restraint, this practice was almost solely used to reverse the liberal actions of the Burger and Warren Courts. The goal of first-era originalism was to apply what they believed the founders were thinking. The words of the Constitution and the thoughts of those who wrote it were all that truly mattered. Originalism was seen as a means to an end, with the end being judicial restraint.[9] Given the limitations associated with judicial restraint, challenges inevitably arose.

C. Challenges

The idea that it was possible to know what the Constitution's founders accurately and precisely were thinking remains an inherently subjective practice. Criticisms, therefore, centered around the fact that not only were the founders' intentions subjective, but the ways that first-era originalists interpreted their intentions were also inevitably subjective.[10] It is impossible to know exactly what the founders were thinking over 200 years ago, and further to know the distinction of thought between each individual founder. There was no one universal intention at the time of the founding, and there is no perfect way to know even what any one founder was thinking, let alone all of them.

With no originalist truly represented on the Supreme Court during the first era of originalism, particularly within the context of Judge Bork's rejection to the Supreme Court, there were also challenges with the ways originalism was perceived as illegitimate or not as serious as other judicial philosophies. So, the fact that first-era originalism lacked strong judicial representation directly led to its demise, especially after William Rehnquist rose to his position as Chief Justice and established a new era of originalism in the Supreme Court lasting from 1986 to 2005.

With the rise of the Rehnquist Court, the work of past liberal courts was not as prominent in the political sphere. This was the beginning of the end for the perceived exigency of first-era originalism, as the defense against liberal courts became less urgent. Criticisms were becoming more pronounced, especially after Judge Robert Bork was rejected in his appointment to the Supreme Court. It became more widely seen that first-era originalism was "not closely engaged in the academic debate and [was] not always clear about their own theoretical claims."[11] Without a consistent understanding of what claims originalists supported and an absence of scholars working to resolve these obstacles, the lack of a standard as well as the imposing presence of subjectivity was hurting first-era originalism. Due to this, in moving towards second-era originalism, even as more scholars were beginning to support originalism as a judicial philosophy, there was a purposeful shift away from the subjectivity of understanding the founders' intent.

III. The Second Era of Originalism: Public Meaning

A. Background

The second era of originalism began with the Rehnquist Court in the mid-1980s when conservative thinkers had regained a more significant majority on the Supreme Court and therefore were not as occupied with undoing the work of liberal courts. Unlike the first era, second-era originalism saw two prominent Supreme Court justices apply the doctrine on the bench: Justice Scalia and Justice Thomas. Second-era originalism was not rooted in fear of judicial freedom but instead was grounded in a desire to create an independent judicial doctrine.[12] Whittington identifies the distinction between first and second-era originalism as a shift away from judicial restraint. First-era originalism *was* judicial restraint; second-era originalism identified itself as an independent judicial philosophy.

Of the judicial figureheads of second-era originalism, Justice Scalia is more widely recognized as a second-era originalist, as his approach created a sharper distinction between judicial restraint and the doctrine of originalism by

[8] Keith Whittington, *The New Originalism*, 22 GEORGETOWN J. OF L. AND PUB. POLICY 599 (2004).
[9] *Id.*
[10] *Id.* at 603.
[11] *Id.* at 605
[12] *Id.*

focusing on broader public meaning at the time the Constitution was written instead of the founders' intent. Second-era originalism also further divided historians and philosophers. While Justice Scalia worked to understand the public meaning of words used within the Constitution, Justice Thomas prioritized a natural law tradition that valued philosophy over history. The practical issues associated with the application of originalist theory have amplified tensions between the use of judicial precedent, original meaning, natural law, and historical versus philosophical perspectives. All these tensions will be further analyzed in the following subsections and will lead to a greater understanding of why the Supreme Court may be moving away from second-era originalism.

B. Key Traits

Unlike first-era originalism, second-era originalism is mainly centered around deciphering public meaning at the time of the founding. This became the focus to provide a greater sense of objectivity to the practice. Further, this did not require as intense a knowledge of history, unlike the scholarship required to decipher the founders' intent.[13] With a lessening reliance on history and a perceived shift towards objectivity, it seemed that originalism was starting to develop as an independent philosophy rather than as a defense mechanism.

Second-era originalism was also a doctrine focused on raising originalism up as an independent philosophy instead of bringing other doctrines down.[14] Judicial restraint and originalism were no longer conflated during second-era originalism. This meant that originalism shifted its focus toward established interpretive methods, rather than just being committed to restraint through the lens of the Constitution. Judicial restraint for conservative originalists remained important, however, it was no longer the primary focus. By looking at the work of Justice Scalia and Justice Thomas on the Supreme Court, we can examine the tensions that arose from second-era originalism.

C. Justices Thomas and Scalia

i. Justice Scalia

Some first-era originalism and much of second-era originalism was represented on the Supreme Court, arguably for the first time, through the work of Justice Scalia. Consider Justice Scalia's opinion in *D.C. v. Heller*, [15] where the question of how the Second Amendment would protect the right to license handguns in Washington D.C. was being contested. Justice Scalia tried to understand the semantics of the words in the amendment as well as the context of the words at the time. In his opinion, he is specifically looking at the meaning of each word in the Second Amendment according to the 1773 edition of English writer Samuel Johnson's dictionary. He found that the term "arms," even at the time of the founding, was understood to be "weapons of offence, or armour, or defence."[16] Through this practice, Justice Scalia concluded that the Second Amendment protected this right. The work Scalia presented in this opinion shows a shift in originalist philosophy. He did not look at the words as the founders may have seen them but instead looked at the definitions that broader society understood.

Justice Scalia's position becomes even more evident when considering his words in his book, *A Matter of Interpretation*. He writes that "while the good textualist is not a literalist, neither is he a nihilist. Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible."[17] Justice Scalia acknowledges that focusing on *intent* is far too subjective. Instead, while there is occasionally a range of meaning when examining words, that range can only extend so far. Because of this, Justice Scalia believes he takes a realist approach, finding a middle ground between a literalist and a pragmatist.

In a lecture he gave called "Originalism: The Lesser Evil," Justice Scalia even goes as far as to say that originalism "requires immersing oneself in the political and intellectual atmosphere of the time . . . and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day."[18] In respecting the natural range of meaning inherent to words, he also recognizes that originalism will always hold some sense of subjectivity through this immersive process. Although Justice Scalia subscribes to the originalist doctrine, in many of his opinions, bias can dominate his perspective and he may choose a far less popularized meaning of a word to remain true to his conservativism. However, by looking at Justice Scalia's opinion in *D.C. v. Heller*, he still has a distinct approach to originalism grounded in the search for public meaning that has shaped the philosophy's evolution.

[13] Constitutional Originalism and History, *supra* note 1
[14] Whittington, *supra* note 5.
[15] District of Columbia v. Heller, 554 U.S. 570 (2008).
[16] District of Columbia, 554 U.S.
[17] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW: AN ESSAY, 24 (1997).
[18] Antonin Scalia, *Originalism: The Lesser Evil*, 849 UNIVERSITY OF CINCINNATI L. REV. 857 (1989).

ii. Justice Thomas

Justice Thomas, unlike Justice Scalia, is much more focused on natural rights and natural law.[19] Natural law is seen as a body of unchanging moral principles functioning as a basis for all human conduct. Natural law works to defend natural rights such as freedom to life and liberty. To many conservatives, this viewpoint is looked at as a form of judicial activism. Yet, Justice Thomas rejects the Constitution as a living document, and therefore chooses to mainly focus on the Constitution's text instead of on new precedents. Consider Justice Thomas's opinion in *Graham v. Collins*.[20] A black man was up for the death penalty but petitioned under a lack of justice for not considering his mitigating life circumstances of having a troubled youth and family life. Justice Thomas's concurrence brought up that, all things being equal, a black person is more likely to be sentenced to death than a white person. He used that point to suggest that juries should have a predictable, clear set of guidelines for punishment rather than following their own discretion and allowing bias to skew their decisions. This opinion goes beyond the Constitution, speaking more directly to natural rights every individual innately should have.

Moreover, *Morse v. Frederick*[21] presented Justice Thomas an opportunity to apply his definition of originalism. This case considered whether students should be disciplined for expressive behavior promoting illegal drug use under the Constitution. Justice Thomas spent time looking through past precedent, specifically in the case of *Tinker v. Des Moines*. Given the precedent, he asserted that "our jurisprudence now says that students have a right to speak in schools except when they don't—a standard continuously developed through litigation against local schools and their administrators." His decision was not a matter of what the Constitution says because, he continues, "As originally understood, the Constitution does not afford students a right to free speech in public schools."[22] The actual decision Thomas came to presents an instance when originalism is not enough. In some instances, Justice Thomas inserted his own views when the words of the Constitution and precedent from other cases were only enough to understand that more was required. Natural law and natural rights are the authoritative guide for Thomas in many instances. This conclusion puts him in a more progressive position than Justice Scalia regarding second-era originalism.

Justice Scalia is more connected to the first era of originalism because he does not prioritize natural rights and law as a guide to the extent that Justice Thomas does, and he more so embodies a restrained version of Judge Bork. While Justice Thomas could be perceived to value the philosophy of originalism, Justice Scalia clearly valued history and philosophy through his public meaning approach.[23] It is questioned among the scholarly community whether Justice Scalia, Justice Thomas, or both together best define the second era of originalism. The tension between history and philosophy is a consistent point of conflict among originalists. Most scholars attach Justice Scalia as the figurehead of the second era, but few would argue that Justice Scalia is a truer originalist than Justice Thomas. This creates a tangible obstacle for second-era originalists that will be analyzed further in the challenges section that follows.

D. Challenges

Since Justice Thomas and Justice Scalia were on the Supreme Court at the same time, the tensions between their differing perspectives makes it difficult to precisely define second-era originalism. This leads us to the main challenge of second-era originalism, since both these dramatically different figures represent the same era. It could be argued that Justice Scalia is the binding agent between first and second-era originalism, holding on to the values of judicial restraint but focusing on public meaning. On the other hand, Justice Thomas represents the transition between second and third-era originalism. Although he often casts aside precedent in favor of the words of the original text, he occasionally values the act of going beyond the text because he sees natural law as an authoritative guide and reads the Constitution as colorblind.[24]

As second-era originalism has gradually shifted away from judicial restraint, originalists are still unclear on one standard approach. While not quite a criticism of second-era originalism, new originalists face a challenge regarding a universal understanding. Alongside the push and pull of Justice Scalia and Justice Thomas, the focus that should be placed on judicial restraint compared to judicial activism remains unclear, as does the value placed on history or philosophy. The second-era places value on laymen interpretation but adopting standardized grounds for other scholars

[19] Steven Hayward, *Two Kinds of Originalism*, NATIONAL AFFAIRS, 2017, https://www.nationalaffairs.com/publications/detail/two-kinds-of-originalism.
[20] Graham v. Collins, 506 U.S. 461 (1993).
[21] Morse v. Frederick, 551 U.S. 393 (2007).
[22] *Id.*
[23] Scalia Defends Originalism as Best Methodology for Judging Law, UNIV. OF VA. SCH. OF L. (2010), https://www.law.virginia.edu/news/2010_spr/scalia.htm (last visited Jul 26, 2021).
[24] *Id.*

and judges to follow is a difficult task. Further, second-era originalism remains a predominantly conservative approach. Given that a central aspect of second-era originalism was the fixed and binding nature of the Constitution, there was significant ambiguity in what precisely read as binding compared to what in the Constitution was not necessary to follow. For instance, throughout his career, Justice Scalia was insistent that provisions such as those in the Fourteenth Amendment do not apply to issues around gender, while other second-era originalists like constitutional scholar and Northwestern professor Steven Calabresi would ardently disagree. Calabresi explains that, for one thing, "Section One of the Fourteenth Amendment was from its inception a ban on all systems of caste; and second, that the adoption of the Nineteenth Amendment in 1920 affected how we should read Fourteenth Amendment's equality guarantee."[25] The idea of the Constitution being binding and fixed was universal, but there is disagreement concerning exactly *which* parts were binding.

While slightly more lenient, Second-era originalism still speaks almost exclusively to conservative ideology. With an ever-increasing value placed on liberal progress in America, it is no wonder that a third era of originalism is emerging. As constitutional questions arise related to liberal issues, new liberal originalists are creating an entirely new way to look at this doctrine. Third-era originalism emerges from ambiguity innate to the first and second eras. The constraints of second-era originalism do not allow for necessary societal progress that third-era originalists can see through the lens of originalism. The lack of political diversity and flexibility in second-era originalism has sparked the emergence of a new, third era.

IV. The Third Era of Originalism: Living Originalism and Construction

A. Background

The third era of originalism is still developing, and therefore is not yet seen as legitimate in the academic community. Because of this, there are little to no scholarly arguments supporting this third era's existence. For so long, originalism has been looked at almost exclusively as a conservative mechanism and a stagnant tool. By looking at either the public meaning at the time of the founding or the founders' intent, the meaning of the Constitution fails to account for many modern-day issues. Understanding the key provisions of the United States through the lens of the eighteenth century has gradually proven to be a barrier to progress. For example, groups like the LGBTQ+ community were not widely recognized in the eighteenth century. Therefore, such marginalized groups would potentially not be granted any necessary rights through a first or second-era originalist viewpoint. Likely due to the lack of acceptance at the time of the founding, earlier originalists did not feel a need to provide many marginalized groups equal rights. Yet, these communities have always existed and are even more so valued and present members of society today. Many found this former originalist logic too extreme, and so they developed a new way to apply originalism. This new, third era of originalism has arisen out of necessity.

While few scholars have concretely labeled a new third era, the writings of liberal constitutional scholars Jack Balkin and Lawrence Lessig reflect a change in how people see originalism. Balkin promotes the idea of "framework originalism" in which one "views the Constitution as an initial framework for governance that sets politics in motion and must be filled out over time through constitutional construction."[26] Constitutional construction is an approach in which all the facts and circumstances are considered in relation to the text of the Constitution. It is an approach that allows for change and societal evolution. Not only is the specific language of the Constitution important, but the entire structure of the American government is critical. Similarly, Lessig argues that if originalists continue to use originalism as their only tool, many issues will never be resolved.[27] Balkin argues for third-era originalism as a tool for stability, and Lessig sees third-era originalism as a means to counter the overdependence on first or second-era originalism that can potentially lead to corruption.

Developing this new approach to originalism has been very gradual and, to an extent, circumstantial. In the academic world, liberal originalists have begun to publish works explaining how they see originalism as a liberal tool. On the Supreme Court, certain cases have allowed for justices to change the way they apply originalism, with the growing realization it can be a helpful tool to progress the rights of marginalized groups. Still, it is yet to be widely recognized by the scholarly community. In this next section, I will provide an overview of the key traits liberal originalists apply to third era originalism and explain why these changes are so important for the survival of this doctrine.

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[25] Steven Calabresi & Julia Rickert, *Originalism and Sex Discrimination*, 90 NORTHWESTERN UNIV. SCH. OF L. 1, 3 (2011).
[26] Jack Balkin, *Framework Originalism and the Living Constitution*, 103 NORTHWESTERN UNIV. L. REV. 549, 550 (2009).
[27] Lawrence Lessig, *What an Originalist Would Understand "Corruption" to Mean*, 102 CAL. L. REV. (2014), https://dash.harvard.edu/handle/1/12942299 (last visited Jul 27, 2021).

B. Key Traits

In this more open approach to originalism, new methods of originalist interpretation are emerging. Jack Balkin, a liberal originalist, creates a distinction between two types of originalist approaches: skyscraper originalism and framework originalism. While skyscraper originalism "views the Constitution as more or less a finished product," framework originalism is not so simple.[28] Balkin explains that framework originalism looks at the Constitution as a starting point, but the rest must be filled out as time progresses with the tool of construction. This idea of framework originalism is paramount to the development of third-era originalism.

Further, unlike second-era originalism, third-era originalists appear to have a more concrete understanding of what is binding in Constitution. There is an understanding that certain definitions of equality are not binding as is the case with how men are referred to in the Constitution compared to women. Consider the fact that, prior to the Nineteenth Amendment's ratification in 1920, the words "women" and "sex" never appear in the text of the Constitution, implying potentially that women do not have the same protections and rights that the Constitution provides men. This sense of agreeance is useful in understanding why third-era originalism is so crucial in the evolution of originalism. It reflects a growing and improved effort to unite originalists and make the approach more feasible in the long term.

i. Framework Originalism

While framework originalism is not a widely known concept, its general traits are subtly becoming more prominent. One of the cardinal aspects of framework originalism is considering all three branches of the government rather than just the judicial branch when it comes to building and supporting the Constitution. This means that framework originalism urges originalists to be more flexible in their application of the Constitution, recognizing how important a role the other two branches of government can play in applying and enforcing the key provisions of the American government. They can do this by "building political institutions, passing legislation, and creating precedents, both judicial and non-judicial."[29] This notion broadly expands how originalism can be applied.

Another aspect of framework originalism centers around the goal of being less constrained in the application of judicial behavior. Balkin strongly emphasizes that originalism is not adequate on its own as a judicial philosophy, and this constraint placed on the approach is not productive. Realistically, any originalist should be able to admit that originalism "will not be sufficient to decide a wide range of controversies, and so judges will have to engage in considerable constitutional construction as well as the elaboration and application of previous constructions."[30] This means that being an originalist, especially in the third era of originalism, brings with it an acknowledgment that originalism will never be enough to solve every issue or debate that can arise. Moreover, it means that "fidelity to original meaning does not require fidelity to original expected application."[31] The biggest flaw that liberal originalists have found with first and second-era originalism is the restrictions placed on society. By sticking to the original expected application, first and second-era originalists stall progress in modern society. In the eyes of third-era originalists, construction and elaboration of the original text are critical for original meanings to be relevant and useful to each new generation.

ii. Original Meaning

When third-era originalists talk about applying original meaning over original expected application, this can mean several things. First, the focus can be on semantic content. Justice Scalia often focused on semantic meaning, which meant that he looked at what the words in constitutional provisions literally meant at the time of the founding, like when he used Johnson's dictionary from the 1700s to look at the definition of "arms" when the Second Amendment was being written. It can also mean looking at practical applications of the provisions, purposes or functions, or specific intentions. The importance of looking at semantic meaning remains critical for third-era originalists. So, while there are Scalia-like strategies at play, there are also some different, less literal approaches taking place.

iii. Construction

Knowing when construction is necessary is another major part of third-era originalism. Balkin points to the two situations where construction is needed: when the Constitution is notably vague on a topic or when a law or institution

[28] Balkin, *supra* note 20.
[29] *Id.* at 552.
[30] *Id.* at 551.
[31] *Id.* at 552.

is needed to fulfill a specific constitutional purpose.[32] An example of such ambiguity within the Constitution is the Necessary and Proper Clause which states that "[The Congress shall have Power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." This clause of the Constitution speaks to the idea of construction, acknowledging that the Constitution could not have predicted legislation for every issue in the future. Construction is an essential part of legislating but is purposefully ambiguous for that same reason, making it difficult to apply. Because the legislative and executive branches are more so the lawmakers, they more often subscribe to living constitutionalism and take a more prominent role in constitutional construction. The courts often turn to the political branches to understand the direction of the State, helping them to determine vague clauses of the Constitution. However, the courts participate in constitutional construction through their process of rationalization of the text and through creating doctrines and resolving disputes relevant to the Constitution. In doing so, the courts help guide the direction of the political branches, either by restricting what they can do or giving them more freedom to act.

Yale Professor and liberal originalist Akhil Amar provides further insight on the idea of constitutional construction. In his book, *America's Unwritten Constitution*, Amar writes that "The written Constitution cannot work as intended without something outside of it—America's unwritten Constitution—to fill in its gaps and to stabilize it."[33] Construction is an important way to approach constitutional interpretation and is essential to best applying originalism in the present day. Unlike second-era originalists, there is a sense of agreeance among third-era originalists regarding what is fixed in the Constitution and what is binding. As Amar, Balkin, and Lessig all argue, with construction in mind, applying fixed constitutional principles like freedom of speech and equality to modern-day situations must account for some sense of fixed meaning and be understood in the present.

The discussion on construction highlights another considerable tension: this method initially meant to constrain judges is now more open and encouraging of expanding beyond mechanisms of restraint. Within this tension there is the consistent underlying aspect of remaining faithful to the judicial branch's role as the guardian and interpreter of the Constitution. This speaks to how much originalism has evolved over these three distinct eras, starting as a defense mechanism to now involving aspects of construction and the incorporation of government branches outside of the judiciary.

The key traits of third-era originalism center around ideas associated with framework originalism. While construction is an integral part of third-era originalism, the distinction between original meaning and original expected application is critical. Further, knowing when and how to apply original meaning or construction is the key to third-era originalism, as not every situation calls for these tools. By looking next at the work of Justice Gorsuch and Justice Barrett, two more recently appointed Supreme Court justices, the potential for increased prominence of third-era originalist application is displayed.

