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Articles

Notes & Comments

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ARE LEGAL FAMILIES DETERMINANT OF INVESTORS' PROTECTION FROM GOVERNMENT MISTREATMENT?

Hector A. Mairal*

INTRODUCTION

In 2004, the World Bank published a report that compared countries from the point of view of protecting investor rights depending on the origin of their legal systems.[1] For this purpose, it classified countries into five

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legal families: those whose legal origin was considered to be French (61 countries), English (41), German (18), Nordic (5), or socialist (10).

Within countries of French legal origin, the report included in Europe, apart from France, Belgium, Spain, Greece, Portugal, the Netherlands, Italy, and, in other continents, all Latin American countries, those countries of Africa and Asia that had been French colonies or protectorates, and other countries from the North of Africa and the Middle East, such as Egypt, Turkey, and Jordan. Within those classified as having English legal origin, the report included all the countries of the Commonwealth and other former British colonies and protectorates, the United States and Israel. Apart from the obvious cases of Germany, Austria, and Switzerland, and countries of German legal origin included Japan, Korea, and Taiwan. Countries that had been behind the Iron Curtain but whose legal systems had German legal origins, such as the Czech Republic, Hungary, and Poland, were also included in the German family. Russia and the former republics that had been part of the URSS were the main countries of the socialist group.

In this comparison, the Report analyzed situations that would be characterized in Continental Europe as private law relationships, such as the rights of shareholders and creditors and the hiring and dismissal of employees, as well as others that implied some government or court participation, such as the steps necessary to start or close a business and the enforcement of contracts. The latter topic took into account the efficiency of the judicial system, the rule of law, corruption, the risk of expropriation by the State, and the likelihood of contract repudiation by the government. A final section was devoted to the quality and extensiveness of regulations.

The Report reached a polemic conclusion: countries with common law origins were more favorable for doing business and protected the rights of investors better than those with French legal origins, with German and Scandinavian systems somewhere in the middle.

The Report was authored by distinguished academics with the participation of many contributors and referees but, as could have been expected, provoked strong criticisms among French jurists, who described

[1] THE WORLD BANK, DOING BUSINESS IN 2004 UNDERSTANDING REGULATION (2004) [hereinafter the Report]. The Report followed previously published papers, with similar conclusions, Rafael La Porta, Florencio Lopez-De-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 5661 NBER WORKING PAPER SERIES 1 (1996); Rafael La Porta, Florencio Lopez-De-Silanes, Andrei Shleifer & Robert W. Vishny, *Which Countries Give Investors the Best Protection?*, Public Policy for the Private Sector, Apr. 1997; Rafael La Porta, Florencio Lopez-De-Silanes, Andrei Shleifer & Robert W. Vishny, *Legal Determinants of External Finance*, 5879 NBER WORKING PAPER SERIES 1 (1997).

it as biased to show the superiority of common law systems, and oversimplified.[2]

Was the criticism justified? Since the Report mostly dwelt on subjects that are not within the specialty of this author, no opinion is advanced in that regard. However, a similar inquiry can be carried out in a different field, i.e., concerning the relationships among foreign investors and their respective host States, the latter classified depending on their legal origins. Would the same conclusion be appropriate?

The reason for choosing this field is that a specific data bank exists: the statistics carried by the United Nations Conference on Trade and Development ("UNCTAD") that compute the claims lodged by investors suing under the different international treaties protecting investors (international investments agreements or "IIAs"), of which the greatest part takes the form of bilateral investment treaties ("BITs") and, more recently, of investment chapters included in preferential trade agreements ("PTAs").[3]

Also, the same influence of French law exists, within its family of nations, in public law as well as in private law areas, to the extent that its administrative law can be considered an important "exportation product" for France.[4]

The proposed field of study presents important differences with the subjects covered by the Report since, in the latter, the involvement of the different governments was partial or non-existent in most cases and thus, to a great extent, more neutral from a political standpoint than the relations between a foreign investor and its host State. Also, the analysis itself cannot but be imperfect as it does not consider the proportion of claims against a given country over the total number of investments in that country protected by IIAs. Moreover, BITs are generally executed between First World nations and countries with emerging economies, where the flow of investments is mostly in one direction. Since the 2018 *Achmea* decision, intra-EU IIA protection has been declared incompatible with EU law.[5]

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[2] *See* Benedicte Fuvarque-Cosson, *Development of Comparative Law in France*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, 35, 60-62, (Mathias Reimann and Reinhard Zimmermann, eds. 2006).

[3] *See* UNCTAD's Investment Policy Hub Investments Agreement Navigation [hereinafter UNCTAD Statistics] (Jan. 16, 2024) https://investmentpolicy.unctad.org/international-investment-agreements; *see also* Roberto Echandi, *Bilateral Investment Treaties and Investment Provisions in Preferential Trade Agreements*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS 3 (Katia Yannaca-Small ed., 2d ed.,2018).

[4] Yves Gaudemet, *L'exportation du droit administratif français. Brèves remarques en forme de paradoxe*, *in* MÉLANGES PHILIPPE ARDANT (1999), at 431; *see also* Didier Truchet, *Le rayonnement de la jurisprudence administrative en France*, Revue Juridique de l'Océan Indien, 165 (2005); L. NEVILLE BROWN & J.F. GARNER, FRENCH ADMINISTRATIVE LAW, 160-71 (3d ed. 1983).

[5] ECJ, *Slovak Republic v. Achmea*, Case C-284/16 (2018).

Nevertheless, despite these imperfections, the analysis of UNCTAD Statistics shows interesting results.

France does not tend to provoke investment disputes, but some developing countries that have adopted the French legal model often do. While the conclusions offered here are tentative, a focus on how administrative law doctrines function in France compared with how doctrines of French origin function in less economically developed countries, indicates that France has in place rules and institutions that act as countervailing factors to avoid the problems that some of those doctrines might otherwise provoke. In contrast, a country like Argentina, which uses an imperfect transplant of the original French model, has not incorporated those countervailing factors. Hence, the model becomes defective from the point of view of protecting investors' rights. There are indications that the same has occurred in a variety of developing countries that have received transplants of the French administrative law model.

This paper will show, first, the results of applying the classification of countries according to their legal origins proposed in the Report, to UNCTAD arbitration statistics, and will also comment on the appropriateness of such classification. Second, it will then analyze whether some of those results can be partially explained either by certain rules of French law or, instead, by the distortions those rules have suffered when transplanted abroad. For the reasons explained below, this analysis will be limited to a comparison between French and Argentine laws. Examples of similar situations arising in other countries placed within the French legal family will show that the problem may be more general. Because of the nature of this paper, conclusions will be in the form of suggestions for further studies.

I. WHAT UNCTAD STATISTICS ARBITRATIONS SHOW

In this section, the classification of countries depending on the origins of their legal systems will be applied to the statistics of arbitration claims brought by dissatisfied investors, who invoke the protection granted by investment treaties, against their host States. This exercise will show that countries with French legal origins have been subject to a higher number of claims than common law countries and thus supports – prima facie – the conclusions of the Report. However, a different conclusion may be reached by casting a closer look at the classification itself.

At present, more than 3,000 international investment treaties are in force, of which 2,220 are BITs.[6] They generally guarantee investors fair and equitable treatment by the host State and allow disputes between the foreign investor and the host country to be decided by arbitration under the auspices of different institutions and mechanisms: the International Centre for Settlement of Investment Disputes (ICSID), the Ad Hoc Dispute Settlement under UNCITRAL Arbitration Rules, the International Court of Arbitration of the International Chamber of Commerce (ICC) and the Stockholm Chamber of Commerce.[7]

UNCTAD Statistics show that up to the end of 2021, 1190 investment claims had been lodged, most of them under the ICSID framework, of which 809 had concluded, either due to the awards having been issued or because of abandonment of the claim or settlement of the dispute.[8]

As of the end of 2021, of the total 1190 investment arbitration claims reported in the UNCTAD Statistics, around 600 (depending on how certain countries of Africa and Asia are classified) had been brought against countries with French legal origins, but only 168 against common law countries.[9] This shows a rate of about ten arbitrations per country for the former and only four for the latter (although this latter average shows a somewhat distorted picture because half of such arbitrations were brought against only three of the common law countries: the United States, Canada, and India).

This finding would seem to coincide with the Report's conclusions concerning protecting investors in mostly private law situations. However, a deeper analysis shows that a more nuanced conclusion is appropriate. This is because almost two-thirds of the 600 claims brought against countries of French legal origin were lodged against Spanish-speaking countries, which means that an area where less than 10% of the world population lives has sparked about one-third of all investment arbitrations.[10]

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[6] *See* UNCTAD Statistics, *supra* note 3; *see also* Stephan W. Schill & Marc Jacob, *Trends in International Investment Agreements, 2010-2011: The Increasing Complexity of International Investment Law*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2011-2012, (Karl Sauvant ed., 2013).

[7] *See* Ucheora Onwuamaegbu, *International Investment Dispute Settlement Mechanisms*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS 3, *supra* note 3.

[8] *See* UNCTAD Statistics, *supra* note 3, at 57, 75.

[9] Similar results are reported for 2022: of a total of 46 new investment arbitrations started, 25 were brought against countries with French legal origins, including 16 arbitrations versus Spanish-speaking countries, while only 3 to 5 (depending on how certain Asian countries are classified) against common law countries. *See* UNCTAD Statistics, *supra* note 3.

[10] "Spanish speaking" and not "Latin American," because Brazil, the largest Latin American nation, is a late arrival to the BITs system and by the end of 2021 no arbitration claims had been lodged against it. Also, 55 claims had been registered against Spain but none against Portugal. In the case of Spain most of the claims arise from a common cause: a change in the conditions offered to investors in renewable energy under the Energy Charter Treaty. *See*, e.g. *AES Solar and Others (PV Investors) v. Spain*, Permanent Court of Arbitration Case No. 2012-14, award dated

The UNCTAD Statistics also show that countries with socialist legal origins have a higher number of arbitrations per country than those with French legal roots. If one includes within the German law family those countries that were formerly behind the Iron Curtain (e.g., Poland, Hungary, and the Czech Republic), then this group would also surpass the French group in arbitrations per country.

There seems, then, that certain political features such as the tradition – or lack of it– of respect for individual rights weigh equally or more on the treatment of private investors than the origins of that legal system. Such origins, therefore, could only act as a concurrent but not as a principal or single cause.

But what then to make of the fact that half of the arbitration claims brought against common law countries were lodged against only three of those countries: Canada, India, and the United States, thus allocating to these countries a higher number of claims than the average for the French legal origin countries?[11]

Legal origins do not seem, therefore, to constitute the exclusive rod by which to measure arbitration claims as evidence of the host state's different treatment of foreign investments.

Disputes among foreign investors and host countries can arise for many reasons, such as ambitious new regulatory schemes, changes of government that lead the incoming administration to challenge decisions of the former authorities (particularly if accusations of corruption are raised or widely differing ideologies between successive administrations exist), an unsophisticated civil serviced that takes unpremeditated decisions which are later disowned, economic problems that force a country to renege on former promises, and opportunistic official decisions that seek to benefit from a change in the rules once the investor has completed its investment but has not yet recovered it. These features have appeared in many of the reported international investment disputes.

Thus, legal origins may be, at most, a concurrent factor but not the only cause of the different treatment granted by host states to foreign investors.

Feb. 28, 2020; *Opera Fund v. Spain*, ICSID case No. ARB/15/36, award dated Sept. 6, 2019; Millan Requena Casanova, "Los arbitrajes de inversiones contra España por los recortes a las energías renovables: ¿cambio de tendencia en la saga de arbitrajes o fin de etapa tras la sentencia Achmea?", Rev. Aranzadi de Derecho Ambiental N° 42/2019, parte Doctrina.

[11] Arbitrations with the United States and Canada as respondents have been brought mostly under the North American Free Trade Area Agreement (NAFTA). The main thrust of these arbitrations, especially of those against Canada, has been to challenge new regulations. *See* Charles H. Brower II, *Against Imperial Arbitration: The Brilliance of Canada's New Model Investment Treat*y, 17 FIU L. REV. 1 (2023).

However, if one considers only countries with French legal origins, an interesting feature is shown by these statistics: if we exclude Spanish-speaking countries, France, together with those countries that were under direct French control either as colonies or protectorates, register about the same average of arbitrations under BITs as common law countries. France scores very well on most indicators, as recognized in the Report.[12] On the contrary, another country with a high number of arbitrations that was included as having French legal origins in the Report but was never (except for a very brief period) under French domination, is Egypt (46 arbitrations), which in at least one case defended its position (without success) using French legal theories.[13]

In one aspect in which the Report and the present analysis overlap, namely that of the risk of contract repudiation by the government, the Report also shows a better average score for common law countries (7.41 out of the best score of 10) than for French law countries (6.32). However, the average score of the latter almost coincides with that of common law countries when one excludes Spanish-speaking countries (7.2).[14]

These very preliminary findings suggest that countries where it can be assumed that French public law is strictly applied or was correctly taught do not have a high record of mistreatment of investors. Such a record seems to exist in those countries where French public law was imported and taught by local scholars but never applied by French public officers or tribunals.

Given this record of controversies and the broad international influence of French administrative law, two queries arise: Do some French legal doctrines allow abuses of government power against private investors, and second, can the case be—additionally or alternatively—of an erroneous transplant of those doctrines?

The queries raised will be analyzed with respect to Argentina, the country in which the author has taught and practiced law, not only to reduce the risk of incorrect comparisons but also due to the following reasons discussed below.

First, Argentina is a good example of a country adopting French administrative law doctrines, mainly through the work of leading scholars, a feature common to many Latin American countries.[15]

Also, since the 1990's, Argentina has executed more than 50 BITs.[16] By the end of 2021, it was the country that had the highest number of

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[12] The Report, p. 21 ("France is a top performer among French origin countries").

[13] UNCTAD Statistics, *supra* note 3. *See* section IV below.

[14] *See* Table 7 of the 1996 paper cited in note 1, above.

[15] *See* Hector A. Mairal, *The need for comparative administrative law studies in Latin America*, 5 Comparative Law Review 1 (2016).

[16] By 2016, Argentina had entered into, and ratified, 56 BITs. *See* C. Sommer, *Laudos arbitrales del CIADI*, 22-23 (2016) (showing full list as well as the laws that ratified those treaties); *see* UNCTAD Statistics, *supra* note 3, for similar figures: by the end of 2022 Argentina

investment arbitration claims brought against it: 62. Among countries that have been repeatedly sued under an investment treaty, Argentina has one of the worst records of successes: it has won only 20% of the 27 cases that had reached an award by the end of 2021, compared with 40% for Venezuela, 50% for Mexico, 60% for Ecuador and 75% for Peru.[17]

Finally (and this may explain the country's bad track record in investment arbitrations), most of the claims successfully brought against Argentina were based on contracts whose clauses the Government had disregarded invoking its sovereign powers, and not merely on the defeat of expectations of the subsistence of favorable regulatory regimes. The latter ground for investors' claims has prompted the greatest criticism of the dispute settlement mechanisms of the IIAs and of the decisions of "imperial arbitrators" who are accused of not respecting the regulatory powers of sovereign countries.[18]

Argentina may thus be a good case to analyze whether French law has had any influence on the high number of arbitration claims brought against the country.

II. THE PECULIARITIES OF FRENCH ADMINISTRATIVE LAW

To answer this question, it is necessary to explain very briefly some peculiarities of French law that differentiate it from Anglo-Saxon systems.

In England, there has been a tradition of invoking the assistance of the courts of law to curb the abuses of public officers from early times. Records of English judicial decisions curbing the power of the authorities exist from the early 1600s.[19]

The evolution in France was very different to the point that the edict of Saint Germain-en-Laye, a royal decree issued in 1641, established the principle that the function of the courts of law was to settle conflicts among individuals but not to enable individuals to challenge the decisions of royal officers before such courts.[20]

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had signed 61 treaties (of which 49 remained in force) and 19 other treaties with investment provisions (of which 12 remained in force).

[17] The impact on those averages of settlements and of awards rejecting arbitral jurisdiction, and thus not deciding on the merits, has not been taken into account. Argentina has been successful in obtaining awards that reduced significantly the amounts claimed. *Id.*

[18] *See* Brower, *supra* note 11.

[19] Bagg's case of 1615 is cited as an early case (*see* S.A. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 515 (3d ed. 1973).

[20] *See* FRANÇOIS BURDEAU, HISTOIRE DU DROIT ADMINISTRATIF 34 (1995); S. SOLEIL, *Administration, justice, justice administrative avant 1789. Retour sur trente ans de recherches*, *in*

This background, plus the historical resistance of the regional Parliaments (institutions that also acted as local courts of law) against the legislation that the Kings wished to introduce, explain the laws that date from the French Revolution of 1789, which continue in force today, that forbid the judicial courts from interfering with the functions of the administration.[21] The solution found to avoid depriving private citizens of all legal remedies against the government was to place the tribunals that have to pass on the legal controversies in which the administration is involved within the same administration, and to make the judgment issued by those courts final and not appealable before the judicial courts, a system that remains currently in place in France.[22]

That is why, in France, the judicial courts are seen to render a public service that the State provides to its citizens and not to constitute a third power that can control the other two, so much so that some French constitutional law authors talk of the existence on only two powers in France: the legislative and the executive.[23]

This also explains why Section 64 of the French Constitution of 1958, in force today, provides that the President of the Republic guarantees the independence of the judiciary. He is given that role because neither he nor his officers are subject—in respect to the validity of their decisions— to those judges.

The second peculiarity of French administrative law is its greater scope compared to Anglo-Saxon administrative law.

Practically all Western countries have a special law to regulate the exercise of power by the public administration. This need for a special law arises from an important difference between administrative law and the law governing private parties' relations. While in the latter, the imposition of duties or prohibitions requires, in principle, the consent of the party thus bound, the administration may—when the law so authorizes—impose unilaterally obligations on private citizens. This unilateral power, which, in principle, does not exist in private law, requires special rules both to determine the requirements and limits that its exercise must respect, as well

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REGARDS SUR L'HISTOIRE DE LA JUSTICE ADMINISTRATIVE 5-6 (Gregorie Bigot & Marc Bouvet, dirs., 2006).

[21] *See* FRANCOIS LUCHAIRE, GERARD CONAC & XAVIER PRÉTOT, LA CONSTITUTION DE LA RÉPUBLIQUE FRANÇAISE 1495-1509 (2009).

[22] *See* MARCEL WALINE, TRAITÉ ÉLÉMENTAIRE DE DROIT ADMINISTRATIF, 21-33 (9th ed. 1963) for the historical evolution; BROWN & GARNER, *supra* note 4, at 27-40.

[23] LUCHAIRE ET AL., *supra* note 21, at 1488. A recent work recognizes this feature of the French system while showing the more recent development of the judicial power in Continental Europe (LOUIS FAVOREAU, PATRICK GAIA, RICHARD GHEVONTIAN, JEAN-LOUIS MESTRE, OTTO PFERSMANN, ANDRE. ROUX & GUY SCOFFONI, DROIT CONSTITUTIONNEL, 413-16 (18th ed. 2016). *But see* B. PLESSIX, DROIT ADMINISTRATIF GÉNÉRAL, 335-38 (2d ed. 2018) (arguing that the judicial power has existed in France since the 1789 Revolution since personal freedom has always been protected by the judicial courts).

as to structure a system that protects the private individual against possible abuses of that power. Therefore, the legal systems of Western countries present important similarities in this aspect.

The French system and those that follow its model diverge from the Anglo-Saxon system in respect of the relations that arise between the administration and private parties in similar situations than those that may exist among private parties, i.e., in contractual and tort situations. This allowed the early development, in French law, of State liability in tort, long in advance of the similar development in common law systems. But the contractual area is even more relevant for our analysis. In it, the contrast is clear: while Anglo-Saxon law starts from a position of equality of the contracting parties, in certain contracts, French law recognizes to the administration a position of supremacy *vis a vis* its private counterparty, evidenced in a series of prerogatives which cannot be waived.[24] These prerogatives allow the administration—even if it is not specifically provided in the contract—to interpret it and even to modify and terminate it unilaterally for reasons of public convenience. The contractor cannot suspend performance by claiming the Government's default (i.e., allege the *exceptio non adimpleti contractus*). Also, the contractor must obey all decisions taken by the government as a contracting counterparty and, if it considers any such decision unwarranted by the contract, can only claim compensation unless the contract is of long duration and involves important investments, in which case it can challenge the decision to terminate the contract before the administrative tribunal.[25]

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[24] The main French text on the subject remains that of A. DE LAUBADÈRE, TRAITÉ DES CONTRATS ADMINISTRATIFS, 2d ed. with F. MODERNE and P. DELVOLVÉ (1983-84) (hereinafter DE LAUBADÈRE ET AL.); more modern but shorter works are CHARLES-ANDRE DUBREUIL, DROIT DES CONTRATS ADMINISTRATIFS (2d ed. 2022); L. RICHER, DROIT DES CONTRATS ADMINISTRATIFS (12th ed. with F. Lichère, 2021); C. GUETTIER, DROIT DES CONTRATS ADMINISTRATIFS (2004). Recent general works that treat this subject are PLESSIX, *supra* note 23; 2 PASCALE GONOD, FABRICE MELLERAY and PHILLIPPE YOLKA, TRAITÉ DE DROIT ADMINISTRATIF (2011). A comparative law analysis is provided in Hector A. Mairal, *Government Contracts Under Argentine Law: A Comparative Law Overview*, 26 FORDHAM INTERNATIONAL JOURNAL 1716 (2003). In recent years the doctrine of the administrative contract and the true scope of the exorbitant powers of the administration have been re-examined. *See* DUBREUIL, *supra*, at 232-52; 2 GONOD et al, *supra*, at 255-63. On the changes of the concept of administrative contract resulting from the influence of the rules of the European Union *see* MATHIAS AMILHAT, *La notion de contrat administratif – L'influence du droit de la Union Européenne* (2014).

[25] The decision of the *Conseil d'État* in *Commune de Béziers II* (2011 Recueil Lebon 117) has expanded to other contracts the possibility of challenging termination. *See* DUBREUIL, *supra* note 24, at 481-88. In 2016 a reform introduced in art. 1195 of the French Civil Code rules analogous to those of the doctrine of imprévision.

It is fair to say that there are special doctrines (that traditionally did not exist in French private law) applicable to those same contracts that protect the private contractor against administrative decisions that make the performance of the contract more onerous and also against unforeseeable economic changes that seriously affect the economy of the contract: the doctrines of the *fait du prince* and *imprévision*, respectively.[26]

The body of law governing administrative contracts in France has only recently been embodied in legislation.[27] Until then, it had been developed by the administrative tribunals in a way that resembled the work of common law courts, a work that will continue given the generality of the rules provided in the CCP.

The indirect result of these theories is the dilution of the obligatory nature of the contract, whether in favor of the administration or of the private party, as compared to the stricter respect of the *pacta sunt servanda* principle observed in the common law. This was experienced by English contractors who worked in the tunnel under the English Channel who began distrusting French administrative law but ended up invoking it in their favor because, given the interest of both Governments in having the tunnel completed, they found their requests considered in a favorable political environment.[28]

Additionally, in France, the State –through enterprises controlled by it– operates the main public utilities and is ever-present in daily reality. While the typical Anglo-Saxon trusts the market but not the State, the general attitude in France is exactly the opposite.[29]

These features—administrative tribunals and not judicial courts to judge the administration, supremacy of the administration *vis a vis* its contractors, and strong presence of the State—could lead to the conclusion that the legal protection of private investors against the government is weak in France. However, such a conclusion would be wrong. This is so for reasons that are not only legal but also institutional and even cultural.

In the first place, administrative tribunals—at the head of which is the *Conseil d'État*—although including among their members' public officers who have performed administrative offices in the past—are independent of

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[26] *See* BROWN & GARNER, *supra* note 4, at 125-131; RICHER, *supra* note 24, at 283-87, 302-05.

[27] It is mainly contained in the *Code de la Commande Publique*, *Ordonnance* 2018-1074 (hereinafter CCP).

[28] Statement made by the Chairman of the Company that built the tunnel in his speech at the opening ceremony of the International Bar Association Meeting in Paris, 1995.

[29] Alain Peyrefitte provides an eloquent description of this contrast in his book *Le mal français* (1976).

the so-called "active" or operative administration and enjoy high prestige.[30] This does not negate that the power of the administrative tribunals to create the rules that apply to cases that involve the administration and to adopt such rules as the circumstances change gives them a higher degree of discretion than that enjoyed by judicial courts who–apart from being separated from both parties of the controversy and thus fully impartial—are subject to the laws that govern private contracts, whether these laws are civil and commercial codes or, in Anglo Saxon countries, constitute common law protected from change by the doctrine of *stare decisis*.[31]

While being part of the administration and having such great power to make the law that they apply, creates a risk in case of lack of independence of the court, no major criticism of the French administrative courts in this regard appears in legal literature.[32]

Two factors further counterbalance this risk. First, the expertise that the judges of the administrative tribunals have in the exercise of administrative functions, gives them a good insight into the sincerity of the motives of general interest alleged by public officers to justify their conduct and thus allow them to control such motives to a degree arguably higher than that possible for a judicial court,[33] and to include in such analysis the value of the credibility of State contracts.

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[30] The independence of the administrative tribunals vis a vis the Executive and Parliament has been declared "a fundamental principle recognized by the laws of the Republic" by the Constitutional Council (decision of July 22, 1980).

[31] Even if restricted by recent legislation, the *Conseil d'État* retains a high degree of discretion in the shaping of administrative law rules, as shown by the following words from one of its members that define which administrative acts can be considered to create vested rights and thus become irrevocable after a short period (translation by the author): "an act creates vested rights if, on the one hand, someone has an advantage to keep it in force and, on the other (the *Conseil d'État*) considers that it can recognize to said act a stability that limits the possibility of the administration to challenge it, it being understood that (the *Conseil d'État*) has a broad discretion to determine – with respect to each type of act … in which case should the autonomy of the administration or the stability of individual situations prevail" (*See* ZÉHINA AIT-EL-KADI, ET AL. CODE DES RELATIONS ENTRE LE PUBLIC ET L'ADMINISTRATION, ANNOTÉ ET COMMENTÉ, DALLOZ 179-80 (2022), at, where it is said that these words remain true today). Thus, police authorizations, i.e. authorizations to conduct certain activities, do not create vested rights according to the jurisprudence of the *Conseil d'État*. PLESSIX, *supra* note 23, at 801.

[32] French legal writers have defended the *Conseil d'État* against criticisms of its lack of impartiality coming from tribunals of the European Union: *see* B. Pacteau, *La justice administrative française désormais en règle avec la Convention européenne des droits de l'homme?, in* REVUE FRANÇAISE DE DROIT ADMINISTRATIF (RFDA) 885 (2009). *See however* RICHER, *supra* note 24, at 666-67 (criticizing decisions on contract controversies that are "difficult to justify" and present an "unfortunate image" of the administrative jurisdiction).

[33] *See* DIDIER TRUCHET, LES FONCTIONS DE LA NOTION D'INTÉRÊT GÉNÉRAL DANS LA JURISPRUDENCE DU CONSEIL D'ÉTAT 171-73, 218-19 (Librairie Generale de Droit et de Jurisprudence ed.,1977); 2 DE LAUBADÈRE ET AL., *supra* note 24, at 666-67 (showing control of

Also, an important rule developed by the administrative tribunals is that—unless otherwise provided in the contract—when the administration exercises its special powers as a contracting party, such as amending or terminating unilaterally the contract for reasons of public convenience, it must compensate the contractor for all the damages it has suffered including loss of profits.[34] For this reason, says a leading author, termination of long-term agreements for reasons of convenience is very rare due to the high cost to the public Treasury that would be involved as a consequence.[35]

Additionally, cultural and institutional factors contribute to making the French system of controlling the legality of administrative action very effective. Senior government officers are recruited as a rule among the country's intellectual elite, which has been educated in establishments of great prestige such as the *École National de d'Administration* (replaced today by the National Institute of Public Service).[36] The French state is solvent and the principle of the unity of the State (that prevents a given administration from ignoring the commitments assumed by the previous one) does not seem to have ever been challenged.

Also, France belongs to the European Union. It is a party to the European Convention of Human Rights that, *inter alia*, guarantees not only to individuals but also to corporations, effective judicial protection emanating from an impartial court.[37] Several decisions of the courts of the Union have induced the adjustment of certain aspects of the French administrative court system that were considered to violate such guarantee, such as the inordinate duration of the trial before administrative tribunals (now significantly shortened), and the intervention in the process of an

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the existence of the reasons invoked by the administration but not of its importance); DUBREUIL, *supra* note 24, at 475-77 (showing control of the reasons of general interest that justify termination of the contract); RICHER & LICHÈRE, *supra* note 24, at 256-57 (discussing whether financial considerations constitute a legitimate reason to terminate the contract); *see generally* PETER CANE, ADMINISTRATIVE TRIBUNALS AND ADJUDICATION 86-90, 200-07 (Oxford and Portland ed., 2009) (describing expertise of French administrative tribunals and the tension it creates with their independence, and the comparison between review of administrative decisions in France and some common law jurisdictions) *see also* Peter Cane, *Judicial Review and Merits Review: Comparing Administrative Adjudication by Courts and Tribunals in* COMPARATIVE ADMINISTRATIVE LAW, 426 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

[34] 2 DE LAUBADÈRE ET AL., *supra* note 24, at 407-08, 669.

[35] *Id.* at 737.

[36] CANE, *supra* note 33, at 100.

[37] *See* EUR. CONSULT. ASS., *Convention for the Protection of Human Rights and Fundamental Freedoms and Protocol* (1950) (referencing articles 6(1) and 13 of the convention as well as articles ratified in 1952); JACQUES ROBERT & HENRI OBERDORFF, LIBERTÉS FONDAMENTALES ET DROITS DE L'HOMME: TEXTES FRANÇAIS ET INTERNATIONAUX 27 (LGDJ ed., 1999); JEAN WALINE, DROIT ADMINISTRATIVE 296-99 (Dalloz ed., 2014).

officer (formerly called *commissaire du gouvernement* and now *rapporteur*) without allowing the private party to opine on her report.[38]

The duration of the lawsuit is of special importance given the rule that allows the administration to decide on the construction of the contract as well as on its termination for reasons of public convenience or default of the contractor. As already explained, these decisions must—as a rule—be obeyed by the contractor but can generate a right of compensation for the contractor and, in some cases, may be annulled by the administrative tribunal. Therefore, a relatively quick decision may provide an opportune remedy to the contractor, while if the contractor must endure a very lengthy trial to determine the legality of the administrative decision, the remedy may finally have limited practical effects.

Traditionally, in France, controversies involving administrative contracts could not be submitted to arbitration, but this approach has changed in recent years.[39]

As can be seen, the French system presents features that make it risky to protect investors' rights in systems that lack the remedies and safeguards, both legal and institutional and cultural, that exist in France.

The questions that should be asked, then, are: first, if in the countries that have received the French juridical model this reception has been faithful and complete and, second, if these countries have been able to replicate the cultural and institutional features that in France put a limit to, and allow a remedy for, the State prerogatives.

III. A COMPARISON WITH RELEVANT ARGENTINE LEGAL RULES

The Argentine case may serve as a good test to seek answers to these queries.

Argentina is an example of the transplant of French administrative law in an imperfect way. This transplant could not have been imperfect given that Argentina's constitutional system is modeled after that of the United States with three separate powers neatly defined.[40] This means that

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[38] *See generally* Kress v. France, 6 Eur. Ct. H.R. at 41 (2001) (referencing as main case in support); Sacilor Lormines v. France, 8 Eur. Ct. H.R. at 163 (2006) (referencing as main case in support).

[39] *See* DUBREUIL, *supra* note 24, at 441-45.

[40] That the Argentine Constitution was following the U.S. model was stated by several members of the Constitutional Convention that produced the 1853 Constitution which, with several amendments, is still in force today. *See* RICARDO RAMIREZ CALVO & MANUEL JOSÉ GARCÍA-MANSILLA, LAS FUENTES DE LA CONSTITUCIÓN NACIONAL – LOS PRINCIPIOS FUNDAMENTALES DEL DERECHO PÚBLICO ARGENTINO (LexisNexis Argentina S.A. ed., 2006).

Argentina cannot have administrative tribunals in the French sense, i.e., administrative tribunals with general jurisdiction, the decisions of which are final and not subject to review by the judicial courts.