B. **Justice Gorsuch**

While Justice Gorsuch, appointed under President Trump, is a conservative figure on the Supreme Court, his recent opinions have sparked some attention. With more time on the Supreme Court, Justice Gorsuch is emerging as a possible figurehead of third-era originalism even though many currently associate him with second-era originalism because of his political leanings. Given his views on topics like religion, where he believes that the government should fund even overtly religious activities, he is taking a broader approach to interpreting the Constitution, but still remains conservative leaning.[34]

By standing so firmly for religious freedom, his opinion that bans discrimination of transgender or queer employees makes him an even more complex figure on the bench. His opinion in *Bostock v. Clayton County*[35] turns to the Civil Rights Act of 1964 and the Fourteenth Amendment, determining that queer and transgender persons are protected from workplace discrimination because discrimination based on sex is prohibited. While this is a law and not directly a provision of the Constitution, how Gorsuch interpreted the word "sex" to apply to queer and transgender persons shows a more third-era originalist approach to this issue. Understanding how Justice Gorsuch can simultaneously hold

[32] *Id.* at 560.
[33] AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012).
[34] For Neil Gorsuch, Religious Freedom Hasn't Gone Far Enough | Religion & Politics, (2020), https://religionandpolitics.org/2020/08/25/for-neil-gorsuch-religious-freedom-hasnt-gone-far-enough/ (last visited Jul 27, 2021).
[35] Bostock v. Clayton County, 590 U.S. (2020).

conservative religious values and seemingly liberal perspectives on gender and civil rights reflects his broader approach to understanding the Constitution, and how third-era originalism can account for the full political spectrum.

The mere instance of a conservative justice on the Supreme Court presenting opinions, like the one in *Bostock v. Clayton County*,[36] using tactics that liberal originalists and third-era originalists are promoting marks a shift for originalism. While the point being made here is by no means to celebrate conservative justices for one liberal decision, it is imperative to note liberal decisions that conservatives make using the lens of third-era originalism. If Justice Gorsuch continues to interpret the Constitution through an originalist lens while also constructing simultaneously, third-era originalism will be more popularized. Alongside originalist Justice Thomas and self-proclaimed originalist Justice Barrett, the simultaneous existence of these subtly different approaches to originalist jurisprudence creates an unprecedented balance on the bench that may ultimately give third-era originalism a louder voice. While Gorsuch is well known to be conservative, his views and opinions have proven to be occasionally liberal in surprising ways. This is primarily due to his definition and application of original meaning. Even though *Bostock* is a single case, the opinion delivered by Gorsuch exemplified how third-era originalism is influential in a different manner than first or second-era originalism: it can spark liberal progress rather than conservative restraint.

D. Justice Barrett

As the most recent appointment to the Supreme Court, Justice Barrett's seat has been clouded by controversy over her appointment process, leading to her third-era views of originalism being overshadowed. In a piece called "Congressional Originalism," Barrett talks about the importance of expanding the application of originalism to other branches of government. She writes that "Originalism, then, is not a theory about how judges should decide cases. As a theory of law, it makes a claim about the content of the law that all public officials—including legislators—must observe."[37] In extending original application outside of the court, Barrett suggests similar ideas of construction as Balkin, a liberal third-era originalist. While Barrett herself is not a liberal or left figure, it is critical to acknowledge that, unlike first or second-era originalism, third-era originalism allows for interpretation that leads to right, left, or more neutral decisions. The association of a typically conservative figure like Barrett with the more open approach that is third-era originalism creates an important and new dynamic within originalism.

Not only does Barrett have a modern approach to originalism when it comes to who can apply it, but she also has a modern, third-era approach when it comes to *how* to apply originalism. Like other constructionists, Barrett argues that "one attracted to originalism as a mechanism of judicial restraint might think it permissible for a senator to decide whether perjury is a 'high crime or misdemeanor' with reference to her constituents' views, regardless of whether those views conflict with the way the phrase was originally understood."[38] Here, Barrett reinforces her belief that originalism should be applied in the government outside of the courts and suggests that, like constructionists, originalism should be used based on modern-day standards and constituent values. The fixed views of most first and second-era originalists do not allow for modern circumstances to be entirely relevant, and Barrett makes sure to account for this in her view of originalism.

While Barrett certainly holds some progressive views relevant to originalism, it is also important to acknowledge that she adheres to staunch originalism as well. In her appointment hearings, she stated that "In English [originalism] means that I interpret the Constitution as a law." She continues to say, "I interpret its text as text, and I understand it to have the meaning that it had at the time people ratified it. So that meaning doesn't change over time and it's not up to me to update it or infuse my own policy views into it." While this view is not universal among originalists, many traditional originalists agree with Justice Barrett's statement. So, even within the broad, arguably more liberal scope of third-era originalism, there remains a dual partisanship innate to the philosophy. Originalism began as a conservative mechanism, and still holds those roots in the present. Justice Barrett reflects this liberal and conservative balance innate to third-era originalism.

Barrett is a self-proclaimed originalist and, while quite conservative-leaning compared to other third-era originalists, her views on originalism shed light on the evolution occurring with this third-era approach to constitutional interpretation. Given how conservative she is, some are hesitant to look at Justice Barrett as a third-era originalist. But due to that exact balance of liberalism and conservatism, she embodies the fluidity of third-era originalism that makes it more accessible for future generations. The presence of Justices Barrett, Gorsuch, and Thomas together on the Supreme Court creates a distinctive dynamic, with varying stages of originalism working simultaneously. While

[36] Bostock, 590 U.S.
[37] Amy Barrett & John Nagle, *Congressional Originalism*, 19 UNIV. OF PA. J. OF CONST. L. 1, 9 (2016).
[38] *Id.* at 7.

Justice Barrett's staunch conservatism may initially overshadow her approach to this philosophy, the work of both her and Justice Gorsuch as third-era originalists suggests that there may be a more definite shift in the evolution of originalism within the judiciary.

E. Challenges

Since the third wave of originalism is not widely recognized, the biggest challenge it faces right now is recognition. There are currently no liberal or leftist originalist thinkers on the Supreme Court, so the representation of originalism on the bench remains fairly conservative despite third era originalism's appeal to the broader political spectrum. This era of the judicial philosophy opens opportunities for conservative and liberal thinkers alike, which cannot necessarily be said for second or first-era originalism. After all, first-era originalism was specifically a defense mechanism against liberal courts. Therefore, originalism is still most closely associated with Justice Scalia and Judge Bork's staunchly conservative views, so the possibility to produce liberal change through this philosophy is a very foreign concept to most.

Moreover, certain ambiguities come with the claims that construction is not only possible but crucial. In the same way that critics believed understanding the intent of the founders was subjective, the act of knowing when and what to construct can be seen as equally subjective. Furthermore, the subjective nature of applying the necessary change to each generation seems nearly impossible to standardize. Moreover, while it is difficult even to find liberal originalists, it is equally challenging for them to be convinced by framework originalism's efforts. That is why it is valuable to have figures like Jack Balkin, who writes about these changes, and figures like Justice Gorsuch, who despite being conservative, show the liberal decisions that can be made through the lens of third-era originalism.

V. Conclusion

Originalism has a dominant role not only in the Supreme Court but also in the larger American system of government. It has shaped some of the nation's most influential decisions and guided some of the most influential thinkers. However, while this philosophy was originally rooted in conservatism, it has evolved into something much more complex and wide-reaching. First-era originalism never truly reached the Supreme Court, and the rejection of Judge Robert Bork to the Supreme Court left many Americans with a sour taste in their mouth when it came to originalism. It was associated with extreme conservatism instead of as a tool to understand and interpret the Constitution. Once both Justice Thomas and Justice Scalia found their way to the Supreme Court, originalism had new figureheads who operated under similar definitions of the philosophy, but each had a distinct perspective. Justice Thomas believed in natural rights and did not focus very much on judicial restraint, while Justice Scalia followed the path of Judge Bork, rejecting natural rights as the authoritative guide and prioritizing originalism as a tool for judicial restraint.

As time passes, a new era of originalism is very clearly emerging. While Justice Gorsuch is believed to be connected to second-era originalism, his unique views on topics such as religion and civil rights make it appear as though he is creating something entirely new on the bench. At the same time, many prolific thinkers like Lawrence Lessig and Jack Balkin are publishing writing explaining what originalism can do not just for conservatives, but for liberals as well. Third-era originalism can survive so long as new thinkers and leaders apply it, and the practice of originalism can remain applicable to all future generations. Nevertheless, suppose originalism returns to the ways of its first or second era. In that case, it will be too restricting, speaking to only conservatives, and will not allow for society to evolve as it sometimes needs to. Therefore, third-era originalism is not only on the rise but is becoming a necessary force to keep the practice of originalism alive and relevant.

Balancing Content Regulation and Due Process: The Implications of Facebook v. Trump for Content Moderation on Social Media Platforms

Patrick Liu (PO ’22)

Facebook is notoriously bad at moderating content. In public consciousness, the social media platform is often perceived as awash with hate speech and disinformation. So it was perhaps uncharacteristic of Facebook when, after then-President Donald Trump posted to Facebook’s platform amid the January 6 insurrection at the U.S. Capitol by a pro-Trump mob, the company wasted no time indefinitely suspending Trump’s accounts.[39] Four months later, Facebook’s Oversight Board—a largely independent adjudicatory body in charge of reviewing key content moderation decisions on the platform—upheld the suspension but rejected its indefinitude. Political scientists, civil service organizations, and politicians alike speculated about the implications of the nuanced decision for free speech and toxic online content.

This article contends, however, that in order to understand the full implications of the Trump decision on internet governance and efforts to regulate harmful online speech, we cannot merely interpret the Board’s rationale in terms of its implications for free speech. Contextualizing this case within the Board’s history and prior decisions reveals that Facebook’s Oversight Board is concerned with not one, but two major balancing acts. The first, unsurprisingly, concerns content regulation and freedom of expression. The second—and the main focus of this article—is a balancing act between content regulation and *due process*. The tension between these two priorities convolutes debates over content moderation and reduces the efficiency with which social media platforms are able to mitigate the effects of harmful but legal online speech.

My aim is to illuminate the elusive role of due process concerns in the Oversight Board’s decisions and spell out their implications for content moderation on Facebook and elsewhere. In drawing a parallel to Herbert Packer’s Due Process and Crime Control Models of the American criminal process,[40] I offer the Due Process and Content Regulation Models as two nascent value systems vying for attention in the emergent debate over content moderation. Packer’s framework remains influential in criminology debates for its incisive portrayal of how competition between two goals for the criminal process has shaped and reshaped the criminal process itself. I argue that the tension between the goals of creating meaningful due process for users and regulating harmful content may similarly shape the process of content moderation. By repeatedly prioritizing promoting due process rights over removing harmful content and users in its initial rulings, the Board has favored regulatory *reliability* over regulatory *efficiency*. Thus, while it is far too soon to accurately predict the Board’s long-term impact on free speech and harmful online content, the Trump ruling offers some insight into how the Board may come to transform the *shape* of the content moderation process, with implications for Facebook and beyond.

Two points of clarity are warranted. This article does not discuss due process rights in the sense of “digital due process,” which concerns protecting the privacy of internet users against government surveillance.[41] Due process in this article entails the rights of users to notice, hearing, and independent adjudication squarely within the context of content moderation and removal on social media platforms. Second, throughout this article I rely heavily on a distinction between the phrases “content moderation” and “content regulation.” Whereas the former refers broadly to a platform’s process of reviewing user-generated content and filtering permitted from unpermitted content, I employ the latter specifically to address the effort to reduce harmful online content.

This article begins by summarizing the Trump decision and contextualizing it within the Board’s history and purpose. A closer look at the Board’s rationale, specifically at its reference to the principle of legality, reveals that the complexities of Trump decision are rooted in a careful balancing act between a need to regulate harmful speech and a desire to protect due process rights for Facebook users. Then, in Part II, I apply Packer’s framework of the American criminal process to interpret the underlying tension between due process and content regulation concerns in the Board’s Trump ruling. Part III considers the long-run effects of this tension, suggesting that the Board’s judicialization of the content moderation process forces us to prioritize between a reliable and an efficient content moderation regime. This, I offer, is a major consequence of the Oversight Board's creation and decisions that has so far been overlooked.

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[39] *See* Tony Room, Elizabeth Dwoskin, & Drew Harwell, *Twitter, Facebook lock Trump’s accounts amid D.C. riots*, WASH. POST (Jan. 6, 2021, 9:22 PM EST), https://www.washingtonpost.com/technology/2021/01/06/trump-tweet-violence/.
[40] *See generally* Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 18 (Nov. 1964).
[41] *See generally About the Issue*, DIGITAL DUE PROCESS, https://digitaldueprocess.org/ (last visited Aug. 27, 2021).

Suffice to say, if Facebook's content policies comprise a newfound "platform law,"[42] then the Board is now engaged in constructing a full-blown platform legal system—for better or worse.

I. Identifying Due Process in the Trump Decision

The public reaction toward the Board's ruling on Trump has been mixed praise, criticism, and surprise. Some applauded the decision as a denouncement of misinformation and hatred,[43] while others, in particular Republican lawmakers, denounced the decision as an "Orwellian" attack on free speech.[44] Political scientists noted striking similarities between the Board's decision to remand the case back to Facebook and typical behavior of the Supreme Court.[45] Yet, there has been little coverage of the centrality of due process to this decision and its legacy.

This Part begins with a summary of the Trump ruling. I then argue that the Board's mixed decision to uphold Facebook's ban, yet require Facebook to revisit the ban in six months, strikes a balance not between content regulation and free speech, but between content regulation and due process.

A. Contextualizing and Explaining the Trump Ruling

On January 6, 2021, as a mob stormed the U.S. Capitol, then-President Trump posted two pieces of content to Facebook and Instagram, which Facebook owns. Both repeated false claims that the 2020 presidential election was "stolen from us"[46]—the same lies that incited the riot[47]—and expressed support for those engaging in the violence.[48] Facebook swiftly removed both posts for violating its Community Standard on Dangerous Individuals and Organizations, which prohibits "content that praises, supports, or represents events that Facebook designates as terrorist attacks, hate events, mass murders or attempted mass murders, serial murders, hate crimes and violating events."[49] Facebook designated the storming of the capitol as a "violating event."

Following Trump's second post, Facebook blocked him from posting on either platform for 24 hours. The following day, Facebook extended the block "indefinitely and for at least the next two weeks until the peaceful transition of power is complete."[50] Soon after, Facebook referred this case to the Oversight Board, requesting a ruling on whether its indefinite suspension of Mr. Trump's access to Facebook and Instagram was appropriate, as well as recommendations about suspending the accounts of political leaders.[51]

The Board's decision, published on May 5, was bipartite. The Board upheld Facebook's decision to extend their suspension of Mr. Trump but found it inappropriate that Facebook imposed an "indeterminate and standardless penalty of indefinite suspension."[52] Consistent with their past decisions, the Board referenced three standards in their analysis:

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[42] *See generally* Molly K Land, *The Problem of Platform Law: Pluralistic Legal Ordering on Social Media*, OXFORD HANDBOOK GLOBAL LEGAL PLURALISM 975 (Sep. 2020).
[43] *See, e.g., NAACP President and CEO, Derrick Johnson, Issues Statement on Facebook Oversight Board's Decision to Uphold the Ban on Donald Trump*, NAACP (May 5, 2021), https://naacp.org/articles/naacp-president-and-ceo-derrick-johnson-issues-statement-facebook-oversight-boards [https://perma.cc/QL9R-YS97].
[44] *See, e.g.*, Eugene Scott, *Trump, Republicans express outrage over extension of Facebook ban*, WASHINGTON POST (May 5, 2021, 8:49 AM), https://www.washingtonpost.com/politics/trump-facebook-social-media-republicans/2021/05/05/919cb430-adb1-11eb-acd3-24b44a57093a_story.html [https://perma.cc/N8KA-KDV5]; Cat Zakrzewski, *Florida governor signs bill barring social media companies from blocking political candidates*, WASHINGTON POST (May 24, 2021, 8:21 PM), https://www.washingtonpost.com/technology/2021/05/24/florida-gov-social-media-230/ [https://perma.cc/6G7Q-MGE3].
[45] This includes Harvard Law Professor Noah Feldman, who wrote a memo for Facebook outlining the initial idea for the Oversight Board. Jeff Neal, *Did Facebook's Oversight Board get the Trump decision right?*, HARVARD LAW TODAY (May 5, 2021), https://today.law.harvard.edu/did-facebooks-oversight-board-get-the-trump-decision-right/. *See also* Nathaniel Persily, *Yes, Facebook's Oversight Board upheld Trump's suspension. But here's the bigger issue.*, WASHINGTON POST (May 6, 2021, 9:00 AM), https://www.washingtonpost.com/politics/2021/05/06/yes-facebooks-oversight-board-upheld-trumps-suspension-heres-bigger-issue/.
[46] *Case decision 2021-001-FB-FBR*, OVERSIGHT BOARD (May 5, 2021), https://oversightboard.com/decision/FB-691QAMHJ/.
[47] David Klepper, *US Capitol insurrectionists to blame their actions on 2020 election misinformation and conspiracy theories, lawyers say*, CHICAGO TRIBUNE (May 29, 2021, 9:23 AM), https://www.chicagotribune.com/nation-world/ct-aud-nw-capitol-attack-election-misinformation-trump-20210529-lal35apdlrbybhjqrggq5h27wi-story.html.
[48] *Case decision 2021-001-FB-FBR*, *supra* note 46. ("At 4:21 pm Eastern Standard Time, as the riot continued, Mr. Trump posted a video on Facebook and Instagram: *I know your pain. I know you're hurt. We had an election that was stolen from us. …We love you. You're very special. You've seen what happens. You see the way others are treated that are so bad and so evil. I know how you feel. But go home and go home in peace.")*
[49] Facebook, *2. Dangerous Individuals and Organizations*, COMMUNITY STANDARDS, https://www.facebook.com/communitystandards/dangerous_individuals_organizations.
[50] *Case decision 2021-001-FB-FBR*, *supra* note 46.
[51] *Id.*
[52] *Id.*

Facebook's content policies, Facebook's Values, and the UN Guiding Principles on Business and Human Rights, which Facebook has endorsed.[53]

The Board found that, in praising those responsible for a riot in which "people died, lawmakers were put at serious risk of harm, and a key democratic process was disrupted,"[54] Trump's two posts severely violated Facebook's Community Standard on Dangerous Individuals and Organizations. The Board determined that escalating sanctions to an account-level restriction was warranted, as it "struck an appropriate balance in light of the continuing risk of violence and disruption."[55] The Board also found that Facebook's decision struck an appropriate balance between Facebook's stated values of "Voice" and "Safety" because, in this instance, "the protection of public order justified limiting freedom of expression." Notably, the Board refrained from finding Trump in violation of Facebook's Community Standard on Violence and Incitement despite its relevance because Facebook originally suspended Trump solely on the basis of its Dangerous Individuals and Organizations standard.[56]

The Board, however, found that Facebook's decision did not fully comply with the company's human rights responsibilities. Because Facebook has endorsed the UN Guiding Principles on Business and Human Rights,[57] which establishes how businesses should avoid and prevent possible and actual human rights harms, the Board analyzes the impact of Facebook's decisions on rights set out by the International Covenant on Civil and Political Rights (ICCPR). In particular, they deploy the tripart test outlined in General comment No. 34 (an authoritative interpretation of ICCPR Article 19),[58] which requires that any restriction on freedom of expression must meet three requirements: "the rules must be clear and accessible, they must be designed for a legitimate aim, and they must be necessary and proportionate to the risk of harm."[59] The Board found that Facebook's policy against praising individuals involved in "violating events" has a legitimate aim,[60] and that Facebook's imposition of account-level restrictions on Mr. Trump were necessary and proportionate,[61] though it argued that, where possible, Facebook should use less restrictive measures (such as removing the post alone or attaching a warning label) to address potentially harmful speech.[62]

Where it took issue with Facebook's action was in the clarity and accessibility of Facebook's rules around indefinite suspensions. The Board cites the principle of legality, which "in international law on freedom of expression… requires that any rule used to limit expression is clear and accessible."[63] More specifically, in criminal law, legality enshrines the notion that "only the law can define a crime and prescribe a penalty."[64] There are two normative rationales for this principle: first, "people must be able to understand what is allowed and what is not allowed," and second, rules must be sufficiently clear to avoid arbitrary or selective application.[65] The Board found no support for an "indefinite" account-level restriction within Facebook's Community Standards, as it is not listed among Facebook's standard penalties for violating content.[66] As a result, the Board required Facebook to reexamine the suspension of Mr. Trump and decide an appropriate penalty within six months of the decision. They required that Facebook ensure its new rules for severe violations are "clear, necessary, and proportionate" and that Facebook's penalty be consistent with these rules and appropriate given "the gravity of the violation and the prospect of future harm."[67]

Much of the public reaction to this nuanced decision has focused on its implications for balancing free speech against the regulation of disinformation and violence-inciting speech online. The Board's own decision reflects these

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[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.* ("Facebook's Community Standard on Violence and Incitement states it 'remove[s] content, disable[s] accounts, and work[s] with law enforcement when [it] believe[s] there is a genuine risk of physical harm or direct threats to public safety.' The Standard specifically prohibits: 'Statements advocating for high-severity violence' and 'Any content containing statements of intent, calls for action, conditional or aspirational statements, or advocating for violence due to voting, voter registration or the administration or outcome of an election.' It also prohibits 'Misinformation and unverifiable rumors that contribute to the risk of imminent violence or physical harm.'")
[57] *See generally* UN Human Rights Office of the High Commissioner, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012), https://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf.
[58] *See* UN Human Rights Committee (HRC), *General Comment no. 34, Article 19, Freedoms of opinion and expression*, CCPR/C/GC/34, 8 (Sep. 12, 2011).
[59] *Case decision 2021-001-FB-FBR, supra* note 46.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] Daniel Grădinaru, *The Principle of Legality*, PROCEEDINGS OF THE 11TH INTERNATIONAL RAIS CONFERENCE, NOVEMBER 19-20, 2018 1, 1 (2018).
[65] *Case decision 2021-001-FB-FBR, supra* note 46.
[66] *Id.* ("Facebook's normal penalties include removing the violating content, imposing a time-bound period of suspension, or permanently disabling the page and account.")
[67] *Id.*

considerations. It cites ICCPR Article 19, which seeks to strike a balance between freedom of expression and other human rights by specifying strict requirements for restrictions on expression. The Board's analysis of Facebook's human rights responsibilities recognizes that "Facebook has become a virtually indispensable medium for political discourse, and especially so in election periods," meaning the company should take all precautions against inhibiting democratic deliberation on its platform.[68]

The Board further argued that limiting Facebook's discretionary powers is "crucial to distinguish the legitimate use of discretion from possible scenarios around the world in which Facebook may unduly silence speech not linked to harm or delay action critical to protecting people."[69] One way to interpret this statement is that the Board sought to balance safety concerns with guarding freedom of expression from excessive restrictions. But this reading is incomplete, as it ignores the Board's distinction between restrictions that are "legitimate" from those "unduly" enacted. In addition to a commitment to free speech, the Board's rationale additionally evinces a certain notion of procedural fairness typically associated with due process.