Argentine judicial courts have the same constitutional guarantees of independence as those provided in the United States Constitution, to the extent that the relevant sections of the Argentine Constitution that structure its judicial power are a translation of the relevant sections of the American Charter.[41] The Argentine Supreme Court has a long tradition of supporting its decisions with quotations of precedents of the United States Supreme Court.[42]

Despite the absence of administrative tribunals in the French sense, Argentine administrative law adopted many doctrines from French administrative law, such as those of the *service public* and the administrative contract. This was due to the high influence that French culture, in general, has exercised in Argentina since the nineteenth century, and to the fact that up to the beginning of the twentieth century the administrative law of the United States was not yet fully developed.[43] Thus, our authors, eager to import what was considered best in more advanced countries, followed U.S. constitutional law precedents and authors, and French – and to a lesser extent Italian and Spanish – administrative law literature.[44]

Thus, the first question is: Can there be a true transplant of French administrative law without one of its fundamental features? Specifically, that of a separate jurisdictional system? And more importantly, should the administration enjoy special prerogatives in its contractual relations without being subject to the closer scrutiny made possible by the intervention of administrative tribunals?[45]

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[41] *Compare* U.S. CONST. art. III *with* Art. 108, 110, 116-19, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

[42] *See* Jonathan M. Miller, *The Authority of a Foreign Talisman: a Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith*, 46 THE AM. UNIV. LAW REV. 1483 (1997); Alberto F. Garay, *A Doctrine of Precedent in the Making: The Case of the Argentine Supreme Court's Case Law*, 25 SW. J. OF INT'L LAW 258 (2019).

[43] *See* RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE 10 (2010) (stating that "Until recently [U.S.] administrative law in the nineteenth century was inaccessible to researchers").

[44] Rafael Bielsa, the author of the first comprehensive treatise of Argentine administrative law, recognized the U.S. model of the Argentine Constitution but explained from its first pages the system of remedies developed by the Counseil d'Etat and considered U.S. administrative law "relatively limited" contrasting it with the "innumberable works" of great value on U.S. constitutional law. *See* RAFAEL BIELSA, 1 DERECHO ADMINISTRATIVO at 1-12, 19 (5th ed. 1955); *see also* Mairal, *supra* note 15.

[45] *See* TRUCHET, *supra* note 33, at 171-73, 218-19; 2 DE LAUBADÈRE ET AL., *supra* note 24 (showing control of the existence of the reasons invoked by the administration but not of its importance); DUBREUIL, *supra* note 24, at 475-77 (showing control of the reasons of general interest that justify termination of the contract); RICHER & LICHÈRE, *supra* note 24, at 256-57

Apart from this, the imperfection of the transplant also results from the exaggeration of the French rules that grant special powers to the administration (even as a contracting party) and from the lack of full application of the rules that limit such power or compensate for the consequences of its exercise.[46]

For example, the definition of an administrative contract, i.e., a contract in which the government enjoys special prerogatives which place it in a position of supremacy vis a vis the private contractor, is broader in Argentina than in France.

According to the precedents of the *Conseil d'État*, and simplifying a very complex subject, an administrative contract is one that is entered into by a public entity and presents any of the following features:

> (i) is so defined expressly by the law; (ii) involves the operation of a public service or is closely connected to such operation; (iii) includes clauses that grant to the administration special powers (prerogatives) over the contractor (the so called "exorbitant clauses"); or (iv) is subject to a special legal regime that provides for the existence of such powers.[47]

In France, the first category has been greatly expanded by a 2001 law that includes within the definition of administrative contracts all contracts of works or the supply of goods and services,[48] so much so that it is now argued that some of these contracts, even if falling under that definition, should not be governed by the rules that generally apply to the performance of all administrative contracts. Such is the case of insurance contracts, which are included in the 2001 law but, arguably, should not be subject to the power of the administration to change them unilaterally for reasons of public convenience.[49]

(discussing whether financial considerations constitute a legitimate reason to terminate the contract); *see generally* CANE, supra note 33, 86-90, 200-07 (describing expertise of French administrative tribunals and the tension it creates with their independence, and the comparison between review of administrative decisions in France and some common law jurisdictions); CANE, *supra* note 33, at 426. On the debate concerning the possibility of legal transplants, *see* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2nd ed.,1993); Pierre Leggrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. OF EUR. COMPAR. LAW 111 (1997).

[46] *See generally* Hector A. Mairal, *De la peligrosidad o inutilidad de una teoria general del contrato administrative*, *in* 180 El DERECHO 773 (1999).

[47] RICHER & LICHÈRE, *supra* note 24, at 89-120; GONOD ET AL., *supra* note 24, at 229-37.

[48] Loi 2001-1168 du 11 du 11 décembre 2001 portant mesures urgentes de réformes à caractère économique et financier [Law 2001-1168 of December 11, 2001 relating to urgent reform measures of an economic and financial nature], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 12, 2001, p. 19703, 19705.

[49] *See* FRÉDÉRIC ALLAIRE, LES MARCHÉS PUBLICS D'ASSURANCE : CONTRIBUTION À LA THÉORIE DE LA FORMATION DES CONTRATS, 258-62 (2007) (criticizing the application of the administrative power of unilateral amendment to insurance contracts).

Even if the French definition of an administrative contract would seem very broad to a common law practitioner, the Argentine definition is still broader. The Argentine Supreme Court has defined an administrative contract as one in which the contractor fulfills a "public purpose."[50] It is not difficult to see that this definition allows any government contract to be considered an administrative contract because it should have a public purpose unless it has been entered for improper reasons. Moreover, while in France, the rule appears to be that contracts entered into by public entities are presumed to be private law agreements unless the features that give it an administrative character exist, in Argentina, the administrative nature of contracts executed by public entities is presumed.[51] In practice, contracts with the Argentine Government are seldom private law contracts, and even those negotiated under private law rules are often characterized as administrative by its lawyers once a controversy in their respect arises, in order to invoke the prerogatives that this category recognizes in favor of the government party.

Secondly, the French rule that allows the administration to alter the contract for reasons of public convenience is limited to changes in its performance required by supervening reasons that are required in the general interest.[52] Thus, as a rule, financial clauses are considered excluded from this power.[53] Even those authors who argue that the administration can reduce the rates contractually agreed with the utility operator (a position

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[50] Corte Suprema de Justicia de la Nación (National Supreme Court of Justice, Argentina (hereinafter "CSJN"), Organizacion Coordinadora Argentina c. Secretaria de Inteligencia del Estado de la Presidencia de la Nación [1996-E] La Ley 76. Definitions put forward by administrative law writers are similarly broad. *See* 3-A MIGUEL S. MARIENHOFF, TRATADO DE DERECHO ADMINISTRATVITO, 3rd. ed. (1983) 34; JUAN CARLOS CASSAGNE, 2 CURSO DE DERECHO ADMINISTRATVITO, 12th ed., 2018, 379.

[51] For France, *see* DUBREUIL, supra note 24, at 69. For Argentina, *see* Decree No. 1023, Aug. 13, 2001, [LXI-D] A.D.L.A. 4144, (hereinafter the "Government Contracts Regulation" or "GCR"), art. 1 (Arg.). *See also* RODOLFO CARLOS BARRA, CONTRATO DE OBRA PUBLICA, 37-47 (Editorial Abaco de Rodolfo Depalma, 1984) (arguing that government contracts can never be subject to private law and that even in common law regimes the contracting officer has powers similar to those resulting from the administrative contract doctrine). But the imprecise notion of what constitutes an administrative contract and the generalization of the government prerogatives to all contracts that may qualify as such does not exist in common law systems.

[52] 2 DE LAUBADÈRE ET AL., *supra* note 24, at 406-07; *see* GONOD ET AL., *supra* note 24, at 229-37 (showing that power to amend the contract unilaterally has been significantly curtailed by European Union directives that seek to avoid the indirect violation of the rules protecting the equality among bidders for government contracts); *see also* GUETTIER, *supra* note 24, at 339. The matter is now governed by the CCP, secs. 2194 and 3135 both of the law and of the implementing regulation, for acquisitions and concessions respectively. These rules do not seem to change the previous jurisprudence of the *Conseil d'État*.

[53] HÉLÈNE HOEPFFNER, LA MODIFICATION DU CONTRAT ADMINISTRATIF, 187, 191 (L.G.D.J. ed., 2009) (interpreting the arrêt Union des Transports Urbains et Régionaux [1983 Recueil Lebon 33] as allowing changes in the financial conditions that result from changes in performance, provided the economic balance of the contract is respected); *see also* GONOD ET AL., *supra* note 24, at 248; PLESSIX, *supra* note 23, at 1266.

never accepted by the *Conseil d'État* according to a leading authority)[54] add that this power does not hurt the operator because the administration should then pay compensation for such reduction.[55] In Argentina, while the authors use similar examples of unilateral contract modifications, the rule is expressed in such general terms that would empower the government party to amend any contractual clause (even financial ones) if it believes it necessary for reasons of public interest.[56] The 2001 Government Contracts Regulation provides such a general rule.[57] Also, Argentina has repeatedly argued that utility rates, even when rules for their determination are included in the contract documents, have a regulatory and not a contractual nature and thus must always be fixed by the Government in the exercise of its discretionary powers,[58] ignoring French precedents and opinions that negate such power or recognize it subject to the payment of an indemnity to the operator.[59]

Argentina has defended its position in investment arbitration with the principle that the rates charged by the operator should always be "fair and reasonable," regardless of what the contract says.[60] However, in the practical application of the principle, it has ignored the strictures of French administrative law, according to which the rates should cover all the following items: operation costs, depreciation, interest, and a "reasonable

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[54] 2 DE LAUBADÈRE ET AL., *supra* note 24, at 667-71.

[55] *See* RICHER & LICHÈRE, *supra* note 24, at 268-69.

[56] 3-A MARIENHOFF, *supra* note 50, at 399-403.

[57] Decree No. 1023, Aug. 13, 2001, [LXI-D] A.D.L.A. 4144, art. 12 (Arg.).

[58] Int'l. Ctr. for Settlement of Inv. Disp. [ICSID] Washington, D.C., *In proceeding between CMS Gas Transmission Company (Claimant) and The Argentine Republic (Respondent)*, at 28, 39-40, Case No. ARB/01/8, (May 12, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf.

[59] *See* 2 DE LAUBADÈRE ET AL., *supra* note 24, at 435-36 (showing that in France, rates payable by users are considered to have a regulatory nature but without this opening the door to unilateral modifications by the administration); RICHER & LICHÈRE, *supra* note 24, at 268-69 (allowing changes provided the operator is compensated). Even after the enactment of the CCP this issue is not clearly regulated.

[60] *See* Int'l. Ctr. for Settlement of Inv. Disp. [ICSID] Washington, D.C., *Certificate EDF International S.A., SAUR International S.A. and Leon Participations Argentinas S.A. v. Argentine Republic*, at 77, Case No. ARB/03/23, (June 11, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1069.pdf; Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/08/2016, "Centro de estudios para la promociaon de la igualdad y la solidaridad y otros c/ Ministerio de energia y mineria s/amparo colectivo," 339 Fallos 1077 (Arg.) (showing Supreme Court admitted that tariffs need not compensate the costs of the operator since the government had other instruments to regulate utility rates such as subsidies).

profit" for the operator, and that the government should compensate deviations from the contract.[61]

Third, and most importantly, the remedies for the contractor are more limited in Argentina than in France. In both countries, the private contractor cannot suspend its performance or terminate the contract on the basis of the government's default of its contractual duties, but it must sue to obtain such a result while remaining bound to continue performing.[62] However, in France, when the administration exercises its power to amend or terminate the agreement unilaterally for reasons of public convenience, the contractor is entitled to full compensation, including loss of profits.[63] In Argentina, the Government's Contract Regulation does not allow loss of profits in similar circumstances.[64]

This last difference effectively grants government contracting officers a significant power over contractors, whose profits may be curtailed almost at will. In a public works or supply contract, the rule is noxious but not fatal, as typically the private contractor collects its compensation as the work or supply is performed, and there is a limited (relative to the size of the contract) initial investment. The situation is very different when the main investment must be made at the beginning of the venture and compensation is to be collected during the long life of the agreement, such as a concession to build a highway and recover the investment through tolls; not many investors may be willing to advance funds on such a weak contractual basis.[65]

The exaggerations go beyond the field of government contracts. Argentina's Administrative Procedure Law provides that the rules on unilateral administrative decisions also apply to government contracts and that all such decisions – even if they grant rights to individuals — can be terminated for reasons of public convenience.[66] While compensation for the

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[61] *See* JEAN-FRANCOIS LACHAUME ET AL., DROIT DES SERVICES PUBLICS 440-41 (LexisNexis ed., 2018); CHARLES F. PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES: THEORY AND PRACTICE (3d ed. 1993) (demonstrating by example that in most French law books the treatment of utility rates is limited to the enunciation of a few general principles, while the detailed analysis found in the U.S. is a subject considered to pertain to the "science of administration").

[62] *See* 2 DE LAUBADÈRE ET AL., *supra* note 24, at 654; 3-A MARIENHOFF, *supra* note 50, at 376-85, 588-89 (Argentina); GONOD ET AL., *supra* note 24, at 258 (showing that is it now permitted in France to include in the contract the contractor's right to suspend performance).

[63] 2 DE LAUBADÈRE ET AL., *supra* note 24, at 667-71.

[64] So provides sec. 12 of decree 1023. This rule does not apply to contracts entered before the issuance of the GCR in 2001. *See* Decree No. 1023, Aug. 13, 2001, [LXI-D] A.D.L.A. 4144, art. 37 (Arg.).

[65] *See* Decree No. 1299, Dec. 29, 2000, [LXI-A] A.D.L.A. 222, art. 19 (Arg.); Law No. 27328, Nov. 16, 2016, [LX] A.D.L.A. 222, art. 9-11 (Arg.) (explaining that recent efforts of the Argentine Government to promote private investment in infrastructure projects established special regimes that excluded the main rules of the administrative contract doctrine).

[66] Decree-law No. 19549, Apr. 3, 1972, [XXXII-B] A.D.L.A. 1752, art. 7, 18 (Arg.) [hereinafter APL] (the rule applying to contracts the regime of unilateral decisions has now been

damages caused to the holder of the terminated right is required, such compensation, according to leading Argentine jurists, does not include loss of profits.[67] A rule that has recently been included in the law that governs State tort liability may now be invoked in support of this position: no loss of profits can be awarded when the government's lawful action causes the prejudice.[68] So, the argument goes, if the government, as a contracting party, can terminate a contract for reasons of public convenience, such a measure should be considered lawful. Thus, compensation for the damages caused to the contractor should not include loss of profits.

Moreover, the administration may revoke its prior decisions when it considers them "absolutely void."[69] This rule also applies to decisions that create rights when the beneficiary knew the nullity, an easy allegation also applies to decisions that create rights when the beneficiary knew of the nullity, an easy allegation given the principle that ignorance of the law is no defense.[70] This power of revocation was not subject to any statute of limitations, but now a 10-year term applies.[71]

The contrast with French law on this point is stark. In France, administrative individual decisions that grant rights cannot be terminated, with or without retrospective effect,[72] unless they are illegal. This power can only be exercised within four months from the date when the decision was issued,[73] a limit that does not apply in case of fraud.[74]

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repealed: *see* APL art. 7 as amended by law 27,742). At this point, a common law practitioner may question the logic of subjecting unilateral acts and different types of contracts to the same rules, but excessive generalizations are a feature of reasoning and legal drafting in civil law countries. *See* Garay, *supra* note 42, at 288-91, for a discussion on the idea prevalent in Continental Europe that "legal reasoning is about general rules."

[67] JULIO RODOLFO COMADIRA & LAURA MONTI, PROCEDIMIENTOS ADMINISTRATIVOS: LEY NACIONAL DE 1 PROCEDIMIENTOS ADMINISTRATIVOS ANOTADA Y COMENTADA 390-96 (2002). Compensation for loss of profits is now required: *see* APL, *supra* note 66, art. 17, as amended by law 27,742.

[68] Law No. 26944, Aug. 7, 2014, [LXI-D] A.D.L.A. 4144, art. 5 (Arg.).

[69] APL, *supra* note 66, art. 17. Article 14 of the APL lists the defects that result in "absolute nullity." *Id.* art. 14. These include some broad reasons such as "non-conformance to law" and "serious violation of applicable procedures." *Id.*

[70] Fraud (and not mere knowledge) is now required to justify revocation. *See* APL, art. 17 as amended by law 27,742.

[71] *See* COMADIRA & MONTI, *supra* note 67, at 371-72; APL, *supra* note 66, art. 22 as amended by law 27,742.

[72] *See* Code des Relations entre le Public et l'Administration [Code of Relations between the Public and the Administration] art. L240-1 (Fr.) (explaining that in French law, termination with retrospective effect is call revocation and without it abrogation).

[73] See *Ternon*, 2001 Recueil Lebon 497. This rule is now included in the CRPA, art. 242-1. The prior rule, established in the arret Dame Cachet (1922 Recueil Lebon 790) set a two month limit from the date of notice of the decision.

Procedural differences also exist between the two legal systems. In both countries, a government's individual decision (i.e., not a regulation) must be challenged within a very short period (two months in France and fifteen days in Argentina) to avoid becoming final as a judgment and thus considered lawful and not subject to subsequent legal challenge by the affected party.[75] However, in France, the lack of such a timely challenge – as a rule – does not bar a subsequent action for damages based on the illegality of the decision.[76] The opposite rule applies in Argentina, where after fifteen days without an administrative challenge, the decision (even if rendered in a contractual context) becomes final, is considered lawful, and thus cannot give rise to a damages award based on its illegality.[77]

The need for legal certainty has been invoked in Argentina to justify the short term which applies to challenges of administrative decisions by private parties.[78] However, the fifteen-day term does not apply to challenges brought by the government against its own prior decisions, and if the decision is considered absolutely void, there was no statute of limitations for such a challenge.[79] This shows that in Argentina, the principle of legal

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[74] Code des Relations entre le Public et l'Administration [Code of Relations between the Public and the Administration] art. L241-2 (Fr.).

[75] *See* Code de la Justice Administrative [Code of Administrative Justice] art. R421-1 (discussing France); *See* APL, *supra* note 66, art. 23 (discussing Argentina) and its implementing regulation approved by Decree No. 1759, Apr. 3, 1972, [LXI-A] A.D.L.A. 222, art. 89-90 (as amended) (the 15-day term has now been extended to 30 days. *See* APL art. 23 as amended by law 27,742; and its implementing regulation, art. 90 as amended by decree 695 of 2024). In France, the challenge of regulations is subject to the same two-month limit – in this case from the date of publication – but the defense of the illegality of the regulation is perpetual. *See* REMI ROUQUETTE, PETIT TRAITE DU PROCES ADMINISTRATIF 596 (2020).

[76] *See* BERNARD PACTEAU, TRAITÉ DE CONTENTIEUX ADMINISTRATIVE 223 (2008); ROUQUETTE, *supra* note 75, at 595.

[77] *See* Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], 5/4/1995, "Gypobras S.A. c. Nacion Argentina (Ministerio de Educacion y Justicia)," 318 Fallos 441 (Arg.); Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice]. 20/8/1996, "Alcántara de Díaz Colodrero c. Banco de la Nación Argentina," 319 Fallos 1476 (Arg.); Camara Federal de Apelaciones [CFed.] [Federal Courts of Appeals], 24/4/1986, "Petracca e Hijos S.A. et al v. Estado Nacional," La Ley [L.L.] (1986-D-10) (Arg.). Rules on contractual disputes have now been amended. *See* APL, *supra* note 66, art. 23 as amended by law 27,742.

[78] *See* Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], 26/10/1993, "Fernando Horacio Serra y Otros c. Municipalidad de la Ciudad de Buenos Aires," 316 Fallos 2454 (Arg.); Gypobras, *supra* note 77.

[79] *See* Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], 24/11/1937, "Sociedad Anónima Empresa Constructora F.H. Schmidt c. Provincia de Mendoza," 179 Fallos 249 (Arg.); Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], 27/6/1941, "S.A. Ganadera 'Los Lagos' v. Nacion Argentina," 190 Fallos 142 (Arg.). *See also* Camara de Apelaciones en lo Civil y Comercial Federal [CApel.CC] [Federal Court of Appeals in Administrative Matters], sala 3, 3/7/1997, "Maruba SCA c. Estado Nacional Ministerio de Economia y Obras y Servicios Publicos s. Medidas Cautelares," La Ley [L.L.] (1998-A-151) (Arg.). *But see*, APL, *supra* note 66, art. 22 as amended by law 27,742; APL, *supra* note 66, art. 23 as amended by law 27,742.

certainty plays only in favor of the government not in favor of private individuals, as in France.

Resorting to the Argentine federal judicial system involves a significant delay in reaching final judgment compared to the current situation in France, as well as important costs and contingencies that do not exist in France.[80]

In Argentina, six years has been calculated as the average duration of a lawsuit up to the judgment of the lower court.[81] Since—as a rule—two successive appeals can be lodged until reaching a final decision from the Supreme Court, ten years can be considered the normal duration of a full lawsuit, but fifteen and twenty-year durations are common. In addition, collection of the sums awarded by a judgment against the government can take up to three years from the date when the judgement has become final.[82]

In contrast, currently one year is the time generally required in France to reach the judgement of the lower administrative tribunal, and one to two more years to exhaust appeals against it.[83]

Finally, like most Latin American countries, Argentina is a party to the 1969 American Convention of Human Rights (also called *Pact of San Jose de Costa Rica*), an instrument that includes rules on judicial protection

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[80] A court tax of 3% of the economic amount of the controversy (whether expressly stated or merely implied) must be paid by plaintiff at the outset of the litigation before the Argentine federal courts. *See* Law No. 23898, Oct. 23, 1990, [L-D] A.D.L.A. 3751, art. 2 (Arg.). This amount may be huge (there is no ceiling) and it is lost if the claim is defeated for any reason (e.g., as premature) and a new court tax must be paid when the subsequent claim is filed. Also, if the claim is defeated, as a rule, loser must pay the legal fees of counsel for the winner, which are calculated as a percentage of the amount involved and may exceed 20% of such amount. *See* CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] [CIVIL AND COMMERCIAL PROCEDURE CODE] art. 68 (Arg.); Law No. 27423, Nov. 30, 2017, [LX-A] A.D.L.A. 2018, art. 21 (Arg.). In contrast, in France there was a court tax of 35 euros, now eliminated, and no other major expenses exist unless the claim is found abusive by the court in which case it may impose a penalty of up to 10,000 euros. *See* ROUQUETTE, *supra* note 75, at 991-93.

[81] Horacio D. Rosatti, *Los tratados bilaterales de inversión, el arbitraje obligatorio y el sistema constitucional argentino* [Bilateral Investment Treaties, Mandatory Arbitration, and the Argentine Constitutional System], 2003-F La Ley [L.L.] 1283, n.28 (Arg.).

[82] See Law No. 11672, Sept. 9, 2005, [LXV-E] A.D.L.A. 694 (Arg.) *restated by* Decree No. 1110, Sept. 9, 2005, [LXV-E] A.D.L.A. 4651, art. 132 (Arg.) setting the rules on the time required to comply with budget requirement.

[83] *See* Jean-Marc Sauvé, *Le juge administratif face au défi de l'efficacité* [*The Administrative Judge Facing the Challenge of Efficiency*], 12 REVUE FRANÇAISE DE DROIT ADMINISTRATIF [R.F.D.A.] 613-16 (2012) (Fr.). However, complaints about delays continue. *See* ROUQUETTE, *supra* note 75, at 301-02; *see also* Jean Massot, *The Power and Duties of the French Administrative Judge, in* COMPARATIVE ADMINISTRATIVE LAW 420-21 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

similar to those of the European Convention of Human Rights.[84] However, unlike Europe, which extended the Convention's coverage to corporations and other legal entities by means of a 1952 Addenda, no such extension has been agreed by Latin American countries, so, according to the Interamerican Court of Human Rights, the American Convention only protects the rights of human beings.[85]

When one looks at "law in practice," the difference with French law is even more marked. French administrative law rules are sometimes presented with a degree of generality that would surprise a common law practitioner.[86] However, the application of those general rules seems to be more prudent in France than in Argentina.

This happens mainly because, even without distortion, the same rule can have very different consequences depending on the political and economic context and on the financial situation of the government. Thus, the rule that the contractor must continue performing even if the administration is in arrears in its payments, subjects such contractor to severe financial stress when the government is perennially insolvent. The French rule that sets a four-month limit for the government to revoke its own decisions, except in cases of fraud,[87] would not constitute an effective limit on such revocations in a political scenario where blanket accusations of fraud are customarily thrown at the previous administration when there is a change of regime.

Also, a freeze of utility rates in the context of double-digit inflation (as it happened in Argentina in the years after 2002), effectively implies their drastic reduction in a matter of months. Thus, if the remedy is an ordinary action that lasts ten to twenty years (the matter being considered too complex for a summary procedure), the operator will be bankrupt before court succor arrives. Particularly, being forced to obey contractual changes and other decisions of the government party during the performance of the

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[84] *See* Organization of American States, American Convention on Human Rights, art. 8, 25, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 144. This convention was approved in Argentina by law 23,054 of 1984 and incorporated as part of the Constitution in the 1994 Reform. *See* Art. 75, ¶ 22 CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

[85] *See* Herrera Ulloa v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No.12367 (July 2, 2004); Usón Ramírez v. Venezuela, Preliminary Objects, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36 (Nov. 20, 2009); *see* Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], 12/11/2019, "Aceitera General Deheza S.A. c. Estado Nacional," 342 Fallos 2051 (Arg.) (applying the Convention rules to a corporation). The opinion of legal writers on the matter is divided: Bidart Campos was in favor of such application while Pinto is against it. *See* GERMÁN J. BIDART CAMPOS, TEORÍA GENERAL DE LOS DERECHOS HUMANOS 41 (1989); MÓNICA PINTO, TEMAS DE DERECHOS HUMANOS 13 (2009).

[86] *See* the decision of the *Conseil d'État* in *Union des Transports* (*supra* note 53), stating that the power of unilateral modification applies to all administrative contracts although the case involved bus lines concessions.

[87] *See supra* notes 73-74 and accompanying text.

contract, and then having to wait ten to twenty years for a judicial remedy (which may well exclude loss of profits) places private concessionaries in a fragile legal situation while, at the same time, providing the government with the opportunity of being popular with the voters (who obviously prefer cheap utility rates) at the expense of the operators.

The Argentine Government always invokes the special rules of administrative law in its controversies. Some of these rules, such as time limitations, are applied strictly by the courts, while others have been tempered. Such is the case of the obligation to continue performance despite the government's default, which, in the majority opinion, ends when such default makes it "reasonably impossible" for the contractor to continue performing.[88] However, this is a difficult defense for the contractor to invoke as it cannot know how much financial stress the court will consider necessary to exonerate it.[89] Also, the constitutionality of excluding loss of profits has been challenged,[90] but no firm rule yet exists in this regard.

Experience shows that mistreatment of investors is a consequence not only of the substantive legal rules but also of the lack of effective and timely procedural remedies before the local courts.[91] The situation improves when international arbitration is possible, and thus, foreign investors frequently resort to the remedies provided by BITs.

Argentine defenses based on Argentine administrative law doctrines based on French law have been mostly rejected or ignored by international arbitration tribunals that have been asked by foreign investors to enforce BITs.[92]

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[88] *See* 3-A MARIENHOFF, *supra* note 50, at 373, 385; MIGUEL ANGEL BERÇAITZ, TEORÍA GENERAL DE LOS CONTRATOS ADMINISTRATIVOS 370-75 (2d ed. 1980).

[89] *See* Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], 2/3/1993, "Cinplast I.A.P.S.A. v. E.N.Tel.," 316 Fallos 212 (Arg.) (rejecting the suspension decided by the contractor).

[90] *See* 1 CASSAGNE, *supra* note 50, at 511-16.

[91] *See* Hector A. Mairal, The Silence of the Argentine Courts (unpublished paper) (on file with the N.Y.U. Inst. for Int'l L. and Just.).

[92] Argentina has also invoked the defense of a state of emergency against many of the investment claims brought against it, successfully in some cases. *See* Sommer, *supra* note 16, at 72-81. But the inordinate extension of the 2002 declaration of emergency (16 years) could not but weaken such defense: the emergency declared by Law 25,561 of January 6, 2002, that terminated the convertibility or "currency board" regime that had been in force since 1991, was to last until December 10, 2003. This was extended successively by laws 25,820, 25,972, 26,077, 26,204, 26,339, 26,456, 26,563, 26,729, 26,896, and 27,200 until Dec. 31, 2017, when the regime finally expired. Moreover, the Executive justified one of last extensions that it was then proposing to Congress not on the internal situation of Argentina (which was described as prosperous) but on the international situation at the time (described as troubled) that required that the Argentine Executive have emergency powers to deal with it (see the message that the Executive sent to Congress in 2013 introducing a bill to extend the emergency until December 31, 2015, that

Thus, in *Azurix,* the defendant argued that under the doctrine of the administrative contract, the concessionaire was not allowed to suspend performance or to terminate the contract by itself, claiming the default of the government party, but had to request such termination to the court.[93] Hence, the termination declared by the concessionaire implied an abandonment of the concession and, thus, a default of the concessionaire. The tribunal admitted that the text of the concession contract provided for different rules in case of default of the Government or of the concessionaire, but applied the *exceptio non adimpleti contractus* (i.e., the concessionaire's defense of non-performance by grantor) in order to effectively reject the Government's argument as contrary to the fair and equitable treatment standard of the relevant BIT.[94] In other cases, the tribunal found that French doctrines allowed compensation being payable to the concessionaire,[95] or found no difference between the applicable Argentine rules and those of international law.[96] In *Total,* loss of profits was awarded to the claimant due to the respondent's refusal to honor export licenses previously granted.[97] In *Webuild*, the tribunal rejected to follow the

became law 26,896). Thus, in *BG Group PLC v. Argentina* the tribunal noted that the emergency declared in 2002 was still in effect five years afterwards. *See* BG Group PLC v. Republic of Argentina, UNCITRAL, Award, para. 151 (Dec. 24, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0081.pdf. In *Hochtief v. Argentina* the tribunal held that, for purposes of that arbitration, the emergency should be considered to have ended by May 2003. *See* Hochtief AG v. Argentine Republic, ICSID Case No. ARB/07/31, Decision on Liability, para. 294-95 (Dec. 29, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw4101.pdf. In *Webuild v. Argentina*, continuance of the emergency was also rejected. *See* Salini Impregilo S.P.A. v. Argentine Republic, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, para. 354 (Feb. 23, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9546.pdf.

[93] *See* Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, para. 253, 260 (July 14, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf.

[94] *Id.* at 260. *Azurix v. Argentina* involved, *inter alia*, the quality of the water supplied by the concessionaire. However, the tribunal found that grantor was the party mostly responsible for this problem. *See id.* at para. 143-44. It also found that "the tariff regime was politized because of concerns with forthcoming elections or because the concession was awarded by the previous government." *Id.* at para. 375. In the annulment proceedings Argentina challenged the award for having applied the *exceptio* in the context of an administrative contract and thus in violation of Argentine law but the annulment tribunal rejected this argument holding that the award had taken into account the *exceptio* to evaluate the conduct of the grantor under international law principles. *See* Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic (Sept. 1, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0065.pdf.

[95] *See* CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, para. 221-26, 244-46 (May 12, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf.

[96] National Grid P.L.C. v. República Argentina, UNCITRAL, Award, para. 88 (Nov. 3, 2008); BG Group PLC v. Argentina, UNCITRAL, Award, para. 96 (Dec. 24, 2007).

[97] Total v. Argentina, ICSID Case No. ARB/04/1, Liability Decision, para. 460 (Dec. 27, 2010).

argument of respondent's expert witness that the administrative nature of the contract influenced its construction to the extent of disapplying the private law rule that waivers are not presumed.[98]

Generally, while the awards in Argentine arbitration cases sometimes mention the Respondent's administrative law arguments, they seldom apply those arguments. Instead, they often prefer to base the decision on a detailed reading of the applicable legal rules and contract clauses and on international law principles. This can partially be explained by the frequent presence of arbitrators from common law jurisdictions, who are not familiar with French legal doctrines.