In the section to follow, I argue that the Board's rationale is best understood not as protecting freedom of expression, but rather as defending due process. Before that, I pause to define the notion of due process and contextualize the Trump decision within the history and purpose of the Oversight Board.

B. Defining Due Process in the Context of Facebook

In May 2018, a small group of civil society organizations, advocates, and academics gathered to write the Santa Clara Principles on Transparency and Accountability in Content Moderation. These three principles—summarized under the headings Numbers, Notice, and Appeal—were proposed as "initial steps that companies engaged in content moderation should take to provide meaningful *due process* to impacted speakers" (emphasis mine) who use their platforms.[70] Not only did Facebook commit itself to the Santa Clara Principles, but the final recommendation under "Appeal"—that "independent external review processes may also be an important component for users to be able to seek redress"[71]—partially inspired the company's decision to create an Oversight Board.[72] Ensuring due process for users has served as a core purpose of the Board from its conception, even if it is not always recognized as such in explicit terms.

Understandings of due process differ by jurisdiction, and the exact procedures required by due process (in other words, the processes that are due to individuals) are understood to necessarily differ on a case-by-case basis. According to Geoffrey Marshall, an English professor of political science, the notion of due process encompasses at least the following elements: "fairness, impartiality, independence, equality, openness, rationality, certainty, and universality."[73] Within the context of American law, the Fifth and Fourteenth Amendments of the Constitution ensure that all levels of government operate in accordance with the law and provide fair procedures.[74] The U.S. Supreme Court has "stated that the core rights of due process are notice and hearing,"[75] and Martin Redish and Lawrence Marshall add that adjudicatory independence may be a third, even greater necessity.[76]

According to Kate Klonick, who documented the development of the Oversight Board through embedded research at Facebook, the company and Oversight Board have worked to secure those three core rights of due process for Facebook users "through transparency and independence."[77] Facebook's opaque private system was historically marked by "cronyism and influence," as getting posts restored was "simply a matter of knowing the right people."[78] In 2018, Facebook made its Community Standards and content policy public, and soon after would begin providing

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[68] *Id.*
[69] *Id.*
[70] *The Santa Clara Principles On Transparency and Accountability in Content Moderation*, SANTA CLARA PRINCIPLES, https://santaclaraprinciples.org/.
[71] *Id.*
[72] Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2448-2449 (Jul. 20, 2020).
[73] Geoffrey Marshall, *Due Process in England*, 18 NOMOS: AM. Soc'y POL. LEGAL PHIL. 69, 70 (1977).
[74] Peter Strauss, *Due Process*, WEX, https://www.law.cornell.edu/wex/due_process.
[75] Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 475 (Jan. 1986). *See also* Klonick, *supra* note 72, at 2479. ("To allow for due process, citizens need (1) notice of what the rule is, (2) notice that they have allegedly violated the rule, (3) notice that a procedural system exists for review of the alleged violation, (4) notice of what that procedural system entails, and (5) notice of the ultimate decision reached.")
[76] Redish & Marshall, *supra* note 75, at 479.
[77] Klonick, *supra* note 72, at 2479.
[78] *Id.* at 2492.

users with notice of rule violation and appeal. The Board's founding documents—its Charter and Bylaws—provide for notice at each stage of the appeals process, require the Board to publicly explain the rationales for its decisions in plain language, and instruct the Board to publish annual transparency reports on its cases and Facebook's implementation.[79] Though much of the platform's moderation process remains opaque, the emerging appeals process marks meaningful progress away from cronyism and toward securing for the average Facebook user the promise of equality at the core of due process.

C. Identifying Due Process in the Board's Decisions

The centrality of due process is not limited to the Board's mission and design, but even extends to the analysis in its case decisions. In their ruling on Trump, the Board found that Facebook's decision to suspend Trump's accounts aligned with Facebook's Community Standards, the company's Values, and the Legitimate Aim and Necessary and Proportionate requirements of international law governing restrictions on free expression. The *only* requirement that the Board found Facebook violated was that of legality, by failing to publicize or adhere to clear, accessible rules about unacceptable content and their corresponding sanctions.

The principle of legality is at the heart of due process. It is well understood that the words "due process of law" were derived from the phrase "law of the land" as found in the Magna Carta: "we will not set forth against him, or send against him, unless by the lawful judgment of his peers and by the law of the land."[80] Here, King John swore to act only in accordance with law (the principle of legality) and to guarantee fair procedures to all.[81] The Fifth and Fourteenth Amendments of the U.S. Constitution are understood to bind all levels of government to operating within these same principles of legality and fair procedure.[82]

While the principle of legality is central to due process, it is not similarly central to freedom of expression. That a restriction on freedom of expression is clearly written in law does not in itself justify restricting the freedom of expression. We might consider adherence to the legality principle a necessary but not a sufficient condition for a valid restriction on free expression. The Board's decision to require Facebook to revisit the Trump suspension and determine a more proportionate restriction, then, is not rooted in a concern for free speech, but almost singularly rooted in a concern for the due process rights of users.

The legality principle is not the only avenue through which the Board expressed concerns for due process in its Trump decision. The Board's deliberation and decision not to charge Trump on a violation of the Violence and Incitement Standard, despite interest by a minority of its members, suggests a voluntary desire to respect traditional legal procedure despite the absence of any explicit requirement in the Board's Charter to do so. The Board's five-page Policy Advisory Statement offered extensive recommendations for Facebook with regard to improving the transparency of its rules pertaining to account-level sanctions against influential users, alongside other recommendations related to how Facebook will respond to future human rights crises.[83]

Nor was this the first case in which the Oversight Board overruled Facebook on grounds of legality. At the time of this writing, of the eight cases in which the Board has overturned Facebook's decision to remove a piece of content, in two cases the Board overruled Facebook in part for applying a standard that was too vague. In Case Decision 2020-005-FB-UA, the Board restored a post containing a quote stating that (in the Board's paraphrasing) "truth does not matter and is subordinate to tactics and psychology" alongside an incorrect attribution to Joseph Goebbels, the Reich Minister of Propaganda in Nazi Germany.[84] Facebook removed this post for violating the Dangerous Individuals and Organizations policy against expressing "support or praise for groups, leaders or individuals" that proclaim a violent mission, as the user did not clearly establish in the post that they did not support Goebbels. Their intent was presumably to draw comparisons between the quote and the language used by then-President Trump, which the Board argued was determinable through the post's comments. The Board ruled that Facebook's policy "falls short of the standard of legality" required by international law because Facebook fails to provide examples of individuals and organizations designated as dangerous, and because the relevant policy lacks clear examples of "support," "praise," and similar language.[85]

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[79] *Id.* at 2480.
[80] Hugh Evander Willis, *Due Process of Law Under the United States Constitution*, 74 U. PA. L. REV. 331, 332 (Feb. 1926).
[81] Strauss, *supra* note 74. *See also* Willis, *supra* note 80, at 332-333.
[82] Strauss, *supra* note 74.
[83] *Case decision 2021-001-FB-FBR*, *supra* note 46.
[84] *Case decision 2020-005-FB-UA*, OVERSIGHT BOARD (Jan. 28, 2021), https://oversightboard.com/decision/FB-2RDRCAVQ/.
[85] *Id.*

In Case Decision 2020-006-FB-FBR, the Board restored a piece of content containing misinformation suggesting the drug hydroxychloroquine was "harmless" and useful for combatting Covid-19, which Facebook removed as part of its publicly stated commitment to remove "misinformation that contributes to the risk of imminent violence of physical harm" in the wake of Covid-19.[86] The Board not only argued that this post did not rise to the level of risking "imminent harm," but also deemed Facebook's misinformation and imminent harm rule "inappropriately vague" and therefore violative of legality. They noted that the rule contains no definition of "misinformation," which risks over-censorship of controversial, minority opinions.[87]

These decisions reflect a high level of concern not only for free speech, but additionally The Board's rationale in these cases almost perfectly mirrors the way the U.S. Supreme Court applies its "void-for-vagueness doctrine," one of four protections under the Due Process Clause. In *Connally v. General Construction Co.*, Justice Sutherland pronounced that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."[88] The vagueness doctrine serves two purposes, preventing both "inadequate notice and excessive discretion."[89] Likewise, in its Trump decision, the Board argued that the principle of legality necessitates clear and accessible rules (1) because "people must be able to understand what is allowed,"[90] and (2) "so that these rules do not confer unfettered discretion, which can result in selective application of the rules."[91]

In all three of these cases, the Board engaged in a balancing act between due process and content regulation. In 2020-005-FB-UA and 2020-006-FB-FBR, the Board prioritized protections for both freedom of expression and due process over regulating speech that could be harmful if misconstrued. The Trump ruling, on the other hand, balances content regulation solely against due process. Though the Board found that Trump's posts clearly and severely violated Facebook's Community Standards—so much so that they warranted issuing an account-level restriction—the Board stopped short of endorsing an indefinite suspension on due process grounds.

To date, there exists little writing on the tension between due process and content regulation on social media. In the next section, I argue that understanding this balancing act through a lens of criminal law is crucial if we are to comprehend the full ramifications of the Trump ruling.

II. A New Framework: Due Process versus Content Regulation

In 1964, law professor and criminologist Herbert L. Packer put forth a theory of two value systems that vie for attention in the operation of the criminal process.[92] These he termed the Crime Control Model and the Due Process Model. Neither value system is the converse of the other, yet their vying for attention infinitely shapes the procedures and efficiency of the criminal process.

There are striking parallels between this framework and the tension between due process and content regulation that characterizes the Oversight Board's Trump ruling. In an effort to reveal those parallels, this section reviews Packer's framework and constructs an analogous framework to dissect the competing goals that are reshaping Facebook's content moderation process.

A. Two Models of the Criminal Process

The thrust of the Crime Control Model is that repressing criminal conduct with efficiency is the criminal process's preeminent function.[93] The model assumes that if the criminal process is inefficient (that is, if there is a "high percentage of failure to apprehend and convict" true offenders of the law[94]), then laws will go unenforced, and society

[86] *Case Decision 2020-006-FB-FBR*, OVERSIGHT BOARD (Jan. 28, 2021), https://oversightboard.com/decision/FB-XWJQBU9A/.
[87] *Id.*
[88] *Connally v. General Construction Co*., 269 U.S. 385, 391 (1926).
[89] Ryan McCarl, *Incoherent and Indefensible: An Interdisciplinary Critique of the Supreme Court's "Void-for-Vagueness" Doctrine*, 42 HASTINGS CONST. L.Q. 73, 89 (2014).
[90] *Case decision 2021-001-FB-FBR, supra* note 46.
[91] *Id.*
[92] *See generally* Packer, *supra* note 40.
[93] *Id.* at 9.
[94] *Id.* at 9.

will begin to disregard legal controls. It places trust in the capacity of investigative and prosecutorial officers to determine factual guilt with relative precision and impartiality.[95]

The Due Process Model rejects this premise. Recognizing that informal, non-adjudicative factfinding may be subject to bias and coercion, it insists on "formal, adjudicative, adversary factfinding processes" adjudicated by a public, impartial tribunal, as well as a full opportunity for the accused to defend themselves.[96] Whereas the Crime Control Model prefers to settle criminal cases via extrajudicial rather than judicial processes—assuming the former to be sufficiently reliable and the latter egregiously inefficient—the Due Process Model maintains that a guarantee of due process necessitates judicial intervention. The goal is a criminal process that maximizes reliability.

Thus, the fundamental friction between these value systems lies in how they respond to the coexistent demands for *efficiency* and *reliability* in criminal procedure. Whereas the Crime Control Model, at its theoretical extreme, would tolerate convicting a few innocents to ensure efficiency,[97] the Due Process Model prioritizes protecting the factually innocent at least as much as it prioritizes convicting the factually guilty.[98]

Nowhere is this discrepancy more apparent than in the doctrine of legal guilt, according to which the accused may not be held guilty if authorities fail to adhere to various rules that safeguard the integrity of the fact-finding and judicial process. This precondition holds regardless of whether "in all probability, based upon reliable evidence, [the accused] did factually what he is said to have done."[99] The rules of due process therefore wedge apart the statuses of *legal guilt* and *factual guilt*. Adherents of the Due Process Model contend that only an impartial tribunal, acting in procedural fashion, can be trusted to make reliable determinations of legal guilt.

Packer places the two models on a spectrum, each at one extreme. The closer our criminal process resembles the Due Process Model, the greater we emphasize reliability over efficiency, and the more "judicialized" each stage becomes. The better our criminal process reflects the values of the Crime Control Model, the more we prioritize efficiency and discourage judicial procedure. A maximally efficient system "throws off at an early stage those cases in which it appears unlikely that the person apprehended is an offender" and convicts the rest with minimal occasions for challenge.[100]

The American criminal process more closely resembles the Crime Control Model than the Due Process Model. But at the time of Packer's writing, he postulated that the process was gradually shifting toward the Due Process Model, the result of which was to "judicialize' each stage of the criminalize process."[101] Much of this occurred through overturning earlier precedents; rather than through legislation, the shifts happened through courts snatching for themselves the power to nullify cases over violations of due process.[102] A comparable process appears underway in Facebook's content moderation arena, where the Oversight Board, in defiance of the narrow jurisdiction demarcated in its Charter and Bylaws, has seized the authority to overturn content removals for violations of due process.

The framework outlined here does not concern the substance of criminal law, but simply enables a more nuanced understanding of the process of criminal law. Specifically, it informs our knowledge of certain normative questions—what is the law good for, and how desperate are we for efficient crime control?[103]—as well as certain procedural ones—how is criminal process evolving, and how good is our system at dealing with the conflicting goals we throw at it?[104] These questions will be of great relevance to the emerging industry of content moderation as it navigates a delicate balance between due process and content regulation. In the next section, I apply Packer's framework and begin to draw out its implications for Facebook and the Oversight Board.

B. Two Models of Content Moderation

[95] *Id.* at 12-14. Importantly, Packer notes that this concept is not the opposite of, but rather irrelevant to, another legal concept: the presumption of innocence. Whereas the presumption of innocence is a "direction to officials how they are to proceed" in criminal trial, the presumption of guilt is effectively a "prediction of outcome." *Id.* at 12.
[96] *Id.* at 14.
[97] *Id.* at 15.
[98] *Id.* at 15.
[99] *Id.* at 16.
[100] *Id.* at 11.
[101] *Id.* at 61.
[102] *Id.* at 62.
[103] *Id.* at 4.
[104] *Id.* at 6.

In the same way that the Due Process Model and Crime Control Model embody two value systems vying for attention in the criminal process, calls for due process and calls to better regulate harmful online speech compete for the attention and commitment of Facebook and other platforms engaged in content moderation. We might therefore term two models of content moderation the Due Process Model and Content Regulation Model.

Proponents of the Crime Control Model argue that repressing crime must constitute the primary mission of the criminal process in order to protect the social order and the interests of law-abiding members of society. Likewise, advocates of stricter content regulation argue that social media platforms must invest greater resources and attention toward improving the efficiency and efficacy of content moderation processes.[105] The value system that underlies the Content Regulation Model is concerned, most of all, by the overflow of harmful social media content that threatens to undermine democracy, elicit real world violence, as well as silence and endanger social media users of minority identities.

Facebook is no stranger to such content. In 2016, foreign groups engaged in fake news and disinformation campaigns on Facebook's platform to disrupt two democratic processes: the U.S. presidential election and the "Brexit" referendum on whether Britain should leave the European Union.[106] In addition, majority groups in Myanmar used Facebook's platform to augment civil unrest and mobilize ethnic cleansing mobs, leading to the death of thousands of persecuted Rohingya Muslims.[107] Public outcry and government scrutiny placed pressure on Facebook to increase transparency about its rules and dedicate additional staff to their enforcement.[108] The Content Regulation Model's end is the efficient—even expedient—prevention and removal of such content.

The Due Process Model embodies the same values in the context of content moderation as it does in criminal procedure. Advocates of this model are both wary and intolerant of the possibility of error in informal, non-adjudicative processes. Civil service organizations and academics like those responsible for the Santa Clara Principles have denounced the lack of transparency and accountability in Facebook's moderation policies and sought to lobby platforms to make commitments to improving transparency and accountability in their content moderation systems. The establishment of a formal appeals process and an independent adjudicatory body in the form of the Oversight Board is, in itself, a small victory for the Due Process Model.

As in Packer's framework, these models are not converses. One may very well desire both meaningful due process and a platform free of harmful speech. Even so, the Board's recent decisions—its ruling on Trump, most of all—make clear that the two value systems are currently competing for the attention of those in charge of content moderation. In cases 2020-005-FB-UA and 2020-006-FB-FBR, the Board prioritized promoting due process over regulating dangerous speech. It demonstrated it would rather under-restrict potentially harmful speech in the name of user rights than risk over-censoring speech due to broad-reaching Community Standards. In the Trump case, the Board struck a balance, allowing the platform to prioritize safety but stepping in to prohibit sanctions with no basis in Facebook's standards.

Packer wagers that the American criminal process "as it actually operates in the large majority of cases probably approximates fairly closely the dictates of the Crime Control Model."[109] Herein lies a principal difference between the American criminal process and Facebook's still inchoate content moderation process. Because the platform's content moderation is neither sufficiently efficient nor sufficiently reliable, it cannot be said to closely approximate the dictates of either the Content Regulation Model or the Due Process Model. Nonetheless, it is undeniable that the balance between Due Process and Content Regulation is quickly evolving. Just three years ago, the average Facebook user had access to neither the platform's content policies nor a process for appealing content removals. This changed in 2018, around the same period in which the Oversight Board was first conceived. And just as federal judges have slowly inched our criminal process ever closer toward the Due Process Model by nullifying cases on the basis of due process, the Board's panelists are gradually reshaping the content moderation process through their own, limited adjudicatory powers. The next section grapples with the long-range implications of this reshaping.

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[105] *See, e.g.*, Adam Satariano, *After Barring Trump, Facebook and Twitter Face Scrutiny About Inaction Abroad*, N.Y. TIMES (Jan. 14, 2021), https://www.nytimes.com/2021/01/14/technology/trump-facebook-twitter.html; Berhan Taye and Javier Pallero, *Open letter to Facebook on violence-inciting speech: act now to protect Ethiopians*, ACCESS NOW (July 27, 2020), https://www.accessnow.org/open-letter-to-facebook-protect-ethiopians/.
[106] Klonick, *supra* note 72, at 2441.
[107] *Id.* at 2442.
[108] *Id.* at 2447.
[109] Packer, *supra* note 40, at 61.