The Argentine government has also invoked the allegation of the administrative nature of the contract to challenge the validity of arbitration clauses agreed upon with its counterparty, on the grounds that the public policy ("*orden público*") issues involved in an administrative contract are not arbitrable. Broad definitions of what constitutes an administrative contract and which issues should be considered in public policy create added uncertainty on the extent of such prohibitions.[99] The Argentine Supreme Court has accepted the arbitrability of administrative contracts when arbitration has been authorized by law and the issues involved do not concern public policy or the government's sovereign attributes or public power.[100] Arbitration tribunals have also rejected the Argentine government's position on this issue.[101]

IV. IS THE ARGENTINE SITUATION JUST DESCRIBED MORE GENERAL?

Argentina is arguably an extreme case. However, similar instances of the exaggeration of French administrative law rules can be found in other

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[98] Salini Impregilo S.P.A. v. Argentine Republic, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, para. 196, 203 (Feb. 23, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9546.pdf.

[99] *See* E. Silva Romero, "The Dialectic of International Arbitration Involving State Parties," 15(2) ICC IC Arb. Bull. 79 (2004) for a discussion on the use of the administrative contract doctrine by governments in order to escape arbitration.

[100] Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], 1920, "Pagano v. Gobierno de la Nación," 133 Fallos 61 (Arg.); Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], 1935, "Puerto de Rosario S.A. v. Gobierno Nacional," 173 Fallos 221 (Arg.); Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], "Compañía Ítalo Argentina de Electricidad v. Nación," 178 Fallos 293 (Arg.); Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], "Procuración del Tesoro Nacional," 341 Fallos 1485 (Arg.).

[101] CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, para. 119-121 (May 12, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf.

countries. Thus, in Bolivia and Venezuela, the government appears to enjoy the prerogatives mentioned above in all its contracts, not only those classified as "administrative."[102] In this respect, Chile appears to be at the other end of the spectrum.[103]

A study conducted by this author on the reception of the French administrative contract doctrine by international investment tribunals revealed that while several countries had invoked the doctrine within the French legal family, it had not generally proven effective as a defense for the host state.[104]

The invocation served the same purposes for which Argentina resorted to the doctrine, i.e., to justify unilateral termination or amendments to the contract by the government, or the reduction of the rights of the private contractor, and also to negate the possibility of submitting the controversy to arbitration due to the public policy considerations that an administrative contract involves.

An Egyptian case is an interesting example of the first situation. Egyptian authorities had signed a contract with an investor granting it a concession to build a hotel near the Pyramids. Because of political opposition to the contract due to the proposed location of the hotel, the administration unilaterally decided to move it some miles from the original site. In the arbitration brought by the dissatisfied investor, the host country argued that under the French theory of administrative contracts, the government was entitled to change the contract unilaterally. Now, French precedents that apply the theory and thus recognize such governmental power generally involve changed circumstances that require adjusting the concessioned service to satisfy new public needs,[105] a situation arguably different from the one that arose in the Egyptian case. It is unclear, therefore, whether the doctrine would have been applied in France. In that case, the tribunal rejected the application of the doctrine as a defense on the grounds that the change was too important to justify, and compensation was awarded to the investor.[106]

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[102] *See* J. M. SERRATE PAZ, V.R. HERNÁNDEZ MENDIBLE, J.R. ARAUJO-JUÁREZ, A. CANÓNICO SARABIA, M.R. PERNÍA REYES AND M.A. TORREALBA SÁNCHEZ, LA CONTRATACIÓN PÚBLICA EN AMÉRICA LATINA, 148, 661 (J.L. BENAVIDES and P. MORENO CRUZ, eds. 2016) (reporting Bolivian and Venezuelan government contract laws).

[103] Ley de Concesiones de Obras Públicas, as restated by Decree 900 of 1996 and as amended by Law 20410 of 2010, art. 28 ter. (setting rules on public works concessions under which Chile has built and extended highway network, rules that after the end of the construction, does not allow termination for reasons of public interest if it is not specifically provided in the agreement).

[104] *See* H.A. Mairal, *The Doctrine of the Administrative Contract in International Investment Arbitration*, in LIBER AMICORUM DEDICATED TO PROF. DON WALLACE JR. (2014).

[105] GUETTIER, *supra* note 24, at 339.

[106] International Centre for Settlement of Investment Disputes [ICSID] May 20, 1992, SOUTHERN PACIFIC PROPERTIES (MIDDLE EAST) LTD. V. ARAB REPUBLIC OF EGYPT, Case No. ARB/84/3, Award.

In several arbitration claims against South American countries, the respondent alleged the administrative nature of the contract as a defense. Thus, in *AUCOVEN*, the arbitration tribunal refused to admit the defendant's argument that, in the context of an administrative contract, plaintiff contractor could not terminate the contract directly but had to ask the tribunal's permission to do so.[107] In another Venezuelan case, the respondent state sought to expand the definition of an administrative contract, arguing that in order to so qualify, the public purpose could be merely indirect.[108]

In a case involving Ecuador, the issue of the relevance of the administrative nature of the contract was discussed at length, with respondent arguing unsuccessfully that such nature prevented claimant from invoking the *exceptio non adimpleti contractus* and that respondent's power of unilateral amendment reached the economic terms of the contract.[109]

The non-arbitrability of the controversy due to the administrative nature of the contract has been raised in several countries.[110] Law review articles have commented this situation.[111]

It is also interesting to observe cases in which the administrative nature of the agreement was alleged by claimant but rejected by the respondent State.[112] The reasons for such positions do not clearly arise from the award. It may be that the investor was invoking the above mentioned rules in favor of the contractor that do not exist in private law contracts,[113] or to sustain the allegation that the challenged measures had been the result of the use by the government of its sovereign prerogatives under the administrative

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[107] International Centre for Settlement of Investment Disputes [ICSID] Sept. 23, 2003, AUTOPISTA CONCESIONADA DE VENEZUELA, C.A. ("AUCOVEN") V. REPÚBLICA BOLIVARIANA DE VENEZUELA, Case No. ARB/00/5, Award, para. 216-27.

[108] International Centre for Settlement of Investment Disputes [ICSID] Jan. 16, 2013, VANESSA VENTURES V. VENEZUELA, Case No. ARB(AF)/04/6, Award, para. 156.

[109] International Centre for Settlement of Investment Disputes [ICSID] Sept. 12, 2014, ECUADOR V. PERENCO, ICSID Case No. ARB/08/6, Award.

[110] *See* R. WAKED JABER, LE CONTRAT ADMINISTRATIF INTERNATIONAL (2013) at 407-41 (discussing French and Lebanese law).

[111] J. CABRERA, D. FIGUEROA & H. WÖSS, *The Administrative Contract Non-Arbitrability, and the Recognition and Execution of Awards Annulled in the Country of Origin: The Case of Commisa v. Pemex*, 2015 Arbitration International 1; E. Silva Romero, *ICC Arbitration and State Contracts* (2002) 13:1 ICC IC Arb. Bull, para. 26; *see also* Silva Romero, *supra* note 99.

[112] Huntington Ingalls v. Venezuela, UNCITRAL Case, Award, Feb. 19, 2008, para. 180-183.

[113] *See* BROWN & GARNER, *supra* note 4, at 125-13; RICHER, *supra* note 24, at 283-87, 302-05.

contract doctrine and thus "acts of State" that qualify as treaty violations instead of mere contract breaches that do not.[114]

Respondent States have also invoked their power to revoke prior decisions, without any reference to the time limit to which that power is subject to in French administrative law. Thus, in *Quiborax v. Bolivia*, the defendant argued that revocation was justified in view of the fraud committed by the beneficiaries of the prior decision.[115] In *Gold Reserve Inc. v. Venezuela*, the respondent alleged that, as a rule, decisions conferring rights are revocable by the administration. The expert witness for the claimant admitted that power when the act to be revoked was absolutely void but subjected it to the respect of due process principles at the administrative stage.[116]

As can be seen, examples exist of the invocation of French administrative law doctrines in countries other than Argentina, sometimes in excess of the limits within which they are applied in France or seeking results that would not be admitted there.

A different concurrent factor contributing to the abundance of arbitration claims against Spanish-speaking countries exists. Many of those claims arise from the alleged infringement of the investor's mining rights by the host State. This happens because mining law principles inherited from Spain grant the State the original ownership of mines, and thus private mining rights depend on concessions from the government. In contrast, in certain common law countries, the government's involvement in the ownership of mines is not as intense. Thus, in the United States, mineral rights may belong to the owner of the surface land or, as it happened with many sales of federal lands to private parties in the Western part of the country, mineral rights were not separated and reserved by the seller.[117]

In Spanish-speaking America, there is therefore some overlapping between mining and administrative law. Thus, in Ecuador,, the granting of

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[114] *See* S.A. ALEXANDROV, *Breach of Treaty Claims and Breach of Contract Claims: When can an International Tribunal Exercise Jurisdiction?*, in ARBITRATION UNDER INVESTMENT AGREEMENTS, *supra* note 3, at 370; C. SCHREUER, *Investment Treaty Arbitration and Jurisdiction over Contract Claims – the Vivendi I Case Considered*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION, 281 (T. Weiler, ed. 2005) (regarding the difference between both types of breaches).

[115] International Centre for Settlement of Investment Disputes [ICSID] Sept. 16, 2015, Quiborax v. Bolivia, Case No. ARB/06/2, Award, (finding evidence of fraud).

[116] International Centre for Settlement of Investment Disputes [ICSID] Sept. 22, 2014, GOLD RESERVE INC. V. VENEZUELA, Case No. ARB(AF)/09/1, Award, para. 370-73.

[117] *See* N.J. CAMPBELL, JR., PRINCIPLES OF MINERAL OWNERSHIP IN THE CIVIL LAW AND COMMON LAW SYSTEMS, (paper delivered at the Deep South Section of the American Bar Association meeting of New Orleans, 1955); C. SIAC, MINING LAW: BRIDGING THE GAP BETWEEN COMMON LAW AND CIVIL LAW SYSTEMS, (paper presented at the Centre for Petroleum and Mineral Law and Policy, University of Dundee, 1999).

mining rights by the State to a private party is an administrative act,[118] and several arbitration cases concerning the region involved the revocation of concessions by the State.[119]

The correction of administrative law rules, for example, to prevent the revocation of allegedly unlawful acts after a reasonable time has elapsed and thus protect legal certainty, could significantly reduce future litigation.

CONCLUSION

The matters covered in this paper would require a comprehensive comparison of French administrative law with the laws of Argentina and other countries with French legal origins, both as those laws exist in the books and as they are applied in practice, a study that exceeds the scope of this work. Conclusions are therefore limited to suggesting the existence of a possible problem and the need for further studies.

A. With respect to Argentina

Awards issued in investment arbitrations brought against Argentina show that it has often alleged administrative law doctrines that exaggerate their original French sources or ignore the countervailing factors that would have come into play in France.

However, having been involved in several of the investment controversies that arose in Argentina during the last 25 years, I would conclude that the government measures that prejudiced investors were prompted by macroeconomic and political considerations and that no prior analysis of the applicable legal rules preceded them. Once the controversies arose, counsel for government, in fulfilling their professional duties, invoked the rules imported from French administrative law as defenses against the claims of the investors. The resulting international arbitrations have produced many awards, mostly contrary to Argentina, without those defenses being admitted.

In this author's opinion, French administrative law rules cannot serve as valid arguments to justify the oppression of investors. Unless the contract expressly provides otherwise, both French as well as international law

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[118] *See* J. LARREA SAVINOVICH AND C. ZUMMARRAGA, THE LEGAL NATURE OF MINING RIGHTS IN ECUADOR (Lexology 2020).

[119] *See* International Centre for Settlement of Investment Disputes [ICSID] Sept. 16, 2015, Quiborax v. Bolivia, Case No. ARB/06/2 Award, (finding evidence of fraud); International Centre for Settlement of Investment Disputes [ICSID] Sept. 22, 2014, Gold Reserve Inc. v. Venezuela, Case No. ARB(AF)/09/1, Award, para. 370-73.

require full compensation for damages caused by the unilateral tampering with the rights emanating from a contract.[120] Arguably, under Argentine constitutional law, the same result should be reached.[121]

The lack of timely legal remedies in local courts has compounded the consequences of this abuse of comparative law. However, the Argentine Supreme Court has never validated the oppression of investors, whether based on the nature of the contracts or other administrative law doctrines.

Nevertheless, obstacles to access to justice, such as short statutes of limitations and the costs, contingencies, and delays of litigation,[122] serve as practical means to maintain a façade of rule of law while, in substance, depriving investors of their rights without compensation or retarding such compensation for decades. Thus, there is a frequent resort to international arbitration.

The distortion of French doctrines, while not successful as a defense in international arbitration, or even in local litigation, is nevertheless politically useful for the Government to clothe initially its decisions with a mantle of legality. At the same time, the delay in the issuance of remedies allows it to pass the financial consequences of those decisions to future administrations. The financial cost for the country that such practices involve is now becoming a matter of political debate in Argentina, and a more rational approach to these problems is now emerging.[123] A proper restatement of the French administrative law doctrines applied in Argentina would help such evolution.

B. More generally

It may be posited that French administrative law, unless faithfully transplanted and properly applied, creates opportunities and temptations for the mistreatment of investors in developing countries.[124] Particularly, by diluting the strength of the principle of *pacta sunt servanda* and the stability of administrative decisions conferring rights, it opens the door to violations of rights which then the infringing State – due to its perennial lack of financial resources – is tempted to refuse to compensate fully by resorting to a distorted view of French doctrines. Worse still, it may try to avoid all

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[120] *See* 2 DE LAUBADÈRE ET AL., *supra* note 24, accompanying text; Permanent Court of International Justice, 1928, *Factory at Chorzow* for international law; I. Marboe, *Compensation and Damages in Investment Treaty Arbitration*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS, *supra* note 3, at 679, 681.

[121] *See* 1 CASSAGNE, *supra* note 50, at 511-16.

[122] *See* Mairal, *supra* note 91; Mairal, *supra* note 104.

[123] *See supra* notes 67, 70, 71, 75, 77, 78, and 79 for specific examples of a more rational approach to the problems stated herein.

[124] *See, e.g.,* International Centre for Settlement of Investment Disputes [ICSID] April 4, 2016, CRISTALLEX V. VENEZUELA*,* Case No. ARB(AF)/11/2, Award, para. 408, 415, 666, 710.

compensation by claiming the original illegality of the contract or decision.[125]

The examples mentioned in this paper would tentatively show that if French administrative law plays a part in the mistreatment of investors by governments, it is mainly due to its distortion in the hands of those countries that claim to follow its steps and to the political benefits that governments obtain by invoking the doctrines thus distorted. Properly applied and enforced, that law should have avoided many of the controversies cited herein where the host State was forced to compensate the claimant investor.

The wide expansion of French administrative law abroad and these examples merit a deeper study of its distortion in the countries that imported said law, in the author's opinion.

It would be a welcomed step if French jurists help set the record straight with regard to the exposition and practical application of its legal doctrines by other countries and also to the institutional conditions that allow a proper balance between the State prerogatives and the rights of the individual to be kept. Such a movement would benefit those countries because the legal uncertainty derived, *inter alia*, from the abuse of French administrative law, affects the cost of doing business and reduces the flow of foreign investments to those countries.[126] Also, the track record of lost cases cannot but influence negatively–from the standpoint of the host State—the outcome of future arbitrations.

But the issue is of a more general nature. France has had a significant cultural influence in Latin America, far exceeding that of its legal system. Jorge Luis Borges once wrote that, apart from the Spanish language itself, France had more influence in Argentina than any other country.[127] If one wishes to find a connection between the legal controversies described in this paper and French culture, one could recall the saying that one of the main problems of Latin America is to have adopted the French idea of the strong presence of the State without having been able to create a civil

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[125] *See*, e.g., GOLD RESERVE INC. V. VENEZUELA, *supra* note 116, para. 593 (discussing Respondent's allegations of the "absolute nullity" of prior administrative decisions that were contrary to new public policies).

[126] Daniel Artana, a leading Argentine economist, stated in one of his conferences that, even when its Government debt was not in default, due to its track record Argentina was paying an interest surcharge of two percentage points over the rate that should apply according to its economic statistics. Given an aggregate (public and private) debt of 400 billion dollars, this would mean an annual surcharge of eight billion dollars which the country could save with more prudent policies.

[127] J.L. BORGES, PRÓLOGO DE PRÓLOGOS (1974).

service as efficient as the French. Only Latin America itself can solve this problem.

SOME BRIEF THOUGHTS ON HECTOR MAIRAL'S ARTICE, *ARE LEGAL FAMILIES DETERMINANT OF INVESTORS' PROTECTION FROM GOVERNMENT MISTREATMENT?*

Jonathan M. Miller*

It is an honor to be able to offer some brief comments on Professor Mairal's article and accompanying presentation at Southwestern Law School given Professor Mairal's legendary status in Argentina and in Administrative Law generally. Not only is Professor Mairal a Professor Emeritus from the Universidad de Buenos Aires where he previously held a chair in Administrative Law, but for many years he was a name partner at Argentina's largest law firm, Marval, O'Farrell & Mairal, where he is now emeritus, and headed one of the most important international legal practices in Latin America. Very few people can match his legal and practical understanding of the problem of government relations with investors.

Professor Mairal's article offers an important qualitative analysis behind data that seems to show that common law countries offer an advantage over countries indebted to French models and he concludes that much of the difference lies not in French practice, but in the failure of some developing countries grouped as following French models to offer the level of investor protections that France in fact offers.[1] He begins by taking note of a study by the World Bank in 2004 that compared investor rights in countries with common law origins with those of other legal families.[2] The study concluded that common law countries offer more favorable places for doing business and better protect investor rights than countries with French legal origins, with German and Scandinavian countries in between.[3] Then Professor Mairal develops his own study of the impact of French

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[1] Héctor A. Mairal, *Are Legal Families Determinant of Investors' Protection from Government Mistreatment?*, 30 SW. J. INT'L L. 285, 286 (2024).

[2] *Id*. at 284-85.

[3] *Id*. at 285.

Administrative Law models on foreign investors. He notes that countries broadly identified as importers of French Administrative Law have faced many more arbitration claims for violation of bilateral investment treaties than common law countries. But he does not stop his analysis there, and does not conclude that French Administrative Law models are inferior to common law models for avoiding government vs. investor disputes.

Instead, Professor Mairal digs further to determine what lies behind the relative unattractiveness to investors of countries in the French legal family. He notes that a detailed analysis of French Administrative Law shows that France provides parties that contract with the State with very substantial protections and that France itself is a very good country for a foreigner to do business with.[4] Rather, it is the incomplete fashion with which many countries have adopted the French model that likely provokes government vs. investor disputes.[5] Professor Mairal illustrates his point by showing the differences in administrative law protections offered in Argentina compared with France. Rather than foreign investors having a problem with French law, it is the inclusion in the French legal family of Argentina and some similar Latin American countries that distort French law that explains the high number of government vs. investor arbitrations in the French legal family of countries.[6] The issue is not French Administrative Law, but adaptations of French models without central French protections for investors.

My comments will not question any aspect of Professor Mairal's excellent article, but will simply suggest that we also need to better understand a nonlegal dimension – the economic and social forces that stand in the way of legal change in Argentina. The problem that hobbles Argentina is not just a failure of law, but the capture of the State by groups that corrupt it for their ends and that successfully promote ideologies to support their economic position.

Professor Mairal has a peerless mastery of comparative administrative law; but Argentina's legal regime also requires an anthropological or sociological description. The sociological analysis is something that Professor Mairal sometimes hints at on other work, and I wish I could hear more about it. My sense is that while Professor Mairal offers a thorough analysis of relevant legal principles, the differences between Argentina and a country like France could also benefit from Marxist analysis of the nature of law and ideology.

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[4] *Id*. at 286.
[5] *Id*. at 287.
[6] *Id*. at 289.

When I refer to a Marxist analysis of the nature of law and ideology, I am not referring to anything particularly radical, but merely to the idea that Marx elaborates in *The German Ideology* that ideology, understood as ideas that serve as a tool for social domination, develops in response to the needs to those who exercise political, economic and social power, and that law is largely an implementation of the dominant ideology.[7] Of course both ideology and law are constantly contested, with competing political forces seeking recognition of their understanding of the world and social needs, and law tending to implement an ideological vision. But when looking at a society as troubled as Argentina's which nevertheless has a very sophisticated legal system, one needs to ask why the present malaise continues to exist. What is it about Argentina's dominant economic and social forces that has allowed persistence of a legal system that makes massive corruption almost inevitable.

In 2007, Professor Mairal published an extraordinarily insightful, short book, *Las Raíces Legales de la Corrupción* [The Legal Roots of Corruption], that describes the factors in Argentina's legal system that sustain public corruption.[8] He begins his book by noting that Argentina is routinely described by both Argentine intellectuals and Transparency International as among the most corrupt countries in the world.[9] He describes a country where government contracting lacks transparency, where the Executive enjoys excessive discretion because sometimes the law and regulations are so unclear that varying interpretations of questionable validity can survive, where public officials receive wide enforcement discretion, and where further discretion exists because of laws that are either impossible to comply with or are routinely subject to lax enforcement.[10] Excessive Executive discretion creates the opportunity for venality. And sometimes Executive discretion further increases due to the difficulty of obtaining judicial review and from judicial doctrines that offer extraordinary deference to the administrator.[11] Further, sometimes the temptation for corrupt enforcement increases due to the enormous gains to the violator from violation, and hence a willingness to pay a high bribe, or from extraordinarily high costs to the violator from enforcement.[12] Professor Mairal's book is filled with examples, just as his article's observations of Argentina's corruption of the

[7] Karl Marx, *Critique of Modern German Philosophy According to its Representatives Feuerbah, B. Bauer and Stirner*, *in* KARL MARX & FREDERICH ENGELS, THE GERMAN IDEOLOGY: INCLUDING THESES ON FEURBACK AND INTRODUCTION TO THE CRITIQUE OF POLITICAL ECONOMY 27, 67 (Prometheus Books, 1998) (1932).

[8] *See generally*, HÉCTOR A. MAIRAL, LAS RAÍCES LEGALES DE LA CORRUPCIÓN: O DE CÓMO EL DERECHO PÚBLICO FORMENTA LA CORRUPCIÓN EN LUGAR DE COMBATIRLA (2007).

[9] *Id*. at 16.

[10] *Id*. at 21-22.

[11] *Id*.

[12] *Id*. at 22.

French Administrative Law model are quite specific. But there is a missing element. Is there an ideology that produces the enormous administrative discretion, opaque government contracting and ineffectual judges? What prevents Argentine society from responding?

Argentine corruption kills people. When the brakes on a train failed because of inadequate maintenance by a government-subsidized train operator, fifty-one people were left dead.[13] When a warehouse was illegally allowed to operate despite repeatedly failing city safety requirements, ten emergency responders died in the resulting fire.[14] Yet as one of Argentina's top investigative journalists writes, the system of government "acts with only one objective: to accumulate power and guarantee impunity."[15] There have been at least a dozen cases of foreign companies that admitted to the U.S. Securities and Exchange Commission or the U.S. Department of Justice that they paid bribes in Argentina, and in only one of the cases, involving IBM, was there a legal action that produced a criminal conviction—and only a very limited one.[16] The system facilitates the enrichment of a corrupt political cast where operators from opposing political parties sometimes work together for mutual enrichment.[17]

Professor Mairal's book identifies some of the ideas that empower Argentina's morass. He observes an emphasis in Argentine society on the importance of friendship over neutral application of the law or adherence to legal rules.[18] He also notes frequent assumptions that economic interventionism works— that price controls, tariffs and special protections for industries or professions serve the public good when in practice they also create gains for unscrupulous individuals who seek to avoid application of the rules or obtain the ability to collect some unique benefit or rent.[19] And he notes the invocation of patriotism as a device to serve corruption since it deprives the public of rational discussion of problems.[20] But I would argue that the underlying ideas protecting the existing corrupt system have a further and rather depressing element. At heart is a sense of learned helplessness, a dominating idea that graft is simply how society works and that the best one can hope for is a political party that "robs but get things

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[13] FLORENCIA HALFON, ¿LA CORRUPCIÓN MATA? 95-100 (2019).

[14] *See id*. at 171, 181-198.

[15] HUGO ALCONADA MON, LA RAÍZ (DE TODOS LOS MALES) 16 (2018).

[16] *Id*. at 15.

[17] *See id*. 32-35; *see also* JUAN CARLOS VEGA, LA CORRUPCIÓN COMO MODELO DE PODER 7 (2019) (describing a model of corrupt power involving political, economic and trade union elements).

[18] MAIRAL, LAS RAICES, *supra* note 8 at 16.

[19] *Id*. at 16-17.

[20] *Id*. at 17-18.

done" as opposed to those who rob but produce nothing.[21] Oddly, an ideology of helplessness is also an idea that serves as a source of power.

Obviously I cannot fault Professor Mairal for not coming up with a full map of the beneficiaries of corruption and the culture that perpetuates their power. But that map needs accurate development if new forces in Argentine society are ever to be mobilized in pursuit of their interest in clean government. Agustín Gordillo's *Prologue* to Professor Mairal's book notes that when the Argentine Senate voted to approve the Inter-American Convention Against Corruption, the draft of the stenographers' notes indicated "risas en la sala" [laughter in the chamber].[22] That laughter represents an idea and power structure that have cursed Argentina for an extraordinarily long time.

Societies and their legal structures certainly evolve. In Argentina's case, new social and economic forces dramatically realigned Argentina's dominant ideologies at least twice in the last two centuries, once in the middle of the nineteenth century and again in the 1930's and 1940's. At the middle of the nineteenth century, the opportunity for trade with Europe led Argentina's economic elites to adopt what became known as the Alberdian vision.[23] That ideology, which dominated Argentine thinking at least through the first World War, called for protection of investments, economic liberty and many individual rights, the encouragement of immigration, and unrestricted international trade—all of which were translated into law through Argentina's Constitution of 1853/1860 and subsequent codification.[24] In the 1930's and '40's, once the Great Depression caused the world trading system to collapse, newly empowered nationalist and corporatist forces in Argentine society began to assert themselves, leading to Peronism.[25] In both cases, new economic conditions changed the interests and organization of important economic and social groups, changing relative political forces—and ushering in first ideological change and then legal change.

Unfortunately, looking at Argentina today, while the country has certainly changed since the 1940's, a realignment of social and economic forces has not appeared that has significantly modified the powerful interests that work against transparency and economic opportunity. When the approval of a treaty against corruption produces laughter among the legislators approving it, the legal regime that Professor Mairal identifies is

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[21] ALCONADA MON, *supra* note 15 at 28.

[22] Agustín Gordillo, *Prologo*, in MAIRAL, LAS RAICES, *supra* note 8 at 11, 12.

[23] *See* Jonathan Miller, *Judicial Review and Constitutional stability: A Sociology of the U.S. Model and its Collapse in Argentina*, 21 HASTINGS INT'L & COMP. L. REV. 77, 131-133 (1997).

[24] *See id*. at 133-142.

[25] *See id*. at 143-150.

not yet under threat. Exactly what will eventually produce new political forces remains to be seen.

GLOBAL TRADE DISPUTE SETTLEMENTS AND HOW TO SURVIVE THE WTO APPELLATE BODY CRISIS QUITE NICELY

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[1] Agreement Establishing The African Continental Free Trade Area, Mar. 21, 2018; *The African Continental Free Trade Area*, AFR. UNION (Jan. 15, 2024), https://afcfta.au.int/en. and https://afcfta.au.int/en.

INTRODUCTION

To paraphrase the great Charles Dickens' novel, *A Tale of Two Cities*, global trade seems to be living in "the best of times" and recovering from "the worst of times."[6] After 10 years of nearly unprecedented growth following the 2008 global recession, the Covid-19 pandemic caused the world's international trade in goods and services to plummet from nearly $20 trillion U.S. dollars in 2019 to some $18 trillion in 2020. The pandemic's worst days may be behind us, but its lingering legacy remains, with continued disrupted global supply chains, computer chip shortages

[2] Free Trade Agreement, CL-UY, Oct. 4, 2016.
[3] The China-Australia Free Trade Agreement, CN-AU, 2015.
[4] Canada-Israel Free Trade Agreement, CN-IL, Jan. 1, 1997.
[5] Comprehensive Economic Partnership Agreement Between Japan and the Republic of India, JP-IN, Feb. 16, 2011.
[6] CHARLES DICKENS, A TALE OF TWO CITIES 1 (Richard Maxwell ed., Penguin Classics 2003) (1859).

hampering manufacturing production everywhere to slow the flow of getting goods to market, and troublesome labor shortages in many key markets. In addition, the Ukraine conflict has significantly impaired global agriculture commerce. Despite these problems, however, global trade is booming and 2023 may well set a historical record for the import-export dollar volume of global goods and services, projected at $33 trillion U.S. dollars in 2023. Even adjusted for inflation triggered mainly by the pandemic effects, these are impressive numbers.[7]

The past several years have also seen some of the more significant international trade law and policy issues emerge since World War II ended. President Trump's America First philosophy reflected in his 2019 decision to impose unilaterally tariffs on steel and aluminum imports from most U.S. trading partners for stated national security reasons, along with his decision to impose tariffs on numerous Chinese products as sanctions for intellectual property theft and discriminatory foreign investment laws, prompted China to impose retaliatory tariffs on various U.S. products.[8] Most other countries affected by the proposed U.S. steel and aluminum tariffs chose not to follow China, and instead filed complaints with the World Trade Organization (WTO), which still remain undecided because of the WTO Appellate Body crisis discussed below. The U.S. national security reasons used to justify steel and aluminum tariffs pose an issue barely tested to date under WTO legal rules, likewise the case with China-specific tariffs based on intellectual property theft and discriminatory investment treatment.[9] In late 2022, WTO panels ruled against the U.S. in several of these disputes by determining that the U.S. improperly invoked national security claims to

[7] Jean-Francois Trinh Tan, *What You Need to Know About International Trade*, WORLD ECON. F. (Aug. 15, 2023), https://www.weforum.org/agenda/2023/08/international-trade-what-you-need-to-know-august- (describing 2022 trade volume and projecting 2023 growth); *2023 Supply Chain Outlook: Expert Advice on Thriving in Times of Change*, APPIAN, at 8 (2023), https://assets.appian.com/uploads/ebook-supply-chain-outlook_EN.pdf; Joe McKendrick, *How to Address the Supply-Chain Staffing Crisis*, HARVARD BUS. REV. (Sept. 18, 2023), https://hbr.org/2023/09/how-to-address-the-supply-chain-staffing-crisis (discussing supply chain issues).

[8] *See generally Symposium: International Trade in the Trump Era*, YALE J. INT'L L. (Nov. 25, 2018), https://www.yjil.yale.edu/features-symposium-international-trade-in-the-trump-era/ (discussing the rise of protectionism in international trade).

[9] For a summary of WTO national security disputes, *see* Tania Voon, *Testing the Limits of WTO Security Exceptions*, E. ASIA F. (June 14, 2023), https://www.eastasiaforum.org/2023/06/14/testing-the-limits-of-security-exceptions/. These disputes themselves (DS544, DS552, DS556, DS564, and DS543) can be found on the WTO website Disputes Chronology web page. https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

justify the tariffs and China sanctions.[10] The U.S. then appealed these panel decisions "into the void" created by the lack of a functioning WTO Appellate Body.

President Biden pledged significant trade reform and greater international cooperation during his campaign. Since taking office in January 2021, however, he has kept in place most Trump trade measures, including Chinese tariffs and sanctions. Trade news headlines now regularly read "**BIDEN CONTINUES TO FOLLOW TRUMP TRADE POLICIES WITH NO CHANGES IN SIGHT.**"[11] Almost all Biden Administration trade attention has focused on U.S. - China trade conflicts, and an anticipated increase in attention to WTO issues never materialized.[12] Donald Trump has indicated he intends to increase tariffs significantly if elected; while Kamala Harris has attacked this particular Trump proposal as exacerbating inflation.[13] Meanwhile, Biden trade policies continue.

International trade law has reached a legal crossroad. The World Trade Organization (WTO), now in its 29th year, provides the fundamental global trade legal framework, with trade dispute settlement rules and procedures generally accepted by countries and international businesses alike as the final word on how trade laws apply. Now, however, the WTO Appellate Body, often described as the WTO "Crown Jewel,"[14] has ceased

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[10] Voon*, supra* note 9.

[11] *See, e.g.*, Noah C. Gould, *Biden-Trump Protectionist Policies Are Bad for the Economy and Don't Accomplish Their Supposed Aim*, NAT'L REV. (Oct. 11, 2021, 6:30 AM), https://www.nationalreview.com/2021/10/biden-continues-trumps-harmful-trade-policy/; Asma Kalid, *Biden Is Keeping Key Parts of Trump's China Trade Policy. Here's Why*, NAT'L PUB. RADIO (Oct. 4, 2021, 3:36 PM ET), https://www.npr.org/2021/10/04/1043027789/biden-is-keeping-key-parts-of-trumps-china-trade-policy-heres-why; Tobias Burns, *How Trump and Biden Killed the Free-trade Consensus*, THE HILL (Sept. 25, 2023, 2:57 PM ET), https://thehill.com/business/4222035-how-trump-and-biden-killed-the-free-trade-consensus/; Asma Kalid, *Biden Kept Trump's Tariffs on Chinese Imports. This Is Who Pays the Price*, NAT'L PUB. RADIO (June 27, 2023, 5:00 AM ET), https://www.npr.org/2023/06/27/1184027892/china-tariffs-biden-trump.

[12] *Remarks by Ambassador Katherine Tai at G20 Trade and Inv. Ministers' Meeting*, OFF. U.S. TRADE REPRESENTATIVE (Aug. 2023), https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2023/august/remarks-ambassador-katherine-tai-g20-trade-and-investment-ministers.

[13] Sam Sutton, *Harris' trade policy balancing act* (Aug. 20, 2024), https://www.politico.com/newsletters/morning-money/2024/08/20/harris-trade-policy-balancing-act-00174914.

[14] Ambassador Ujal Singh Bhatia, *Launch of the WTO Appellate Body's Annual Report for 2018*, WORLD TRADE ORG. (May 28, 2019), https://www.wto.org/english/tratop_e/dispu_e/ab_report_launch_e.htm; Eric Arias, *Impartiality & US Influence in International Courts*, ASIA SCH. BUS. (May 3, 2023),

functioning. Although the WTO retains its other dispute resolution mechanisms, the Appellate Body absence may have broken the world trade legal system. Or has it?

This article examines the WTO from legal, historical, and practical perspectives. It next discusses the Appellate Body crisis, as well as the stop gap appeal measures a growing number of WTO members have adopted to address the problem. It then reviews other significant international trade and related investment law developments to explain how some are already filling the Appellate Body void or may well be doing so in the future. Finally, it concludes with the author's observations about what this all may mean for trade law and lawyers.

I. THE WTO: A BRIEF HISTORY AND WHY HISTORY MATTERS[15]

A. Background

The year 1995 saw the world's most significant international trade law event in history when the WTO began. Responding to pent-up global demand for an international trade body able to resolve disputes effectively and efficiently, based upon clear legal rules and principles applicable to general trade policies and practices, the WTO has, until recently, stood the test of time as an effective international body able to get things done. As seen below, however, this test has become exceptionally more difficult to study for and pass.

Understanding the WTO requires traveling back in time to the 1940s, when World War II was close to ending, with the 1944 Bretton Woods Conference in the U.S. state of New Hampshire, attended by World War II Allied Powers seeking to create post-War entities able to help rebuild war-

https://thedocs.worldbank.org/en/doc/3e5537ac17a795823a3e3c46b12c0351-0050022023/related/Session-6-3-Eric-AriasWTO.pdf.

[15]*See generally* World Trade Organization, www.wto.org, (containing most information used in this article). *See also* PETER VAN DEN BOSSCHE AND DENISE PRÉVOST, ESSENTIALS OF WTO LAW (2nd ed. 2021), https://doi.org/10.1017/9781108878845; JOHN H. JACKSON, THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS (1st ed. 2007); JOHN H. JACKSON AND ALAN SYKES, IMPLEMENTING THE URUGUAY ROUND (1st ed. 1997); THE BRETTON WOODS AGREEMENTS: TOGETHER WITH SCHOLARLY COMMENTARIES AND ESSENTIAL HISTORICAL DOCUMENTS (Naomi Lamoreaux & Ian Shapiro eds., 2019), https://doi.org/10.2307/j.ctvk8vz01.

shattered national economies.[16] These meetings helped create the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (World Bank).[17]

The Bretton Woods sessions also focused on trade, albeit as a somewhat lower priority. Most experts agree that the great world depression extending throughout the 1930s resulted from national protectionist trade laws and policies imposing high tariffs. In turn, this became a major factor in causing the war, as nations unable to trade for or produce the goods needed to sustain their economies opted to take them from other countries. To keep this from recurring, the Allies envisioned both a treaty espousing free trade rules and principles, and an international structure for enforcing them.

In 1947, twenty-three countries met in Geneva, Switzerland, to draft a General Agreement on Trade and Tariffs (GATT) to meet Bretton Woods trade objectives.[18] The GATT called for free trade in goods with limited exceptions. A year later fifty-three countries met in Havana, Cuba, to draft an International Trade Organization (ITO) Charter based on 1947 GATT principles.[19] The U.S. never ratified the Charter because Congress blocked U.S. membership in new international organizations.[20] The U.S. President instead used executive authority to join twenty-one other countries in signing the 1947 GATT Agreement, making it applicable to the U.S.

The GATT functioned for about forty years focusing primarily on trading of goods based on two main legal rules. The first required parties to grant most favored nation (MFN) treatment to all other parties on an unrestricted basis.[21] The second required national legal treatment for like products imported from other party countries except for express GATT exceptions.[22] The MFN rule also generally prohibited import quotas, licenses, or other restrictions on goods from party states except for taxes

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[16] Jeffry Freiden, *The Political Economy of the Bretton Woods Agreement*, *in* THE BRETTON WOODS AGREEMENTS: TOGETHER WITH SCHOLARLY COMMENTARIES AND ESSENTIAL HISTORICAL DOCUMENTS 21, 21-37 (Naomi Lamoreaux & Ian Shapiro eds., 2019), https://doi.org/10.2307/j.ctvk8vz01.4

[17] *Id.* at 28, 34.

[18] The General Agreement on Tariffs and Trade, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited Jan. 21, 2024).

[19] The Havana Charter for an International Trade Organization, WORLD TRADE ORG., https://docs.wto.org/gattdocs/q/GG/SEC/53-41.PDF (last visited Jan. 21, 2024).

[20] *Id.*

[21] Principles of the Trading System, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Jan. 21, 2024).

[22] *Id.*

and duties applied equally to all member goods. The GATT further prohibited unfair trade practices, including dumping and certain government subsidies, by party states; and provided for complaint filing and resolution. However, GATT dispute settlement rules contained neither firm deadlines for processing and deciding complaints, nor mandatory enforcement. These became major factors in creating the WTO because in its pre-WTO 47-year history, the GATT resolved only a few cases per year.[23]

GATT provisions further required future negotiations, or rounds, to discuss reducing tariffs and non-tariff trade barriers on all GATT member goods.[24] Following the 1947 GATT, a number of negotiation rounds occurred. Most rounds through the 1980's focused primarily on reducing tariffs for products and product categories. The 1964-67 Kennedy Round recognized and incorporated into GATT certain developing country exceptions to MFN and general free trade provisions. The 1973-79 Tokyo Round resulted in agreements to reduce or eliminate numerous non-tariff trade barriers. The Uruguay Round talks in 1986 ultimately resulted in the 1994 Marrakesh Agreement establishing the WTO,[25] which greatly expanded both the prior GATT Agreement and the range of trade sectors in addition to goods.

B. The WTO Composition, Structure and Decision-Making Process

Created to begin in 1995, the WTO is based on a series of international agreements with treaty effect, including the Agreement Establishing the WTO and its Annexes, which in turn include an expanded GATT, and a series of other Multilateral and Plurilateral Trade Agreements, not all involving goods. The 1994 GATT[26] encompasses most of the 1947 GATT as amended by various subsequent rounds. Unlike the 1947 GATT, the 1994 GATT does not allow application of national laws or treaties existing

[23] 1 Dispute Settlement Reports within the Framework of GATT 1947, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm (last visited Jan. 17, 2024) (showing 90 cases decided by accepting panel reports and 31 cases undecided by party panel report rejections over 47 years).

[24] 1 Dispute Settlement Reports within the Framework of GATT 1947, WORLD TRADE ORG., at 17, https://www.wto.org/english/res_e/publications_e/gatt4895vol12_e.htm.

[25] Agreement Establishing the World Trade Organization, WORLD TRADE ORG., at 17, https://www.wto.org/english/docs_e/legal_e/04-wto.pdf

[26] General Agreement on Tariffs and Trade (GATT) 1994, WORLD TRADE ORG., https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_e.htm.

before 1994, which conflict with the 1994 GATT. The 1994 GATT continues prior national treatment (Article III) and MFN (Article I) rules, while reducing, eliminating, or phasing out tariffs on most non-agriculture goods.[27] GATT Article XI prohibits export bans and quantity restrictions, with a few exceptions.[28] Other key GATT rules include Articles XX(b) and (g), allowing countries to impose environmental restrictions on imports subject to national treatment and scientific evidence conditions (seldom met because these conditions must impact trade in the least restrictive manner); Article XX(a), allowing countries to restrict products violate of national public morality laws, subject to the national treatment rule (also a condition seldom met); and Article XXI, allowing genuine national security-related import and export restrictions. Article XXI is only now being fully tested.[29]

Other goods-related Multilateral Trade Agreements annexed to the WTO Agreement include:

- Agriculture, which permits subsidies on numerous products;[30]
- Textiles, which authorizes WTO member state quota agreements (but has since lapsed);[31]
- Antidumping, which codifies international antidumping legal rules;[32]
- Subsidies and Countervailing Measures, defining lawful and unlawful state export assistance;[33]

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[27] General Agreement on Tariffs and Trade (GATT) 1994, Art. 3, WORLD TRADE ORG., https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art3_e.pdf (last visited Jan. 21, 2024); General Agreement on Tariffs and Trade (GATT) 1994, Art. 1, WORLD TRADE ORG., https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art1_oth.pdf (last visited Jan. 21, 2024).

[28] General Agreement on Tariffs and Trade (GATT) 1994, Art. XI, WORLD TRADE ORG., https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art11_oth.pdf (last visited Jan. 21, 2024).

[29] *See* Voon, *supra* note 9. In the Ukraine - Russia case, a WTO panel found that military conflict between the countries justified its application. Panel Report, *Russia — Measures Concerning Traffic in Transit*, at 53-54, WT/DS512 (Apr. 5, 2019). In the Qatar-Saudi Arabia case a panel found a similar national security rule in the WTO TRIPS Agreement could apply when countries had a serious diplomatic crisis based on potential military conflict, if a party complained against for invoking it enforced domestic laws which protected the complainant's legal rights. Panel Report, *Saudi Arabia — Measures concerning the Protection of Intellectual Property Rights*, at 116, 119-20, WT/DS567/R (June 16, 2020).

[30] Agreement on Agriculture, WORLD TRADE ORG., at 51, https://www.wto.org/english/docs_e/legal_e/14-ag.pdf (last visited Jan. 21, 2024).

[31] Textiles, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/texti_e/texti_e.htm (last visited Jan. 21, 2024).

[32] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/19-adp.pdf (last visited Jan. 20, 2024).

- Safeguards, allowing WTO parties to impose emergency relief protections from serious economic harm caused by import surges (although the threshold for harm is so high that such measures are seldom permissible);[34]
- Technical Barriers to Trade (TBT), limiting the scope of permissible national product labeling, specifications, and regulations (such as import taxes) contrary to WTO principles;[35]
- Sanitary and Phytosanitary (SPS) Measures, which allow members to adopt product health and safety standards on an MFN basis, but also require sound scientific bases for such measures;[36]
- Pre-shipment Inspection, intended to facilitate customs treatment;[37]
- Rules of Origin, defining the national identity of goods for MFN treatment purposes;[38]
- Import License Procedures, designed to standardize licensure rules and procedures.[39]

These Agreements collectively and significantly exceed the prior GATT scope, as intended.

Three separate non-goods Multilateral Trade Agreements annexed to the WTO Agreement warrant inclusion here. These include the General Agreement on Trade and Services (GATS);[40] the Agreement on Trade-

[33] Agreement on Subsidies and Countervailing Measures, WORLD TRADE ORG., Art. XVI, at 19, https://www.wto.org/english/docs_e/legal_e/24-scm.pdf (last visited Jan. 20, 2024).

[34] Agreement on Safeguards, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/25-safeg.pdf (last visited Jan. 21, 2024).

[35] Agreement on Technical Barriers to Trade, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/17-tbt.pdf (last visited Jan. 21, 2024).

[36] Agreement on the Application of Sanitary and Phytosanitary Measures, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/15-sps.pdf (last visited Jan. 21, 2024).

[37]Agreement on Preshipment Inspection, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/21-psi.pdf (last visited Jan. 21, 2024).

[38] Agreement on Rules of Origin, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/22-roo.pdf (last visited Jan. 21, 2024).

[39] Agreement on Import Licensing Procedures, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/23-lic.pdf (last visited Jan. 21, 2024).

[40] General Agreement on Trade and Services, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/26-gats.pdf (last visited Jan. 21, 2024).

Related Investment Measures (TRIMS);[41] and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[42]

The GATS subjects almost all different types of services to MFN and national treatment free trade principles, with exceptions for public agency services.[43] The GATS allows WTO members to opt in and out of providing MFN and national treatment for services by express exemptions and inclusions. The GATS operates on a principle of encouraging WTO members to negotiate bilateral and multilateral service sector agreements by recognizing party rights based on MFN and national treatment. For example, education is a GATS service sector, although most WTO members have opted to exempt it from full GATS inclusion. As to educational credentials, GATS Article VII states: "A [WTO] Member may recognize the education or experience obtained, requirements met, or licenses or certificates granted in a particular country."[44] Health is another GATS service sector, viewed by observers as both a positive factor for increasing developing country access to health services and information through telemedicine; and as a problem area because of developing country health professional "brain drains" and increased health care privatization likely to reduce care access. Legal services are another GATS service sector subject to attention among attorneys, although to date the GATS has not notably increased licensure reciprocity because so many WTO members exempted them. GATS Article XIV(a) allows countries to restrict services imports on public morals grounds similar to GATT Article XX(a).[45]

The TRIMS Agreement ensures equal treatment of national and foreign investors by applying MFN and national treatment rules, along with established international law principles, to investments related to trade in goods. Of the forty-six TRIMS disputes to date, twenty-nine concluded with WTO decision implementations, and the others were amicably

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[41] Agreement on Trade-Related Investment Measures, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/18-trims.pdf (last visited Jan. 21, 2024).

[42] Agreement on Trade-Related Aspects of Intellectual Property Rights, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/27-trips.pdf (last visited Jan. 21, 2024).

[43] General Agreement on Trade in Services, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (last visited Jan. 22, 2024).

[44] General Agreement on Trade in Services, Art. VII, WORLD TRADE ORG., https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art7_oth.pdf#:~:text=Where%20a%20Member%20accords%20recognition%20autonomously%2C%20it%20shall,in%20that%20other%20Member%27s%20territory%20should%20be%20recognized (last visited Jan. 22, 2024).

[45] General Exceptions: Art. XIV of the GATS, Art. XIV(a), WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/repertory_e/g4_e.htm (last visited Jan. 23, 2024).

resolved.[46] The TRIMS Agreement only allows WTO disputes between member states.

The TRIPS Agreement requires WTO member adherence to international intellectual property agreements (the Berne Convention for copyright, the Paris Convention for patents, and the Madrid Protocol for Trademarks), as well as the adoption of reasonable national law measures to protect all intellectual property forms.[47] Worth noting here are China's extensive intellectual property law reforms during the 1990s to avoid significant U.S. trade sanctions, laying the groundwork required for China's eventual WTO membership.[48]

The WTO also has two Plurilateral Trade Agreements (binding on and benefitting only those parties which sign them), including Government Procurement,[49] intended to apply MFN and national treatment principles to public agency purchases by WTO member states and reduce local purchasing requirements, and Trade in Civil Aircraft.[50]

All WTO Agreements contain special provisions allowing developing country (LDC) exceptions to requirements applicable to other WTO members.[51] The TRIMS Agreement had a five-year LDC phase-in period with extensions possible by consensus (although the 2000 date has long since passed, quite a few members have still not conformed their laws to TRIMS, and the U.S. has indicated its refusal to allow extensions). The TRIPS Agreement likewise contained LDC phase-in periods, although a number have now expired.

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[46]Disputes by Agreement, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm (listing forty-six TRIMS cases) (last visited Jan. 21, 2024).

[47] Overview: the TRIPS Agreement, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Jan. 23, 2024).

[48] Jie Hong, Jakob Edler & Silvia Massini, *Evolution of the Chinese Intellectual Property Rights System: IPR Law Revisions and Enforcement*, *in* 18 MGMT. & ORG. R. 755, 758-59 (May 3, 2022), https://www.cambridge.org/core/journals/management-and-organization-review/article/evolution-of-the-chinese-intellectual-property-rights-system-ipr-law-revisions-and-enforcement/ACEF8E7FC893123D6D95FF6245CC51D6.

[49] Agreement on Government Procurement, Art. 3, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/gpr-94.pdf (last visited Jan. 21, 2024).

[50] Agreement on Trade in Civil Aircraft, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/air-79.pdf (last visited Jan. 21, 2024).

[51] Special and Differential Treatment Provisions, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (last visited Jan. 21, 2024).

The WTO Agreements include the Understanding of Rules and Procedures Governing the Settlement of Disputes (DSU),[52] applicable to GATT and the Multilateral Trade Agreements as described below.

The WTO structure and decision-making process include:[53]

- The Ministerial Conference, which meets biennially and is comprised of all WTO member top trade officials, each with equal voting weight;
- The General Council, which has executive authority over WTO ongoing functions and operations; is comprised of representatives of all WTO members, each with equal voting weight; and interprets the various WTO Agreements;
- The various bodies reporting to the Ministerial Conference (Committees on Trade and Development, Balance of Payment Restrictions, Budget, Finance and Administration) or General Council, Dispute Settlement Body (DSB), Trade Policy Review Body, and Councils for Trade in Goods, Trade in Services and Trade-Related Intellectual Property Rights).

Most WTO Ministerial Conference and General Council decisions require consensus, i.e., unanimous support or no formal member objection, although the DSB process is excluded from this requirement. The Ministerial Conference can grant "exceptional circumstances" waivers of WTO obligations by a three-fourths vote. WTO procedural rules require only a majority Conference or Council vote.

One must remember that the WTO is comprised of member national governments, which make all relevant decisions collectively. The WTO currently has 164 members, with another fourteen countries applying to join. The European Union (EU) is a single member representing its twenty-seven member countries.[54] The WTO itself has a relatively small professional staff that facilitates member negotiations and other activities, including dispute settlement administration.

C. The WTO Dispute Settlement Process

The WTO provides for settling international trade disputes by parties pursuant to the Dispute Settlement Understanding (DSU) and using the

[52]Understanding on Rules and Procedures Governing the Settlement of Disputes, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (last visited Jan. 21, 2024).

[53]About the Organization, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/thewto_e.htm (last visited Jan. 21, 2024).

[54] Members and Observers, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 21, 2024).

Dispute Settlement Body (DSB).[55] The DSU applies to all WTO Agreements and members, according to well-defined rules that contain the following sequential stages for resolving disputes.

- Consultation (negotiation) by dispute parties for 60 days unless the parties extend;
- Voluntary mediation if the parties wish it;
- Dispute panel establishment, investigation, and report (3-5 qualified persons not usually citizens of a disputing party), with panel reports normally due in 180 days;
- Appellate review of panel report legal findings (although panel report factual findings are not appealable), by a quorum of the permanent 7-member Appellate Body who can serve up to two 4-year terms, with three Judges deciding each appeal, in a supposed 90-day process, a stage step that is on hold indefinitely because there are no Appellate Body judges;
- Remedies arbitration if the parties cannot agree, also subject to Appellate Body review;
- DSB adoption of panel (if not appealed), and appellate decisions;
- Implementation of the decisions in a 3-step process, with WTO strongly favoring rules conformity (usually within 15 months after the decision) as the preferred remedy; and compensation or authorized retaliation allowed only when conformity does not occur.

The DSB process also permits binding arbitration in lieu of panels and the Appellate Body if parties agree; and during the decision implementation phase, the non-prevailing party has a right to binding remedies arbitration. Final DSU decisions, binding on all WTO members, get de facto automatic DSB acceptance because it requires WTO member consensus to overturn them.

Dispute remedies include (1) mutually satisfactory solutions in the consultation phase; (2) following panel or Appellate Body decisions, conforming the challenged conduct to the applicable Agreement rule; compensation; and/or (3) suspension of concessions (resulting in authorized

[55] WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement, https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (last visited Jan 21, 2024).

tariffs) by the prevailing party. Diplomacy also achieves acceptable remedies.

One key DSU aspect which has greatly enhanced WTO member DSU support is the right of third-party WTO members to participate both formally and informally in the dispute settlement process whenever a particular dispute affects, or is likely to affect, third-party trade interests. Once third parties notify the DSB that a particular dispute substantially affects their interests, DSU Article 10 allows direct third-party participation in panel proceedings, and DSU Article 17 allows third-party appellate review submissions.

D. Illustrative WTO Cases Showing Key Rules Applications

Since its first Appellate Body decision in 1995, soon after the DSU took effect, the DSB has received hundreds of complaints with a majority settled at the consultation stage or before any panel decision. Of cases decided at later stages, a number of them are significant. Listed below are cases closely studied by international trade lawyers and their clients as examples of how various WTO rules apply. Except where noted, these cases reflect Appellate Body decisions:

- The *Reformulated Gasoline* case, finding U.S. environmental rules applicable to Brazilian and Venezuelan refined gasoline imports violated the WTO national treatment rule.[56]
- The *Bananas* case, resulting in multiple panel and Appellate Body decisions finding European Union (EU) banana quotas and import license restrictions favoring bananas from former European colonies in Africa, based on a pre-WTO treaty, in violation of the WTO MFN rule.[57]

[56] WTO, Dispute Settlement DS2: One Page Case Summaries, *United States – Standards for Reformulated and Conventional Gasoline,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds2sum_e.pdf (last visited Jan 21, 2024).

[57] WTO, Dispute Settlement, DS27: *European Communities – Regime for the Importation, Sale and Distribution of Bananas,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm (last visited Jan 21, 2024).

- The *Meat Hormones* case, resulting in panel and Appellate Body decisions that EU import bans of U.S. and Canadian hormone-treated beef violated the SPS Agreement by failing to meet required scientific evidence standards.[58]
- The *Copyright Music* case, a panel decision, not appealed, finding a U.S. copyright law that exempted bars and restaurants from recorded music playing royalty payments violated the TRIPS Agreement because the latter allowed no such exemption.[59]
- The *Foreign Sales Corporation* case, with panel and Appellate Body findings that a U.S. tax law benefiting U.S. exporters violated the SCM Agreement as an illegal export subsidy.[60]
- The *Dolphin-Tuna* case, resulting in various panel and Appellate Body findings that a U.S. environmental protection law barring imports of tuna fished in a manner harmful to dolphins violated WTO import restriction bans because the U.S. could not prove the law was needed to protect dolphins; and ultimately further finding U.S. tuna import labeling laws did not violate the TBT Agreement.[61]
- The *Steel Safeguards* case, with panel and Appellate Body findings that U.S. steel import restrictions violated

[58] WTO, Dispute Settlement DS26: *European Communities – Measures Concerning Meat and Meat Products (Hormones),* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm (last visited Jan 21, 2024); WTO, Dispute Settlement DS48: *European Communities – Measures Concerning Meat and Meat Products (Hormones),* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds48_e.htm (last visited Jan 21, 2024).

[59] WTO, Dispute Settlement DS160: *United States – Section 110(5) of US Copyright Act,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm (last visited Jan 21, 2024)

[60] WTO, Dispute Settlement DS108: *United States – Tax Treatment for "Foreign Sales Corporations,"* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds108_e.htm (last visited Jan 21, 2024).

[61] WTO, Dispute Settlement DS381: *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm (last visited Jan 21, 2024).

the Safeguards Agreement by not meeting import surge criteria.[62]

- The *Byrd Amendment* case, resulting in panel and Appellate Body findings that a U.S. law giving financial compensation to U.S. importers harmed by illegal dumping and subsidies violated WTO Anti-dumping and SCM Agreement remedy rules.[63]
- The *China Audiovisuals* and *Intellectual Property* cases, resulting in panel and Appellate Body findings that Chinese import sales and distribution restrictions on artistic and multi-media products violated WTO import restrictions rules and could not be justified on GATT Rule XX(a) or GATS Article XIV(a) public morals protection grounds.[64]
- The *Country of Origin (COOL)* product labeling case, with panel and Appellate Body findings that U.S. import product labeling requirements violated the TBT Agreement.[65]
- The *Internet Gambling* case, resulting in panel and Appellate Body findings that U.S. online gambling bans violated the WTO national treatment rule because of online gambling permitted in some U.S. states, while recognizing a WTO member right to restrict gambling generally for public morals protection as long as it meets national treatment and MFN requirements.[66]

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[62] WTO, Dispute Settlement DS252: *United States – Definitive Safeguard Measures on Imports of Certain Steel Products,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds252_e.htm (last visited Jan 21, 2024).

[63] WTO, Dispute Settlement DS217: *United States – Continued Dumping and Subsidy Offset Act of 2000,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds217_e.htm (last visited Jan 21, 2024).

[64] WTO, Dispute Settlement DS363: *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm (last visited Jan 21, 2024).

[65] TO, Dispute Settlement DS384: *United States – Certain Country of Origin Labelling (COOL) Requirements,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm (last visited Jan 21, 2024).

[66] WTO, Dispute Settlement DS285: *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm (last visited Jan 21, 2024).

- The *Rare Earths* case, resulting in panel and Appellate Body findings that China's minerals export restrictions violated WTO export restriction rules.[67]
- The *Seal Products* case, resulting in panel and Appellate Body findings which upheld most EU bans of seal mammal byproducts as a valid WTO Article XX conservation measure, but disallowed certain exceptions for EU indigenous tribe exports.[68]
- The *Aircraft Subsidies* case, with numerous Appellate Body and panel decisions finding that U.S. (including U.S. state) and EU (including EU country) financial support for aircraft exports violated the SCM Agreement.[69]

E. Ministerial Conferences[70]

The key WTO meetings are biennial Ministerial Conferences. The primary ones initially included the 1999 Seattle Conference and the 2001 Doha Conference.

i. The 1999 Battle at The Seattle Conference and Why It Failed

Consistent with its mandate to hold ongoing conferences and

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[67] WTO, Dispute Settlement DS431: *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds431_e.htm (last visited Jan 21, 2024).

[68] WTO, Dispute Settlement DS400: *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm (last visited Jan 21, 2024).

[69] *Measures Affecting Trade in Large Civil Aircraft,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm (last visited Jan 21, 2024); WTO, Dispute Settlement DS353: *United States – Measures Affecting Trade in Large Civil Aircraft -Second Complaint,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds353_e.htm (last visited Jan 21, 2024).

[70] WTO, Ministerial Conferences, https://www.wto.org/english/thewto_e/minist_e/minist_e.htm (last visited Jan 21, 2024) (The topmost decision-making body of the WTO is the Ministerial Conference, which usually meets every two years. It brings together all members of the WTO, all of which are countries or customs unions. The Ministerial Conference can take decisions on all matters under any of the multilateral trade agreements).

negotiations on all WTO aspects, the parties scheduled a November 1999 meeting in Seattle. Topics to be discussed included whether to:

- Increase transparency and non-government participation in WTO disputes (which are conducted in secret unless parties agree to open them) and permit only member states to participate except for non-party briefs in the WTO appeal process;
- Link environmental and worker rights protection measures to WTO trade rules and require dispute panels to consider them in decisions; and
- Negotiate a new Agriculture Agreement which would eliminate all subsidies in a shorter phase-out period.

In response to great public interest in the Seattle meeting, President Clinton openly encouraged all persons and groups interested in WTO to come to Seattle. Many U.S. environmental and labor organizations, as well as many non-U.S. counterparts, came to Seattle to protest past WTO failures, to address the above issues, and to urge changes. Neither the U.S. Government nor Seattle public officials anticipated the large number of demonstrators. When local law enforcement agencies proved unable to keep order, the Seattle meeting broke down after the demonstrators took control of Seattle's streets and blocked WTO delegates' ability to attend scheduled meetings for nearly two days. Most demonstrations lacked local government permission, and thousands of protesters rioted in the streets, destroying downtown Seattle property in what became known as the Battle of Seattle.[71]

Even when the delegates were finally able to attend at least some meetings, there was neither sufficient time nor much desire to conduct serious discussions about any of the above controversial proposals, objectionable to many members. Most developing countries oppose any linkage of environmental protection measures to WTO trade rules and policies because they believe they lack the resources to conform to such

[71] University of Washington Libraries: *WTO Seattle Collection*, https://content.lib.washington.edu/wtoweb/ (last visited Jan 21, 2024) (This has been the most documented Ministerial Conference. An excellent source of information describing it is the University of Washington WTO Seattle Collection); *see also* Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values,* 22 U. PA. J. INT'L ECON. L. 61 (2001); Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle,* 17 ARIZIZ. J. INT'L & COMP. L. 257 (2000). (This author attended the Seattle Conference at the U.S. Senate Trade Subcommittee Chair's invitation to participate in various negotiation sessions, a number of which were canceled after the riots began).

measures. Many (although not all) developing countries oppose linking labor protections and employee rights to WTO trade rules for similar reasons. Although many countries do not necessarily oppose greater transparency in WTO decisions and perhaps limit NGO or other non-party participation in disputes, present WTO rules requiring party consensus as a condition for change make negotiating details likely to achieve such consensus difficult. Because the EU has traditionally opposed an end to most agricultural subsidies and a number of other WTO members share this view, the likelihood of a new Agriculture Agreement being seriously negotiated in Seattle was likewise remote.

The Seattle delegates left without accomplishing anything.

ii. The 2001 Doha Conference Highlights

Despite the September 11, 2001, World Trade Center attacks and resulting travel disruptions, the 2001 WTO Ministerial Conference scheduled for Doha, Qatar, proceeded without incident and resulted in some significant new WTO directions.

- The Conference responded to concerns by developing countries impacted by AIDS epidemics and the lack of available, affordable medications by proposing several intellectual property measures to make such medications available through mandatory licensing by pharmaceutical companies, under certain conditions (although to date few such licenses appear to have been granted).
- The Conference formally approved China's (and Taiwan's) WTO membership, subject to the adoption of required domestic law changes.

iii. Subsequent Conferences Highlights

Since Doha, Ministerial Conferences have been held in Cancun (2003), Hong Kong (2005), Geneva (2009 & 2011), Bali (2013), Nairobi (2015), Buenos Aires (2017), and Geneva (2022). Before the Nairobi Conference apart from approving new members, including Russia (2011), these Conferences achieved relatively few changes and appeared to be mainly discussion forums for long-range trade objectives. The Bali Conference did develop specific steps to help lesser-developed members become more effective trading partners. A primary point of contention in all these Conferences prior to Nairobi was whether to and how to eliminate agricultural subsidies despite an emerging consensus favoring agriculture export subsidies elimination (nonetheless raising serious doubts about how

to distinguish direct from indirect export subsidies). The Nairobi Conference has probably been the most productive one since the WTO began in terms of results because the negotiators agreed to eliminate almost all agriculture export subsidies; develop favorable customs treatment for the least developed country products; and eliminate most tariffs on information technology products. The Buenos Aires Conference focused mainly on trying to finalize a fisheries subsidies agreement, which has not yet happened. The WTO indefinitely postponed the Ministerial Conference, scheduled for June 2020 in Nur-Sultan, Kazakhstan, because of WTO organizational problems caused by the Appellate Body crisis and the WTO Director General's resignation, as well as Covid.

The WTO held its next Conference in Geneva in 2022, where much appeared to be accomplished. Results included a long-awaited final Fisheries Subsidies Agreement; easing TRIPS Agreement licensing requirements for pandemic-related products; allowing food export restrictions for food security purposes; continuing customs duty exemptions for electronic commerce transactions; and a commitment to improving WTO operations, even though the Conference failed to resolve the Appellate Body crisis.[72]

The most recent Ministerial Conference took place in February 2024 in Abu Dhabi, where serious discussions about whether to revive the WTO Appellate Body occurred but with no progress made; and little else of significance resulted.[73]

F. The Appellate Body Crisis[74]

[72] WTO, Ministerial Conferences: *MC12 "Geneva Package" – in brief*, https://www.wto.org/english/thewto_e/minist_e/minist_e.htm (last visited Jan 21, 2024) (The topmost decision-making body of the WTO is the Ministerial Conference, which usually meets every two years. It brings together all members of the WTO, all of which are countries or customs unions. The Ministerial Conference can take decisions on all matters under any of the multilateral trade agreements).