III. Forecasting the Board's Impact in Light of Packer's Models

When the Oversight Board was first conceived, some commentators perceived the institution's purpose as (or, perhaps, hoped it would be) helping Facebook effectively police the toxicity on its platform.[110] Yet, from its introduction until the time of this writing, the Board's influence on Facebook has been anything but auspicious for an efficient content moderation process. This Part examines the Board's creation and Trump ruling through the lens of the Due Process and Content Regulation Models, then explores their implications for the future of content moderation on Facebook and other online platforms.

A. On the Shape of Content Moderation: Improving Reliability at the Expense of Efficiency

In his 2018 public memo announcing the creation of a quasi-judiciary body, Facebook CEO Mark Zuckerberg outlined the soon-to-be Oversight Board's purpose to include improving t0068e accuracy of Facebook's moderation, creating fairness in the appeals process, and providing external accountability.[111] Evidently, from the outset, the Oversight Board was designed to promote the values of the Due Process Model—not the dictates of the Content Regulation Model. This preference is reflected both in the Board's design and in its initial rulings. The longer the Board pursues the Due Process Model, the more it will transform the *shape* of Facebook's content moderation process and, potentially, the way we understand content moderation as an enterprise.

The Board's design reflects a preference for the Due Process Model in both its quasi-judicial function and the scope of its jurisdiction. For most of Facebook's lifespan, the company's internal moderation team acted as the sole judge, jury, and executioner, adhering strictly to Facebook's long-undisclosed Implementation Standards (later sanitized and condensed into the public-facing Community Standards[112]) and, at times, the whims of its executives.[113] They reviewed content, ruled on its legitimacy, and handed down decisions with scant external oversight, save the occasional public outcry over an improper ban. By instituting formal, adversarial fact-finding processes, however, the creation of a quasi-judiciary body has introduced some semblance of checks and balances to Facebook. In the same way that "judicializing" each stage of the criminal process hinders the efficiency with which it can enforce law, quasi-judicializing content moderation slows the pace at which the Facebook machine can operate.

Additionally of note are the restrictions placed on the Board's initial subject-matter jurisdiction. At launch, the Board's Bylaws permitted it only to hear cases in which Facebook removed content, but not cases in which Facebook chose against removing potentially impermissible content.[114] In other words, the Board had no power to increase the efficiency with which Facebook removes harmful content—it had the authority to correct Facebook when its content regulation was overly restrictive but not where the company remained overly permissive. Though the Board's jurisdiction expanded in April 2021 to allow user appeals to remove content,[115] the Board's limited initial scope reinforces the idea that the body's *raison d'être* is not to ensure Facebook polices toxic content with efficiency.

In their initial set of rulings, the Board consistently advocated for users' due process rights at the expense of efficiency. In decision 2020-005-FB-UA, the Board overturned Facebook's removal of a post that contained a quote attributed to the Reich Minister of Propaganda in Nazi Germany (a member of Facebook's Dangerous Individuals list), but that failed to explain the post's purpose as criticism rather than endorsement. The Board deemed Facebook's fact-finding processes insufficient, arguing that the post's critical motive was determinable via its comments section, and found Facebook in violation of the principle of legality for failing to disclose the list of Dangerous Individuals for whom the company prohibits endorsement. In decision 2020-006-FB-FBR, the Board overturned the company's removal of a post containing misinformation about COVID-19 on the basis that Facebook's Community Standard on COVID-19 misinformation was excessively vague and thus violative of the principle of legality.

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[110] *See, e.g.*, Kara Swisher, *Facebook Finally Has a Good Idea*, N.Y. TIMES (Oct. 17, 2019), https://www.nytimes.com/2019/10/17/opinion/facebook-oversight-board.html.
[111] Mark Zuckerberg, *A Blueprint for Content Governance and Enforcement*, FACEBOOK (Nov. 15, 2018), https://m.facebook.com/nt/screen/?params=%7B%22note_id%22%3A751449002072082%7D&path=%2Fnotes%2Fnote%2F&_rdr.
[112] Andrew Marantz, *Why Facebook Can't Fix Itself*, NEW YORKER (Oct. 12, 2020), https://www.newyorker.com/magazine/2020/10/19/why-facebook-cant-fix-itself.
[113] *See Id.* (documenting instances in which Facebook's leadership quietly had the platform's Implement Standards weakened to avoid removing posts by high-profile officials).
[114] Klonick, *supra* note 72, at 2470.
[115] *The Oversight Board is accepting user appeals to remove content from Facebook and Instagram*, OVERSIGHT BOARD (Apr. 2021), https://oversightboard.com/news/267806285017646-the-oversight-board-is-accepting-user-appeals-to-remove-content-from-facebook-and-instagram/.

In both cases, Facebook's original decision may have been permissible through the lens of the Content Regulation Model; broad regulations and speedy fact-finding are favorable for an efficient crackdown on harmful content, and the model is forgiving of errors to the extent that they further the end of efficiency. Efficiency may warrant an excess of caution on the part of moderators and may support the notion that users should hold responsibility for explicitly indicating when they are criticizing rather than endorsing dangerous individuals. The Oversight Board sided, instead, with the Due Process Model. It prioritized defending users' due process rights and improving the long-term reliability of Facebook's content moderation decisions, at the expense of an efficient regulation of misinformation.

The Trump decision is, to date, the most illustrative example of the Board's proclivity for the Due Process Model, as well as its collateral effects. The Board sided with Facebook on the facts of the case. The threat posed by then-President Trump's posts during the Capitol riot was sufficient to warrant a suspension of Trump's Facebook account. The Board also did not argue Facebook's indefinite suspension of Trump was disproportionate. They rejected the indefinite suspension for the sole reason of due process: there was no basis for such a sanction in Facebook's rules.

The significance of this act must not be understated. By accepting the facts of the case yet rejecting Facebook's choice of sanction, the Board imbued Facebook's content moderation apparatus with a correlate to Packer's doctrine of legal guilt. Before the Board was conceived, if an internal moderator designated a post "factually guilty" of violating Community Standards, that post would be de facto "legally guilty," and the post or its poster would be subject instantly to the respective sanctions. Factual and legal guilt were one and the same. That changed with the Trump decision. The Board found Trump factually responsible for violating the Community Standards but stopped short of upholding Facebook's sanction because the company failed to abide by the conventions of due process. In doing so, they reaffirmed two core principles of the doctrine of legal guilt and, by extension, the Due Process Model:

i. The "factually guilty" may be deemed "legally guilty" only if authorities adhered to the rules of due process.
ii. Only an independent adjudicator acting within their sworn duties may be entrusted with the authority to assign the status of "legal guilt."

The development of so-called "platform law"—an amalgam of internet intermediaries' community standards, contract, technological design, and case-specific practice that threatens to displace the laws of national jurisdictions[116]—has raised concerns in recent years about the transparency and accountability of rules governing our forums for democratic deliberation. So long as they swear to moderate the content hosted on their platform, Section 230 of the Communication Decency Act protects online intermediaries from legal responsibility for the speech of their users. Effectively, for as long as social media has existed, the enforcement of each platform's private law has been the exclusive enterprise of its internal moderators. The introduction of the doctrine of legal guilt, however, suggests for the first time that a core component of platform law enforcement can exist outside the scope of internal moderators' authority: the final act of upholding rules of due process and assigning legal guilt. While this doctrine has yet to be enshrined, it offers some hope that the Board's creation and early decisions can trigger a gradual shift toward greater accountability in the content moderation enterprise. The division of factual and legal guilt also, of course, serves as a victory for the Due Process Model.

For the Content Regulation Model, the Board's ruling on Trump has nuanced implications. On one hand, the decision to suspend a high-profile official and the Board's partial endorsement marks some degree of progress toward controlling Facebook's inexorable plague of dangerous content. This is true regardless of whether one interprets Facebook's choice to suspend Trump as a good faith effort to crack down on harmful content or purely a business calculation. On the other hand, demanding that Facebook codify its enforcement protocols and rejecting its heavy-handed response to Trump limits how efficiently the company may respond to dangerous content by public figures during times of civil unrest.[117] Moreover, the doctrine of legal guilt fundamentally reshapes the way in which content moderation decisions must be made. No longer can internal moderators simply restrict content they believe should be restricted—they may do so only if Facebook's rules meet the requisite standards for specificity and transparency necessitated by due process. Should Facebook's moderation system fail to offer affected users proper notice, a superior adjudicatory body may strike it down. These efforts to maximize the reliability of Facebook's moderation system and protect individual users from undue sanctions inevitably generate inefficiency.

[116] Land, *supra* note 42, at 976.
[117] *See generally* Nick Clegg, *In Response to Oversight Board, Trump Suspended for Two Years; Will Only Be Reinstated if Conditions Permit*, FACEBOOK (June 4, 2021), https://about.fb.com/news/2021/06/facebook-response-to-oversight-board-recommendations-trump/ (announcing Facebook's narrowed enforcement protocols for public figures amid ongoing violence, developed in response to the Oversight Board's Trump ruling).

By no means is the analysis above meant to suggest that increasing the reliability of Facebook's moderation apparatus is undesirable. That Facebook's moderation machine frequently errs—both removing speech that should be allowed and permitting plainly impermissible posts—should surprise no one, given the scale at which the machine operates and the tremendous backlash garnered by the company's more high-profile errors. Perhaps the best known of these scandals accompanied Facebook's removal of a 2016 post of "The Terror of War," a Pulitzer Prize-winning piece of photojournalism that depicts a naked nine-year-old girl running from a napalm bombing in Vietnam during the Vietnam War.[118] The photo's removal for violating Facebook's Community Standards on child nudity, in spite of its political and cultural significance, evinced the nuance required by online content moderation and drew public attention to the inadequacy of Facebook's rules for the task at hand.[119] Even in cases where the Community Standards offered a clear path forward, policing content has proven an inconsistent and even venal affair at the hands of Facebook's leadership. Despite ostensible bans against hate speech and disinformation, the company has routinely permitted such content when it originates from world leaders such as Rodrigo Duterte, Narendra Modi, and Donald Trump to avoid retaliatory regulations and secure Facebook's bottom line.[120] The company's moderation has been notoriously inconsistent in the absence of institutionalized, external oversight.

A full analysis of whether the Board's initial decisions have improved the accuracy of Facebook's content moderation overall is beyond the scope of this article. But some of those decisions can help us envision the sort of reliability that quasi-judicial oversight would ideally bring to Facebook. In Case Decision 2020-004-IG-UA, the Board overturned Facebook's removal an Instagram post for breast cancer awareness that depicted uncovered female nipples and thus violated the company's Community Standard on Adult Nudity. Facebook restored the content soon after the Board selected the case, determining the removal was an error by Facebook's automated system. Even an act as simple as raising awareness of implementation errors or ensuring Facebook abides by its Community Standards when deploying sanctions—as the Board did in the Trump case—exemplifies how the judicialization of content moderation can effectuate greater reliability.

Yet, even with a case as seemingly intuitive as that of the breast cancer awareness post, overturning Facebook in the name of reliability bear consequences for the Content Regulation Model. Permitting occasional errors is favorable if one's first priority is minimizing the presence of impermissible content on the platform. The Board recommended that Facebook modify its automated moderation system to handle greater nuance, which—while desirable in the pursuit of accuracy—may increase the risk of the algorithm permitting the impermissible.

Understanding the content moderation process in light of Packer's framework bears significant implications for social media companies, as well as those advocating for meaningful due process and substantive regulation of harmful content on online platforms. While Facebook's current moderation strategies are neither sufficiently efficient nor sufficiently reliable, it can be immensely challenging to address both issues simultaneously. Improvements to the reliability of content moderation systems often precipitate burdens on their efficiency, and vice versa. This competition between the Due Process Model and Content Regulation Model affects the shape of the content moderation process. In Facebook's case, the values of the Due Process Model catalyzed the creation of a quasi-judiciary and its subsequent efforts to clarify Facebook's Community Standards, all of which favors a process shaped for greater caution, precision, and transparency. It remains to be seen whether Facebook will support such changes; the company retains discretion over whether and how to implement the Board's decisions, and Facebook's leadership often appears apathetic, if not hostile, toward efforts to improve the platform's accountability and transparency.[121]

B. On the Outcomes of Content Moderation: A Hazy Forecast

The shape of the content moderation process directly influences its outcomes. A highly judicialized process containing checks and balances, for instance, will likely be characterized by fewer wrongful removals than a process containing

[118] *See* Time Photo, *The Story Behind the 'Napalm Girl' Photo Censored by Facebook*, TIME (Sep. 9, 2016, 12:19 PM EDT), https://time.com/4485344/napalm-girl-war-photo-facebook/.
[119] Klonick, *supra* note 72, at 2439-2440.
[120] Marantz, *supra* note 112.
[121] *See, e.g.*, Davey Alba, *Facebook sent flawed data to misinformation researchers.*, N.Y. TIMES (Sept. 10, 2021, 3:58 PM ET), https://www.nytimes.com/live/2020/2020-election-misinformation-distortions; Jeff Horwitz, *Facebook Says Its Rules Apply to All. Company Documents Reveal a Secret Elite That's Exempt.*, WALL ST. J (Sept. 13, 2021, 10:21 AM ET), https://www.wsj.com/articles/facebook-files-xcheck-zuckerberg-elite-rules-11631541353?mod=article_inline; Taylor Hatmaker, *Senators press Facebook for answers about why it cut off misinformation researchers*, TECHCRUNCH (Aug. 9, 2021, 9:08 AM PT), https://techcrunch.com/2021/08/09/facebook-klobuchar-warner-letter-nyu-ad-observatory/.

no oversight whatsoever. However, while the Board's creation and Trump ruling may spell clear implications for the shape of the content moderation process, predicting how this institution will affect the quantity of toxic content on social media over the long run possesses great challenges. Little on this subject can be extrapolated from the Oversight Board's early record. Though the Board's initial rulings suggest a general propensity for prioritizing the defense of due process, the recent expansion of the Board's subject-matter jurisdiction in April 2021—which enabled them to hear appeals to remove content—may trigger a shift in their approach. There is a possible future in which the Board accelerates Facebook's crackdown of hate speech and disinformation by hearing and overturning substantial numbers of cases in which Facebook allowed content that should have been removed.

Moreover, to wager that the Board will substantially improve either the reliability or the efficiency of Facebook's content moderation process in the long term, one must presuppose that the Oversight Board's actions have meaningful sway over Facebook in the first place. Many are skeptical of the Board's independence from and power to influence Facebook. Even if the Board has sufficient financial and intellectual independence from the company,[122] why would Facebook's executives relinquish meaningful control over its content moderation to an independent adjudicator when restricting speech hurts Facebook's bottom line? Firstly, though the company is bound to implementing the Board's rulings and the Board's Charter specifies that the body's prior decisions will have "highly persuasive" precedential value,[123] it remains to be seen whether Facebook will truly abide by these promises. If not, the Board's rulings may have little enduring influence on the manner in which Facebook's moderators approach enforcement.

Furthermore, though Board's Charter demands Facebook publicly report whether it accepts or rejects each of the Board's policy recommendations, a requirement that subjects Facebook to public pressure, the platform ultimately retains its authority over that decision.[124] If Facebook's executives continue to prioritize financial growth over the well-being of its users and quality of its platform, as they have been wont to do in years past, we may see a skew in the company's responses to policy recommendations, accepting policies that loosen speech restrictions and rejecting those that tighten. If, on the other hand, public pressure can exert substantial sway over the company, Facebook may faithfully abide by the board's policy recommendations, regardless of whether they enlarge or diminish users' speech rights. It is too early in the Board's lifespan to say with any certainty which of these two eventualities will come to pass.

Conclusion

Adopting Packer's framework offers several key insights about the creation of the Oversight Board and its ruling on Trump. First, it reveals how the Board's creation and Trump decision emerged from the interplay of the Due Process and Content Regulation Models, as well as how the Board's deliberation reflects their competition. The nuanced ruling on Trump evinces an effort to balance the urgency of removing dangerous content with the protection of users' due process rights. At the same time, Packer's framework exposes an unambiguous trend in the Board's initial decisions of showing preference toward the Due Process Model. Above all else, the Board's early impact on Facebook has been defined by improvements to the reliability of Facebook's content moderation system and a corresponding sacrifice in regulatory efficiency.

Ultimately, the ideal content moderation system for social media platforms may be neither maximally reliable nor maximally efficient. It might, instead, emerge only from a compromise between the two value systems proposed here. The task before social media companies, users, researchers, and advocates is to determine which of these two ends should take precedence in the short run: instituting meaningful due process or regulating harmful content like hate speech and disinformation. As the Trump ruling makes clear, the Oversight Board has, at least for the time being, taken its stance.

[122] *See generally* Klonick, *supra* note 72, at 2465-2469 (discussing whether the Board's ability to set its own docket and endowment through a trust enable the body to hold meaningful intellectual and financial independence from Facebook).
[123] *Id.* at 2463.
[124] *Id.* at 2464.

The United States Could Use a New Court — A Constitutional One

Celia Parry (PO '24)

Political polarization has reached unprecedented heights in the United States.[125] The Supreme Court should be immune,[126] but the congressional confirmation process for Court nominees is itself steeped in polarization.[127] Now, politicization threatens to delegitimize the Supreme Court.[128] Ideally, political leaders would reexamine the judicial branch and enact reforms. However, in practice, such drastic reform is unlikely. President Biden has not made court reform a top priority, and it is difficult to imagine Congress passing a court reform bill in the near future.[129]

For the time being, reforms, especially drastic ones, are best presented as thought experiments. One unrealistic, but nonetheless ideal reform consists of establishing a specialized constitutional court to decide the nation's constitutional questions. A constitutional court would theoretically depoliticize, re-legitimize, and limit the power of the Supreme Court — all of which are valuable reform goals. Entertaining the possibility of sweeping reform is worthwhile because it allows us to reflect on problems with the current Supreme Court and fully appreciate future options for reform. By imagining ideal scenarios, we can clarify our goals for court reform going forward.

While political scientists, legal scholars, and politicians have proposed a wide array of court reforms, I argue that the best solution focuses on creating a specialized constitutional court. Examples of constitutional courts in other countries, particularly Germany, demonstrate that these courts can enhance judicial legitimacy through public trust and by possessing a clear mandate. Furthermore, a constitutional court aligns with reform guidelines put forth by multiple legal scholars. Crucially, a new specialized court would work well in conjunction with other reforms. And last, the constitutional court could be viewed as a temporary test court to assess reforms that could eventually be applied to the Supreme Court.

Part I of this paper provides background on Supreme Court politicization and also details the importance of judicial legitimacy. Part II outlines basic features of constitutional courts and of one proposal for a U.S. constitutional court. Part III explores examples of constitutional courts in other countries. Part IV examines the ability of a constitutional court to depoliticize and re-legitimize the U.S. Judiciary. Part V discusses the benefits of combining a constitutional court with other reforms. Finally, Part VI elaborates on the importance of a sunset provision for making the constitutional court temporary.