[73] *Remarks by Ambassador Katherine Tai at G20 Trade and Inv. Ministers' Meeting*, *supra* note 12; Ken Heydon, *MC13 Success Critical to the Liberal Trading Order*, E. ASIA F., (Sept. 26, 2023). https://www.eastasiaforum.org/2023/09/26/mc13-success-critical-to-the-liberal-trading-order/; Norman P. Aquino, *WTO Plans to Fix Appellate Body Paralysis by 2024*, BUS WORLD, (Sep. 14, 2023, 12:33 AM). https://www.bworldonline.com/top-stories/2023/09/14/545399/wto-plans-to-fix-appellate-body-paralysis-by-2024/; *see also, WTO | 2024 News items - MC13 ends with decisions on dispute reform, development; commitment to continue ongoing talks*.

[74] Brandon J. Murrill, *The WTO's Appellate Body Loses Its Quorum: Is This the Beginning of the End for the "Rules-Based Trading System?",* CONG. RES. SERV., (Dec. 16, 2019) https://crsreports.congress.gov/product/pdf/LSB/LSB10385; Jorge Miranda & Manuel Sánchez Miranda, *Chronicle of a Crisis Foretold: How the WTO Appellate Body Drove Itself into a Corner*, 26 J.INT'L L. 435 (2023); Peter Van den Bossche, *Can the WTO Dispute Settlement*

To date, the WTO has successfully modernized global trade rules and efficiently settled many trade disputes. However, the U.S., at President Trump's direction, blocked the appointment of new Appellate Body members to replace those with expired terms, who are not allowed to continue. In November 2019, the Appellate Body lost its quorum required to function, and a year later its last member left. President Biden indicated no intention to change Trump's position. This left the Appellate Body with no members to hear cases for the past several years, and effectively shut down much, although by no means all, of the DSU dispute resolution process for cases not settled, before the Appellate Body stopped functioning.

The U.S. tacitly supported by some other countries, disagrees with the broad scope of past Appellate Body rulings and seeks renegotiation of the overall dispute settlement process, including the requirement for WTO member consensus to overturn Appellate Body rulings. The U.S. further objects to Appellate Body decisions using prior cases as precedent as outside the scope of Appellate Body powers, and to frequent Appellate Body delays in meeting what were intended to be strict DSU decision deadlines.[75] So far, the situation remains at an impasse, with no clear resolution in sight.

Meanwhile, the Appellate Body crisis has partly created what may well be the Appellate Body critics' intended effect of shutting down panel decision appeals to block final dispute resolutions. Dispute parties who disagree with panel decisions can and do appeal such decisions "into the void," knowing these appeals cannot be heard.[76] To date, twenty-eight panel

System Be Revived?, Options for Addressing a Major Governance Failure of the World Trade Organization, (WTI, Working Paper no. 03/2023, 2023) https://www.wti.org/media/filer_public/dc/68/dc6816ae-6d34-4f95-8d8d-837597ce54f3/wti_wp_03_2023.pdf.

[75] Off. of the U.S. Trade Representative, Rep. on the APP. Body of the WTO (Feb. 2020), https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf; James Bacchus, *The Biden Administration Continues to Be Wrong about the WTO*, CATO INST., (Sept. 26, 2023, 11:13 AM). https://www.cato.org/blog/biden-administration-continues-be-wrong-about-wto.

[76] WTO, Dispute Settlement: *Understanding on rules and procedures governing the settlement of disputes,* Annex 2 of the WTO Agreement, https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#25 (last visited Jan 21, 2024); Peter Ungphakorn, *Technical note: Appeals 'Into the Void' in WTO Dispute Settlement*, TRADE B BLOG (Sept. 19. 2023). https://tradebetablog.wordpress.com/technical-note-appeals-into-the-void-in-wto-dispute-settlement/.

decisions have fallen into this void, with many more expected.[77] The EU has recently hinted that panel decisions should perhaps be considered final for the purpose of allowing whoever wins the dispute to impose sanctions under WTO rules, but this would appear to conflict with the DSU provisions themselves unless all parties to the dispute agreed.[78] Such an approach would resemble the pre-WTO GATT dispute resolution process, which was so universally criticized that it helped create the current DSU.

As demonstrated below, however, the Appellate Body's absence has not necessarily paralyzed trade dispute resolution finalization, neither at the WTO nor elsewhere.

G. The MPIA and Other WTO Arbitration Alternatives to No Appellate Body

In 2020, the EU (on behalf of its twenty-seven member countries) plus twenty-two countries, but not the U.S., signed the Multi-Party Interim Arbitration (MPIA) Agreement subjecting WTO panel decisions to binding arbitration appeals in cases involving the signatories as parties, conditioned on the absence of an Appellate Body to hear them; and any non-signatory parties may join the Agreement if they choose.[79] Article 25 of the DSU expressly allows arbitration as a substitute for resolving any WTO dispute when parties agree.[80]

Numerous WTO members, led by the United States, have not signed

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[77] WTO, Dispute Settlement: Appellate Body, https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (last visited Jan 21, 2024).

[78] EC Trade Consultation: *Information gathering on the Indonesian export ban and domestic processing requirement on nickel ore* (July 7, 2023), (https://policy.trade.ec.europa.eu/consultations/information-gathering-indonesian-export-ban-and-domestic-processing-requirement-nickel-ore_en; https://policy.trade.ec.europa.eu/consultations/information-gathering-indonesian-export-ban-and-domestic-processing-requirement-nickel-ore_en; Panel Report, *Indonesia – Measures Relating to Raw Materials*, WTO Doc. WT/DS592/R (Nov. 30, 2022) (This Consultation is in direct response to a favorable panel decision regarding Indonesia's nickel ore export ban and domestic processing requirements, which Indonesia appealed into the void).

[79] WTO Plurilateral, *Multi-Party Interim Appeal Arbitration Arrangement (MPIA)*, https://wtoplurilaterals.info/plural_initiative/the-mpia/ (last visited Jan 21, 2024). (To date 53 WTO Members are MPIA Parties, although the 27 individual EU countries are counted for numbers purposes even though the EU is a single WTO member).

[80] WTO, Dispute Settlement: *Understanding on rules and procedures governing the settlement of disputes,* Annex 2 of the WTO Agreement, https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#25 (last visited Jan 21, 2024).

on to the MPIA and some experts predicted it would likely fail.[81] However, after a slow start, it now looks like the MPIA has taken root as a viable Appellate Body alternative. The MPIA has produced two final WTO decisions.[82] Perhaps even more significantly, ten additional WTO cases to date, which include those involving major trading nations such as the EU, Canada, Australia, and China, have MPIA appeal arbitration agreements, with eight pending, one dismissed for failure to pursue the appeal, and one recently resolved through pre-arbitration consultation.[83] The EU seems especially pleased with the MPIA option and actively encourages all WTO members to use it.[84] On the other hand, the U.S. has refused to consider MPIA participation and likened the MPIA to the Appellate Body's "worst

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[81] David A. Gantz, *The Demise of WTO Dispute Settlement: Are Dispute Settlement Mechanisms Under Free Trade Agreements a Viable Substitute?*, (July 11, 2019), https://ssrn.com/abstract=3418621.

[82] Panel Report, Arbitration Award, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, WT/DS591/ARB25 (Dec. 21, 2022); Panel Report, Arbitration Award, *Turkey — Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, WT/DS583/ARB25 (July 25, 2022).

[83] Panel Report, Appeal Arbitration Agreement, *Canada — Measures Concerning Trade in Commercial Aircraft*, WT/DS522/20 (June 3, 2020) (case withdrawn); Panel Report, Appeal Arbitration Agreement, *Costa Rica — Measures Concerning the Importation of Fresh Avocados from Mexico* WT/DS524/5/Rev.1 (Dec. 2, 2021) (panel decision adopted); Panel Report. Appeal Arbitration Agreement, *Canada — Measures Governing the Sale of Wine*, WT/DS537/15 (Mar. 6, 2020) (case settled); Panel Report Appeal Arbitration Agreement, *China — Measures Concerning the Importation of Canola Seed from Canada*, WT/DS589/5 (Sep. 28, 2021) (case dropped); Panel Report, Appeal Arbitration Agreement, *China — Anti-dumping and Countervailing Duty Measures on Barley from Australia*, WT/ DS598/5 (Aug. 20, 2021) (case settled); Panel Report, Appeal Arbitration Agreement, *China — Anti-Dumping Measures on Stainless Steel Products from Japan*, WT/ DS601/6 (Apr. 13, 2023)(panel report adopted); Panel Report, Appeal Arbitration Agreement, *China — Anti-Dumping and Countervailing Duty Measures on Wine from Australia*, WT/DS602/3 (Dec. 20, 2021) (panel suspended at parties' request); Panel Report, Appeal Arbitration Agreement, *Australia — Anti-Dumping and Countervailing Duty Measures on Certain Products from China*, WT/DS603/4 (Sept. 20, 2022); Panel Report, Appeal Arbitration Agreement, *China — Measures Concerning Trade in Goods*, WT/DS610/10 (July 7, 2023 (case extended); *China — Enforcement of Intellectual Property Rights* WT/DS611/7 (July 7, 2023) (case extended). WTO, Dispute Settlement: The Disputes, Chronological lists of disputes cases, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Jan. 21, 2024) (these disputes and their parties' MPIA arbitration agreements may be accessed at the WTO Disputes Chronology Webpage).

[84] WTO, Dispute Settlement: *Türkiye states intention to implement findings in pharmaceuticals dispute with EU*, (Aug. 29 2022), https://www.wto.org/english/news_e/news22_e/dsb_29aug22_e.htm; European Commission Press Release, EU welcomes Japan joining dispute settlement arrangement (Mar. 10, 2023), https://policy.trade.ec.europa.eu/news/eu-welcomes-japan-joining-dispute-settlement-arrangement-2023-03-10_en.

practices."[85]

One case has also recently been submitted for non-MPIA arbitration pursuant to the Article 25 general arbitration provision.[86] Interestingly, the U.S. and EU used Article 25 arbitration years ago to resolve the above *Copyright Music* case. It remains to be seen how much Article 25 MPIA and non-MPIA arbitrations can replace Appellate Body decisions, given the limited history to date. Major trade nations are using the MPIA, which bodes well for its future.

H. Some Special WTO China Considerations

China's WTO participation warrants a separate mention because of its membership importance. For years, China sought unsuccessfully to join the GATT because Taiwan was an early GATT proponent, even though GATT members ultimately excluded Taiwan because of concerns about China's reaction, subsequently, the WTO, when its economy began globalizing in the 1980's. Although membership requires unanimous WTO approval, it is always granted at some point after a country seeking to join makes significant changes in its laws and economic systems to ensure compatibility with MFN, national treatment, and other WTO rules and agreements. These changes often take, and in China's case did take, many years. The U.S. and the EU guided membership discussions in a manner requiring China to make these changes. The WTO lays out the lengthy chronology and steps leading to China's 2021 membership.[87] In addition to its required legal and economic changes, another key reason China received U.S., E.U., and other member support was to subject China to DSU rules and procedures, which China gladly accepted.

China's WTO membership has fostered, and continues to foster,

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[85] WTO, Dispute Settlement: *Panels established to review Indian tech tariffs, Japanese export restrictions EU palm oil measures* (July 29, 2020), https://www.wto.org/english/news_e/news20_e/dsb_29jul20_e.htm.

[86] WTO, Dispute Settlement System Training Module: Chapter 8, *Dispute Settlement without recourse to Panels and the Appellate Body*, 8.2 Arbitration pursuant to Article 25 of the DSU, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c8s2p1_e.htm (last visited Jan 21, 2024).

[87] WTO, Accession, *China*, https://www.wto.org/english/thewto_e/acc_e/a1_chine_e.htm: (last visited Jan 21, 2024); *see also* PETROS C. MAVROIDIS & ANDRE SAPIR, CHINA AND THE WTO: WHY MULTILATERALISM STILL MATTERS (Princeton Univ. Press 2021).

controversy because its critics do not believe China's legal and economic changes have necessarily met expectations. Critics also believe China has abused its status by entering as a developing country under a 15-year plan and continuing to act like one.[88] However, China has actively participated in numerous WTO disputes as a primary party and when it loses cases, it has consistently agreed to comply with Appellate Body and panel decisions. Two concrete examples reflect this point. In a complaint filed by the United States against China's restrictions on publications and media products (WTO Case DS 363), China lost the case at the Appellate Body and agreed to comply with the decision.[89] The same occurred in the above-referenced WTO Rare Earths case.[90] There are numerous other examples.

China's commitment to rule-based dispute settlement matters in terms of how it handles future trade disputes. As noted above, China has joined the MPIA, subjecting panel decision appeals to binding arbitration. Perhaps more importantly, China took the leadership role in negotiating the Regional Comprehensive Economic Partnership (RCEP Agreement), now in effect with some sixteen other countries, which contains binding dispute resolution rules similar to the WTO's.[91] This seems ironic in that the U.S., which insisted on China's firm commitment to the DSU process as a WTO membership condition because of the U.S. commitment to law-based trade case decisions, now refuses to help reinstate the Appellate Body; refuses to join the MPIA; and has rejected in its own trade agreements any effort to apply WTO or WTO-like dispute settlement principles.

i. A Brief WTO Assessment

The GATT generally accomplished its main purpose before the WTO was created by moving the world towards eliminating, phasing out, and reducing tariffs on many non-agricultural products and quite a few agricultural products. The GATT firmly entrenched national treatment and

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[88] Council on Foreign Relations, *What Happened When China Joined the WTO?* (June 17, 2021), https://world101.cfr.org/global-era-issues/trade/what-happened-when-china-joined-wto; Henry Gao, *WTO Reform And China: Defining or Defiling the Multilateral Trading System?,* 62 HARV. INT'L L.J. 1 (2021); Petros C. Mavroidis & Andre Sapir, *China in the WTO Twenty Years On: How to Mend a Broken Relationship?*, 24 GERMAN L.J. (2023), published online at https://www.cambridge.org/core/journals/german-law-journal/article/china-in-the-wto-twenty-years-on-how-to-mend-a-broken-relationship/DDC80B78E5352E51AEEF6C6866488946.

[89] Mavroidis & Sapir, *supra* note 88, at 233.

[90] *Id.*

[91] *See infra*, notes 114-119 and accompanying text.

MFN principles as bedrock rules now incorporated into all other multilateral and bilateral trade agreements including the WTO's. The WTO nonetheless reflects a keen desire by most GATT member states to solve two problems inherent in the prior GATT. The first, perhaps most important to international trade attorneys, involved the need for clear trade dispute resolution rules with set procedures and deadlines. Because the pre-WTO GATT lacked these, relying instead on dispute party willingness to cooperate in good faith when bringing disputes, plus a strong bias favoring diplomatic negotiation resolution, it decided relatively few cases. The second problem, fundamentally important for all global trade, involved the need to expand the pre-WTO GATT scope from merely an agreement for the trade of goods, to agreements encompassing all key international trade activities such as services, intellectual property, science-based health and safety trade regulations, government procurement, modern subsidies, and anti-dumping rules, among others. The WTO creation resolved both.

From a positive perspective, the DSU process seemed to work well before the Appellate Body crisis, and most parties complied with DSB decisions upholding results from prior stages. Even the WTO mega-cases noted below tended to get resolved in phases. Moreover, most countries want it to continue. The consultation stage has become a place for diplomatically resolving the majority of trade disputes. In addition, at least anecdotally the existence of the DSU consultation and other prescribed stages has prevented many disputes, through diplomatic negotiations, from ever being filed with the WTO. The ongoing WTO negotiations through Ministerial Conferences and member initiatives to eliminate or reduce trade barriers in all trade activities and sectors likewise play a positive role in enhancing trade. The approval of China in 2000 and Russia in 2011 as WTO members were major developments because these memberships required both countries to adopt thousands of new laws and regulations as conditions. The fact that virtually all countries are either WTO members or are in the membership application process means almost all global trade now operates subject to WTO rules and agreements. Finally, the overall record of DSU decision compliance is very high.

From a negative perspective, the DSU process has received sharp criticisms going well beyond the Appellate Body.[92] These include a lack of

[92] Helpful WTO criticism sources include Jeffrey Kucik & Sergio Puig, *Do International Dispute Bodies Overreach? Reassessing World Trade Organization Dispute Ruling*, 66 INT'L STUD.Q. (Oct. 31, 2022); Marco Bronckers, *Trade Conflicts: whither the WTO?*, 47 LEGAL ISSUES OF ECON. INTERROGATION 221 (2020), at 221-23; Steve Charnovitz, *A WTO If You Can Keep It*, GEO. WASH. UNIV. L. SCH. RSCH. PAPER NO. 2019-46 1, 8-9 (2019) for helpful WTO

meaningful regard in the DSU process for national law and international treaty environmental protections despite GATT Article XX because most environmental protection arguments have failed at the panel and Appellate Body stages when they restrict trade. Another criticism includes the absence of any labor rules protecting workers from abusive working conditions in the production of export-related goods, and increasingly services. The DSU process does not allow direct non-government party participation, requiring private actors to rely on their own national governments to make the non-government entity arguments even when private party relations with their governments are hostile. A lack of transparency created strong attacks because the DSU imposes confidentiality on its entire process until panel and Appellate Body decisions become final. Developing countries have also long viewed the DSU with suspicion, because the process often requires expensive legal, economic, science, and industry experts to bring or defend cases, even though DSU developing country participants have fared reasonably well with their case results.

Another justified criticism of the WTO, shared by this author in regards the relative handful of mega-cases that last for decades, involve many members as direct and third-party participants, and do not seem ever to attain permanent compliance.[93] These cases, almost always characterized by retaliatory remedies fighting both inside and outside the WTO process, often involve the two largest WTO members – the U.S. and the EU (operating as a single member representing the EU country bloc). Examples include the above-mentioned *Bananas*,[94] *Meat Hormones*, and *Aircraft*

criticism, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3498574; and *especially* former Appellate Body U.S. Member James Bacchus, *The World Trade Organization: Myths versus Reality*, CATO INSTITUTE (Sept. 26, 2023), https://www.cato.org/publications/world-trade-organization-myths-versus-reality, which provides an incisive WTO criticisms point-counterpoint analysis.

[93] *See* Marc D. Froese, *Does Trade Retaliation Work? How Members Learned Effective Retaliation at the WTO and Applied those Strategies to the Trump Tariffs*, SSRN 5-6 (July 8, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4157936. Although Professor Froese's intent is not to criticize these cases, he describes them in significant chronological detail leaving no doubt about their effects.

[94] Although technically the *Bananas* case did not involve the U.S. as a claimant, U.S. companies owned much of the banana production and commercialization in the WTO member countries which did file their complaint against the EU. With the private sector financial support, first at the GATT and then transferring into the WTO when it began. Professor Bhala provides an in-depth discussion of the case, which continued for years past his publication. Raj Bhala, *The Bananas War*, 31 MCGEORGE L. REV. 839, 843-45 (2000).

Subsidies cases. Another classic mega case is the U.S.-Canada *Softwood Lumber* anti-dumping and subsidies dispute which began well over twenty years ago at the WTO, thirteen years before that at the GATT and through the North American Free Trade Agreement (NAFTA) dispute resolution process; and continues as a conflict over how the U.S. should calculate WTO-approved tariffs on subsidized and dumped lumber.[95] After losing the *Meat Hormones* case, the EU still refused to allow these product imports, entitling the U.S. and Canada to impose offsetting tariffs on various EU products, with further disputes lasting years over the application of these tariffs and their amounts. Fortunately for the WTO, such cases are the exception, and the Appellate Body crisis has frozen these, along with some others, in place as parties continue assessing other appeal and trade remedy options.

Perhaps the biggest future challenge to the WTO dispute settlement process will come from the increasing number of alternatives available to countries for resolving trade disputes through provisions contained in multilateral and bilateral trade agreements. Some are discussed below.

II. NON-WTO TRADE AGREEMENT DISPUTE SETTLEMENT MEASURES

Although many still consider the DSU the world's primary legal forum for settling trade disputes, most other multilateral and bilateral trade agreements contain substantially similar or viable alternative dispute settlement provisions. So far, about twenty-five percent of the WTO member countries have agreed to use arbitration as an alternative WTO appeals mechanism through the MPIA or otherwise, but if the United States and other large trading nations like India do not participate, non-MPIA member disputes have no binding finality.

This does not mean, however, that countries lack viable trade dispute settlement mechanisms outside the WTO. The multilateral and bilateral trade agreements described below, which collectively involve most WTO member countries as parties, all have dispute settlement provisions substantially similar or legally equivalent to the DSU for the same dispute types including, in almost all cases, single panel binding arbitration by

[95] *See* World Trade Organization, *Index of Disputes Issues,* WTO.ORG, https://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm (last visited Jan. 11, 2024) (for the list of the disputes between the U.S. and Canada). *See also* Olivier Rancourt & Gabriel Giguère, *Canadian Softwood Lumber: A Costly Dispute for Consumers and Companie*s, MONTREAL ECON. INSTITUTE (June 30, 2022) https://www.iedm.org/canadian-softwood-lumber-a-costly-dispute-for-consumers-and-companies/ (for a dispute of chronology).

arbitrators required to have the same high qualifications as WTO panel members and remedies arbitrators.

These other agreement dispute settlement measures have not yet been much utilized except for those within the EU and North American Free Trade Agreement (NAFTA) countries because of WTO member preference for the DSU; and also, because some key agreements are new. That said, these agreements can nonetheless be used in lieu of the DSU by their respective parties in disputes against each other. Moreover, some are starting to be. Rule XXIV of the 1994 GATT Agreement expressly recognizes the validity of these agreements, if they contain the same WTO trade liberalization objectives and do not result in more restrictive trade.[96] As of August 2023, the WTO reports 360 regional trade agreements in force.[97] Some are discussed below.

A. U.S. Trade Agreement Dispute Settlement Measures

Despite its refusal to resolve the WTO Appellate Body situation, the U.S. has numerous multilateral and bilateral trade agreements with detailed dispute settlement measures. Since 2002, U.S. law has required these agreements to include trade-related environmental and labor protections, a major departure from the WTO.

i. NAFTA & USMCA Dispute Resolution

The NAFTA[98] and its United States, Mexico, and Canada Agreement (USMCA)[99] successor, have comprehensive trade dispute settlement procedures similar in certain aspects to those in the DSU. The NAFTA consultation and panel stages mirrored those at the WTO, although the NAFTA had no Appellate Body. Its panel decisions were final, which went to the losing party government for implementation. These Agreements give the three country parties the option of using their own processes or the DSU, and once a complaining party chooses the forum, it becomes

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[96] General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194 art. XXIII.

[97] World Trade Organization, *Regional Trade Agreements Database,* https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx (last updated Jan. 12, 2024).

[98] North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M 289.

[99] The United States-Mexico-Canada Agreement, Oct.1, 2018, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

exclusive to the dispute.[100] Both Agreements cite multiple WTO Agreements as sources to be used in interpreting the former, indicating party reliance on the WTO for interpreting and applying NAFTA and USMCA terms. NAFTA Chapter 11 encompassed investor-state disputes; Chapter 14 encompassed financial disputes; Chapter 19 encompassed anti-dumping and subsidies cases; and Chapter 20 covered most other NAFTA areas. The NAFTA dispute processes received and resolved quite a few different cases pursuant to all these Chapters. Various *Softwood Lumber* case aspects have been presented to NAFTA Chapter 19 for resolution. The NAFTA provisions still apply to complaints filed before the USMCA 2020 effective date, but parties have already begun filing cases under USMCA rules and procedures.[101]

The NAFTA broke the new U.S. trade agreement ground by including labor and environmental dispute provisions requiring each party to enforce its own labor and environmental laws. Mexico had to enact modern environmental laws to get NAFTA approval. In 2002, the U.S. Congress enacted a law requiring the inclusion of labor and environmental protection provisions in all future U.S. trade agreements.[102]

USMCA Chapter 31 essentially incorporates these multiple NAFTA Chapters for the purpose of providing rules and procedures for most USMCA disputes except for Chapter 11 investor disputes. The USMCA eliminates such investor disputes between Canada and U.S. parties altogether; and substantially limits them for disputes between U.S. and Mexican parties to direct expropriation cases. Mexican and Canadian investors' private party disputes fall outside the scope of USMCA, although both Mexico and Canada are parties to the CPTPP, which does allow them.[103] USMCA Chapter 31 has labor and environmental dispute provisions subject to some added consultation requirements. USMCA

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[100] David A. Gantz, *Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties*, 14 AM. U. INT'L L. REV. 1025, 1026-27 (1999).

[101] To review NAFTA disputes and their outcomes, as well as disputes filed under the USMCA, *see* The Secretariat, *Publications,* CAN-MEX-USA-SEC.ORG, https://can-mex-usa-sec.org/secretariat/report-rapport-reporte.aspx?lang=eng (last visited Jan. 14, 2023) and SCOTT SINCLAIR, THE RISE AND DEMISE OF NAFTA CHAPTER 11, 28-61 (2021) for a list of NAFTA Chapter 11 disputes.

[102] 19. U.S.C. §§ 3802(a)(5) and 3802(a)(6).

[103] For USMCA dispute resolutions and overall Agreement explanations, *see* M. ANGELES VILLARREAL, THE UNITED STATES-MEXICO-CANADA AGREEMENT (USMCA) 32 (2023); Nina M. Hart, *Enforcing International Trade Obligations in USMCA: The State-State Dispute Settlement Mechanism*, (Jan. 3, 2020), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://crsreports.congress.gov/product/pdf/IF/IF11399.

Chapter 27 requires each party to have modern anti-corruption laws and enforce them.[104]

The USCMA has so far seen three disputes decided by panels. One favored the U.S. challenge to Canada's dairy import restrictions;[105] another favored Canada and Mexico against the U.S. challenging automotive content requirements;[106] and a third generally favored Canada's challenge to U.S. solar product safeguards applied to Canada.[107] Although the automotive report does not mention the WTO, the dairy and solar reports make several WTO references affecting the decisions. A panel was also recently formed to hear a U.S. dispute challenging Mexico's ban on genetically modified corn products.[108] In addition, the U.S. has requested another panel for a dispute over Canada's alleged failure to comply with the 2022 dairy products decision.[109]

The USMCA has generated another series of U.S. complaints against Mexico arising under Chapter 31 Annex A labor provisions, which allow rapid response investigations of specific employer sites to see whether Mexico is enforcing its labor laws to protect workers.[110] To date, all complaints have been successfully resolved, with several resulting in

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[104] *See also* The United States-Mexico-Canada Agreement, art. 27.2.

[105] ELBIO ROSSELLI ET.AL., CANADA – DAIRY TRQ ALLOCATION MEASURES (CDA-USA-2021-31-010) 17-8 (2021), https://ustr.gov/sites/default/files/enforcement/USMCA/Canada%20Dairy%20TRQ%20Final%20Panel%20Report.pdf.

[106] ELBIO ROSSELLI ET.AL., UNITED STATES – AUTOMOTIVE RULES OF ORIGIN (USA-MEX-CDA-2022-31-01) 10-3 (2022), https://ustr.gov/sites/default/files/enforcement/FTA/USMCA%2031/USMCAAutomotive%20ROO.pdf.

[107] MARIO MATUS BAEZA ET. AL., CRYSTALLINE SILICON PHOTOVOLTAIC CELLS SAFEGUARD MEASURE (USA-CDA-2021-31-01) 4 (2022), https://ustr.gov/sites/default/files/enforcement/USMCA/Chapter%2031%20Disputes/Final%20Report%20USMCA%20solar.pdf.

[108] Office of the United States Trade Representative, *WHAT THEY ARE SAYING: U.S. Establishes USMCA Dispute Panel on Mexico's Agricultural Biotechnology Measures*, (Aug. 21, 2023), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/august/what-they-are-saying-us-establishes-usmca-dispute-panel-mexicos-agricultural-biotechnology-measures..

[109] Office of the United States Trade Representative*, United States Establishes Second USMCA Dispute Panel on Canadian Dairy Tariff-Rate Quota Policies*, (Jan. 31, 2023), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/january/united-states-establishes-second-usmca-dispute-panel-canadian-dairy-tariff-rate-quota-policies.

[110] *See* Office of the United States Trade Representative, *Chapter 31 Annex A; Facility-Specific Rapid-Response Labor Mechanism*, USTR.GOV, https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/fta-dispute-settlement/usmca/chapter-31-annex-facility-specific-rapid-response-labor-mechanism (last visited Jan. 21, 2024) for a list of complaints from the U.S. against Mexico.

remediation plans. These complaints fall outside WTO jurisdiction, which hears no comparable labor cases.

ii. Other U.S. Trade Agreement Dispute Settlement Provisions

The U.S. presently has separate multilateral and bilateral free trade agreements involving 20 other countries as parties.[111] In addition, the U.S. has initiated trade agreement negotiations with the EU, Japan, Kenya, and the UK. These agreements all contain dispute settlement provisions similar in various respects to those in the USMCA. Although they do not incorporate WTO rules or decisions into their own dispute settlement provisions, they mirror WTO substantive rules and binding procedures closely in the topics they cover. Unless the parties to these agreements choose to do so, there is no reason for them to submit disputes to the WTO in lieu of using U.S. trade agreement alternatives.

Interestingly, the U.S. Trade Representative cites no disputes between the U.S. and any of its bilateral or multilateral trade agreement partners, neither at the WTO nor under these various U.S. agreements since the latter took effect except for the USMCA.[112] This strongly suggests that the trade agreements themselves have strong dispute-prevention effects.

One finds an example of such a situation in the 2020 U.S.-China Economic and Trade Phase One Agreement,[113] which was not intended to be a free trade agreement, but rather a means of avoiding an unrestricted trade war between the two countries. The Phase One Agreement reflected

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[111] These include bilateral agreements with Australia, Bahrain, Chile, Colombia, Israel, Jordan, Korea, Morocco, Oman, Panama, Peru, Singapore; the USMCA with Mexico and Canada; and the CAFTA-DR with Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua. Office of the United States Trade Representative, *Trade Agreements*, USTR.GOV, https://ustr.gov/trade-agreements (last visited Jan. 21, 2024).

[112] LAURA BUFFO ET AL., THE OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, THE 2023 TRADE POLICY AGENDA AND 2022 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 42 (2023).

[113] Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China (Jan. 15, 2020), https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china/phase-one-trade-agreement/text; *See also* Nina M. Hart et al., *Section 301 Tariffs on Goods from China: International and Domestic Legal Challenges*, CONG. RSCH. SIDEBAR (2021); Daniel C.K. Chow, *A New and Controversial Approach to Dispute Resolution Under the U.S.-China Trade Agreement of 2020*, 26 HARV. NEGOT. L. REV. 31 (2020); and Daniel C.K. Chow, *A New and Controversial Approach to Dispute Resolution Under the U.S.-China Trade Agreement of 2020*, 26 HARV. NEGOT. L. REV. 31, 15-6 (2020) for more background information about Phase One.

China's commitment to purchase more U.S. goods in 2020 and 2021, as well as to make certain reforms in its technology, intellectual property, and other sectors in return for a U.S. commitment to refrain from adding tariffs or increasing their rates. Most experts deem the Phase One Agreement a failure because China has never come close to meeting its U.S. import purchasing commitments and the U.S. has not notably lowered tariffs, although the parties have not opted to initiate any specific dispute.[114]

The U.S.-China Phase One Agreement also contains specific dispute settlement provisions enabling both countries, if they choose, to bypass the WTO, where they currently have relatively numerous and serious DSU complaints pending against each other (with a growing number on hold because of the Appellate Body situation), in favor of Phase One resolution. China is an eager MPIA party, whereas the U.S. refuses to become one, and so far, neither China nor the U.S. have sought to apply Phase One Agreement resolution procedures to their outstanding WTO disputes. Chapter 7 of the Phase One Agreement requires multiple levels of mandatory consultations with specified deadlines at each level. It allows a complaining party to impose remedies unilaterally if these consultations fail to resolve the dispute, with either country retaining the right to withdraw from the Agreement if the withdrawing country finds the other has acted in bad faith. By effectively eliminating the need for the countries to utilize the WTO, Chapter 7 raises serious questions about the DSU's importance if other countries choose to adopt similar provisions in their own trade agreements, as a number have.