I. Background

A. Politicization - How We Got Here

While Supreme Court politicization has reached its most "nuclear" [130] level within the past five years, constitutional law professor Jonathan Adler traces the extreme polarization back to the mid-1980s, when Senate Democrats set out to oppose Reagan nominees.[131] Political journalist E. J. Dionne traces it back even further, to 1960 when the far right sought to impeach Chief Justice Warren.[132] Most recent frustration with the Court stems from Senate Majority Leader Mitch McConnell's refusal to hold hearings for Merrick Garland — or anyone nominated by President Obama — until

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[125] *See e.g.*, LILLIANA MASON, UNCIVIL AGREEMENT (2018).
[126] *See* THE FEDERALIST NO. 78 (Alexander Hamilton).
[127] *See* Jonathan Adler, *Thoughts on the judicial nominations mess and nuclear fallout*, WASH. POST (Apr. 5, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/05/thoughts-on-the-judicial-nominations-mess-and-nuclear-fallout/ (last visited July 24, 2021). *See also* E.J. Dionne Jr., *Capitulating to the right won't end the judicial wars*, WASH. POST (Sep. 23, 2020), https://www.washingtonpost.com/opinions/capitulating-to-the-right-wont-end-the-judicial-wars/2020/09/23/5402f378-fdd5-11ea-9ceb-061d646d9c67_story.html (last visited July 24, 2021).
[128] *See* Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE. L. J. 148, 153 (2019).
[129] *See* Mark Joseph Stern, *Biden's Supreme Court Commission Shows He Doesn't Really Want Court Reform*, SLATE (Apr. 9, 2021), https://slate.com/news-and-politics/2021/04/joe-biden-supreme-court-reform-commission.html.
[130] Alex Seitz-Wald, *The Nuclear Option: What It Is and Why It Matters*, NBC NEWS (Apr. 3, 2017), https://www.nbcnews.com/politics/congress/nuclear-option-what-it-why-it-matters-n742076 (last visited Aug 4, 2021). *See also* Jim VandeHei and Charles Babington, *From Senator's 2003 Outburst, GOP Hatched 'Nuclear Option,'* WASH. POST (May 19, 2005), https://www.washingtonpost.com/wp-dyn/content/article/2005/05/18/AR2005051802144.html (last visited Aug 4, 2021). *See also,* Adler, *supra* note 127.
[131] *See* Adler, *supra* note 127.
[132] *See* Dionne, *supra*, note 127.

after the 2016 election.[133] When stalwart conservative Justice Antonin Scalia died unexpectedly in February of 2016,[134] McConnell refused to fill the vacancy: "The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new President."[135] He relied on a fictitious tradition to support the delay: "All we are doing is following the long-standing tradition of not fulfilling a nomination in the middle of a presidential year." However, all nine Supreme Court vacancies in place during election years in the Court's post-Civil War era were filled in the election year.[136]

McConnell's starkly partisan move, which prevented Obama from appointing a justice, ensured that the 2016 presidential election would determine the Court's ideological balance, instead. If Donald Trump won, he vowed to appoint a justice "in the mold of Scalia."[137] By contrast, if Hillary Clinton won, she was sure to appoint a justice in the mold of a liberal justice such as Ruth Bader Ginsburg or Sonia Sotomayor. Trump further politicized the confirmation process by releasing a list of potential Supreme Court nominees, most of whom had ties to the conservative legal organization the Federalist Society.[138]

Sure enough, once Trump was elected President, he nominated Federalist Society member Neil Gorsuch, who was confirmed in the Senate by a margin of only nine votes.[139] Senate Republicans took the 'nuclear option' and changed Senate rules to allow Gorsuch's confirmation with only a simple majority of fifty-one votes, instead of the usual sixty.[140] Just three Democrats voted for Gorsuch, underscoring the partisanship of the confirmation process.[141] Next, after Justice Kennedy's retirement, came more partisan warfare leading up to Justice Kavanaugh's confirmation hearings, which resulted in a 50-48 confirmation vote, one of the closest in American history.[142] This time, only one Democrat voted in favor of confirmation.[143] And, most recently, a hypocritical McConnell rushed the confirmation of Amy Coney Barrett in an election year and helped put, in his words, a "political asset" for the Republican Party on the Supreme Court.[144] This time around McConnell advanced an erroneous historical principle to justify considering Barrett but not Garland in an election year.[145]

As a result of a politicized and starkly divided confirmation process, justices are voting along party lines more consistently than they have in the past.[146] Additionally, framing the Supreme Court as an election issue could condition the public to view the justices politically. The Supreme Court "has no influence over either the sword or the purse,"[147]

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[133] *See* Ron Elving, *What Happened with Merrick Garland in 2016 and Why it Matters Now*, NPR (June 29, 2018), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now
[134] *See* Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html (last visited July 24, 2021).
[135] *See* Harper Neidig, *McConnell: Don't replace Scalia until after the election*, THE HILL (Feb. 13, 2016), https://thehill.com/homenews/senate/269389-mcconnell-dont-replace-scalia-until-after-election (last visited July 24, 2021).
[136] *See* Russell Wheeler, *McConnell's fabricated history to justify a 2020 Supreme Court vote*, BROOKINGS (Sept. 24, 2020), https://www.brookings.edu/blog/fixgov/2020/09/24/mcconnells-fabricated-history-to-justify-a-2020-supreme-court-vote/ (last visited July 24, 2021). (The court's post-Civil War era refers to the period when Congress had "stabilized the Court's membership at nine and the justices largely stopped serving as trial judges in the old circuit courts.").
[137] *See* Jonathan Adler, *How Scalia-esque will Donald Trump's Supreme Court Nominee be?*, WASH. POST (Jan. 26, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/how-scalia-esque-will-donald-trumps-supreme-court-nominee-be/ (last visited Aug. 5 2021).
[138] *See* Bob Egelco, *Trump has Outsourced his Supreme Court Picks to this Conservative Group*, SF CHRONICLE (July 8, 2018), https://www.sfchronicle.com/nation/article/Trump-has-outsourced-his-Supreme-Court-13056987.php
[139] *See Supreme Court Nominations (1789-Present)*, UNITED STATES SENATE (July 24, 2021) https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm. (In the past, confirmation votes weren't as closely divided. As recently as Ruth Bader Ginsburg's confirmation in 1993, only three Senators opposed confirmation.).
[140] *See* Seitz-Wald, *supra* note 130. *See also*, VandeHei & Babington, *supra* note 130.
[141] *See* Audrey Carlsen & Wilson Andrews, *How Senators Voted on the Gorsuch Confirmation*, N.Y. TIMES (Apr 7, 2017), https://www.nytimes.com/interactive/2017/04/07/us/politics/gorsuch-confirmation-vote.html (last visited July 24, 2021).
[142] *See* Chris Keller, *Senate Vote on Kavanaugh Was Historically Close*, L.A. TIMES (Oct. 6, 2018, 5:35 PM), https://www.latimes.com/nation/la-pol-scotus-confirmation-votes-over-the-years-20181005-htmlstory.html. *See also*, Sheldon Gilbert, A Look at the Closest Court Confirmation Ever, NAT'L CONST. CTR.: CONST. DAILY (Oct. 6, 2018), https://constitutioncenter.org/blog/a-look-at-the-closest-court-confirmation-ever. ("The closest margin in history was 24-23, in the 1881 confirmation of Justice Matthews, under a cloud of suspected nepotism.").
[143] *See* Annie Daniel, Jasmine C. Lee, and Sara Simon, *How Every Senator Voted on Kavanaugh's Confirmation*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/interactive/2018/10/06/us/politics/kavanaugh-live-vote-senate-confirmation.html (last visited July 24, 2021).
[144] Daniel Chaitin, *Mitch McConnell: Barrett a 'political asset' for Senate Republicans*, WASH. EXAM'R (Oct. 27, 2020), https://www.washingtonexaminer.com/news/mitch-mcconnell-barrett-a-political-asset-for-senate-republicans
[145] *See*, Wheeler, *supra* note 136. ("Since the 1880s, no Senate has confirmed an opposite-party president's Supreme Court nominee in a presidential election year."). However, this standard is erroneous because the two more recent divided-government vacancies got filled (Justices Kennedy and Brennan. The standard also lacks a constitutional basis, and McConnell failed to provide support for the value of historical precedent in Supreme Court vacancies and the confirmation process. *See id*.
[146] *See* Epps & Sitaraman, *supra* note 128 at 151.
[147] Hamilton, *supra* note 126.

so it must convince the public and other branches that its rulings are legitimate. Politicization puts the Court's legitimacy on the line.[148]

B. A Legitimacy Crisis

Due to the current six-three conservative supermajority, liberals have a short-term incentive to reform the Supreme Court. But in the long-term, reform would ideally boost the Court's legitimacy, which is a nonpartisan aim. The Constitution's framers did not intend a political judiciary.[149] As Alexander Hamilton stated, "The complete independence of the courts of justice is peculiarly essential in a limited Constitution."[150] The Supreme Court must at times answer questions with a political undertone or with political implications, but that does not mean the courts should operate politically by basing decisions on political objectives or repercussions.

When courts are politically corrupt, public opinion suffers, and when courts face public distrust, the rule of law loses meaning.[151] The Supreme Court consistently enjoys the most public approval of the three branches, but it's worth noting that in mid 2016, in the aftermath of Scalia's death, more than half of Americans disapproved of the Court. For reference, the average disapproval rating for the Supreme Court was only 34 % from 2000 to 2010.[152] Public distrust puts the judiciary in a poor position to insist on the legal integrity of the executive branch. It also makes the branch attacks from the executive more devastating.

Former President Trump repeatedly mocked federal judges and rulings over twitter. When a district court judge temporarily blocked the termination of the Deferred Action for Childhood Arrivals program, Trump called the court system "broken." These tweets further contributed to judicial distrust, improperly exerted power over the judiciary, and tarnished the Court's legitimacy. In regard to this "troubling pattern," The Brennan Center for Justice stated, "This threatens our entire system of government. The courts are bulwarks of our Constitution and laws, and they depend on the public to respect their judgments and on officials to obey and enforce their decisions. Fear of personal attacks, public backlash, or enforcement failures should not color judicial decision-making…"[153] The fact that Trump openly and repeatedly cast doubt on the federal judiciary and its members points to lessened legal legitimacy in the United States.

As I have already explained, recent history exposes a variety of ways that the present Supreme Court is prone to politicization. First, the rejection of moderate nominee Merrick Garland reveals how political views in Congress can trump the competence of a judge, making apparent the need for appointment process reform. Second, the young ages of Justices Kavanaugh and Barrett demonstrate how the appointment process constitutes a political strategy for a sitting president to influence the ideological leaning of the Court for as long as possible (younger justices will presumably serve on the bench longer). Term limits would prevent age from being a primary consideration in Supreme Court nominations. Third, the political warfare that has become synonymous with Supreme Court appointments highlights the power of every single justice on the Court to make or lose a majority, meaning every Supreme Court confirmation has the potential to shape future landmark decisions and their political ramifications. The Supreme Court could implement a supermajority requirement to lessen the political pressure of each individual justice.[154] Ultimately, events such as these expose how much political tension rests on who is deciding important legal issues in the United States. A constitutional court could redirect that tension by taking on constitutional questions, which entail some of the most important legal issues.

It is precisely because public trust in the Supreme Court depends on the Court's ability to act independently of the political branches that we must reform the Supreme Court.[155] The Supreme Court could benefit from a different

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[148] *See id.*
[149] *See id.*
[150] *Id.*
[151] *See* Amanda Hollis-Brusky, *Conservatives played the long game. Will they benefit in the long run?* L.A. TIMES (Oct. 6, 2018), https://www.latimes.com/opinion/op-ed/la-oe-scotus-hollis-brusky-20181006-story.html
[152] *See* SUPREME COURT, GALLUP, https://news.gallup.com/poll/4732/Supreme-Court.aspx (last visited Dec. 4, 2020). https://news.gallup.com/poll/321119/trust-federal-government-competence-remains-low.aspx
[153] Brennan Center for Justice, *In His Own Words: The President's Attacks on the Courts* BRENNAN CENTER FOR JUSTICE (Feb. 14, 2020), https://www.brennancenter.org/our-work/research-reports/his-own-words-presidents-attacks-courts.
[154] *See Ryan* Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. __ 46 (forthcoming 2021). ("requiring a supermajority to declare federal legislation invalid, for example, would meaningfully reduce the stakes for Supreme Court appointments and judicial appointments more generally") ("the appointment of justices would, in term of stakes, be more akin to the appointment of agency officials.").
[155] *See* JODI S. FINKEL, JUDICIAL REFORM AS POLITICAL INSURANCE 5 (Univ. of Notre Dame Press 2008) (defining judicial independence as "a relationship between judges and judicial institutions with respect to other individuals, groups, and interests in society;" and "as demonstrated behavior by judges to rule independently of those who enjoy power").

confirmation process, term limits, a supermajority requirement, and most importantly a new body to decide the United States' most contested issues: the constitutional ones.

II. The Basics of a Constitutional Court

According to political scientist, Alec Stone Sweet, a constitutional court or tribunal is "a constitutionally established[156], independent organ of the state whose central purpose is to defend the normative superiority of constitutional law within the juridical order."[157] In simpler terms, a constitutional court is confined to constitutional questions, and should protect and affirm the constitution.[158]

In most political systems with constitutional courts, judges presiding over civil and criminal cases in lower courts "frame and refer" cases to the constitutional court. The constitutional court would issue decisions on these constitutional disputes and return cases to the courts from which they came. Those courts would then use the constitutional court's judgment to decide the criminal or civil matters.[159] The deference given to a constitutional court is similar to the appeals system in the United States which gives the Supreme Court supremacy over inferior courts. The Supreme Court and constitutional court could both have jurisdiction to determine their own jurisdiction. In other words, the constitutional court would decide which cases qualify as constitutional.

Professor Kent Greenfield proposed a constitutional court as a reform technique for the United States in an October 2020 opinion article in *The New York Times*.[160] He asserted that this reform would shift "the most contentious and important legal issues" to the constitutional court, which would include a group of presidentially selected judges from other federal courts. Greenfield's vision for reform includes limited and staggered terms, so each President would be granted multiple appointments. In the appointment process, the President could select judges from a list "generated by a bipartisan commission to create legitimacy and balance."[161] This commission could be composed of constitutional law scholars, non-Article III judges, or members of Congress.[162] The court would also have an even number of judges to avoid any bare majority decisions.[163] Greenfield suggests a sunset provision for the new court[164] and additional reform for the Senate's confirmation process. At least in principle, a constitutional court with these features would be less politically charged than the Supreme Court. The constitutional court would not have the same political problem areas[165] as the Supreme Court and could be a more responsible body to entrust with the United States' most critical legal issues.

Countries with constitutional courts often establish them in the aftermath of military dictatorship or totalitarian government. These countries view constitutional courts as "a necessary guardian of democratic institutions, constitutionalism and fundamental rights."[166] While Trump's behavior did not rise to the level of a military dictatorship

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[156] Although, the constitutional court I propose in this paper would be established via statute.
[157] Andrew Harding, *The fundamentals of Constitutional Courts*, CONSTITUTION BRIEF 1 (Institute For Democracy and Electoral Assistance), 2017.
[158] *See* Bo Vesterdorf, *A constitutional court for the EU?*, 4 INT'L J. CON LAW 607, 611 (2006). (Constitutional questions refer to those that require constitutional interpretation as opposed to statutory or common law analysis. Disputes about federalism, separation of powers, and particular constitutional clauses are all constitutional questions. By contrast civil, criminal, and administrative cases are not inherently constitutional questions.).
[159] *See* Harding, *supra* note 157.
[160] *See* Kent Greenfield, *Create a New Court*, N.Y. TIMES (Oct. 27, 2020),https://www.nytimes.com/interactive/2020/10/27/opinion/constitutional-supreme-court.html; *see also* Vesterdorf, *supra* note 158 at 613 ("what is, in my view, the best way to provide the ECJ with some breathing space.")
[161] *Id.* (Greenfield doesn't explain who would appoint the commission. Perhaps, the president could appoint the Senate majority leader, the ranking minority member, the Speaker of the House, and the House minority leader to each decide on an even number of members for the commission. Members of the commission and those who appoint them would ultimately depend upon the status of the commission members and interpretation of the Appointments Clause, a subject beyond the scope of this paper.).
[162] Alternatively, the commission could have a more complex makeup and appointment process like the Judicial Services Commission in South Africa. *See* Vesterdorf, *supra* note 158 at 4 ("In South Africa the President is required to act in harness with the Judicial Services Commission (JSC) in first appointing the Chief Justice and Deputy Chief Justice, but then the JSC also provides nominees for the other appointments to the court. To limit the politicization of the process the president, after exercising a duty to consult, cannot simply reject nominees without submitting reasons, and any such rejection requires the JSC and not the President to submit a supplemental list of names.")
[163] Presumably, cases resulting in a tie would be sent back to lower courts.
[164] A sunset provision is "a law that automatically terminates the agency or program it establishes unless the legislature expressly renews it. For example, a state law creating and funding a new drug rehabilitation program within state prisons may provide that the program will shut down in two years unless it is reviewed and approved by the state legislature." Sunset Law, NOLO, https://www.nolo.com/dictionary/sunset-law-term.html (last visited July 24, 2021).
[165] Namely a political confirmation process, the Court being an election issue, the lack of term limits, and the political pressure of each individual justice, all relating to a politically encumbered Supreme Court —see section I.
[166] Vesterdorf, *supra* note 158. at 2.

or totalitarianism, he has indeed weakened the country's institutions and accelerated democratic decline.[167] Besides helping the country recover from a damaging administration, a new court could give other courts — in this case, the Supreme Court — the breather they need to reestablish legitimacy, become more independent, and temporarily embrace a more limited function in government, one that focuses on resolving federal statutory and common law disputes.

III. Constitutional Courts in other Countries

Since World War II, many European countries have established constitutional courts.[168] Today, eighty-five countries have constitutional courts — the majority of countries with a system of constitutional review.[169] The United States, however, is an outlier. In this paper, I focus on Germany's constitutional court because it has been one of the most influential. Professor Donald Kommers provides an admiring appraisal: "the Constitutional Court has influenced the shape of Germany's political landscape, reaching deep into the heart of the existing state, guarding its institutions, circumscribing its powers, clarifying its goals and, in some instances, instructing politicians to adopt given courses of action."[170] The Federal Constitutional Court of Germany was established after World War II as a reaction to the Nazi regime's unchecked federal power.[171] The court offered the protection of judicial review, something that Germany's government had previously lacked. The Federal Constitutional Court runs smoothly by using a combination of abstract review, judicial referrals, and constitutional complaints as avenues by which petitioners may challenge laws on constitutional grounds.[172]

The Federal Constitutional Court of Germany must resolve all constitutional conflicts, even in the area of foreign policy. This jurisdictional rule "provides no avenue of escape,"[173] meaning that the court can't easily resort to "the passive virtues" — using justiciability doctrines to avoid decisions on the merits of an issue.[174] Having a clear mandate to rule on certain issues means that the public and the other branches cannot easily accuse the court of playing politics. If a court can decide not to rule on a particular issue, then the public can read their choices as political actions, whereas a court that must rule on all constitutional issues cannot be blamed by the public or other branches for ruling on constitutional topics, whether they're controversial or not. In essence, clear justiciability rules can decrease politicization. The judges also gain trust and legitimacy by "freely acknowled[ging] that constitutional law is 'political' law and that their decisions affect political outcomes."[175] Perhaps as a result, Germany's Federal Constitutional Court has won favor among the general public. In 1990, 84% of the public trusted the Federal Constitutional Court while 69% trusted the judiciary.[176] The German public's notion that the court is independent and, for the most part, above partisanship distinguishes it from the realities of the current American political system.

Some may say that the political and constitutional differences between Germany and the U.S. undermine the usefulness of looking to the Federal Constitutional Court of Germany in assessing U.S. Supreme Court reform.[177] However, Germany modeled its Federal Constitutional Court on the U.S. Supreme Court.[178] And although this may seem a circuitous route for addressing issues with the Supreme Court, the German constitutional court was based on the less politicized U.S. Supreme court prior to 1950.[179] In fact, Germany was gaining inspiration from the U.S. Supreme Court not long after the "switch in time that saved the nine," which preserved the Court's independence from

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[167] *See* MICHAEL J. ABRAMOWITZ, DEMOCRACY IN CRISIS 2-5, 9 (Freedom House ed., 2018), https://freedomhouse.org/sites/default/files/FH_FITW_Report_2018_Final_SinglePage.pdf. *See also* VARIETIES OF DEMOCRACY INSTITUTE AT THE UNIVERSITY OF GOTHENBURG, DEMOCRACY FOR ALL? 21, 27, 31 (V-Dem ed., 2018), https://www.v-dem.net/media/filer_public/3f/19/3f19efc9-e25f-4356-b159-b5c0ec894115/v-dem_democracy_report_2018.pdf. *See also* Robert Mickey, Steven Levitisky & Lucan Ahmad Way, *Is America Still Safe for Democracy: Why the United States Is in Danger of Backsliding*, 96 FOREIGN AFF. 20 (2017).

[168] *See* Finkel, *supra* note **Error! Bookmark not defined.**, at 7.

[169] *See* Harding, *supra* note 157 at 1.

[170] Donald P. Kommers, *The Federal Constitutional Court in the German Political System*, 26 COMPARATIVE POLITICAL STUDIES 470, 470 (1994). *See also* Justin Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court 1951-2001* (2005).

[171] *See* Encyclopedia Britannica, *Federal Constitutional Court*, https://www.britannica.com/topic/Federal-Constitutional-Court (last visited Jan. 9, 2021).

[172] *See* Kommers, *supra* note 170 at 476.

[173] *Id*. at 479.

[174] *See* Alexander Bickel, *The Supreme Court 1960 term —Foreword: The Passive Virtues*, 129 HARV L. REV. 40 (1961).

[175] *See* Kommers, *supra* note 170 at 488.

[176] *See id*. at 486.

[177] *See e.g.*, Lech Garlicky, *Constitutional courts versus supreme courts*, 5 INT'L JOURNAL. OF CONSTITUTIONAL LAW 1, 45 (2007) (citing Mauro Cappelletti: "profound differences in the political and constitutional culture on both sides of the Atlantic Ocean").

[178] In addition to the Austrian Constitutional Court. *See* Encyclopedia Britannica, *supra* note 171.

[179] *See* Adler, *supra* note 131. (Liberals and conservatives tend to have different views about when partisan escalations around Supreme Court nominations began, but common consensus seems to be that it was sometime in the sixties or later.).

political manipulation. Ironically, the "switch in time that saved the nine" was a response to President Roosevelt's court reform bill. But Roosevelt's reform bill differed from the reforms proposed in this paper in that it was a court packing[180] plan designed to give more power to the presidency, not alleviate politicization or reaffirm judicial independence. In a sense, using the Federal Constitutional Court of Germany as an example would allow the U.S. to reconnect with its own past successes.