B. EU Trade Agreement Dispute Settlement Measures

Like the U.S., the EU has a long history of incorporating trade dispute settlement measures into its various trade and economic agreements involving its own members and other countries.

i. Intra-EU Dispute Settlement

The various EU trade and integration agreements applicable to its

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[114] *Reflections on the Phase One*, CHINA BUS. REV. (Jan. 20, 2022), https://www.chinabusinessreview.com/reflections-on-the-phase-one-agreement/; Cathalijne Adams, *Biden Administration May Impose Further Tariffs on Chinese Imports*, ALL. AM. MFG. (Apr. 17, 2023), https://www.americanmanufacturing.org/blog/biden-administration-may-impose-further-tariffs-on-chinese-imports/.

twenty-seven EU member countries plus several other European countries,[115] which have agreed to be bound by these agreements, apply a binding judicial dispute resolution process in the European Court of Justice (ECJ). This Court has the power to declare, without effect, any national laws which conflict with EU agreement obligations.[116] In addition, the ECJ will apply WTO rules to intra-EU disputes to the extent such rules in turn affect the specific disputes themselves, although WTO rules are not per se binding on ECJ decisions.[117] As noted above, for WTO and other trade agreement purposes, the EU functions as a single party on behalf of all EU members.

ii. EU Multilateral and Bilateral Trade Agreements Dispute Settlement

The EU has multiple multilateral and bilateral trade agreements with non-European country blocs, either in effect or signed and awaiting ratification.[118] Multilateral agreements in effect, or with negotiations concluded and final approval pending, include the EU Colombia-Peru-Ecuador, Central America (six countries), CARIFORUM (fourteen Caribbean countries as parties, one pending), Western Balkans (five countries), Eastern and Southern Africa (eleven countries), West Africa (two countries as parties, fourteen more pending), Southern African Development Community six countries), and East African Community (six countries pending) Agreements, among others. The thirty-two EU bilateral trade agreements in effect with countries not party to one of the multilateral agreements include those with major trade nations such as Canada, Japan, Mexico, and Chile. The EU and the four primary MERCOSUR countries

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[115] These include Norway, Switzerland, Iceland, and Lichtenstein.

[116] For more information on the Court of Justice of the European Union *see Court of Justice of the European Union (CJEU)*, EUR. UNION, https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/court-justice-european-union-cjeu_en (last visited Jan. 23, 2004); *see generally* EUROPEAN UNION LAW (Catherine Barnard & Steve Peers eds., 3rd ed. 2020); RALPH H. FOLSOM, EUROPEAN UNION LAW INCLUDING BREXIT AND BEYOND IN A NUTSHELL (10th ed. 2021).

[117] E.g. Case C-66/18, European Comm'n v. Hungary E.C.R. (Oct. 6, 2020) (applying WTO GATS national treatment rules); Sven De Knop et al., *Importing into the EU: Overview*, THOMPSON REUTERS (Mar. 1, 2023), https://uk.practicallaw.thomsonreuters.com/w-010-1104?comp=pluk&contextData=(sc.Default)&transitionType=Default&firstPage=true&OWSessionId=NA&skipAnonymous=true.

[118] *See* European Commission, *Trade Agreements, EUR. COMM'N,* https://ec.europa.eu/info/business-economy-euro/trade-non-eu-countries/trade-agreements_en (last visited Jan. 22, 2024) for a list of trade agreements.

recently concluded negotiations of the EU's newest proposed multilateral agreement, which awaits signature and ratification. The EU-MERCOSUR Agreement allows disputes by parties against each other, but not investor disputes against states.[119] It expressly incorporates WTO rules and decisions into its dispute resolution chapter.[120]

All the above EU agreements contain detailed dispute settlement provisions involving consultations, mediation, binding arbitration panels, and exclusive forum clauses. When parties to a dispute are WTO members (almost always the case), panels apply WTO decisions in similar topic disputes to maintain global trade law consistency. The agreements also incorporate the various WTO agreements and rules as seen in the EU-MERCOSUR Agreement.

C. Other Multilateral Trade Agreement Dispute Settlement Measures

Multilateral trade agreements not involving the U.S. or the EU as a party also reflect strong dispute settlement examples. Here are select examples.

i. Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) Agreement Dispute Settlement Measures

The December 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[121] resulted from initial Trans-Pacific Partnership (TPP) negotiations initiated by President Obama. President Trump withdrew the U.S. from these negotiations in part because he disagreed with the proposed dispute settlement provisions. The eleven other countries nonetheless continued negotiations and created the CPTPP, one of the world's largest free trade areas based on total member GDP.[122] The UK

[119] EU-Mercosur Trade Association Agreement, Arg.-Braz.-Eur. Union- Para.-Uru., June 28, 2019, XXX, art. 2, § 3-6.

[120] *Id.* art. 11 § 2.

[121] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 28.12.3, Mar. 8, 2018, Off. U.S. Trade Representative, *TPP Full Text,* https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text (date last visited Jan. 22, 2023) [hereinafter CPTPP].

[122] *Id.* The countries that are a part of the agreement are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

and Taiwan have applied to join and will likely be accepted. South Korea has expressed its intent to join and will likely do so relatively soon. China has also applied to join, but some CPTPP members strongly oppose this because China's trade laws and practices, while meeting WTO requirements, fall well short of CPTPP member country open government and economy requirements.

CPTPP Chapter 28 has comprehensive dispute settlement provisions comparable to those in the above-mentioned EU and U.S. agreements, with consultation and binding arbitration panels and no appellate review. Only member states, and not private parties, may use these provisions. As in most other agreements, the CPTPP incorporates WTO agreements, legal principles, and DSU decisions.[123] The CPTPP has comprehensive Labour (Chapter 19), Environmental (Chapter 20), and Anti-Corruption (Chapter 26.C) provisions. The CPTPP applies Chapter 28 dispute to these other Chapters. The U.S. had insisted on these provisions during Obama Administration negotiations, and they remain despite U.S. withdrawal.

The CPTPP has seen one significant Chapter 28 dispute resolved to date, finalized in September 2023. It involved a complaint filed by New Zealand against Canada over the latter's dairy products import restrictions. A divided 2-1 arbitral panel based much of its decision on the WTO Import Licensing Procedures Agreement in finding some Canadian restrictions compliant and others noncompliant with the CPTPP.[124] Both countries seem okay with the results.[125] If the UK and Korea join the CPTPP, its ample dispute settlement reach will be even broader, and some have suggested it as a viable WTO dispute settlement substitute.[126] If China succeeds in joining, the CPTPP dispute resolution process could become a game changer.

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[123] CPTPP, *supra* note 121, art. 28.12.3.

[124] JENNIFER HILLMAN ET AL., CANADA – DAIRY TARIFF RATE QUOTA ALLOCATION MEASURES (CDA-NZ-2022-28-01) (Sept. 5, 2023) art. X. §§ 201-05.

[125] Nathan Eastwood, Alexis Martinez & Philip Kim, *CPTPP Canada – Dairy Dispute: Early Lessons for Governments And Investors*, WATSON FARLEY & WILLIAMS (June 26, 2023), https://www.wfw.com/articles/cptpp-canada-dairy-dispute-early-lessons-for-governments-and-investors/; *Canada and New Zealand Both Claim Victory in CPTPP Dairy Dispute,* ASIA PAC. FOUND. CANADA, (Sept. 8, 2023) https://www.asiapacific.ca/asia-watch/canada-and-new-zealand-both-claim-victory-cptpp dairy#:~:text=Following%20the%20verdict%2C%20Wellington%20claimed,a%20clear%20victory%20for%20Canada.%E2%80%9D.

[126]Natalia Gallardo-Salazar & Jaime Tijmes-IHL, *The Pacific Alliance and the CPTPP as Alternatives to WTO Dispute Settlement*, 86 REVISTA DE LA FACULTAD DE DERECHO 39 (2021).

ii. Regional Comprehensive Economic Partnership (RCEP)[127]

The December 2020 RCEP Agreement encompasses most East and Southeast Asian plus Oceana countries.[128] The RCEP is a comprehensive trade agreement focused primarily on tariff and non-tariff barrier removal, including the adoption of common rules of origin for all fifteen countries. It entered into force in October 2021, when the sixth member ratified it. The RCEP supplants most trade agreement aspects, including dispute settlement, of the Association of Southeast Asian Nations (ASEAN), established in 1967, as Asia's first significant regional trade organization by incorporating them into the RCEP with the five non-ASEAN countries.[129]

RCEP Chapter 19 contains dispute settlement provisions similar to the above agreements with consultation, mediation, binding arbitration panels without appeals, high arbitrator qualifications, exclusive forum clauses, and incorporation of WTO agreements, rules, and decisions. The RCEP has no dispute settlement history to date, but because China has strongly embraced Chapter 19, it is assumed all parties with China disputes will use it.[130]

iii. African Continental Free Trade Agreement (AfCFTA)[131]

In 2018, most African nations signed the AfCFTA, and when it became

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[127] *Regional Comprehensive Economic Partnership Agreement (RCEP)*, AUSTL. GOV'T DEP'T OF FOREIGN AFFAIRS AND TRADE, https://www.dfat.gov.au/trade/agreements/in-force/rcep.

[128] Australia, Brunei, Burma (Myanmar), Cambodia, China, Indonesia, Japan, Laos, Malaysia, New Zealand, the Philippines, Singapore, South Korea, Thailand, and Vietnam. For good RCEP explanations, *see* Kate Whiting, *An Expert Explains: What Is RCEP, the World's Biggest Trade Deal?* WORLD ECON. F. (May 18, 2021) https://www.weforum.org/agenda/2021/05/rcep-world-biggest-trade-deal/; *Short Overview of the Regional Comprehensive Economic Partnership (RCEP*), EU EXTERNAL RELATIONS POLICY DEP'T REPORT TO EUROPEAN PARLIAMENT (Feb. 2021).

[129] For a good ASEAN description, *see What Is ASEAN?*, COUNCIL ON FOREIGN RELS. (Sep. 18, 2023), https://www.cfr.org/backgrounder/what-asean.

[130] Ulfah Aulia, *Giving a Chance to the RCEP's Dispute Settlement Mechanism,* ECON. RES. INST. FOR ASEAN & EAST ASIA (Mar. 21, 2023), https://www.eria.org/news-and-views/giving-a-chance-to-the-rceps-dispute-settlement-mechanism/; Yvette Foo, *Dispute Settlement under the Regional Comprehensive Economic Partnership: Part 1: An Overview of Chapter 19*, CTR. FOR INT'L LAW, NAT'L UNIV. SING. (2022), https://cil.nus.edu.sg/blogs/dispute-settlement-under-the-regional-comprehensive-economic-partnership-part-1-an-overview-of-chapter-19-by-yvette-foo/.

[131]Agreement Establishing The African Continental Free Trade Area, Mar. 21, 2018; *The African Continental Free Trade Area*, AFR. UNION (Jan. 15, 2024), https://afcfta.au.int/en.
and https://afcfta.au.int/en

operative in January 2021, all fifty-five African continent countries except Eritrea were signatories; thirty-eight had ratified it, with another ratifying since that time.[132] The AfCFTA is by far the world's largest regional trade organization and is second in size only to the WTO globally in size. This Agreement, which encompasses most of the same trade sectors as the WTO, also follows the WTO organizationally and functionally in most key respects. The Protocol on Rules and Procedures on the Settlement of Disputes has adopted virtually verbatim the DSU stages, bodies, and procedures including consultations, arbitration panels, arbitrator qualifications, a seven-member Appellate Body, a DSB comprised of all AfCFTA members, remedies, and deadlines.[133] In short, this is akin to a WTO for Africa. Although Africa has eight other operative regional multilateral trade agreements (seen in the above EU-Africa agreements) not discussed here, one major AfCFTA goal is to make trade conducted within and among these entities compatible with what the AfCFTA is created to do in terms of eliminating, reducing and phasing out tariffs, liberalizing trade in all sectors, and effectively resolving disputes. As with the RCEP, the AfCFTA has no dispute history, so it is too soon to determine how well the AfCFTA will function generally and regarding dispute settlements.[134] The legal framework nonetheless looks solid.

iv. MERCOSUR

The 1991 Treaty of Asunción[135] signed by Argentina, Brazil, Argentina, and Uruguay, created a common market for trade among the countries. The Treaty called for the parties to create a dispute settlement component by the end of 1994, which was done with a process limited to consultations among the members to determine solutions. The Treaty Protocols of Brasilia (1993), Ouro Preto (1995), and ultimately Olivos,

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[132] *About The AfCFTA*, AFR. UNION, https://au-afcfta.org/about/.

[133] Paul Baker, Pablo Quiles & Smita Bheenick, *Mauritius: Mauritius and The AfCFTA Part 3: Dispute Settlement*, INT'L ECON. (Oct. 4, 2023), https://www.mondaq.com/international-trade--investment/1373790/mauritius-and-the-afcfta-part-3-dispute-settlement.

[134] For a good analysis of the protocol, *see* Francis Ojok, *The Efficiency of the AfCFTA Dispute Resolution Mechanism: An In-Depth Analysis*, KLUWER ARB. BLOG (Jul. 11, 2023), https://arbitrationblog.kluwerarbitration.com/2023/07/11/the-efficiency-of-the-afcfta-dispute-resolution-mechanism-an-in-depth-analysis/.

[135] Mercosur Free Trade Agreement, Mar. 26, 1991.

which entered into effect in 2004 and governs current dispute settlement,[136] created a comprehensive trade dispute settlement process with multiple stages including forum choice, consultation, referral to the Mercosur country representatives for review, and recommended settlement of the dispute, an initial ad hoc arbitration panel and a permanent arbitral panel empowered to review and modify ad hoc panel decisions, all subject to fixed deadlines. The dispute settlement provisions allow disputes between party states, but not private investor disputes against states.

This process seems more complex than most, but it nonetheless captures the essence of what the dispute measures in other agreements do in terms of providing mechanisms for resolving disputes relatively quickly and fairly. Its use has been relatively limited, however, with only eighteen reported arbitration awards since 1999, and the most recent award reported in 2012.[137] Experts cite political and cultural reasons why the signatory countries have not utilized the process more frequently.[138] Perhaps because MERCOSUR predates the WTO, it does not reference WTO rules or DSU procedures.[139]

D. Select Non-US and Non-EU Bilateral Agreement Dispute Settlement Examples

A review of various bilateral trade agreements not involving the U.S. and EU as parties indicates a common dispute settlement mechanisms pattern in all of them tending to parallel mechanisms in the other agreements described above. Below are representative examples.

i. The 2018 Chile-Uruguay Free Trade Agreement[140]

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[136]Protocol of Olivos, Feb. 18, 2002; Raúl Emilio Vinuesa, *Enforcement of Mercosur Arbitration Awards within the Domestic Legal Orders of Domestic States*, 40 TEX. INT. L.J. 425 (2004-2005).

[137] *Olivos Protocol for the settlement of disputes in MERCOSUR, Permanent Court of Review*, MERCOSUR, https://www.mercosur.int/quienes-somos/solucion-controversias/laudos/ (last visited Jan. 24, 2024).

[138] Andressa Oliveira Soares, Marco André Germanò & Marco Antônio Zago de Castilho, *Assessing Mercosur's Dispute Settlement System: Comparative Analysis And Suggestions For Improvement*, GEO. UNIV. TRADELAB AND UNIV. OF SAO PAULO (July 2021), https://georgetown.app.box.com/s/yesfwimvdgdzhgc2a5l4ou9o5izuuaid.

[139] MERCOSUR countries can and occasionally do file WTO complaints against each other. *Id*. at 29.

[140]Free Trade Agreement, CL-UY, Oct. 4, 2016.

This Agreement is exceptionally comprehensive, encompassing trade in virtually all sectors. It includes environmental, labor, and anti-corruption chapters. The Chapter 18 dispute settlement stages include consultation, mediation, a single binding arbitration panel, and binding remedies arbitration, all with fixed deadlines. Although Chapter 18 does not explicitly reference the WTO (OMC in Spanish), the FTA extensively references and incorporates most of the WTO Agreements as interpretative guides and requirements. Chile has become a world leader in the number of bilateral and multilateral free trade agreements it is party to, with most bilaterals equally comprehensive.

ii. The 2015 China-Australia Free Trade Agreement[141]

This Agreement substantially parallels and incorporates by reference most of the various WTO agreements and covers most trade sectors, as well as investments similar to the WTO TRIMS Agreement. Chapter 9 authorizes investment disputes between private parties and the state in any established international investor-state dispute forum, or by mutual agreement through ad hoc arbitration. Chapter 15 contains the trade dispute settlement provisions, which include single forum selection, application of WTO decisions, consultation, voluntary mediation, and a single binding arbitration panel. Chapter 15 also has a unique feature which includes a section describing model arbitration rules and procedures for the trade dispute panels. Because China is aggressively negotiating bilateral and multilateral free trade agreements with many other countries around the world, this particular agreement serves as a possible model for any others based on international dispute settlement standards.

iii. The 1997 Canada-Israel Free Trade Agreement (Updated in 2018)[142]

These two countries entered into one of the earlier bilateral free trade agreements soon after Israel had concluded one with the U.S. The initial 1997 Agreement focused primarily on the trade in goods and incorporated much of the 1994 GATT provisions. It has a dispute settlement chapter similar to most of the ones above with consultation, mediation, single binding arbitration panels, fixed procedural deadlines, and single forum

[141]The China-Australia Free Trade Agreement, CN-AU, 2015.
[142]Canada-Israel Free Trade Agreement, CN-IL, Jan. 1, 1997.

requirements. The parties updated this Agreement in 2018 by adding anti-corruption, environmental, and labor protection provisions. Chapter 19 of this Agreement expanded the 1997 dispute settlement provisions with detailed procedural rules for binding arbitration panels while leaving intact the consultation, mediation, and single binding arbitration panel stages, along with the single forum requirement. The 2018 Agreement differs somewhat subtly from others discussed above by clauses favoring the Agreement over conflicting WTO interpretations in some situations.[143]

iv. The 2011 India-Japan Comprehensive Economic Partnership Agreement[144]

This Agreement incorporates the primary WTO agreements and terms to promote liberalized trade in most sectors. It involves two countries with economies that tend to complement, rather than directly compete with each other. The Agreement has anti-corruption and environmental protection articles like other such agreements but does not include any labor provisions. It also has a comprehensive investment protection component comparable to the WTO TRIMS Agreement and allows private parties to bring investor disputes against a state party in an international arbitration forum. Chapter 14 of the Agreement contains a comprehensive dispute settlement system with consultation, mediation, binding single arbitration panel stages, and an exclusive forum clause.

v. The 2021 UK Post-Brexit Trade Continuity Agreements

Since leaving the EU at the end of 2020, the UK has been actively negotiating and entering into trade agreements as an independent country party. These include:

- The April 2021 UK-EU Trade and Cooperation Agreement,[145] which grants both parties the same trade rights in all sectors they have under the WTO; incorporates WTO case law; has detailed labor and

[143] A Canada-Israel Free Trade Agreement art. 19.3, 20.6, annex 19.2, CN-IL, Jan. 1, 1997.

[144] Comprehensive Economic Partnership Agreement Between Japan and the Republic of India, JP-IN, Feb. 16, 2011.

[145] Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the European Union and the European Atomic Energy Community, of the other part, Apr. 2021.

environmental articles; and contains detailed dispute settlement rules and procedures in Part 6 plus Annexes 48 and 49 of the Agreement, including exclusive forum clauses, consultation, and single binding arbitration panels.

- Trade continuity agreements with various countries, allowing the UK to trade unilaterally as a non-EU country under the same conditions, including dispute settlement rules, as it had under the EU while negotiating comprehensive agreements separately, although, except for the UK-Canada Agreement which took effect in April 2021, most are still in the negotiation stage.

Even before its EU withdrawal, after it became apparent in 2019 that withdrawal would occur, the UK began negotiating multilateral and bilateral trade agreements on a provisional basis with most parties to then-existing EU trade agreements, in essence, subject to the same terms and conditions. These agreements are now concluded or in their finalization phase.[146]

III. THE INTERNATIONAL TRADE LAW-INTERNATIONAL INVESTMENT LAW RELATIONSHIP

A detailed international investment law discussion exceeds the scope of this Article, but briefly describing the international trade-international investment legal relationship is helpful to better understand how their dispute resolution mechanisms do and do not intersect.

The WTO TRIMS Agreement applies MFN, national treatment, and other key WTO rules to protect international investors. The TRIMS Agreement has two major deficiencies, however, because it is limited to trade in goods and adds little to the other WTO agreements which already prohibit various import and export restrictions. Additionally, it does not allow private investor DSU complaints. The TRIMS Agreement mainly benefits trade by barring discriminatory import/export practices. Thus, private investors must use bilateral or other investment treaties (BITs) to enforce their rights.

To date, the United Nations Conference on Trade and Development (UNCTAD) reports 2,831 BITs throughout the world, with 2,221 in

[146] *UK Trade Agreements In Effect*, DEP'T FOR BUS. AND TRADE, DEP'T FOR INT'L TRADE (Nov. 3, 2022), https://www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries.

force.[147] These BITs also include multilateral treaties such as those Mercosur has with various individual countries and country blocs. Of these totals, 4,430 contain private investor protection provisions, with 368 in force.[148] Those in force usually, although not always, allow private investors from treaty countries to file binding international arbitration claims against the other treaty countries, whenever investors allege unfair and inequitable treatment including violation of national treatment and MFN principles, as well as illegal expropriation. Most countries now have one or more BITs with these kinds of investor protection provisions. Despite facially impressive BIT numbers, however, countries appear to be backing away from them in favor of the newer, multi-faceted agreements described above.[149]

The International Center for Settlement of Investment Disputes (ICSID),[150] an autonomous part of the World Bank located in Washington, D.C., has been a primary forum for arbitrating BIT investor disputes. ICSID has 156 contracting state parties bound to abide by all ICSID arbitration decisions. ICSID has so far received about 900 investor arbitration cases pursuant to BITs and other investor protection treaties. Of those concluded, two-thirds were decided, and the other third were settled or dropped.[151]

A typical BIT example is the 2005 Uruguay-U.S. BIT,[152] ratified in 2007 by the U.S. Congress. It has language common to most BITs in requiring each country party to afford fair and equitable treatment to investors from the other country party based on national treatment, MFN, legal transparency, and international expropriation law principles, among others. It allows investors from one country to seek binding international arbitration of investment disputes against the other country, through ICSID, the United Nations Commission on International Trade Law (UNCITRAL), or any other forum agreed to by the parties.

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[147] *International Investment Agreements Navigator*, U.N. CONF. ON TRADE AND DEV., https://investmentpolicy.unctad.org/international-investment-agreements.

[148] *Id*.

[149] Emily Osmanski, *Investor-State Dispute Settlement: Is There a Better Alternative?* 43 BROOK. J. INT'L L. 637 (June 1, 2018); Stephen R. Buzdugan, *The Global Governance of FDI and the Non-market Strategies of TNCs: Explaining the "Backlash" Against Bilateral Investment Treaties*, 28 TRANSNAT'L CORP. J. 131 (Sep. 3, 2021).

[150] INT'L CTR. FOR SETTLEMENT OF INV. DISPS., https://icsid.worldbank.org/ (last visited Jan. 24, 2024).

[151] *The ICSID Caseload – Statistics*, INT'L CTR. FOR SETTLEMENT OF INV. DISPS. (Aug. 9, 2023), https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics.

[152] Treaty Between the United States Of America And The Oriental Republic Of Uruguay Concerning The Encouragement And Reciprocal Protection Of Investment, US-UY, Nov. 2005.

The ICSID *Philip Morris Company* tobacco company case against Uruguay, brought pursuant to the Uruguay-Switzerland BIT, illustrates a typical ICSID international investment arbitration process. The company claimed that Uruguay's legally mandated tobacco product labeling requirements violated its investment rights by unfairly imposing a costly new regulatory requirement. The ICSID panel first had to decide if the BIT gave the panel jurisdiction, by determining whether the claimant had followed the steps required by the BIT to initiate arbitration and whether the claimant's tobacco products commercial activity was an investment. The panel determined that Philip Morris met these requirements by (a) attempting to resolve the dispute through conciliation; (b) challenging the requirement's Uruguayan law validity in domestic courts; and (c) presenting sufficient evidence of an investment covered by the BIT.[153] The panel subsequently ruled on the merits in favor of Uruguay in rejecting various Philip Morris fair and equitable treatment, expropriation, trademark, and denial of justice claims (the last one arising from how Uruguayan courts ultimately decided the company's domestic law challenge, although one arbitrator dissented and agreed with Philip Morris on this claim).[154]

The ICSID *Italba* case against Uruguay, also brought pursuant to the Uruguay-U.S. BIT, provides an excellent example of how BIT arbitral panels consider natural person and corporate entity nationalities to determine whether a claimant can meet the BIT investor definition requirement based upon claimant nationality.[155] Here, the claimant was a U.S. corporation (*Italba*) personally owned by an individual Italian citizen who acquired a Uruguayan company to invest in a telecommunications venture. The panel rejected jurisdiction and dismissed the case because there was no evidence that the American corporation ever invested its own funds or other assets in the Uruguayan company. The panel instead found the Uruguayan investment made by the Italian citizen with personal funds outside the BIT scope.

ICSID has worked prodigiously over the past forty years to provide a professional forum for resolving investor-state disputes, achieving a high arbitration award compliance rate. Because many ICSID cases are

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[153] The jurisdiction decision is reported at Philip Morris Brands Sàrl et al., v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (July 2, 2013).

[154] The merits decision is reported at Philip Morris Brands Sàrl et al., v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (July 8, 2013).

[155] The panel decision is reported at Italba Corporation v. Oriental Republic of Uruguary, ICSID Case No. ARB/16/9 (Mar. 22, 2019).

conducted subject to strict confidentiality, as with WTO and non-WTO trade settlement disputes, the lack of full ICSID transparency has caused strong criticisms.[156] Similar criticisms have been raised about the inability of non-parties to participate in these cases even when non-party interests may be directly affected. These same criticisms have been made against other treaty-based arbitration forums. However, strong legal protections for investors facilitate and promote liberalized trade, a primary objective of the WTO and non-WTO trade agreements. To the extent national legal barriers to international trade adversely impact international investors and investments protected by BITs and some of the above-described trade agreements, they may offer private parties a viable path to challenge the barriers. One commentator has even suggested that investment arbitration panels should adopt and apply WTO substantive law principles more frequently in their decisions.[157]

One recent CJEU judgment will likely affect multiple BITs between individual EU member countries and their investors. The Court has determined that EU laws disallow intra-EU investment arbitrations between investors and states, consistent with the EU trade laws requiring all trade disputes to be litigated through the legally prescribed EU judicial system.[158]

More recent bilateral and multilateral agreements today include both trade and investment disputes chapters, as noted above. Their dispute settlement mechanisms have the potential to change, perhaps dramatically, how investment disputes get resolved. This is because for the first time in modern trade law history except for NAFTA's Chapter 11, the process has merged trade and investment dispute settlements into one sole agreement. Trade and investment disputes have notably different remedy considerations, in that trade remedies tend to involve tariff changes, while investment remedies usually involve large monetary awards to investor

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[156] Maria Laura Marceddu & Pietro Ortolani, *What Is Wrong with Investment Arbitration? Evidence from a Set of Behavioural Experiments*, 31 EUR. J. INT'L L. 405 (2020); Gabrielle Kaufmann-Kohler & Michele Potestà, *Why Investment Arbitration and Not Domestic Courts? The Origins of the Modern Investment Dispute Resolution System, Criticism, and Future Outlook* 7, INV. STATE DISP. SETTLEMENT AND NAT'L CTS. (June 30, 2020), https://link.springer.com/chapter/10.1007/978-3-030-44164-7_2.

[157] Siqing Li, Comment, *Convergence of WTO Dispute Settlement and Investor State Arbitration: A Closer Look at Umbrella Clauses*, 19 CHI. J. INT'L L. 189 (Aug. 16, 2018).

[158] *The CJEU Finds Investor-State Arbitration Clause in the Energy Charter Treaty Inapplicable to Intra-EU Disputes*, CLEARLY GOTTLIEB (Sep. 27, 2021), https://www.clearygottlieb.com/news-and-insights/publication-listing/the-cjeu-finds-investor-state-arbitration-clause-in-the-energy-charter-treaty.

prevailing parties.[159] Trade disputes occur between and among governments, albeit often with governments advocating their own citizens' causes to each other; investment disputes almost always involve complaints filed by individual investors against governments. How single agreements covering trade and investment disputes with common dispute resolution procedures will work remains to be seen. The fact that these agreements exist at all raises questions about whether time has rendered irrelevant the WTO TRIMS Agreement's narrow focus and lack of individual investor standing to file disputes against WTO members.

IV. TRADE AND INVESTMENT AGREEMENT DISPUTE SETTLEMENT OBSERVATIONS AND LAWYER TIPS

Although the WTO dispute settlement process faces turmoil over the Appellate Body crisis, and some major non-WTO trade agreements are still too new to have dispute settlement experience, important observations seem nonetheless apparent.

1. The WTO has achieved unparalleled success and acceptance for what it was created to do because every country in the world is now a member or seeks to join. Its mission of expanding and liberalizing trade, as well as developing a coherent and overall effective system for resolving trade disputes, has succeeded despite its critics and generally continues to succeed. The WTO has also, with its various agreements, created international rules applicable to all global trade, including national treatment, MFN, SPS and TBT, trade in services, and most other sectors.

2. The DSU still functions despite no Appellate Body because disputes still settle, although perhaps not as fast or as often. Since the Appellate Body ceased to function in late 2019, the DSU has seen twenty-eight new complaints formally filed[160] and twenty-four panel decisions,[161] which are totals similar to prior years. As in past years, some parties have not appealed their panel decisions, nor submitted them for DSB approval; while others have filed appeals "into the void" to delay indefinitely any final settlement. Yet others are now using the MPIA, and with more likely to do so.

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[159] Ralph Ossa, Robert W. Staiger & Alan O. Sykes, *Disputes in International Investment and Trade*, NAT'L BUREAU ECON. RES. WORKING PAPER (Apr. 2020).

[160] *Chronological List of Disputes Cases*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

[161] *Current Status of Disputes*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm.

3. The Appellate Body situation still needs fixing because the DSU makes Appellate Body panel decision appeals a substantive legal right as a condition, albeit a waivable one, to any final DSB decision; and too many WTO members, including the U.S., have not agreed to MPIA or other Article 25 appeal arbitrations. Continuing to allow panel decision appeals into the void without their being heard means that numerous disputes cannot be decided under current DSU rules, which require WTO member consensus before they can be changed. Failure to resolve this issue could end up returning the DSU to prior GATT years when few disputes got resolved.

4. If the Appellate Body situation is not resolved, WTO members seeking to challenge adverse panel decisions must rethink how to proceed. The MPIA offers an obvious appeals avenue to its signatories, plus non-signatories which opt in for specific cases, as does WTO non-MPIA arbitration. Because such arbitrations are voluntary, however, mandatory dispute settlement closure remains elusive in many cases; and yet readily attainable in others.

5. The DSU must still be doing something right because most new multilateral and bilateral trade agreements not involving the U.S. have copied much of it. These other agreements have embedded the DSU consultation, mediation, panel arbitration, and remedies stages, along with arbitrator qualification requirements, mandatory application of WTO decisions, exclusive forum selection, and fixed deadlines, as their own dispute settlement mechanisms, albeit without an Appellate Body layer except in the new AfCFTA. This arguably makes dispute settlements via other agreements more efficient and perhaps even less contentious.

6. WTO members which are parties to other bilateral and multilateral trade agreements with DSU-like settlement measures should now seriously consider using them until, or even regardless of whether, the Appellate Body returns. If these agreements offer fair and efficient dispute settlement alternatives with WTO quality, there is little reason not to use them.

7. Even if the Appellate Body returns, it may be time to decide whether the WTO has become obsolescent because it lacks anti-corruption, environmental protection, and employee rights provisions linked to trade agreement dispute settlement. Given that most new bilateral and multilateral trade agreements now contain these provisions, the WTO should confront this issue directly because as long as the other agreements have them, the incentive to use their dispute settlement procedures in lieu of the DSU, when coupled with claimants' exclusive forum rule in all agreements, can diminish DSU use interest.