In contrast to the Federal Constitutional Court of Germany, constitutional courts in Latin America have experienced less success. For example, the Peruvian Constitutional Court is not independent, evidenced by the fact that justices have been fired for ruling against the President.[181] Political scientist Jodi Finkel describes Latin American constitutional courts as "impotent" to challenge "blatant constitutional violations by the prevailing political elite."[182] Constitutional courts in Latin America serve as a reminder that constitutional courts do not always bring legitimacy to a judicial branch. But as Germany shows, constitutional courts are capable of providing depoliticization and legitimacy, especially when they have the right mechanisms. The United States could draw inspiration from Germany (and indirectly its own past) by constructing a constitutional court that possesses a clear jurisdictional mandate for the purposes of depoliticization and that garners public respect and legitimacy by striving for the utmost neutrality while openly acknowledging that the court's work will never be completely devoid of politics.

IV. How Constitutional Courts Measure up for the United States

Aside from Greenfield, most scholars have remained silent on using a constitutional court as an option for Supreme Court reform. This is likely due to its radical nature and infeasibility. In the absence of specific critiques[183] for constitutional courts as reform, I will rely on more general guidelines for court reform to assess the theoretical advantages and disadvantages of constitutional courts as reform. The first set of general guidelines comes from law professors Daniel Epps and Ganesh Sitaraman, who proposed reforms to increase Supreme Court legitimacy.[184] The second guideline I will rely on comes from professors Ryan Doerfler and Samuel Moyn.[185] The proposals set forth in Epps and Sitaraman's article on court reform were endorsed by presidential candidate, Pete Buttigieg. Since then, their scholarship has been influential in the media and policy debates.[186] I include the guidelines proposed by Doerfler and Moyn because they contribute the concept of "disempowering reforms." Doefler and Moyn focus on the power of the Supreme Court, while Epps and Sitaraman focus on its composition. These guidelines encompass the two main angles for thinking about reform.

A. Epps & Sitaraman

Epps and Sitaraman propose three main requirements for successful Supreme Court reform.[187] First, reform must be "designed to preserve the Court as an institution that is not partisan—or, at the very least, as an institution that is less partisan than other branches." Second, reform must "significantly lessen[] the importance" and "reduce the political stakes of nominating individual Justices." Third, it must "preserve some ability for the Justices to strike down laws while also nudging them in the direction of deference to the political branches."[188] Finally, Epps and Sitaraman bring up additional requirements of statutory implementation, constitutional plausibility, and stability. They point out that most previously proposed reforms fall short of their criteria. These reforms include term limits, panels, court-packing, jurisdiction stripping, and Senate-based reform.[189]

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[180] Court packing refers to enlarging the Supreme Court. This would have allowed Roosevelt to add additional justices that aligned with his ideological views. Barry Cushman, *Court Packing and Compromise*, 29 CONSTITUTIONAL COMMENTARY 1, 4 (2013-2014) [https://heinonline.org/HOL/P?h=hein.journals/ccum29&i=8].

[181] *See* Finkel, *supra* note **Error! Bookmark not defined.** at 1.

[182] *Id*. at 2.

[183] Jonathan Turley recently published a blog post in which he critiqued constitutional courts as a "radical proposal" that would only be put in place to counter the conservative majority. He did not engage in a specific argument on substantive or legal grounds. *See* Jonathan Turley, *"The Supreme Court Needs a Breather": Law Professor Calls For Replacement of Supreme Court with A "Specialized Court" for Constitutional Questions*, THE THING ITSELF SPEAKS (Dec. 2, 2020), https://jonathanturley.org/2020/12/02/the-supreme-court-needs-a-breather-law-professor-calls-for-replacement-of-supreme-court-with-specialized-court-on-constitutional-questions/

[184] *See* Daniel Epps & Ganesh Sitaraman, *supra* note 128.

[185] *See* Ryan Doerfler & Samuel Moyn, *supra* note 154.

[186] *See* Neil Schoenherr, *Epps testifies before Supreme Court commission*, THE RECORD (July 26, 2020), https://source.wustl.edu/2021/07/epps-testifies-before-supreme-court-commission/.

[187] They established these criteria in response to what they identified as the problem with the Supreme Court: "As we see it, a key problem with how the Supreme Court works today is that its design makes it possible for political parties to capture control over the institution using bare-knuckle tactics, leading to the apocalyptic confirmation battles we have seen in recent years." Epps & Sitaraman, *supra* note 128 at 169.

[188] *Id.* at 170.

[189] Stephen Sachs authored a response rejecting Epps and Sitaraman's proposals as "radical." Sachs argues, "A Court that seems unbound by legal principle is too powerful a weapon to leave lying around in a democracy; we should start thinking about disarmament." Creating a constitutional court is more radical than Epps and Sitaraman's proposals, and that is indeed a downside to creating a constitutional court. But, as long as court

1. Preserving the Supreme Court as Non-Partisan

According to Greenfield, constitutional issues are "the most contentious and important legal issues."[190] Interpretations of federal statutes typically aren't as politically charged as constitutional issues such as abortion rights and the extent of presidential power, so partisanship tends to manifest in constitutional cases.[191] And the fact that Congress can more easily respond to statutory rulings than constitutional ones makes constitutional questions more high stakes. By creating a constitutional court, Congress could require cases of a constitutional nature to be passed from the Supreme Court to the constitutional court, until the sunset provision takes effect. And by temporarily limiting the amount of contentious and partisan issues that the Supreme Court hears, creating a constitutional court will help "preserve the [Supreme] Court as an institution that is not partisan."[192]

2. Reducing Political Stakes

With a constitutional court, the Supreme Court would no longer possess jurisdiction over some of the most controversial issues and could therefore be less politically charged. Congress would construct the new constitutional court from scratch, which would allow it to include measures that further reduce political stakes from the outset. Staggering terms with judges from lower federal courts and the constitutional court would "reduce[s] the political stakes of nominating individual Justices"[193] (after the constitutional court, judges would go back to lower courts, so the system would abide by the Good Behavior Clause[194] and guarantee the judges life tenure). Staggered terms guaranteeing that every President will appoint a constitutional court judge will significantly lower the political stakes of appointments and minimize the chances of the constitutional court becoming an election issue. Also, the judge that one President appoints will not matter as much in the grand scheme of things because their time on the constitutional court will have a clear end date. And decisions made with more than a bare majority would "lessen[] the importance of individual Justices."[195] Prior to Justice Barrett's confirmation, Justice Roberts was the pivotal vote, siding with the majority in most cases.[196] In a constitutional court of eight or ten judges, no one judge would ever be the deciding vote.

3. Ability of Judges to Strike Down Laws or Defer to the Political Branches

A constitutional court's limited jurisdiction would "preserve some ability for the Justices to strike down laws," which Epps and Sitaraman identify as a characteristic of a "better system."[197] Limited jurisdiction would also "nudg[e] [the constitutional court and the Supreme Court] in the direction of deference to the political branches" by providing meaningful checks to both courts' power, another characteristic suggested by Epps and Sitaraman.[198] The Supreme Court would no longer hear constitutional cases and the constitutional court would only hear constitutional cases. Judges on the constitutional court would serve limited terms before returning to their previous courts, granting them less lasting power. Under term limits, judges could not gain political followings the way they can on the Supreme Court now.[199] The Supreme Court would simply have less jurisdiction and thus a decrease in power. Presumably, with judicial power more divided, both the Supreme Court and the constitutional court would be less likely to overstep into the domain of the political branches.

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reform remains a thought experiment and not a political reality, immoderation isn't so problematic. Additionally, the "disarmament" Sachs promotes is consistent with Doerfler and Moyn's disempowering reforms that I suggest for a constitutional court. *See* Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 YALE. L. J. FORUM. 93 (2019).

[190] Greenfield, *supra* note 160.
[191] Discrimination statutes provide an exception.
[192] Epps & Sitaraman, *supra* note 128.
[193] *Id.*
[194] *See* U.S. CONST. art. III, § 1, cl. 2.
[195] Epps & Sitaraman, *supra* note 128.
[196] *See* Lawrence Hurley & Jan Wolfe, *'The Roberts Court': U.S. chief justice cements pivotal role*, REUTERS (June 29, 2020), https://www.reuters.com/article/us-usa-court-chiefjustice-analysis/the-roberts-court-u-s-chief-justice-cements-pivotal-role-idUSKBN2402Y7 (""He is clearly the court's pivot point," Columbia Law School professor Gillian Metzger said. "Put simply, it is truly the Roberts Court now;" "As the court's term nears its end, Roberts has been in the majority in 50 out of 51 cases that have been decided including all 10 cases in which the court was split 5-4, according to lawyer Adam Feldman, who tracks court statistics at a website called 'Empirical SCOTUS.'") *See also* SCOTUS STATISTICS, HARV. L. REV., https://harvardlawreview.org/supreme-court-statistics/#:~:text=Each%20Justice%20agreed%20in%20the,disposition%2095.3%25%20of%20the%20time (last visited May 2, 2021).
[197] Epps & Sitaraman, *supra* note 128.
[198] *Id.*
[199] *See* LAWRENCE BAUM, THE SUPREME COURT 18-19 (13th ed. 2019).

4. Additional Requirements

A constitutional court adheres to the pragmatic requirements that Epps and Sitaraman put forth. It can be achieved through statute as opposed to a constitutional amendment, making the reform more politically sensible. Additionally, the court would be "unquestionably constitutional."[200] A specialized constitutional court is just as constitutionally consistent as U.S. federal courts of appeals and district courts because, under Article III of the Constitution, Congress has the power to create new courts and manage the Supreme Court's appellate jurisdiction.[201] Finally, a specialized constitutional court maintains stability by "establishing a national uniformity in matters of constitutional rights and authority."[202] The constitutional court would have supremacy over lower federal courts on constitutional matters. And the Supreme Court and constitutional court would each have supremacy within their respective jurisdictions. Also, a bipartisan commission, composed equally of Democrats and Republicans, that selected potential nominees would add to stability by increasing the chance that both parties could "live with [the arrangement] going forward."[203]

B. Doerfler & Moyn

In *Democratizing the Supreme Court*, Ryan Doerfler and Samuel Moyn "urge[] progressives to reject the legitimacy frame of the issue . . . in favor of an openly progressive frame in which the question is how to enable democracy within our constitutional scheme."[204] They encourage a shift in the focus of reform from saving the Supreme Court[205] to disarming its ability to "invalidate federal statutes on constitutional grounds."[206] In other words, they suggest reform that will weaken the Supreme Court. Doerfler and Moyn suggest "disempowering reforms that meet the contemporary need."[207] Their appeal to disarmament overlaps with arguments conservative legal scholar Stephen Sachs makes in his article, which opposes Epps and Sitaraman (See footnote 189).[208]

As opposed to personnel reforms that strive to change the Supreme Court's composition, disempowering reforms limit what the Supreme Court is permitted to do.[209] These reforms "effectively reassign power away from the judiciary and to the political branches."[210] Disempowering reforms do not give a partisan advantage; as a disempowered Supreme Court moves more power to the political branches, the advantage shifts to align with electoral outcomes.[211] In the end, disempowering reforms lower the stakes of judicial appointments and increase the stakes of congressional and presidential elections.

Creating a constitutional court disempowers the Supreme Court by limiting it to non-constitutional issues. In fact, it resembles jurisdiction stripping, the reform Doerfler and Moyn focus on. However, a constitutional court would not explicitly reallocate power to the political branches unless it were to join the executive branch as an administrative court. Based on Kent Greenfield's proposal for a constitutional court in the *New York Times*, the new court would remain in the judiciary, which is not completely consistent with the disempowering reform strategy. Still, "the judiciary is beyond comparison the weakest of the three departments of power,"[212] so disarming the Supreme Court without weakening the judiciary as a whole, or further empowering the legislature and executive, could be sufficient. Indeed, it might be preferable. Overall, a constitutional court would balance the goals of re-legitimizing (Epps and Sitaraman) and disarming (Doerfler and Moyn) the Supreme Court by moving constitutional questions to a new court that contains depoliticizing measures.

V. A Combined Approach

A specialized constitutional court would be ideal not merely for the strengths of constitutional courts, but also for the insufficiencies of other popular reform proposals. Calls for Senate-based reform, altering Senate confirmation protocols as opposed to the Supreme Court itself, echo the need for changes to the confirmation process. And while

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[200] Greenfield, *supra* note 160.
[201] *See* U.S. CONST. art. III, § 2, cl. 3 (stating the Supreme Court has "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make").
[202] Epps & Sitaraman, *supra* note 128.
[203] *Id.* at 171.
[204] Doerfler & Moyn, *supra* note 154 at 2.
[205] *See* Epps & Sitaraman, *supra* note 128.
[206] Doerfler & Moyn, *supra* note 154 at 6.
[207] *Id*.
[208] *See* Sachs, *supra* note 189.
[209] *See* Doerfler & Moyn, *supra* note 154 at 8.
[210] *Id.*
[211] *See id.* at 18.
[212] Hamilton, *supra* note 126.

this type of reform is worth a try, the Senate could vote to change its rules, reversing the reform.[213] To dismantle an Article III court, such as a constitutional court, the Senate, House, and President would all need to favor its elimination. This makes a constitutional court more durable than Senate-based reform, which is a valuable addition to a constitutional court but remains fragile on its own.

Given the Good Behavior Clause Congress probably does not have the constitutional authority to enact term limits (without a rotating system) for Supreme Court Justices.[214] Congress could, however, create a completely new court, in this case a specialized constitutional court, with a rotating system of judges, and therefore term limits, from the beginning. Without a rotating system, Supreme Court term limits would require a constitutional amendment[215] — no easy endeavor — and pushing a system of rotating judges onto the already established Supreme Court would likely be challenging.

The underlying goal of a supermajority requirement, however, could be achieved constitutionally by changing the membership of the court to an even number. With this change, the court could never make a decision with a margin of just one member. But a supermajority requirement achieved through an even number of justices may result in an even, and indecisive, split. A true supermajority requirement (keeping an odd number of justices, and still requiring more than a bare majority) is not clearly constitutional.[216] Additionally, a supermajority voting requirement and term limits would not initiate the more substantial change that the Supreme Court needs and that a constitutional court offers. Senate-based reform, a supermajority requirement, and term limits are flawed on their own. Combined with a constitutional court, however, they could help to make the judiciary less political.

Germany's success, the reform guidelines of legal scholars Epps, Sitaraman, Doerfler, and Moyn, and the deficiencies in other reform options suggest that a constitutional court is an ideal judicial reform. Another reason for creating a constitutional court is that the approach could work seamlessly with other reform approaches. By creating a new court that incorporates a different confirmation process, term limits, and a supermajority requirement, we could enact multiple reforms as one. This approach is more feasible than layering multiple reforms onto the already-established Supreme Court.

Furthermore, the specialized constitutional court model brings together the ideas of many constitutional scholars and the advantages of multiple proposals. A single approach might not be enough to secure the legitimacy of the Supreme Court. Combining a variety of reform techniques to depoliticize the Supreme Court could provide extra security. In Federalist 51, Madison introduces the idea of "auxiliary precautions," which provide extra protection against tyranny in addition to elections, which are the "primary control."[217] The additional approaches would combine with a constitutional court to equip judicial legitimacy with auxiliary precautions. If moving constitutional issues to another court fails to depoliticize the Supreme Court, then Senate-based reform may diffuse tension instead. And if Senate-based reform fails, a supermajority and term limits provide additional precautions. Establishing a constitutional court in combination with other reforms grants a safety net.

VI. The Importance of a Sunset Provision

Supreme Court reform does not have to be an all or nothing proposition. As I wrote earlier, a constitutional court could give the Supreme Court a breather. During the Supreme Court's absence from constitutional questions, a constitutional court would be a firm guardian of the Constitution. When the constitutional court expires via the sunset provision, Congress could reestablish the Supreme Court's full jurisdiction, meaning the constitutional court could be dismantled and the Supreme Court could go back to deciding cases that hinge on constitutional disputes. Permanently removing constitutional issues from the Supreme Court's jurisdiction would be hasty and seems like an unnecessary insult to its authority. An ideal reform does not entail attacking the Court or needlessly stripping it of jurisdiction. The purpose of reform should be to preserve and refine our institutions, so they can continue to serve the country well.

Indeed, one way to think of the constitutional court is as a test court for reform that could eventually be applied to the Supreme Court. Most reform techniques[218] have been asserted in theory, but never observed in practice. Temporarily creating a new court featuring reform techniques could give political scientists, legal scholars, politicians, and the

[213] *See* Epps & Sitaraman, *supra* note 128 at 179.
[214] *See* U.S. CONST. art. III, § 1, cl. 2 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.")
[215] *See* Epps & Sitaraman, supra note 128 at 174.
[216] *See* Sachs, *supra* note 189 at 97.
[217] THE FEDERALIST NO. 51 (James Madison); *See also,* Hollis-Brusky, *Impeachment as a 'Madisonian Device' Reconsidered,* 96 CHI. L. REV. 101, 113 (2019).
[218] *See Why does the Supreme Court have nine Justices?,* NAT'L CONSTITUTION CTR. (July 24, 2021), https://constitutioncenter.org/blog/why-does-the-supreme-court-have-nine-justices. (There have been different numbers of justices on the court besides nine, so scholars may be able to turn to historical evidence to evaluate proposals to change the number of justices on the Court.).

public a better sense of how reform might work out for the Supreme Court. With a sunset provision, the constitutional court could be viewed as an especially experimental chapter in the "Great American Experiment," not as an attack on the Supreme Court or its potential.

VII. Conclusion

Implementing a variety of reforms and focusing on creating a specialized constitutional court may be a comprehensive solution. But would Congress ever enact it? A reform of this scale would need to be a main goal of the Biden Administration. Biden did sign an executive order to create a commission on the Supreme Court, but this commission isn't designed to promote change. Its charge is to study court reform, not to produce concrete recommendations. The commission doesn't include any of the key advocates for court reform, such as Daniel Epps and Ganesh Sitaraman.[219] This paper has considered a U.S. constitutional court as a thought experiment to identify problems with the Supreme Court and recognize a full range of reform techniques. But that is not to say a new court would be unconstitutional or technically impossible. Congress has successfully invoked its Article III power to "ordain and establish … inferior Courts"[220] before. The United States Court of International Trade, which transitioned out of the United States Customs Court after a congressional act in 1980, presents one example.[221] Biden hasn't taken the steps to promote legislation that would reform the Court, but his commission provides the opportunity to think critically about what reforms would benefit the Court most, even if these reforms won't be enacted in the near future.

Ultimately, we need to depoliticize and re-legitimize the Supreme Court. The United States Constitutional Court could accomplish those goals. As a starting point, the Court could use aspects of Germany's Federal Constitutional Court and include a confirmation process with a bipartisan commission, term limits, and a supermajority requirement. Large-scale reform is difficult to imagine in our current political climate, but at some point, maybe this thought experiment will materialize. Examining the Supreme Court's shortcomings by discussing ideal reform could promote smaller-scale reform or, at the very least, cultivate an awareness of the judiciary's current problems.

[219] *See* Ian Millhiser, *Biden's Supreme Court reform commission won't fix anything*, VOX (Apr. 10, 2021), https://www.vox.com/2021/4/10/22375792/supreme-court-biden-commission-reform-court-packing-federalist-society. S*ee also,* Stern, *supra* note 129r.
[220] U.S. CONST. art. III, § 1, cl. 1
[221] *See* Federal Judicial Center, *U.S. Court of International Trade, 1980-present*, https://www.fjc.gov/history/courts/u.s.-court-international-trade-1980-present (last visited Jan. 8, 2021).

The Philosophical Underpinnings of Redistribution in India and the United States

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Philosophies about wealth redistribution established during the constitutional origins of nations give shape to the bodies of law that they will adopt in the future. However, countries may deviate from these doctrines to address economic challenges such as income inequality and promoting growth. In this article, we seek to offer a comparative analysis of India and the United States, and how both converged towards a utilitarian philosophy over time. While both countries have declared independence from Great Britain, the preambles to their constitutions, which act as statements of purpose behind their respective structures of government, reveal their differences:

We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens: Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the Nation; In our constituent assembly this twenty-sixth day of November, 1949, do hereby adopt, enact and give to ourselves this constitution.
The Constitution of India[222]

We the People of the United States, in Order to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.
The Constitution of the United States of America[223]

From the outset, terms such as “Equality of status and of opportunity” and “general Welfare” signify differences in each country’s allocational priorities. Throughout this article, we will examine these constitutional documents and public policy through the lens of four types of government philosophies:

1) *Egalitarian*: the goal of reducing economic inequality in society (i.e., equal slices of the economic pie for everyone).
2) *Rawlsian*: the goal of maximizing the social welfare of the worst-off members of society (i.e., giver bigger slices of the economic pie to hungrier people).
3) *Libertarian*: the prioritization of a set of rules (property rights) over individual allocations of wealth without economic intervention from the government (i.e., free market competition determines the size of each slice of the economic pie); and
4) *Utilitarian*: the goal of maximizing the total social welfare in society (i.e., the slices of the pie can vary in size as long as that allocation maximizes the total size of the economic pie).