8. In pursuing international trade dispute settlement strategies,

parties injured by practices prohibited in their trade agreements should always determine whether to pursue an investment arbitration option when the investment is linked to trade and authorized by treaty. Although WTO members have the right to pursue TRIMS investment discrimination complaints against other WTO members state-to-state, to date, most TRIMS complaints have not gone past the consultation stage before concluding, and only one TRIMS case has been filed in the past several years.[162] In contrast, investment arbitration forums have extensive experience hearing and settling disputes with a resulting comprehensive body of law based on these decisions. Even though BITs and other investment agreements have so far mostly applied to private party disputes against states, these agreements generally also allow state-to-state investor dispute arbitrations which may be better suited than the WTO to hear these cases.

9. The growing number of viable trade and investment dispute settlement options should please governments and private parties alike. For the first time since the WTO was created, many countries have trade dispute settlement options other than the DSU. The U.S. has proved, at least concerning NAFTA and now the USMCA, that it does not need the DSU at all to resolve trade disputes with its growing number of trade agreement partners. Other countries may well find similar results. In addition, private parties in these countries have opportunities to participate more directly in the broader range of activities these agreements cover.

10. China's willing MPIA and RCEP participation in handling trade disputes incorporating WTO rules and principles, coupled with U.S. self-exclusion from these agreements so far, suggests China's willingness to accept rule of law applications to these disputes. This in turn should give the U.S. pause, because one reason the U.S. has been so antagonistic towards the DSU is its supposed misapplication of WTO rules to China. Yet it is the U.S., not China, which has seemingly turned against trade dispute settlement by rule of law, at least at the WTO.

11. Despite its hostility to the DSU, the U.S. has not backed away from rules-based trade dispute settlements, as seen in its own multilateral and bilateral trade agreements. Every U.S. trade agreement to date contains dispute settlement rules and procedures that are generally equivalent to the DSU without an Appellate Body. They also contain substantive agreement terms virtually identical to those in the various WTO

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[162] *Disputes by Agreement*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm.

agreements. Moreover, these agreements include labor, environmental, and some private-party investor dispute settlement provisions that fall outside the DSU scope. The U.S. nonetheless faces the dilemma of whether to expand the number of trade agreements to cover other countries; reconsider its Appellate Body opposition and MPIA accession reluctance; or live with WTO appeals into the void, even in the cases it wins. These will not be easy decisions.

12. Even if the WTO disappears tomorrow, its legacy provides the legal rules and framework countries will likely follow in trade dispute settlement proceedings contained in their other agreements. This seems not even debatable.

13. Even non-trade lawyers should study international trade and investment law basics applicable to their clients' global commercial activities to help their clients and their clients' governments understand how best to avoid or confront illegal trade practices. Law school and CLE programs provide excellent ways to do so.

14. Lawyers should familiarize themselves with all international trade and investment agreements applicable to their clients and client governments, to help identify new client opportunities. For example, in addition to its bilateral U.S. trade agreement with the U.S., Chile has more than twenty similar modernized and comprehensive free trade agreements with other countries and country blocs, including the 2021 UK treaty, the CPTPP, and the three USMCA countries. Chile also has more than fifty other BITs in force. From a commercial standpoint, these agreements may allow non-Chilean companies to qualify as Chilean traders and investors by meeting the legal requirements to do so set forth in the agreements and Chilean law. This in turn opens up potential trade benefits involving many countries outside the U.S. even if the U.S. or other client governments lack agreements with some of them.

15. Lawyers should engage and stay engaged with government officials responsible for trade and investment agreement management. Because trade agreements generally do not allow private party trade complaints against governments, private sector attorneys involved with international trade can often best respond to another country's unfair trade practices affecting clients by urging their clients' governments to use the WTO or any other applicable trade agreement dispute settlement process.

16. Lawyers who represent companies adversely affected by another country's trade practices prohibited in multilateral and bilateral agreements should be ready and able to prepare their clients' legal cases for the client's government to present against the other country. It is unrealistic to assume that government lawyers and other officials responsible for handling trade relations have enough information

about an individual company's or even a whole sector's international business activities to prepare and argue a complex trade case. Moreover, it may be unrealistic to assume that these same government lawyers and officials have the time to research all potentially applicable WTO panel and Appellate Body decisions, as well as trade decisions in other forums, for inclusion in these cases.

17. Lawyers can effectively represent offshore clients engaged in international trade and investment in the lawyers' own countries. Representing offshore clients in cases involving a lawyer's own country offers significant opportunities but requires familiarity with applicable laws and agreements.

18. Lawyers can seek opportunities to represent their own or other governments in trade and investment disputes as specially appointed counsel to the extent legally permissible. Limiting international trade disputes to government parties need not foreclose private lawyer opportunities to participate directly in the cases. Countries commonly retain expert outside lawyers with special counsel appointments to represent and advocate their interests in WTO and other forums of trade and investment disputes. The WTO has even stated this in Appellate Body decisions and its own training materials.[163] Such representation, of course, requires expertise and conflicts of interest avoidance.

CONCLUSION

Returning to Dickens' *A Tale of Two Cities*, the growing number of trade agreements, especially those involving multiple countries, offer the best of times for dispute settlement, with no worst of times in sight for those who are parties to the newer agreements. They have the best of the WTO rules and DSU procedures to work with as these are incorporated into newer agreements, which also expand the range of dispute topics they cover. The WTO also remains, and its MPIA offers a mechanism to resolve trade disputes definitively without the Appellate Body. A cornucopia of viable dispute resolution options now awaits those willing to use them.

[163] *Participation in Dispute Settlement Proceedings*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s2p1_e.htm.

GLOBAL TRADE DISPUTE SETTLEMENT IN TRANSITION: *SURVIVING THE WTO APPELLATE BODY*

Robert E. Lutz*

A signature achievement in establishing the World Trade Organization ("WTO") in 1994, the Dispute Settlement Body ("DSB") and, more prominently its Appellate Body ("AB"), are currently in crisis. That crisis inspired Professor Aronofsky's article in which he details the alternative prospects beyond the WTO's mechanism for resolving trade disputes. The nature and scope of international trade and its dispute-settlement processes have also been an academic and practice interest of mine.[1] I will focus my

*This piece is a comment by Prof. Robert E. Lutz on Dr. David Aronofsky's piece which begins on page 324 of this journal.

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comments on the WTO crisis involving the Appellate Body and its possible solution.

I. THE CRISIS

Although the World Trade Organization and its pioneering dispute settlement process are now thirty years old,[2] criticisms of their various aspects began to appear shortly after the founding. By 2000, the use of the Agreement on Understanding on Rules and Procedures Governing the Settlement of Disputes ("Dispute Settlement Understanding" or "DSU") revealed problems. And since 2000, the two most litigious members of the WTO—the EU[3] and the U.S.,[4]— have consistently registered complaints; many centering on the AB.[5]

He is also the Principal of LutzLaw International Consulting Group & Associates through which he advises on ESG, is an arbitrator, and counsels international investors.

[1] For some time after its founding, I was on the WTO list of non-government persons qualified by the WTO to serve as arbitrators for the three-person panels that heard disputes involving goods and services. And, for many years, I sat as an arbitrator of and/or as the chair of NAFTA arbitrations between the U.S., Canadian and Mexican parties. Today, as a semi-retired professor (emeritus), I continue to focus on both Trade Law and dispute settlement issues: I work with the General Counsel's Office of the U.S. Department of Commerce and its Commercial Law Development Program ("CLDP") assisting it on a voluntary basis (pro bono) to conduct legal assistance with developing and post-conflict countries. The focus is to assist such countries adopt "global commercial law best practices." Recently, I also chaired a Working Group of the California Lawyers Association to co-author state legislation (AB 1903 in 2024) revising and updating California's International Commercial Arbitration and Conciliation Act of 1988.

[2] In 1994, the agreement to establish the World Trade Organization was signed by parties in Marrakesh, Morocco. The WTO settled into its building in Geneva, Switzerland, the Palais des Nationes, its staff was hired, and by 1996 the first appellate case was filed. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

[3] Twenty-seven countries are members of the European Union, but the EU is registered as one member of the WTO. *The European Union and the* WTO, https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm.

[4] Roughly 50% of WTO cases are brought by or are against the US; about 40% by or against the EU; and the rest by other nations. *Disputes by Member*¸ WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm#respondent.

[5] Several U.S. administrations have weighed in against the AB. Obama vetoed one nominee for appointment to the AB; Trump followed continuing to object to appointees; and now Biden refuses to consensually support appointees to the Appellate Body.

Some concerns about the AB even pre-date 2000. In fact, in 1996 when I visited Geneva to see for myself the "new" international trade organization, I met with lawyers of the Office of the U.S.

But in 2020, the Trump Administration arguably sealed for a time the fate of the AB, which the Biden Administration has not reversed. By December 2019, only three of the seven AB member's terms[6] had not expired; two expired at the end of 2019, with the third and final member's term expiring in February 2020. All future appointments were blocked by the U.S., meaning no nominee to the AB could achieve consensus. No one was appointed to the AB with the consequence that no AB panels (requiring a quorum of three persons) could exist. Additionally, even though a right to appeal under the DSU[7] is provided, no appeal is possible. Consequently, parties "appeal" into the "void" or "Limbo", and there is no finality to their cases.

II. U.S. COMPLAINTS

One might initially consider this U.S. unilateralism "heavy-handed." Yet early in the life of the WTO, the U.S. expressed concerns that the WTO's Dispute-Settlement system (and most notably, the AB) was not functioning

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Trade Representative, the agency of the U.S. Government that represents the U.S. at the WTO. I discussed the pending decision by the U.S. about whether to appeal a case, *Reformulated Gasoline*, which it had lost at the arbitration panel level. It would require using the new and untested AB. Having just lost at the panel level to the Brazilians and Venezuelans and the remedy requiring the U.S. Congress to change the applicable law, the USTR lawyers expressed their hesitancy to appeal. They felt at the time that they would lose in the AB, and they feared that doing so would set a precedent—i.e., appeals would subsequently be automatic in all circumstances by all members when losing at the arbitration level. Eventually, the U.S. did appeal the panel decision and lost, and *Reformulated Gasoline* became the first AB case of the WTO. Keith M. Rockwell, *WTO Dispute Settlement Reform Hinges on Washington*, EUROPEAN CTR. FOR INT'L POL. ECON. (Feb. 2024), https://ecipe.org/blog/wto-dispute-settlement-reform-hinges-onwashington/#:~:text=Although%20the%20Trump%20administration%20is,were%20put%20forward%20and%20agreed.; Appellate Body Report, United States-Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R (adopted Apr. 29, 1996).

[6] AB is composed of 7 members. Members are appointed by consensus of the DSB (all WTO members). AB members may renew only one term, thus serving a maximum of 8 years. Appeals under DSU Art. 17 are made to 3-person AB panels. By December 2019, all but 3 panelists remained on the AB, and due to the U.S. blockage of any appointment, there was no consensus among the DSU members about proposed appointments for the four vacancies. By March 2020, all terms of current AB members had expired, necessitating appointments of seven AB members, which the U.S. continued to block. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]; *United States Continues to Block New Appellate Body Members for the World Trade Organization, Risking the Collapse of the Appellate Process*, 113 AM. J. INT'L L. 822 (2019).

[7] DSU, s*upra* note 6.

according to the Rules[8] that had been agreed to by the U.S. and the WTO membership. In the USTR Report's blistering critique,[9] the overarching theme objecting to the AB is that "the AB expanded US obligations and diminished its rights."[10] Certainly, a review of its negotiating history reveals facts that suggest that the founding members of the WTO intended for the AB to serve a limited role. It is not referred to as a "court" in the DSU; rather, the term "appellate body" is used. Also, its members are not called "judges", but "members of the AB." The 60-90 day turn-around for written opinions of the AB—by the limited time allowed—suggests a narrow consideration of appealable issues; moreover, an AB member was intended to be non-resident and "part-time," with only occasional visits to Geneva for hearings.[11]

US objections over the years have been shared by other states as well. They include:

- Ignoring mandatory deadlines for deciding appeals;
- Allowing persons whose terms expired to continue to serve when it was extended by the Dispute Settlement Body;
- Not adhering to a limited standard of review as prescribed in the DSU;
- Issuing advisory-type opinions and opining on issues extraneous to cases; and
- Treating former panel opinions as precedent.[12]

[8] Among the WTO Agreements, the Dispute Settlement Understanding (DSU) establishes the Dispute Settlement Body ("DSB") institution of the WTO prescribing the process and setting the rules for dispute settlement in the WTO. *Id.*

[9] *Report on the Appellate Body of the WTO,* USTR (Feb. 2020), ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf. This language parallels the language of the DSU in Art. 3.2: "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."; *see also* Robert McDougall, *Crisis in the WTO—Restoring the WTO Dispute Settlement Function,* CTR. FOR INT'L GOVERNANCE INNOVATION, CIGI Paper No. 194 (Oct. 2018).

[10] USTR Report, *supra* note 9.

[11] *See* DSU, Art. 17.8 which indicates "persons serving on the Appellate Body [receive] travel and subsistence allowance…."

[12] *See generally* USTR Report, *supra* note 9.

III. CONSEQUENCES AND FUTURE PROSPECTS FOR WTO DISPUTE SETTLEMENT

Without an operating AB, no appeal is possible using the institutions of the WTO. And without the full process of dispute settlement prescribed in the DSU, the effectiveness of the WTO dispute settlement process is called into question. As expressed in the DSU Article 2.2:

> "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system….[I]t serves to preserve the rights and obligations of Members under the covered agreements and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."[13]

However, Professor Aronofsky's article points out, that the DSU, in Article 25, allows for resort to arbitration as an "alternative means of dispute settlement"[14] upon mutual agreement, including the procedures to be used. Thus, following the dysfunction of the AB in April 2020, the European Union[15] and 16 other countries originally formed the Multi-party Interim Arbitration Agreement ("MPIA").[16] While viewed as a temporary solution for the loss of an operating AB, the MPIA is a "stop-gap," ad hoc appeal

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[13] *See* DSU art. 2.2, *supra* note 7.

[14] DSU, art. 25.1, *supra* note 7.

[15] The EU (containing 27 countries) is a single entity in the WTO on account of its single external tariff. *The EU Market*, EUROPEAN COMMISSION, https://trade.ec.europa.eu/access-to-markets/en/content/eu-market-0#:~:text=The%2027%20Member%20States%20of,customs%20tariff%20for%20imported%20goods.

[16] For the MPIA, *see Multi-Party Interim Appeal Arbitration Arrangement (MPIA)*, GENEVA TRADE PLATFORM, https://wtoplurilaterals.info/plural_initiative/the-mpia. The parties to the MPIA today number 25 and are: the EU (27 countries as one block), Australia, Benin, Brazil, Canada, China, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Hong Kong (China), Iceland, Japan, Macao (China), Mexico, Montenegro, New Zealand, Nicaragua, Norway, Pakistan, Peru, Singapore, Switzerland, Ukraine, and Uruguay; s*ee* Geneva Trade Platform of the Geneva Graduate Institute's Centre for Trade and Economic Integration at wtoplurilaterals.info. Two appeals were finalized; seven ongoing appeals; three were finalized without MPIA appeal, withdrawn, or settled; *see* Joost Pauwelyn, *The MPIA: What's New? (Part I),* INT'L ECON. L. AND POL'Y BLOG (Feb. 21, 2023), https://ielp.worldtradelaw.net/2023/02/the-mpia-whats-new-part-i.html;. *see also* Joost Pauwelyn, *The MPIA: What's New? (Part II),* INT'L ECON. L. AND POL'Y BLOG (Feb. 27, 2023), https://ielp.worldtradelaw.net/2023/02/the-mpia-whats-new-part-ii.html; *see generally Multi-Party Interim Appeal Arbitration Arrangement (MPIA)*, GENEVA TRADE PLATFORM, https://wtoplurilaterals.info/plural_initiative/the-mpia.

measure that serves as a substitute for the AB and enables parties to obtain some finality to cases.

IV. IS MPIA A SOLUTION TO THE AB CRISIS?

While the MPIA has attracted a number of the most significant trading countries, the U.S. is notably not among the parties to the Agreement. Some commentary faults the MPIA process for replicating the former AB process, and repeating the "sins" of the prior AB. Others suggest that it would benefit from some case management control approaches employed by international commercial arbitrators. Certainly, without U.S. participation, the prospects of developing an AB jurisprudence are reduced.

For the U.S., its U.S. Trade Representative, Ambassador Katherine Tai, recently summarized the position of the U.S.:

> "The goal here is not restoring the Appellate Body or going back to the way things used to be. It is about providing confidence that the system is fair. And revitalizing the agency of Members to settle their disputes. The system was meant to facilitate mutually agreed solutions between Members. But over time, it has become synonymous with litigation—costly and drawn out, and often only accessible to Members who have the resources to foot the bill. The system has also suffered from a lack of restraint. The Appellate Body systematically overreached to usurp the role of Members themselves to negotiate and create new rules. And in so doing, it undermined the ability of all Members to defend their workers from harmful non-market policies.
>
> For the last year, we've been actively participating in innovative and constructive discussions with WTO Members of all sizes—including developing country Members—to hear their concerns and solutions for a better system.
>
> We are thinking creatively and have come forward with concrete ideas that could promote fairness for all Members. For example:
>
> - We should make practical and appropriate alternatives to litigation—like good offices, conciliation, and mediation—real options for the entire WTO membership.
> - We should ensure that dispute panels address only what is necessary to resolve the disputes and resist the urge to pontificate. And any corrections to reports or decisions must be limited to addressing egregious mistakes.
> - We should end judicial overreaching and restore policy space so that Members can regulate and find solutions to their pressing needs, such as tackling

> the climate crisis or defending their workers' interests from non-market policies.
>
> And we urgently need to correct WTO panel reports that have asserted that the WTO may second-guess Members' legitimate national security judgments, something none of us ever intended. This calls into question foundational principles of how far-reaching trade rules should be…
>
> The United States wants a WTO where dispute settlement is fair and effective and supports a healthy balance of sovereignty, democracy, and economic integration. Where all Members embrace transparency. Where we have better rules and tools to tackle non-market policies and practices and to confront the climate crisis and other pressing issues.
>
> As President Biden emphasized: We're going to continue our efforts to reform the World Trade Organization and preserve competition, openness, transparency, and the rule of law while, at the same time, equipping it to better tackle modern-day imperatives.[17]

CONCLUSION

In his wide-ranging survey of modern international dispute resolution processes available on bilateral, regional, international, and even multilateral bases, Professor Aronofsky intimates that the WTO's AB problem that stalemates its dispute settlement body does not pose a crisis to the WTO. To summarize his conclusions with a commonplace saying, there are "plenty of fish in the sea"; that is, many alternatives are available to which parties can resort.

Whether this is the "best of times" for trade dispute settlement (alluding to his article's opening sentence), the WTO's dispute settlement process is fractured, and the prospects for a viable AB at this time are not particularly good. Nonetheless, the crisis of trade dispute settlement caught the attention of WTO members, and makeshift measures, like MPIA, though temporary, are available. On the other hand, recognizing that GATT '47 lasted almost fifty years as a "provisional" set of goods-trading rules, it is possible the MPIA will stand the "test of time" as a provisional appellate option until reform is accomplished. And noting that the U.S. and the WTO are embarking on efforts to rehaul the trading organization's dispute settlement processes, the best of times may be yet to come.

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[17] *Remarks by Ambassador Katherine Tai on the World Trade Organization and Multilateral Trading System,* OFF. OF THE U.S. TRADE REPRESENTATIVE (Sep. 2023), https//: ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2023se[te,berre,arls-a,bassadpr-katherine-tai-world-trade-organization-and-multilateral-trading-system.

HOW DO SUPREME COURTS SHED THEIR SKIN? CHANGING ROLES IN SOCIAL RIGHTS ADJUDICATION: ARGENTINA, 1994–2021

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ABSTRACT

Based on Katharine Young's typologies of judicial review approaches and court roles in social rights adjudication, this article analyzes the Argentine Supreme Court's treatment of social rights since the 1994 constitutional reform, which constitutionalized international human rights treaties and expanded judicial review. This article distinguishes three periods in which the Supreme Court went through membership changes, modified its role, and provided legal justifications for each shift. From 1994 to 2000, the Court played a detached role, deferring to elected branches and crafting restrictive interpretations of social rights and international sources, while its public esteem declined. A partially renewed Court sought, from 2000 to 2012, to regain legitimacy by shifting towards a supremacist role, broadening review powers, making extensive readings of social rights, and relying on international law, while tensions with the government increased and the Court risked overburdening itself with complex social issues. Since 2012, the Court has returned to a detached role by narrowing the scope of judicial review, adopting restrictive interpretations of social rights clauses, and selectively using international law while leaving precedents intact by distinguishing new cases in order to protect its technical legitimacy. In the future, the Court will likely face difficulties finding distinguishing features in upcoming cases or further departing from international law. Its current detached role risks undermining legitimacy if no new legal justification emerges. The Court will be forced to overturn precedents from the supremacist era, which would damage its technical legitimacy.

INTRODUCTION: COURTS IN CHANGE, SOCIAL RIGHTS AND THE NEED FOR LEGAL JUSTIFICATION

In her book *Constituting Economic and Social Rights*, Katharine Young develops typologies of judicial review approaches and court roles, regarding social rights cases.[1] Young outlines a spectrum from detached courts that defer to elected branches to supremacist courts that actively strike down policies.[2] This framework helps analyze the Argentine Supreme Court's treatment of social rights since the 1994 reform, which not only expanded the list of social rights by giving constitutional rank to several human rights treaties, but also established ample review powers for the judiciary. As this article will explain, the Argentine Supreme Court changed its role since 1994, undergoing three different stages and providing legal justifications for each shift. The Court played a detached role in the first period, from the reform until 2000.[3] It deferred to the elected branches' neoliberal program and built a restrictive interpretation of applicable human rights treaties, while the levels of public esteem for the Court kept waning. In the second period, from 2000 until 2012, a partially renewed Court sought to rebuild its legitimacy, further damaged during the 2001 crisis, by gradually shifting to a supremacist role, in the area of social rights. It crafted an extensive construction of judicial review powers and relied on international human rights treaties and international interpretive sources. Tensions with the elected branches increased, and the Court also ran the risk of overburdening itself by managing difficult social issues. Finally, from 2012 until 2021, the Court took back a detached role in the social rights area while avoiding overturning its rulings from the previous period to protect its technical legitimacy.[4] The Court narrowed the scope of judicial review for rights with budgetary implications, applied restrictive constructions of social rights clauses, and made a selective use of international human rights sources. The Court also denied certain groups or individuals the entitlement to specific rights. These legal arguments allowed the Argentine Supreme Court to leave its precedents untouched by distinguishing them from the new cases. In order to maintain its detached role, the Court will probably face difficulties in the future in trying to find convincingly distinctive features for upcoming cases or in

[1] *See* KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS 242 (Oxford Univ. Press, Oxford, 2012).

[2] *See id.* at 242–43.

[3] *See id.* at 242–46.

[4] *See id.*

deepening its departure from international human rights law.[5] The Court needs legally persuasive arguments regarding social rights, review powers, and international law while upholding past rulings. If it does not develop a new justification, precedent reversal seems inevitable, undermining technical legitimacy.

Supreme Courts and Constitutional Courts in modern democracies pose an often remarked paradox. While they hold ample powers, including judicial review, Constitutions usually aim to keep them insulated from political and electoral cycles. These tribunals, in general, are non-elected bodies. Thus, the independence of the courts implies a relatively lower level of democratic legitimacy. The "democratic objection" against judicial review relies on this paradox: a powerful institution designed to be exempt from a clear mechanism of popular accountability.[6]

As it is well known, adjudication underlines the objection in the case of social rights.[7] Rulings on constitutional social rights may involve the use of public resources, striking down decisions by elected branches, or issuing orders to various Government agencies to perform certain measures and not only to refrain from acting. In addition, social rights claims usually imply thorny technical questions, such as the efficacy and costs of medical treatments, the budgetary impact of a housing project or the long-term sustainability of a pension system. Since courts are generally staffed with lawyers, the lack of other scientific knowledge is also laid out

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[5] *See id.*

[6] ROBERTO GARGARELLA, THE LAW AS A CONVERSATION AMONG EQUALS 183-87 (David Dyzenhaus & Thomas Poole eds., 2022) (discussing Alexander Hamilton's arguments in The Federalist Papers related to objections against judicial review which date back to very early stages of constitutionalism). *See* ALON HAREL & ADAM SHINAR, THE REAL CASE FOR JUDICIAL REVIEW, *in* COMPARATIVE JUDICIAL REVIEW 13, 14 (Erin F. Delaney & Rosalind Dixon eds., 2018) (arguing in favor of judicial review and defining it as a mechanism to ensure citizens' right to a hearing about their grievances, and to require the State to defend its decisions in a public deliberation with the plaintiffs); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 426 (William Rehg trans., 1996) (emphasizing importance of giving all those affected "an effective opportunity to voice their demands for rights on the basis of concrete experiences of violated integrity, discrimination, and oppression").

[7] *See* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 190–91 (2008) (emphasizing that when courts are required to defer to legislative decisions on distributional issues, problem remains—an alleged violation of social rights casts doubt on the legitimacy of legislature itself since voters may have been excluded from political process due to lack of access to food, healthcare or education and judiciary's limits depend on assumption that legislature is genuinely democratic and representative; at that point "we are left in a conceptual house of mirrors").

as an additional objection—sometimes called technical objection—to social rights adjudication.[8]

In light of these difficulties, courts take various approaches to social rights adjudication,[9] trying to preserve their institutional stability and legitimacy.[10] Comparative literature analyzes these different paths[11] and the associated instruments.[12] In recent years the enforcement of economic and social rights has become more "court-centric" in developing countries due to the continuing projects aimed at fostering and strengthening the "rule of law" as a condition for foreign investments and economic progress.[13] Some courts become models or examples, fostering a global conversation on how to achieve the most adequate role for the judiciary in

[8] *See* DAWOOD AHMED & ELLIOT BULMER, SOCIAL AND ECONOMIC RIGHTS 17 (2nd ed., Int'l IDEA, 2017) (describing objection to judicial enforcement of social rights based on challenges judges face in analyzing budgetary implications of their decisions); *see also* Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, 11 CONST. F. 123, 131 (2000) (arguing that "technical objection" advises against including enforceable social rights in a constitution, a position later modified by the author); Carlos Rosenkrantz, *La pobreza, la ley y la Constitución* [*Poverty, the Law and the Constitution*], *in* EL DERECHO COMO OBJETO E INSTRUMENTO DE TRANSFORMACIÓN [THE LAW AS AN OBJECT AND INSTRUMENT OF TRANSFORMATION] 241, 245–46 (SELA, 2003) (emphasizing judges lack "technology of justice" to make grounded decisions in the social rights area).

[9] *See* Matthias Klatt, *Positive Rights: Who Decides? Judicial Review in Balance*, 13 INT'L J. CONST. L. 354, 359 (2015) (explaining that alternatives range from reasonableness review under South African constitution to institutional dialogue carried out in Canada to a strong review as exercised by Brazil's highest court).

[10] *See* Gabriel Pereira, *Judges as Equilibrists: Explaining Judicial Activism in Latin America*, 20 INT'L J. CONST. L. 696, 700–02 (2022) (describing the combination of "fragmentation of power" approach centered in the relationship between judiciary and other branches and the "public support" approach which emphasizes how the Courts also need to respond to demands from the public at large).

[11] *See* David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 190, 196–99 (2012) (arguing that courts in different countries have found specific ways to give content to social rights advising against taking any of them—such as the South African Court's approach—as a single model for analyzing multiple developments, given the incidence of local political contexts); Pereira, *supra* note 10, at 704–13 (proposing in the case of structural remedies the "equilibrist approach" as a notion to describe how courts in Latin America—and his work takes the Argentine Supreme Court as an illustration—operate in unfriendly contexts to preserve their stability and tenure while building public support and keeping a low level of conflict with the other branches).

[12] *See* DAVID FONTANA, DOCKET CONTROL AND THE SUCCESS OF CONSTITUTIONAL COURTS, *in* COMPARATIVE CONSTITUTIONAL LAW 624, 627–28 (Tom Ginsburg & Rosalind Dixon eds., 2011) (describing how "issue timing", *i.e.*, the power of courts to define its agenda, contributes to ensure decisions are enforced, without compromising the legitimacy and political relevance of the tribunal). In most systems, for instance, courts can moderate the political impact of their decisions by carefully selecting the cases to hear or to decide. *See id.*

[13] YOUNG, *supra* note 1, at 360.

this area under the local circumstances.[14] In Latin America, according to Carlos Bernal, a wave of constitutional reforms in the past four decades has shown a convergence in the entrenchment of justiciable social rights and a divergence in the various approaches applied by apex courts in the region.[15] Scholars have analyzed the social and political factors that come into play when courts make important decisions,[16] especially when dealing with social rights claims, the larger impact of any ruling on those issues,[17] and the different political processes sparked by effective enforcement of judicial decisions.[18]

This article centers on one dimension of the complex process of social rights judicial enforcement: the legal arguments offered by a court to justify its role in the matter and its shift from one role to another, while simultaneously preserving its own legitimacy. The Argentine Supreme

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[14] *See, e.g.*, COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? (Roberto Gargarella et al., eds., 2006) (offering an early detailed account of courts from Brazil, Hungary, South Africa, India, Colombia, Angola and Bolivia, as case studies of diverse forms of judicial intervention on social issues in a fifteen-year period); *see also*Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 INT'L J. CONST. L. 106, 109 (2009) (describing the South African court as "widely admired by legal academics" while enjoying low public support).

[15] *See* Carlos Bernal, *The Constitutional Protection of Economic and Social Rights in Latin America*, *in* COMPARATIVE CONSTITUTIONAL LAW IN LATIN AMERICA 325, 328, 338–39 (Rosalind Dixon & Tom Ginsburg eds., 2017) (describing the trend to include judicially enforceable social rights in Latin American constitutions in the preceding decades, and the competing paradigms shared, discussed and applied by high courts in each country, according to local political contexts and the influence of the Inter-American human rights system); David Landau, *Judicial Role and the Limits of Constitutional Convergence in Latin America*, *in* COMPARATIVE CONSTITUTIONAL LAW IN LATIN AMERICA 227 (Rosalind Dixon & Tom Ginsburg eds., 2017) (illustrating the divergent approaches between the high courts of Brazil, Chile, Colombia and Mexico).

[16] *See* Ezequiel González-Ocantos, *Courts in Latin American Politics*, *in* THE OXFORD ENCYCLOPEDIA OF LATIN AMERICAN POLITICS (Harry E. Vanden & Gary Prevost eds., 2021) (analyzing courts in Latin America by outlining three main lines of work aimed at explaining the increasing involvement of the judiciary in political questions: one is centered on courts-empowering institutional reforms while another one pays attention to the strategic interaction between courts and other branches, and a third approach focuses on the judges' ideas, values and self-conceptions as key elements); *See* Diana Kapiszewski, *Tactical Balancing: High Court Decision Making on Politically Crucial Cases*, 45 LAW & SOC'Y REV. 471, 472–81 (2011) (proposing the notion of "tactical balancing" to describe how Courts ponder a set of concerns and elements, from Justices' ideologies to public opinion to law in their decision making process).

[17] *See* Cambridge Univ. Press, *Introduction*, *in* COURTS IN LATIN AMERICA 1 (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011) (examining a multidisciplinary approach in "judicial politics" studies by considering not only the role of courts in the political system, but also the conduct of judges as individuals and the social effects of rulings, with contributions from political science, sociology and law among other disciplines).

[18] *See, e.g.,* SANDRA BOTERO, COURTS THAT MATTER: ACTIVISTS, JUDGES, AND THE POLITICS OF RIGHTS ENFORCEMENT 85-128 (Cambridge Univ. Press ed., 2023) (emphasizing through case studies the importance of "legal constituencies" and monitoring mechanisms in implementing court decisions on the ground).

Court (SC) is the case to be examined. A long-established institution subject to various forms of manipulation throughout its history, in the past thirty years, the Court underwent a constitutional reform process, a changing political landscape, and a severe socioeconomic crisis that put social rights enforcement to the test. Taking into account the general context, this article focuses on the evolving legal concepts advanced by the tribunal to sustain its role. Therefore, the legal dimension is examined with a chronological perspective, making a distinction among three stages in the Court's history after the 1994 constitutional reform.