To reveal a greater understanding about the ideologies prevalent in India and the United States, this paper offers chronologies which expose trends that have emanated in relation to these constitutional documents and have culminated in the two states’ current-day philosophies. In Part I) and Part II) of this article, we discuss the history of redistribution in India and the United States, respectively. We will then use this context in Part III) to identify comparisons between each country’s history and demographics that have contributed to their divergent redistribution preferences. Following this, we will offer a brief comparative analysis of the present-day philosophies in both countries in Part IV). In brief, our findings suggest that the Constitution of India establishes the goal of egalitarianism, while the U.S. Constitution forms a libertarian government which promotes a minimal state and non-interventional economic policy. Overtime, both countries stray away from these models toward different forms of utilitarianism and have seen rises in inequality. We suggest factors regarding population homogeneity and perception of social mobility contribute to each country’s adoption of utilitarian-esque ideologies, despite their disparate constitutional origins.

I. India

[222] INDIA. CONST. pmbl.
[223] U.S. CONST. pmbl.

We cannot examine the philosophical underpinnings that guide Indian policy without first looking at the Directive Principles of State Policy, as laid down in the Indian constitution.[224] These edicts, though not enforceable by law, are "nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws, as stated in Article 37.[225] Article 38(1) goes on to declare that "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."[226] Article 38(2) further states, "the State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities(…)."[227]

Despite this call for egalitarianism, India has seen a rise in its Gini index, a measure of income inequality in a population, in the past fifty years, from 32.1 in 1983 to 37.8 in 2011.[228] The gap between the pre-tax national income of the top ten percent and the bottom fifty percent of adults has been widening at an increasing rate since around 1990.[229] While the average national income has more than tripled in the past half century,[230] there has been a rise in income inequality. This shows that the benefit of increased production is mainly accruing to a small fraction of the population.[231] This trend indicates that only a fragment of the country is benefitting from increased production, thereby undermining the constitution's regard for economic justice. The situation can be partially explained by the fact that the agriculture sector, which contributes smaller amounts to the GDP annually (14.6%, as of 2018),[232] continues to employ a substantial portion of the workforce (43.86% as of 2018):[233] this indicates that India is still in the early stages of industrialization. While a large percentage of the population continues to work in agriculture, the income that they earn from it is dwindling, thereby resulting in increasing inequality. This betokens a structural discrepancy in the workforce—a trend that has underscored the Indian economy since 1947.[234]

A. 1700s-1947: Elite Social Welfare

Prior to the British *Raj*, India had an independent economy that relied on the export of handicrafts, particularly textiles and precious stone works.[235] However, the economic policies pursued by the colonial government transformed the country into a supplier of raw materials and consumer of finished industrial products from Britain.[236] While this period did not have reliable and regular censuses, existing data and diaries suggest that poverty was rampant and growth was slow.[237] Though the nineteenth century did see the introduction of modern industry, its growth was too slow to be of consequence.[238]

The situation was worsened by various systems of land settlement that were imposed by the British government. One example of this is the *zamindari* system in Bengal, where in Indian landowners were required to pay a fixed amount to the colonial government each year.[239] Whatever amount they got beyond that was retained as profit. This was

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[224] INDIA. CONST. pmbl.
[225] INDIA. CONST. Art. 37, cl. 1.
[226] INDIA. CONST. Art. 38, cl. 1.
[227] *Id.* at cl. 2.
[228] WORLD BANK, *Gini index (World Bank estimate) – India* https://data.worldbank.org/indicator/SI.POV.GINI?end=2011&locations=IN&start=1983&view=chart, (last visited Aug 1, 2021).
[229] WORLD INEQ. DATABASE, *Income inequality, India, 1951-2019,* https://wid.world/share/#0/countrytimeseries/sptinc_p90p100_z;sptinc_p0p50_z/IN/2015/eu/k/p/yearly/s/false/10.93/60/curve/false/1951/2019, (last visited Aug 1, 2021).
[230] WORLD INEQ. DATABASE, *Evolution of average income, India, 1922-2020,* https://wid.world/share/#0/countrytimeseries/anninc_pall_992_i;agdpro_pall_992_i/IN/2015/eu/k/p/yearly/a/false/445.10200000000003/10000/curve/false/1922/2020, (last visited Aug 1, 2021).
[231] WORLD INEQ. DATABASE, *Income inequality, India, 1951-2019,* https://wid.world/share/#0/countrytimeseries/sptinc_p90p100_z;sptinc_p0p50_z/IN/2015/eu/k/p/yearly/s/false/10.93/60/curve/false/1951/2019, (last visited Aug 1, 2021).
[232] AARON O'NEILL, *India: Distribution of gross domestic product (GDP) across economic sectors from 2010 to 2020,* STATISTA, https://www.statista.com/statistics/271329/distribution-of-gross-domestic-product-gdp-across-economic-sectors-in-india, (last visited Aug 1, 2021).
[233] AARON O'NEILL, *India: Distribution of the workforce across economic sectors from 2009 to 201*9, STATISTA, https://www.statista.com/statistics/271320/distribution-of-the-workforce-across-economic-sectors-in-india, , (last visited Aug 1, 2021).
[234] *Id.*
[235] *Chapter IV: India Before the Establishment of British Rule.* 15 BULL. OF THE DECCAN C. RES. INST., 88 (Dec 1953), https://www.jstor.org/stable/42929535.
[236] NATIONAL COUNCIL OF EDUCATION RESEARCH & TRAINING, *INDIAN ECONOMIC DEVELOPMENT,* 5, (Shveta Uppal ed., 1t ed. 2006), https://ncert.nic.in/textbook.php?keec1=1-10.
[237] P. K. NAYAK ET AL., *RES. BANK. OF INDIA, INCLUSIVE GROWTH AND ITS REGIONAL DIMENSION, 96, (2010),* https://www.rbi.org.in/scripts/bs_viewcontent.aspx?Id=2359.
[238] NATIONAL COUNCIL OF EDUCATION RESEARCH & TRAINING, *supra* note 14, at 7.
[239] B. H. BADEN-POWELL, *The Origin of Zamindari Estates in Bengal,* 11 Q. J. OF ECON., 36, 41 (1896),

intended to incentivize the *zamindars* (landowners) to invest in agriculture. The reality, however, was that the system deepened class inequalities. In a period riddled with plagues and falling agricultural prices, the farmers struggled to pay the amount that was set by the government. The *zamindars*, not wanting to lose control of their land, hired goons to beat up the peasants and extract the money from them. This meant that the farmers were left with meager earnings and food to sustain themselves. At the same time, there is evidence of a relatively higher yield of cash crops in certain areas of the country due to the commercialization of agriculture. However, this too benefited the British who used it for the production of goods back in their home country.[240]

Overall, the policies pursued prior to Independence were elitist and selective, and did little to improve the condition of Indians. Policies instead focused on boosting the economy of the British empire. Despite a lack of data measuring inequality during this period, given the institution of the caste system, we can deduce that there was vast polarization in the distribution of wealth. This is supported by prominent thinkers in Indian political philosophy such as Amartya Sen and B. R. Ambedkar.[241] We can conclude that India under the British *Raj* not only lacked redistributive efforts, but also witnessed stagnation of economic growth. The situation was further made rigid by the urban-rural and caste divides that existed in India. The caste system inhibited intergenerational mobility by restricting people to certain professions, thereby perpetuating inequalities.[242]

The colonial government followed a sort of elitist social welfare scheme—they maximized the utility accruing to the British citizens and used their colonies to serve this purpose. This is not to say that their policies had no intended consequences on the Indian population; however, this was a secondary focus after considering the benefit to the British. Therefore, the colonial government maximized total utility, calculated by giving a significantly higher weightage to the needs of the motherland. Given that a change in the allocation of resources would reduce the profit to the British nation, the situation could be considered Pareto efficient, meaning that some were made better-off without making others worse-off. Redistribution occurred *within* social classes rather than across them, thereby doing little to change the state of matter.

B. 1947-1980s: Egalitarian Growth

Jawaharlal Nehru, the first Prime Minister of India, saw rapid industrialization as the key to growth, but was also aware of the perils of unregulated capitalism—a lesson learned from the Great Depression.[243] In the decades following Independence, India followed the framework of a mixed economy, wherein production was distributed between the public and private sectors. In other words, it was a reluctant pro-capitalist state with a socialist ideology.[244]

To this effort, the Planning Commission was set up in 1950, with Nehru as Chairperson, who was responsible for formulating the Five-Year Plans.[245] These were drafted with a focus on growth, modernization, self-reliance, and equity. The First Five Year Plan states:

It is no longer possible to think of development as a process merely of increasing the available supplies of material goods; it is necessary to ensure that simultaneously a steady advance is made towards the realization of wider objectives such as full employment and the removal of economic inequalities. Maximum production, full employment, the attainment of economic equality and social justice which constitute the accepted objectives of planning under present-day conditions are not really so many different ideas but a series of related aims which the country must work for (…) On the other hand, equality and social justice will have little content unless the production potential of the community is substantially raised. Development, thus conceived, is a process which calls for effort and sacrifice on

https://www.jstor.org/stable/pdf/1881726.pdf. (See also, at 43).

[240] *Id. at 43.*

[241] ANUP HIWRALE, *Caste: Understanding the Nuances from Ambedkar's Expositions,* JOURNAL OF SOCIAL INCLUSION STUDIES, 6:1 (2020), https://journals.sagepub.com/doi/full/10.1177/2394481120944772.

[242] We analyzed the Census of 1872, retrieved from http://censusindia.gov.in, which had data on the caste and the occupational distribution in districts. However, there are no government reports related to what castes worked in which fields. That said, travellers and historians have written extensively about the confines of the caste system, and the Census also classified the population with titles such as "superior castes," "intermediate castes," "trading castes," "pastoral castes," "weaver castes," "labouring castes" etc. signifying a direct relationship between caste and occupation.

[243] PULAPRE BALAKRISHNAN, *The Recovery of India: Economic Growth in the Nehru Era,* 42 ECON & POL. WKLY, 52, (2017), https://www.jstor.org/stable/40276833?seq=2#metadata_info_tab_contents.

[244] ATUL KOHLI, *Politics and Redistribution in India*, PRINCETON UNIV., 2, (2004), https://www.princeton.edu/~kohli/docs/UNRISD.pdf.

[245] PLANNING COMMISSION, *History, (Oct. 2019), https://niti.gov.in/planningcommission.gov.in/docs/aboutus/history/index.php?about=aboutbdy.htm,* (last visited Aug. 1, 2021).

the part of the entire body of citizens. For such effort and sacrifice to come forth psychological conditions have to be created which provide an incentive for all to give of their best.[246]

The plan suggests that the committee aimed to balance growth with social equity. This egalitarian mindset underscored the industrial development that took place until the 1990s. Although most industries were publicly owned, there were a few that were left to the private sector. These were strictly regulated through a system of licenses, which were used to promote regional equity – it was easier to obtain a license if the industrial unit was established in an economically backward area.[247] Such units were also given certain concessions such as tax benefits and electricity at a lower tariff.[248]

Redistribution in the agricultural sector manifested in the form of land reforms and subsidies. In particular, the post-Independence period saw the abolition of intermediaries between the farmers and the state, imposition of a land ceiling, and regulation of state tenancy.[249] This was done in an attempt to reduce the gap between the landless laborer and the landowner. Farmers were also offered subsidies to incentivize them to adopt new technology. However, the policies pursued by the government increased regional divisions between farmers of the perennially irrigated regions and relatively dryer regions,[250] as the new technology favored the growth of crops that relied on irrigation. Therefore, we put forth here that while the policies were egalitarian in that they were expected to provide farmers with equal opportunity to enhance production, they simultaneously worked to increase regional inequality due to the variant terrain and pre-existing resources. This explains the slightly altered focus of the Second Five Year plan, which sought to

*...rebuild rural India, to lay the foundations of industrial progress, and to secure to the greatest extent feasible opportunities for weaker and under-privileged sections of our people and the balanced development of all parts of the country.****[251]***

Here, the egalitarian mindset is matched with a Rawlsian approach. This is evidenced by the steep and progressive tax-system. The top marginal income tax rate, on average, increased between 1950 and 1973, hitting a peak of 97.75 before decreasing.[252]

The policymakers were aware that economic regulations were not enough to undo centuries of social disparities. In 1956, Nehru said, "We have not only striven for and achieved a political revolution, not only are we striving hard for an economic revolution but… we are equally intent on social revolution; only by way of advance on these three separate lines and their integration into one great whole, will the people of India progress."[253] In this regard, the abolition of untouchability in the Constitution was supplemented by clauses regarding reservations in educational and government employment in favor of Scheduled Castes, Scheduled Tribes, and other vulnerable sections of society. In addition, measures were taken to raise their social status by means of special facilities in the form of scholarships, hostel accommodation, grants, housing, legal-aid services, etc.[254] In conjunction with concentrated efforts at redistribution, the period between Independence and around 1980 saw a rise in national income, evident in the steadily declining gap between the top ten percent and bottom fifty percent of earners and the declining Gini coefficient. This rise seems to suggest an increase in total welfare. However, the poverty rates between 1952 and 1974 fluctuated cynically, with an increasing trend.[255] Furthermore, the per capita real income growth was low, especially compared with some other developing countries. The confounding data indicates that the redistribution did not help those near the poverty line.

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[246] PLANNING COMMISSION, OBJECTIVES, TECHNIQUES AND PRIORITIES IN PLANNING, in 1ST FIVE YEAR PLAN. 1, (1950), https://niti.gov.in/planningcommission.gov.in/docs/plans/planrel/fiveyr/index1.html
[247] NATIONAL COUNCIL OF EDUCATION RESEARCH & TRAINING, *supra* note 16, at 29.
[248] *Id.*
[249] N. BANDYOPADHYAYA, *'Operation Barga' and Land Reforms Perspective in West Bengal: A Discursive Review*, 16 ECON. & POL. WKLY., A38, (1981), https://www.jstor.org/stable/4369965.
[250] D. N. DHANAGARE, *Green Revolution and Social Inequalities in Rural India*. 22 ECON. & POL. WKLY., AN139, (1987), https://www.jstor.org/stable/4377016.
[251] PLANNING COMMISSION, INTRODUCTION, in 2ND FIVE YEAR PLAN, 1, (1956), https://niti.gov.in/planningcommission.gov.in/docs/plans/planrel/fiveyr/index1.htm
[252] LUCAS CHANCEL & THOMAS PIKETTY, WORLD INEQ. DATABASE, INDIAN INCOME INEQUALITY, 1922-2015: FROM BRITISH RAJ TO BILLIONAIRE RAJ?, 27 (2d ed., 2018), https://wid.world/document/chancelpiketty2017widworld/.
[253] BIPAN CHANDRA ET AL., *India After Independence 1947-2000,* PENGUIN BOOKS, 123, (2008).
[254] *Id.* at 182.
[255] JAMES W. FOX, USAID, *Poverty in India Since 1974 – a Country Case Study*, 3, (2002), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.573.2229&rep=rep1&type=pdf.

Therefore, though policy makers attempted to help the worst-off, they realized that the cornerstone of a newly formed state was a strong economy, and hence sought to increase the overall growth rate. This restricted them from being truly Rawlsian in their approach, for economic redistribution was aimed at the middle and lower classes and excluded those at the bottom of the ladder. Nonetheless, social reforms—such as the abolition of untouchability and the provision of educational facilities—attempted to provide an egalitarian basis for growth.

C. 1980s-Present: Utilitarian Capitalism with a Rawlsian Outlook

Since the 1990s, the government has attempted to privatize, globalize, and liberalize the Indian Economy, making it a pro-capitalist country. This has involved deregulation of the industrial sector (e.g., the withdrawal of license requirements), tax reforms, disinvestment, outsourcing, and other fiscal measures.[256] These measures have all worked to induce retrogression in terms of equity, evident in the rising gap between the bottom fifty percent of earners and the top ten percent starting around 1990.[257] Additionally, the top marginal tax rate drastically reduced between 1980 and 2000, testifying to a reduction in the progressive nature of the tax.[258] The tax-GDP ratio rose between 1980 and 1990, but fell again at the turn of the decade to minimize disincentives on work, savings and investment.[259]

Economists Chancel and Piketty found that income growth rates in India over the 1980-2015 period reflected a "cobra-curve" with substantial increases in growth as the country progressed upwards through the distribution of income.[260] They found that the income of the middle 40% of the Indian population grew at 102% between 1980 and 2015. However, they further found that the "middle 40% group in India captured a much smaller share of total growth (25%) than its counterparts did in China or Europe (more than 40%) or even the USA (33%)." Interestingly, the tremendous growth was seen only between 1951 and 1980, after which growth was unevenly distributed within the top 10% group.[261] Thus, even within the middle class of the country, there was growing inequality.

In the 1990s, we see the regression to an earlier state of inequality, accelerated by the privatization of the industrial sector. Therefore, we conclude here that the policies pursued were utilitarian, and attempted to maximize growth. The rewards of this rapid growth were expected to trickle down to the poorer sectors through the increase in employment and GDP. However, due to structural discrepancies and lack of adequate vocational training, the majority of the workforce continued to be engaged in agriculture, and therefore the industrial sector was unable to capture and profit the poorest sections.[262]

In the twenty-first century, government efforts have shifted to reflect a more Rawlsian outlook.[263] Former Chief Economist of the World Bank, François Bourguignon, for example, acknowledged in an article on wealth inequality that income redistribution does not accelerate growth in any major way, and yet, "directly investing in opportunities for poor people is essential."[264] He further said, "Transfers to the poor should not consist merely of cash; they should also boost people's capacity to generate income, today and in the future."[265] Hailed by the government as "the largest and most ambitious social security and public works program in the world," Mahatma Gandhi National Rural Employment Guarantee Act 2005 (MGNREGA) is one such measure.[266] It provides willing and able individuals with the opportunity for one hundred days of unskilled manual labor.

Overall, the country's capitalist—though redistributive—stance during this era alludes to a utilitarian mindset, reflected in increasing national income despite increasing inequality, and reduced top marginal income tax rates. At the same time, there is Rawlsian theory at work, evident from the progressive tax structure and the means-tested welfare schemes. While the amalgamation of the two philosophies may seem contradictory at face-value, it is the

[256] LAURA ALFARO & ANUSHA CHARI, *Deregulation, Misallocation, and Size: Evidence from India,* HARV. BUS.SCH., 1, (2013), https://hbswk.hbs.edu/item/deregulation-misallocation-and-size-evidence-from-india.
[257] WORLD INEQ. DATABASE, *supra note 10.*
[258] LUCAS CHANCEL & THOMAS PIKETTY, *supra note 28, at 4.*
[259] M. GOVINDA RAO, *Tax Reform in India: Achievements and Challenges,* 7 ASIA-PAC. DEV. J., 62, (2000), https://www.unescap.org/sites/default/files/apdj-7-2-3-rao.pdf.
[260] LUCAS CHANCEL & THOMAS PIKETTY, *supra note 28, at 21.*
[261] LUCAS CHANCEL & THOMAS PIKETTY, *supra note 28, at 29.*
[262] LAURA ALFARO & ANUSHA CHARI, *Deregulation, Misallocation, and Size : Evidence from India,* (NATIONAL BUREAU OF ECONOMIC RESEARCH (2012).
[263] Note that this paper focuses only on the philosophies underlying policies, and not the implementation of the policies. Therefore, we are not commenting here on the effectiveness of MGNREGA, but only on its ideology.
[264] FRANÇOIS BOURGUIGNON, *Spreading the Wealth. Finance and Development,* 55 INT'L MONETARY FUND, 23, (2018), https://wl.ww.imf.org/external/pubs/ft/fandd/2018/03/bourguignon.htm
[265] *Id.*
[266] MINISTRY OF RURAL DEVELOPMENT, *Annual Report 2012-13,* VI, (2012), https://rural.nic.in/sites/default/files/MoRDEnglish_AR2012_13_0.pdf.

virtue of a mixed economy. The growth-oriented utilitarian and capitalist nature of the Indian economy has allowed it to increase the size of its economic pie, and the Rawlsian principles underlying state regulations attempt to ensure an equal distribution of said pie. Furthermore, the marginal utility per unit income for the poorer populations is higher than that for the well-off. Combining such a phenomenon with India's twenty percent under the national poverty line,[267] we can conclude that improving the means to earn a livelihood for the lowest earners in India will culminate in a significantly larger total utility, calculated as the aggregate of individual utilities.

II. The United States

At a glance, three different philosophies seem to have informed U.S. government intervention at different chapters in the country's history. To approach a closer understanding of the landscape of taxation and redistribution in the United States, one must consider its libertarian beginnings as well as its recent trends to and away from Rawlsian welfare, which have amalgamated into its current utilitarian framework.

A. 1776-1900s: Constitutional Underpinnings of the U.S. Government

Taxed without representation in the British Parliament,[268] the framers of the U.S. Constitution devised a limited government that sought to protect the basic rights of the colonists while preventing the abuses of power which they experienced under the tyranny of King George III.[269] While the British Monarchy derived the King's authority from God under the "Divine Right of Kings" doctrine[270], the Articles of Confederation—the first constitution of the United States—sourced its power from the consent of the governed in a representative democracy, a novel concept for the 18th century.[271] Fearful of a centralized body of power, the framers constructed a weak government that lacked the ability to levy taxes, which among other shortcomings, lead to its failure to secure the unalienable rights of man which John Locke philosophized as life, liberty and property.[272]

Thus, the framers created the stronger and current Constitution in 1787, which relies on the division of power between several opposed bodies to prevent the takeover by any one person, party, or class. It created three interconnected branches of government with tools to limit each other's growth, a bicameral congress that balances the representation between larger and smaller states, and a federal structure that allows autonomy at the local, state, and national level.

This structure, along with the laissez-faire, or non-interventional economic policy, largely resembled contemporary political philosopher Robert Nozick's Libertarian model of the "minimal state": a government which only performs basic functions such as the provision of police protection, national defense and the administration of courts of law, and cedes all other institutions such as schools to charities and competition in the free market.[273] Nozick is widely considered to be an architect of contemporary libertarian political philosophy. In his seminal work, *Anarchy, State and Utopia* (1974), Nozick explores the philosophy of man's self-ownership[274]: the concept that a person exercises autonomy over their talents and efforts. In line with Locke, Nozick concludes that among man's unalienable rights to life and liberty, man's self-ownership entitles him to the fruits of his labor and the right to dispose of his property as he sees fit; slavery thus violates this basic tenant as "theft of a person from themselves."[275] Nozick justifies taxation to fund the minimal state as a mutually beneficial social contract that occurs as a result of individuals living in a state of anarchy. However, Nozick argues that taxes collected to finance redistribution and welfare programs constitute involuntary labor for the state, and thus theft. Together, these sentiments inform the libertarian philosophy: a view that prioritizes a set of rules over the individual allocations that result from those rules.

Viewed from a libertarian lens, laws such as the Fifth Amendment, which states that "[no person shall] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation," define the procedures that limit the government's intervention of property rights; this further reflects the Nozickian concept of "self-ownership" which stipulates that individuals act as the sole determinants of their allocation of wealth in society.[276] Consequently, the Constitution permits variations in wealth because they result from

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[267] WORLD BANK, *India's Poverty Profile,* 1, (2016), https://www.worldbank.org/en/news/infographic/2016/05/27/india-s-poverty-profile.
[268] *Magna Carta: Muse and Mentor, No Taxation Without Representation*, LIBRARY OF CONG., https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/no-taxation-without-representation.html, (last visited Aug. 1, 2021).
[269] *The Founders and Federalism,* USHISTORY, https://www.ushistory.org/gov/3a.asp, (last visited Aug. 1, 2021).
[270] *Divine Right of Kings,* ENCYCLOPEDIA BRITANICA, https://www.britannica.com/topic/divine-right-of-kings, (last visited Aug. 1, 2021).
[271] *Articles of Confederation,* OURDOCUMENTS, https://www.ourdocuments.gov/doc.php?flash=false&doc=3, (last visited Aug. 1, 2021).
[272] JOHN LOCKE, *Second Treatise of Government,* 133, *(*1690).
[273] EDWARD FESER, *Robert Nozick (1938-2002).* INTERNET ENCYCLOPEDIA OF PHIL. https://iep.utm.edu/nozick, (last visited Aug.1, 2021).
[274] ROBERT NOZICK, *Anarchy, State, and Utopia,* 333, (1974).
[275] EDWARD FESER, *supra note 49.*
[276] U.S. CONST. amend. V.

differences in individuals' decisions, talents, and efforts. Throughout the 19th century, the U.S. government largely practiced this libertarian philosophy and did not institute any major redistribution or welfare programs, as demonstrated by the government's lack of adoption of redistributive policies during this period.

B. 1932-1969: Experiments in the Rawlsian Welfare State

In a departure from libertarianism, the first half of the 20th century saw the size of the U.S. government skyrocket to mobilize the country in response to two world conflicts and the Great Depression.[277] President Franklin D. Roosevelt's New Deal provided the United States its first venture into Rawlsian legislation, which sought to provide relief for the poor and unemployed, recover the economy, and reform financial systems that led to the Great Depression.[278]

In contrast to Nozick's doctrine of the minimal state and self-ownership, his contemporary, John Rawls, whom the Rawlsian political philosophy derives its namesake, promotes egalitarian liberalism in his book, *A Theory of Justice* (1971).[279] Rawlsian philosophy proposes that society should maximize the welfare of its least-advantaged members. Under Rawlsian doctrine, the government should seek to maximize tax revenue from the rich to transfer to the poor.

Henry Hopkins, FDR's appointed director of the Work Projects Administration, captured the era's state of welfare when he said "Give a man a dole, and you save his body and destroy his spirit. Give him a job and you save both body and spirit."[280] Rather than direct transfers to the worst-off people, work projects such as parks and roads allowed people to earn their paychecks until World War II reignited the American industry toward the war effort.[281]

Not until President Lyndon B. Johnson's Great Society and War on Poverty, however, did the United States experience significant Rawlsian transfer and welfare programs to advance the poor: the Food Stamp Act, the Higher Education Act (which provided scholarships and low-interest loans), the Elementary and Secondary Education Act, the Economic Opportunity Act, the Urban Mass Transportation Act, and federal housing programs.[282] Among the greatest legacies of the Great Society includes the expansion of Social Security and the creation of Medicaid, which provides health insurance to the poor. In the backdrop of the civil rights movement, the Great Society era also saw the passage of 24th Amendment banning poll taxes in federal elections and the Civil Rights Act of 1964 which prohibited discrimination and segregation on the basis of race, sex, religion, and nationality, contributing toward minority suffrage and equal opportunity.

C. 1970s-Present: Corporate Utilitarianism

In the decades following the Great Society, however, a wave of conservatism starting with the Ford Administration sought to shift the nation away from government intervention and spending as a means to solve economic and social issues.[283] This wave culminated in the landslide victory of President Ronald Reagan against Democrat incumbent Jimmy Carter. Reagan carried an electoral mandate to slash taxes, cut social welfare programs, increase military spending, and deregulated markets. Instituting supply-side and "trickle-down" economic policies, the Reagan Administration cut corporate and top marginal tax rates based on the theory that these corporations would pass on their new savings to the rest of the economy and promote growth.[284]

Prevalent corporate bailouts since the passage of the Emergency Loan Guarantee Act of 1971 characterize this departure from the United States' early laissez-faire economic policies to a utilitarian framework. Unlike the anti-trust interventions of the late 1800s and early 1900s, feasibly permissible under a libertarian model for "preserving free and unfettered competition as the rule of trade,"[285] this act intervened in the market to save major businesses on the brink

[277] CONGRESSIONAL BUDGET OFFICE, *The 2014 Long-Term Budget Outlook, (2014),* https://www.cbo.gov/publication/45471.
[278] *New Deal,* ENCYCLOPEDIA BRITANICA, (2021), https://www.britannica.com/event/New-Deal.
[279] HENRY. S. RICHARDSON, *John Rawls (1921-2002),* INTERNET ENCYCLOPEDIA OF PHIL, https://iep.utm.edu/rawls/.
[280] PUBLIC BROADCASTING SYSTEM. *The Works Progress Administration,* https://www.pbs.org/wgbh/americanexperience/features/surviving-the-dust-bowl-works-progress-administration-wpa/.
[281] NATIONAL PARK SERVICE, *The Civilian Conservation Corps,* https://www.nps.gov/articles/the-civilian-conservation-corps.htm
[282] THE GILDER LEHRMAN INST. OF AMERICAN HISTORY, *Great Society Legislation,* https://www.gilderlehrman.org/history-resources/teaching-resource/study-aid-great-society-legislation
[283] F. FREIDEL & H SIDEY, WHITE HOUSE HISTORICAL ASS'N. *The Presidents of the United States of America, Gerald R. Ford,* https://www.whitehouse.gov/about-the-white-house/presidents/gerald-r-ford/.
[284] WILL KENTON, INVESTOPEDIA, *Reagonomics, (2019),* https://www.investopedia.com/terms/r/reaganomics.asp.
[285] FEDERAL TRADE COMMISSION, *The Anti-Trust Laws, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.*

of bankruptcy by giving them access to low-interest government loans.[286] A utilitarian would justify this redistribution if the winners of this policy (the companies and its employees, for example) exceed its losers (the taxpayers).

Similar utilitarian trends continue into the Trump Administration with policies such as the Tax Cuts and Jobs Act which lowered taxes on corporate profits, investment income, and estate taxes.[287] As the top marginal tax rates fell under this policy change, it allowed top earners to regain and trend toward exceeding their pre-WWII share of national income.[288] Prevalent tax loopholes such as charitable donations, benefit plans, and estate and gift exemptions further perpetuate a regressive tax schedule that allows a billionaire like Warren Buffett to pay a smaller share of his income than his secretary.[289] As a matter of course, since 1988, the U.S. Gini coefficient has increased from 0.38 to 0.42; the top ten percent owns a third of the national income while the bottom ten percent only owns 1.7%.[290]

Yet, the same utilitarian sentiments can be used to justify the passage of more redistribution-orientated policies such as the recent Coronavirus Aid, Relief, and Economic Security (CARES) Act, which allocates an estimated $500 billion in low-interest loans to large corporations, $377 billion to small business, and $560 billion in transfers to individuals.[291] Dissimilar in nature from a transfer like the Supplemental Nutrition Assistance Program which limits purchases to certain goods to promote a baseline commodity bundle, the direct cash transfers of the CARES act largely seek to maintain widespread engagement in the economy, thus its colloquial "stimulus" namesake. Thus, we maintain the notion that the CARES act constitutes a largely utilitarian intervention.

Further issues regarding campaign finance also contribute to the staying power of utilitarian preferences in the United States. One example includes the Supreme Court's decision in *Citizens United v. The Federal Election Commission*,[292] which enables corporations to contribute unrestricted amounts of donations towards campaign advertisements. Since then, the prevalence of political action committees and money in politics further skews democracy toward the interests of the wealthy, not the poor.[293] Under the table, the rich can effectively purchase votes that support their utilitarian and low redistribution preferences, despite popular sentiment.

In its current state, the philosophy of U.S. government intervention resembles neither the minimal, laissez-faire state of its constitutionally libertarian beginnings, nor its attempts in a Rawlsian social welfare state. Rising economic interventions, especially during times of financial crisis, mobilize public resources to bail-out corporations which display utilitarian tendencies in the U.S. government.

III. Comparisons of Philosophies

While the United States followed a non-consequentialist, libertarian philosophy, pre-Independence India was more concerned with consequentialism, wherein policies were judged by the utility accrued to the British nation rather than how the policies impacted the Indian population. After Independence, however, a deontological perspective promoted an egalitarian mindset. Around the same time, the United States experimented with a Rawlsian welfare state. It is interesting to note that both countries followed philosophies that favored the worst-off as a response to unstable times—India reacted to the withdrawal of colonial power, and the United States responded to the vulnerability during the Great Depression, and other financial crises.

As each country industrializes toward the end of the millennium, we see two philosophies on either extreme of the redistribution spectrum—one that seeks to remove social and wealth inequities and one that believes in minimal intervention, regressing toward a common utilitarianism in attempt to maximize economic growth. Yet, the same sentiments which manifested in each country's constitutional frameworks continue to reflect in their utilitarian

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[286] MORGAN HOUSEL, THE FOOL, *A History of U.S. Government Bailouts,* (2017), https://www.fool.com/investing/general/2011/04/05/a-history-of-us-government-bailouts.aspx

[287] DAVID FLOYD, INVESTOPEDIA *Explaining the Trump Tax Reform Plan*, (2020), https://www.investopedia.com/taxes/trumps-tax-reform-plan-explained/.

[288] GABRIEL ZUCMAN, *The Rise of Income and Wealth Inequality of America: Evidence from Distributional Macroeconomic Accounts, 25,* NY. UNIV. SCH. OF LAW, https://www.law.nyu.edu/sites/default/files/The%20Rise%20of%20Income%20and%20Wealth%20Inequality%20in%20America-%20Zucman.pdf.

[289] MICHELLE FOX, *5 Ways the Super-Rich Manage to Pay Lower Taxes,* CNBC, (2019), https://www.cnbc.com/2019/02/21/here-are-5-ways-the-super-rich-manage-to-pay-lower-taxes.html.

[290] TRADING ECONOMICS, *United States – Gini Index,* (2021), https://tradingeconomics.com/united-states/gini-index-wb-data.html.

[291] KELSEY SNELL, *What's Inside The Senate's $2 Trillion Coronavirus Aid Package,* NPR, (2020), https://www.npr.org/2020/03/26/821457551/whats-inside-the-senate-s-2-trillion-coronavirus-aid-package.

[292] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[293] TIM LAU, BRENNAN CTR. FOR JUST., *Citizens United Explained, (2019), https://www.brennancenter.org/our-work/research-reports/citizens-united-explained.*

philosophies. Thus, variances in racial heterogeneity and perceptions about social mobility form a utilitarian fusion with libertarianism in the United States and egalitarianism in India.

Furthermore, India's growth in the second half of the century was not equally distributed among its population, despite egalitarian efforts. With a high fraction of an already large population living below the poverty line, India's efforts at redistributing to the poor and/or providing them with an equitable base to improve their own status is in itself utilitarian due to the diminishing marginal utility of income (as discussed in Section I).

In the United States, the belief that corporate profits boost the overall welfare of the nation has induced substantial corporate tax cuts and government bailouts over the past several decades. Despite rises in inequality, the perception of a fair market structure that allows the tenants of "self-ownership" to determine allocations of wealth prevails in the United States. Thus, the concept of the "American Dream" compounded with issues of heterogeneity lead to low redistribution preferences from the rich to the poor but permit government intervention to protect large corporations.

IV. Possible Determinants of Redistribution Preferences in India and the United States

Despite both sharing colonial pasts, the constitutions of India and the United States built upon very different political philosophies regarding state-sanctioned redistributions of wealth. Two prominent hypotheses in the existing literature of political philosophy attempt to explain what demographic factors help determine the redistribution preferences of individuals in a country: first, how they perceive the state of their own social mobility, and second, the extent of heterogeneity in a population as it gives rise to in-group loyalty between members of different races and ethnicities. In the follow section, we will demonstrate how the experiences of India and the United States support these hypotheses and provide a convincing explanation to the different redistribution preferences in these countries.

A. Perceptions of Social Mobility

At an individual level, relative income acts as a powerful determination of one's redistribution preferences. Material self-interest leads high income earners to prefer lower redistribution preferences while low-income earners prefer higher redistribution preferences.[294] However, this relationship seems less apparent in U.S. culture, a phenomenon that is captured in a quip attributed to American novelist, John Steinbeck: ". . . socialism never took root in America because the poor see themselves not as an exploited proletariat but as temporarily embarrassed millionaires."[295] The belief in an "American Dream" suggests that Americans tend to perceive high levels of social mobility which they consider enabling the poor to climb the social ladder on the basis of effort and talent, thus making redistribution unnecessary.[296] Perceptions of equality of opportunity, according to a study entitled "Intergenerational Mobility and Preferences for Redistribution" conducted by a professor of political economy at Harvard University, separate Americans from European sentiments about redistribution; the latter tend to believe that wealth comes from inheritance and sticky social classes, while poverty results from bad luck and society's lack of welfare for the needy.[297] Results of the study suggest that Americans typically overestimate the true probability of a child reaching the top quintile from the bottom, a perception which may influence Americans to not support redistribution to avoid paying higher taxes on their optimistic future incomes.

We posit here that Indians have a more egalitarian mindset due to their culture of the "group," and because of the existence of social disparities such as the caste system, which worked to inhibit intergenerational mobility, thereby subjecting certain factions of the population to generations of poverty. Therefore, redistribution may be supported in India as individuals have less control over their economic situations, further promoting an egalitarian mindset.

B. In-Group Loyalty

In their book *Who Wants What, Redistribution Preferences in Comparative Perspective*, economists David Rueda and Daniel Stegmueller present data to suggest that the warm glow effect that rich individuals feel from giving away their

[294] DAVID RUEDA AND DANIEL Stegmueller, *Who Wants What? Redistribution Preferences in Comparative Perspective,* CAMBRIDGE UNIV. PRESS, 133, (2019).
[295] RONALD WRIGHT, *A Short History of Progress,* HOUSE OF ANANSI PRESS INC., 124, (2004).
[296] *American Dream*, ENCYCLOPEDIA BRITANNICA, https://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/american-dream, (last visited Aug 1, 2021).
https://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/american-dream
[297] ALBERTO ALESINA ET AL., *Intergenerational Mobility and Preferences for Redistribution,* AMERICAN ECON. ASS'N, 1, (2018), https://www.aeaweb.org/articles?id=10.1257/aer.20162015.

wealth diminishes as the presence of out-of-group members increases.[298] Group identities based on race, ethnicity, and religion affect redistribution preferences in populations with high heterogeneity because potential givers receive zero or even negative utility from providing welfare to members outside of their identity group. The wealth gap between White earners and Black and Hispanic earners causes, we argue, an innately racialized discussion about redistribution in the United States. Legacies of slavery, Jim Crow laws, mass incarceration, redlining, predatory loans, and other forms of economic racism like the Tulsa Greenwood district massacre[299] continue to obstruct minority effort and talent from determining their wealth allocations.[300] Combined with the effects of stereotypes about minority laziness and free ridership[301], racial heterogeneity acts as a significant determinant of low redistribution preferences in the United States and contributes a new layer of understanding American utilitarian preferences which tend to distribute wealth along divisions of race.

On the other hand, as there are no significant racial divisions in India, this group loyalty hypothesis may not hold to the same degree. Even though there are substantial group divisions in India, racial homogeneity makes it difficult to identify group membership by outward appearance. We hypothesize that racial homogeneity in India may act as a contributing factor for the existence of more populous support for redistributive policies in India, compared to in the United States. In fact, in a study conducted in 2011, Economists Ito and Ohtake found that income level has a positive effect on the preference for income redistribution in India. A potential cause could be the group loyalty hypothesis, wherein "the rich may believe that their current economic status is attributed to the community or group to which they belong and that it is natural to support the poor in their community."[302] The same study found no significant impact for caste dummies, thereby rejecting the hypothesis at a micro level. However, groupism does occur on various factors other than race; it is possible that India favors redistribution more than the United States does due to its relative ethnic homogeneity, though more research needs to be done on this front.

V. Conclusion

We started this paper with a comparison of the preamble of the constitutions of the two nations, which provide an insight into the minds of the framers of the charter, while simultaneously considering the history of the countries and laying out the objectives that should guide policy making. It therefore works to point out the underlying philosophies that the nations strive to base their decisions on. Through a historical analysis of redistribution in both countries, we have attempted to show how despite India's call for egalitarianism and the United States' libertarian origins, the two states have strayed toward utilitarianism. Yet, the way in which they adopt this philosophy is in line with their initial doctrines. India's simultaneous focus on growth and redistribution, implemented through a mixed economy system wherein market forces are allowed to prosper with means-tested government schemes to permit those at the bottom of the ladder (who make up a significant fraction of the population) to partake in the increased growth, reflects a utilitarian goal with a Rawlsian outlook. The two work together to lay the foundation for egalitarianism and "Equality of status and of opportunity," in the words of the preamble. The United States, in line with the preamble of *its* constitution, promotes "the general Welfare" by adopting supply-side economic policies that encourage consumption and reflect the social preferences of the citizens. The differences in the demographics and income distribution of the two countries allow for the consonance of their initial philosophy and current policies.

[298] DAVID RUEDA AND DANIEL Stegmueller, *supra* note 77, at 133.
[299] In 1921, white race rioters left hundreds of black residents dead and 1,000 houses destroyed in an affluent black community, often considered the "Black Wall Street." (For further reading, visit https://www.history.com/news/black-wall-street-tulsa-race-massacre.)
[300] CALVIN SCHERMERHORN, *Why the racial wealth gap persists, more than 150 years after emancipation,* WASH. POST, (2019), https://www.washingtonpost.com/outlook/2019/06/19/why-racial-wealth-gap-persists-more-than-years-after-emancipation/.
[301] JOY MOSES, *Moving Away from Racial Stereotypes in Poverty Policy,* CNTR. FOR AMERICAN PROGRESS, 8, (2012), https://www.americanprogress.org/wp-content/uploads/issues/2012/02/pdf/race_stereotypes.pdf.
[302] TAKAHIRO ITO & FUMIO OHTAKE, *Noblesse Oblige? Preferences for Income Redistribution among Urban Residents in India.* HIROSHIMA UNIV GRAD. SCH. FOR INT'L DEV. & COOP., 1, (2011), https://ideas.repec.org/p/hir/idecdp/1-8.html.

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