Designed after the American model, the SC is a non-elected body with judicial review powers. Though it deals with the interpretation of constitutional clauses, it is not a constitutional court in a strict sense.[19] It holds other attributions, including competence to rule as the first and only instance in certain matters, such as cases involving foreign representatives or suits filed by a Province against another one. A second difference relies on the Argentine judicial review system, also based on the American model.[20] Any court, local or federal, lower or higher, may strike down a statute, administrative act, or even a private agreement or rule, on constitutional grounds.[21] Such a decision is effective only for the case in question, with only exceptional instances of collective impact.[22] Established in 1863, the SC sits at the top of this decentralized judicial review system.[23] It has competence by way of exceptional appeal and operates in the context of a presidential federal republic. In another singular trait, the SC generally follows its own precedents in the context of a country that employs civil law, with no formal stare decisis rule. This practice also proves difficult because of the Court's history of instability,

[19] *See* Martín Oyhanarte, *Supreme Court Appointments in the U.S. and Argentina*, 20 WASH. UNIV. GLOB. STUD. L. REV. 697, 719 (2021).

[20] *See id.* at 699–700.

[21] *See* Alejandro M. Garro, *Judicial Review of Constitutionality in Argentina: Background Notes and Constitutional Provisions*, 45 DUQ. L. REV. 409, 410 (2007).

[22] *See* Art. 43, para. 2, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (explaining that in cases dealing with discrimination, market competition, environment, consumers' rights and rights of general public interest rulings can have a collective effect and not only directly affected people but also the Ombudsman or civil society organizations may file the claim).

[23] *See* Garro, *supra* note 21, at 409–10.

with sudden changes in its composition.[24] Periodic economic crises,[25] on the other hand, also provide a particularly hostile context for enforcing social rights, which often depends on the availability of financial resources. Finally, the increasing importance of international law, and of international human rights law, adds a relevant element to the SC's task in social rights adjudication.

This article examines the SC's changing roles from 1994 to 2021 in social rights adjudication. The analysis applies Katharine Young's typologies of judicial review and court roles.[26] The starting point is the 1994 constitutional reform, which introduced important modifications to a 19th century text that included only a singular social rights clause, which was added in 1957.[27] In 2021, the sole sitting female member quit the Court and left an incomplete, all-male four-member tribunal.

In particular, the article examines how the Court offers a range of legal arguments to justify its shifting roles along the way, preserving its public legitimacy under a technical perspective.[28] Young's typologies shed

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[24] *See* Rebecca Bill Chavez, *The Evolution of Judicial Autonomy in Argentina: Establishing the Rule of Law in an Ultrapresidential System*, 36 J. LATIN AM. STUD. 451, 454 (2004) (describing informal practices such as court-packing and opaque appointment processes as "indicators of executive subordination of the courts").

[25] *See* Mariana Llanos, *They Should All Go (Again)!: Forty years of Democracy in Argentina*, 4 GIGA FOCUS (2023), https://www.giga-hamburg.de/en/publications/giga-focus/they-should-all-go-again-forty-years-of-democracy-in-argentina (describing the 1989 and 2001 crises and their impact on the political system); *see also* COLIN M. LEWIS, ARGENTINA: A SHORT HISTORY 160–179 (2002) (outlining the process from the 1989 hyperinflation crisis to the neoliberal reform program of the 1990s, and its demise in 2001); *see generally* David Bilchitz, *Socio-economic Rights, Economic Crisis, and Legal Doctrine*, 12 INT'L J. CONST. L. 710, 715 (2014) (pointing out Governments use crisis to justify extraordinary measures that would not be admitted under normal circumstances); Constantinos Kombos, *Constitutional review and the economic crisis: In the Courts We Trust?*, 25 EUROPEAN PUB. L. 105, 110–111 (2019) (explaining how the "language of crisis" emphasizes deference to expert decision-makers with only a superficial judicial control, in the context of an alleged lack of alternatives and an imperative need to prevent chaos, even enabling centralizing institutional redesign) in the context of an alleged lack of alternatives and an imperative need to prevent chaos, even enabling centralizing institutional redesign).

[26] *See* YOUNG, *supra* note 1, at 242.

[27] For an overview of the 1994 reform, prepared by a leading Argentine constitutional law scholar, *see* Néstor P. Sagüés, *An Introduction and Commentary to the Reform of the Argentine National Constitution*, 28 U. MIAMI INTER-AM. L. REV. 41, 65 (1996–1997) (underlining that the reform "accentuated the social bent" of the Constitution, particularly by including the principle of social justice and of real equal opportunities).

[28] *See* Juan F. González-Bertomeu, *Judicial Politics in Latin America*, *in* ROUTLEDGE HANDBOOK ON LAW AND SOCIETY IN LATIN AMERICA 169, 177–78 (Rachel Sieder et al., eds., 2019) (highlighting the potential of studying judges' opinions and votes, *i.e.*, legal arguments, as part of the scholarly effort to understand courts; such a "legal model" of study may be compatible with contributions from other disciplines).

light on the Argentine Court's evolving approaches to social rights in complex contexts and with a diverse membership.[29]

As the Court is an unelected institution, legal justification plays a crucial role in maintaining the Court's public legitimacy. This social perception depends in part on the belief that the Court's decisions are legally justified.[30] In addition, legal arguments included as grounds for the SC's decisions become building argumentative blocks in lower court rulings in Argentina.[31] These arguments are also generally drawn upon by the legal profession as a whole. Therefore, legal arguments embedded in Court precedents have a powerful projection, considering the multitude of audiences the Justices address.[32]

I. TYPOLOGIES TO READ WHAT COURTS DO: AN INTERPRETATION TOOL

To reach a renewed understanding of the SC decisions on social rights since 1994, this article relies on Katharine Young's connected typologies of judicial review and of court roles. Through these categories, it is possible to distinguish periods in the trajectory of the SC. In each period, the Court adopts a particular role in the adjudication of social rights, associated with the preferred use of certain approaches to the task. Young's work provides the tools for examining how the Court sustained, from a legal point of view, its technical legitimacy despite embracing different roles after the 1994 constitutional reform. At the same time, this article intends to explore the fertility of Young's categories for the analysis of a specific court from the Global South, which is not a centralized constitutional court, belongs to the Civil Law tradition, and operates in a

[29] *See* YOUNG, *supra* note 1, at 242.

[30] *See* Alba Ruibal, *The Sociological Concept of Judicial Legitimacy: Notes of Latin American Constitutional Courts*, 3 MEX. L. REV. 343, 345–46 (2010) (explaining that the legal perspective on legitimacy "implies an internal or intra-institutional point of view based on the . . . comparison between judicial behavior and the established rules and principles that govern it"); *see also* Klatt, *supra* note 9, at 361 (explaining that while courts change their role over time, the decisive question is "how to rationally justify the choice of a particular review approach").

[31] *See* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 757 (1982) (underscoring "[t]he search for meaning is always arduous, but even more so when one realizes that the interpretation will become authoritative").

[32] *See* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 175 (2006) (emphasizing that courts shape their decisions partly in order to gain approval from peers and superiors in the judiciary, interested parties, academics, the general public, and elite opinion-makers; this approach, according to Baum, reopens a debate about the "the balance between legal and policy considerations in judges' choices").

federal, presidentialist republic. These features, among others, distinguish the Argentinean case from the courts thoroughly analyzed in Young's pioneering works.

After laying out Young's typology of judicial review, this section presents the four roles courts can play regarding economic and social rights.[33] These concepts, in turn, provide a sound basis for recognizing those roles in the SC's performance, as analyzed in the following sections.

Young outlines five types of judicial review: deferential, conversational, experimentalist, managerial, and peremptory.[34] This spectrum ranges from the least intrusive to the most court-empowering alternative.[35] It also includes the possibility that actors other than the judiciary and the elected branches may participate in the process.[36] Young argues that all of these forms of review can be found in different courts and jurisdictions—a sign of the migrations taking place in the contemporary legal sphere, in some cases encouraged by constitutional or legal clauses that connect local interpretation to international law.[37]

Under a *deferential* approach, courts acknowledge elected branches hold greater decision-making powers and possess superior epistemic authority when it comes to interpreting the scope and content of economic, social, and cultural rights. Out of respect for the democratic principle, legislation or policy will usually survive this type of review. However, weak protections may result in rights violations, which Young labels "judicial abdication."[38]

A *conversational* approach implies that the court has confidence in engaging in a sustained dialogue with the executive or the legislature to determine how to properly secure these rights in a joint interpretive endeavor—carried out over time—where there is room for disagreement.[39]

The *experimentalist* stance expands that interaction, including other relevant agents, such as groups, communities, or civil society organizations, always in the search for a plausible reading of the right at

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[33] *See* Katharine G. Young, *A Typology of Economic and Social and Rights Adjudication:Exploring the Catalytic Function of Judicial Review*, 8 INT'L J. CONST. L. 385, 410 (2010).

[34] *See id.* at 387.

[35] *See id.* A plural vision of enforcement mechanisms in the area of social rights is also discussed in TUSHNET, *supra* note 7, at 226–64 (outlining "weak" and "strong" forms of judicial review, and emphasizing that "weak" forms take into account "the existence of reasonable disagreement over what an abstractly described constitutional right means in a particular context," and the difficulties both political processes and judicial power face in searching for that meaning).

[36] *See* Young, *supra* note 33, at 387-88.

[37] *Id.* at 410.

[38] *Id.* at 392–95.

[39] *Id.* at 395–98.

stake.[40] Rather than following a deferential path, the court examines the reasonableness of legislation and policy and, where necessary, promotes structural changes by proposing new priorities and bringing new voices and actors into the process.[41]

When a court conducts a *managerial* review, it interprets the right's content, and creates specific mechanisms and timetables to protect it.[42] This includes regularly monitoring the right to ensure its protection.[43] The court summons the other branches to produce plans for the judges' approval and control.[44] The judiciary needs to devote a large amount of technical and financial resources, with a significant impact on the institutional budget.[45]

Lastly, a *peremptory* review implies that the court is competent to provide the final interpretation of the right at stake, direct other branches of government on its implementation, and supervise the enforcement of those directives.[46] The court has the authority to strike down legislation, reinterpret it, or uphold it.[47]

A. From Judicial Review Approaches to Court Roles

While all judicial review types may be available to any court,[48] different combinations of approaches shape four court roles: catalytic, detached, engaged and supremacist.[49] Thus, judicial review typology provides the building blocks for a second, non-exhaustive typology—that of court roles,[50] aimed at classifying and connecting previously dispersed elements, for heuristic purposes.[51] Young contends that a courts' legitimacy comes from assuming the proper role according to the institutional context.[52]

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[40] *Id.* at 398.
[41] *Id.* at 398–401.
[42] *Id.* at 402.
[43] *Id.*
[44] *Id.* at 402–07.
[45] *See id.* at 402–07.
[46] *See id.* at 407.
[47] *Id.* at 387, 407.
[48] *See* Klatt, *supra* note 9, at 360 (emphasizing that Young's typology offers no normative guidance or justification for any form of judicial review).
[49] *See* YOUNG, *supra* note 1, at 312–13.
[50] *See* Young, *supra* note 33, at 411.
[51] *See* YOUNG, *supra* note 1, at 243.
[52] *See id.* at 339.

Various explanations may account for specific choices regarding judicial review approaches, according to Young.[53] Positive or negative state obligations may favor a more deferential or a more peremptory approach, respectively, though this is not a systematic link.[54] A second explanation emphasizes the court's growing confidence in its own legal creations: deference may have been an appropriate stance initially, but a more intellectually robust court may opt for a more interventionist approach.[55] Complexity is also cited as a significant factor: for example, deference may be in order for dealing with more intricate issues, while simpler solutions would warrant a bolder stance.[56] Finally, the costs appear to be a relevant factor.[57]

The adoption of a particular judicial review approach, in turn, usually correlates with how the court reads the Executive or Legislative position and the behavior regarding the right at stake.[58] The court's choice of a specific review approach is linked to its assessment of the extent to which governmental negligence, inadequate resources, or deliberate obstruction undermine the rights in question.

Catalytic courts, in Young's typology, may deploy all five types of judicial review approaches, according to circumstances, to open communication and deliberation channels with other branches of government and social actors, and between them, in order to achieve substantial rights protection, with less political friction.[59] The court does not design a solution, but makes it possible for the other branches to do it through a deliberative process. At the same time, the court keeps itself out of the focus of change. Young categorizes South Africa's Constitutional Court as a catalytic institution that also connects procedural safeguards to a substantial reading of democracy, including economic and social rights.[60]

A detached court resorts to deferential or conversational approaches to judicial review. The United Kingdom courts, according to Young, assume this role even after the approval of the 1998 Human Rights Act.[61] The judiciary can interpret any piece of legislation according to the Act, or declare it to be incompatible with it. The latter decision does not strike down that piece of legislation nor makes it inapplicable. It only works as

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[53] *See* Young, *supra* note 1, at 387, 413–16.
[54] *See id.* at 413–14.
[55] *See id.* at 414–15.
[56] *See id.* at 415.
[57] *See id.* at 416.
[58] *See id.* at 387, 416–17.
[59] *See id.* at 387.
[60] *See id.* at 387, 410–12, 418, 420; *see also* YOUNG, *supra* note 1, at 269.
[61] *See* YOUNG, *supra* note 1, at 206–12.

a signal to the Parliament. Judicial culture, steeped in a history of parliamentary sovereignty, reinforces the courts' detachment, especially when the decision implies resource allocation. Young contends a detached role may be effective for economic and social rights enforcement under certain institutional contexts, where the elected branches are traditionally responsive or attentive to judicial prompts and social demands.[62]

An engaged court employs an experimental or a conversational approach to judicial review.[63] Young contends that India's Supreme Court offers an example. While economic and social rights are included in the Indian Constitution only as formally non-enforceable "Directive Principles of State Policy," the Court has developed social rights jurisprudence since the 1980s.[64] Through an expanded interpretation of the enforceable right to life, and by considering the principles of interdependence and indivisibility of rights and the contents of the 1948 Universal Declaration of Human Rights (UDHR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the Court included housing, emergency healthcare, education, clean working conditions, and food as parts of the right to life.[65]

Supremacist courts favor a managerial approach or a peremptory approach to judicial review.[66] Examples of managerial stance include establishing admission tests for state-run healthcare systems, quotas for elementary education, or specific housing financing schemes.[67] A peremptory orientation accounts for decisions that strike down legislation or policies, such as pension cuts.[68] In many cases, these decisions come after a series of information-gathering measures and public hearings.[69]

Young describes the Constitutional Court of Colombia as an example of a supremacist court.[70] Based on its civil law tradition of inquisitorial

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[62] *See id.* at 206–08. A detached role in Latin American courts, such as the Argentine Supreme Court, cannot be explained by a history of legislative sovereignty, since the region shows, on the contrary, a historic pattern of strong Executives. *See* Bernal, *supra* note 15, at 338–40 (highlighting the "hyperpresidentialism" and the lack of adequate Congressional control over the Presidency as key elements for understanding the behavior of high courts in Latin America); DIANA KAPISZEWSKI, HIGH COURTS AND ECONOMIC GOVERNANCE IN ARGENTINA AND BRAZIL 195 (Cambridge Univ. Press ed., 2012) (describing a pattern of "submission" of the Argentine Court to the Executive, interspersed by instances of confrontation).

[63] *See* YOUNG, *supra* note 1, at 242.

[64] *See id.* at 223–31.

[65] *See id.*

[66] *See id.* at 313–14.

[67] *See id.* at 317.

[68] *See id.* at 269.

[69] *See id.* at 318.

[70] *See id.* at 317.

powers, this new Court adopted a bolder, less bureaucratic stance, empowered by the 1991 Constitution and its wide standing rules and institutions, including the *tutela*—a petition procedure open to anyone seeking judicial protection for human rights.[71] In addition to that, the judges of the Court share a common belief in both the importance of rights and the relevant role of the judiciary in enforcing them, given Colombia's violent, authoritarian political history and the dysfunctional behavior of contemporary elected branches.[72]

In a closer look at the Colombian case, Young underscores the managerial approach has drawn heavily on judicial resources and overtaxes the Court's capacity. The peremptory approach has also shown its downsides, at least in the realm of public opinion. Since the Court has struck down legislation or policy for being "retrogressive" in terms of economic or social rights, some critics have described those decisions as biased in favor of the middle-class or registered workers, already benefited by traditional social policy and labor regulations, while the most vulnerable population remains unprotected. Where institutional dialogue seems inapt to promote changes, or the affected parties lack any political clout or relevance, the supremacist role seems the more adequate response, according to Young.[73]

The trend is not restricted to Colombia. According to Young, elements of supremacy can also be found in the high courts of Argentina and Brazil, after judicially enforceable social rights became part of the constitutions in the late 1980s and early 1990s.[74] This article, precisely, examines the shifting Court roles in social rights adjudication after the 1994 reform, and the following section lays out the salience of legal arguments offered by the Court to justify its evolving behavior.

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[71] *See id.* at 318.

[72] *See id.* at 317–18. The Argentine SC, as previously explained, is not a novel institution, having been established 160 years ago, in the early stages of Argentina's state-building process after a four-decade long civil war. *See* DAVID ROCK, ARGENTINA 1516–1982: FROM SPANISH COLONIZATION TO THE FALKANDS 125 (1986) (describing the simultaneous creation of national institutions such as a taxation system, a judiciary and the basic units for an army).

[73] *See id.* at 319–20; *see also* Landau, *supra* note 15, at 246–47 (describing the high-profile role of Brazil's highest federal court in enforcing social rights, particularly through the issuance of rulings involving individual cases).

[74] *See* YOUNG, *supra* note 1, at 322.

II. WHAT COURTS SAY: THE IMPORTANCE OF LEGAL JUSTIFICATION IN THE QUEST FOR LEGITIMACY

While the Argentine SC is not subject to electoral accountability and enjoys constitutional protections for its stability,[75] it needs to offer legal justifications for its decisions, as one of the main instruments to maintain its public legitimacy. The use of its own precedents as a legal foundation emerged very early in the Court's practice. Because Argentina belongs to the civil law tradition, there is no formal rule of *stare decisis*. In addition, the Court may exceptionally overrule previous decisions under certain conditions, also defined by applicable precedents. In the absence of such requirements, the Court needs to follow a different method to change course without formally overturning precedents, to avoid jeopardizing the Court's technical legitimacy.

Various factors, including the political landscape, the moral and ideological leanings of the Justices, their personal affinities or antagonisms, short-term urgencies or long-term institutional needs can be examined to explain any given judgment. However, the Court is expected to provide sound technical arguments, according to the standards of legal discipline[76]. Being a non-elected body, technical proficiency serves as one

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[75] *See* Arts. 99(4) & 110, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). Under articles 99(4) and 110 of the Argentine Constitution, Supreme Court Justices hold their positions "during their good behavior" until they reach 75 years of age; at that point the President can nominate the same judge again and the Senate can confirm for a renewable five-year term. *See id.* Art. 99(4) & 110. Supreme Court Justices can be removed only by impeachment, which requires a two-thirds supermajority in both Houses of Congress (the lower House drafts the accusation while the Senate delivers the final decision). *See id.* Art. 99(4). In addition to that, the compensation clause—inspired by a similar provision included in the U.S. Constitution as part of Art. III, Sec. 1—ensures compensation for all federal judges "may not be diminished in any way during their tenure." *See id.* Art. 110. This clause intends to prevent financial manipulation by Congress or the use of pay cuts as political pressure on the judiciary. *See* Francisco José Quintana & Justina Uriburu, *Comentario al art. 110*, *in* 2 CONSTITUCIÓN DE LA NACIÓN ARGENTINA: COMENTADA 874 (Roberto Gargarella & Sebastián Guidi eds., 2019); NÉSTOR P. SAGÜÉS, 2 DERECHO CONSTITUCIONAL 442–46 (2017) (describing the protections granted by the Argentine Constitution to the judicial branch); *see also* MARÍA ANGÉLICA GELLI, CONSTITUCIÓN DE LA NACIÓN ARGENTINA: COMENTADA Y CONCORDADA 849–54 (3d ed. 2005); N. GUILLERMO MOLINELLI, M. VALERIA PALANZA & GISELA SIN, CONGRESO, PRESIDENCIA Y JUSTICIA EN ARGENTINA 637–42, 644–47 (1999).

[76] *See* Jonathan M. Miller, *Evaluating the Argentine Supreme Court under Presidents Alfonsín and Menem (1983–1999)*, 7 SW J.L. & TRADE AMS. 369, 376 (2000) (highlighting that "the relative degree of dependence of the Court on the Executive and the degree to which

key source of legitimacy, through what may be termed legal or technical legitimacy. Theunis Roux analyzes the Constitutional Court of South Africa and explains that, "legal legitimacy of judicial review depends on a court's capacity to decide cases according to forms of reasoning acceptable to the legal community of which it is a part."[77] Alba Ruibal, in turn, refers to a Court's "procedural legitimacy" as "the perceptions of principled and lawful decision-making," and the connected idea that judges' legitimacy implies that they "do not only make their decisions based on their political and personal preferences."[78] Legal grounds for judicial decisions thus contribute to what Marc Loth labeled "output legitimacy,"[79] *i.e.*, the legitimacy based on what the courts develop and deliver. This article discusses in later sections the main legal argumentative lines developed by the SC to justify its role changes related to social rights adjudication and to preserve its legal or technical legitimacy.

Legal training is a constitutionally required condition for becoming a member of the Court.[80] Legal arguments are, in principle, the only type of arguments admitted as a foundation for deciding cases. As the Court highlights in a 2015 ruling on healthcare benefits, "[j]udgments must have consistent and rationally sustainable grounds," to respect the constitutional rights to "defense in trial and effective judicial protection."[81] In the same paragraph, this unanimous vote stresses that "expressing the reasons that the law provides for the resolution of controversies" favors "the credibility

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the Court's reasoning in important constitutional cases is based on legal principles" are key elements for leading lawyers in Argentina to perceive the Court's behavior "as a legitimate use of judicial authority").

[77] Roux, *supra* note 14, at 106, 108 (distinguishing "legal legitimacy" from "sociological legitimacy," understood as a general support from the public). That general notion encompasses the three types of legitimacy—institutional, substantial and authoritative—that a judicial organ like a Supreme Court can possess. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1789, 1827–29 (2005); *see also* Diana Kapiszewski, *Economic Governance on Trial: High Courts and Elected Leaders in Argentina and Brazil*, 55 LATIN AM. POLS. & SOC'Y 47, 54 (2013) (defining legitimacy as a reflection of the Court's standing among the general public as well as legal community).

[78] *See* Ruibal, *supra* note 30, at 346, 354.

[79] Marc Loth, *Courts in a Quest for Legitimacy: A Comparative Approach*, *in* THE LEGITIMACY OF HIGHEST COURTS' RULINGS 267 (Nick Huls et al., eds., 2009) (distinguishing between "input-legitimacy," related to institutional factors such as recruitment and training of judges, and "output-legitimacy," based on the court's performance and its communication with the parties).

[80] *See* GELLI, *supra* note 75, at 770–71 (explaining that the Argentine Constitutional requirement of Supreme Court candidates to have at least eight years of professional legal experience is absent in the U.S. Constitution taken as a model—and defines the Supreme Court as a "court of law" and excludes laypeople from its membership).

[81] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/6/2015, "P., A. c. Comisión Nacional Asesora para la Integración de las Personas Discapacitadas y otro s/ amparo," Fallos (2015-338-488) (Arg.).

of the decisions made by the judiciary in the framework of a democratic society."[82] According to this view, individual rights in a trial setting, connect to democracy and to the non-elected Court's public esteem through the explicit articulation of legal grounds for judicial decisions.

This technical, non-political profile has another consequence. The Court has consistently refused to analyze the political merits or the social appropriateness of any given statute or decision adopted by the elected branches,[83] focusing on law as its central area of competence.[84]

A. Legal Justification and Precedents at Argentina's Apex Court

While it is not a formal rule,[85] the Argentine SC has tended to respect its own precedents since the earliest stages of its history.[86] This practice

[82] CSJN, 16/6/2015, "P., A," Fallos (2015-338-488, 492) (author's translation). A year before, the Court linked this requirement of legal foundation to Inter-American Court of Human Rights decisions. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 20/5/2014, "L., E. S. c. Centro de Educación Médica e Investigaciones Clínicas Norberto Quirno (CEMIC) s/ amparo," Fallos (2014-337-580, 589) (Arg.).

[83] *See* Susan Rose-Ackerman et al., *Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and Philippines*, 29 BERKELEY J. INT'L L. 246, 313 (2011). In defining the scope of judicial competence, the Supreme Court developed over time its own version of the "political question" doctrine, which prevents the Argentine apex tribunal from assessing "the opportunity, merits or convenience" of decisions made by the political authorities. *See id.* (describing the local version of the "political question" doctrine as a defining element of judicial self-restraint in Argentina with respect to policy choices made by the elected branches). Leaving policy assessments to the Executive and Legislative powers, the Supreme Court affirms its own competence to engage in legal analysis and, if necessary, constitutional review. While the line between political assessments and legal judgments has often proved difficult to draw, it remains as a conceptual framework for the Court's activity, even if its explicit mention has diminished since the late 1990s. *See id.*

[84] JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 239, 248 (Ciaran Cronin & Pablo De Greiff eds., 1998) (arguing that in a "deliberative democracy" courts in modern democracies rely on law as a key legitimizing instrument due to the role of law in pluralist societies as central instrument of social integration).

[85] *See* Alberto F. Garay, *A Doctrine of Precedent in the Making: The Case of the Argentine Supreme Court's Case Law*, 25 SW. J. INT'L L. 258, 291 (2019).

[86] *See id.* at 258, 274, 288 (highlighting that the Supreme Court officially publishes its decisions since 1863 and that the practice of respecting precedents diverged from the Civil Law tradition and catered to the demands of the legal profession of the mid-1860s Argentina); *see also* Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith*, 46 AM. UNIV. L. REV. 1483, 1559, n. 556 (1997) (providing multiple 19th century examples of Argentine SC rulings based on the Court's own precedents). In the preamble to the first volume of the official record of the Court's decisions (issued in 1864),

ensures the Court's credibility even in a Civil Law country.[87] As the Court stated in a 1939 case, "the tribunal could not move away from its case law but under causes sufficiently serious to justify the change of criteria" otherwise "it would be extremely inconvenient to the public if precedents were not duly regarded and implicitly followed," according to the unanimous vote.[88] Following established precedents, reinforces the secular constitutional principle of equality before the law:[89] if a current case is like a previous one, equality demands that the same treatment be applied. On the other hand, it also contributes to the impersonality of the Court,[90] *i.e.*, to the separation of its decisions from the individual members of the current composition. It also reinforces the notion of judicial independence, understood here as independence from the Court, and from the personal biases or interests of its Justices. Finally, respect for precedent helps to achieve stability and predictability in constitutional interpretation and enforcement.[91] It is also relevant since the SC expects lower courts to follow its precedents,[92] in a process known as "vertical stare decisis,"

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the Secretary of the Court stressed the importance of publishing judgments, not only to make them generally known, but also "to raise before the Supreme Court the power of the people's opinion." *See* SECRETARÍA DE JURISPRUDENCIA, CORTE SUPREMA DE JUSTICIA DE LA NACIÓN, NOTA DE JURISPRUDENCIA: HISTORIA DE LA COLECCIÓN "FALLOS DE LA CORTE SUPREMA DE JUSTICIA" (2021), https://sj.csjn.gov.ar/homeSJ/notas/nota/25/documento.

[87] *See* Santiago Legarre & Christopher R. Handy, *A Civil Law State in a Common Law Nation, A Civil Law Nation with a Common Law Touch: Judicial Review and Precedent in Louisiana and Argentina*, 95 TUL. L. REV. 445, 473–74 (2021) (describing Argentina as a "hybrid" case, which incorporates an American style decentralized judicial review in the context of Civil Law tradition).

[88] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 15/5/1939, "Miguel Baretta c. Provincia de Córdoba," Fallos (1939-183-409, 413) (Arg.).

[89] Art. 16, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) ("The Argentine Nation admits neither blood nor birth prerogatives: there are neither personal privileges nor titles of nobility. All its inhabitants are *equal before the law*, and admissible to employment without any other requirement than their ability. Equality is the basis of taxation and public burdens." (italics added)).

[90] *See* Garay, *supra* note 85, at 314 (linking the notion of judicial "impersonality" to the practice of the U.S. Supreme Court); *see also* RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 41 (Cambridge Univ. Press ed., 2017) (distilling the notion of impersonality from U.S. Supreme Court case law, which underscores the need for principles to be "founded in law, rather than in the proclivities of individuals").

[91] *See* GELLI, *supra* note 75, at 986.

[92] *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 4/7/1985, "Incidente de prescripción Cerámica San Lorenzo," Fallos (1985-307-1094) (Arg.) (explaining that the Court ruled that lower courts have the duty to conform their rulings to those of the Court in similar cases and departing from these rulings requires the development of new arguments). This reaffirmation of a qualified version of "vertical stare decisis" took place in the context of a newly restored constitutional democracy where most lower court judges had been appointed or confirmed by the military dictatorship, and

which requires a well-developed and consistent rationale for its decisions over time to provide that guidance. The Court must not only lay the legal groundwork for its rulings, but also place those foundations within a larger, long-term structure of legal decisions, even if the Argentine Court—as Alberto Garay points out—takes this idea in loose terms, since it does not always adequately articulate the relevant facts of cases, focusing only on the similarities between them.[93]

However, the approach to precedents is not rigid, as there are exceptions. In particular, the Court has made it clear that preserving its constitutional function as an apex tribunal should come before the need to maintain a certain line of precedents. The Court has given three reasons for overruling a previous decision: (1) because it was an "erroneous" decision; (2) the lessons of experience; and (3) changing historical circumstances.[94] The first reason is based on technical arguments, while the other two are based on changes in context, at least as perceived by the Justices. In any event, a shift in course requires the Court to provide, in turn, a sufficient justification for it under one or more of the three possible scenarios.

On the other hand, a mere change in the composition of the Court is not a formally permissible reason to modify a line of precedents—at least not in principle. Nevertheless, governments have often tried to modify membership of the Court, by appointing Justices who share their

according to Alberto Garay, lower courts took the ruling in *Cerámica San Lorenzo* as a permission to build their own legal paths if necessary. *See* Garay, *supra* note 85, at 285, 319 (emphasizing that after 1985 the Supreme Court had to overturn multiple lower court decisions that contradicted its precedents). More recently, the Court has confirmed this approach in the *Farina* (2019). *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/12/2019, "Farina, Haydée Susana s/ homicidio culposo," Fallos (2019-342-2344, 2352, 2357-58) (Arg.); *see also* Legarre & Handy, *supra* note 87, at 477–78 (underscoring the "soft" nature of the lower court's obligation to follow the Supreme Court's precedents and even though "vertical stare decisis" is not a strict rule, it is still necessary for the SC to provide sound legal justification).

[93] *See* Garay, *supra* note 85, at 285, 300–01 (describing the Court's difficulties in using facts as determinative elements in selecting applicable precedents and linking these weaknesses to the civil law training of most of the Justices).

[94] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 21/3/2006, "Alberto Damián Barreto y otra c. Provincia de Buenos Aires," Fallos (2006-329-759, 765). The Court also cited a 1960 ruling, where a unanimous vote justified an exception to the respect for precedents. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/10/1960, "Thorndike, María Helena García de s/ pensión," Fallos (1960-248-115, 125) (Arg.) (discussing with specific regards to pension rights, "[a]lthough the permanence of case law is desirable, based on the preservation of legal certainty, it should not prevent its revision when there are sufficient reasons of justice to that effect").

worldview, in order to secure favorable rulings.[95] Sometimes, a renewed Court bluntly changes course, explaining that the new stance is held by the "present composition" of the tribunal, without any effort to tie the new position to a pre-existing line of cases.[96] This approach can be seen as legitimate in the context of a restored rule of law after a dictatorship:[97] the 1983 SC, for instance, could invoke its legitimacy to depart from the holdings sustained by the military-era Court, due to their irregular origin. In other situations, the sheer departure from established precedent may take its toll on the Court's legitimacy.

Therefore, to protect its technical standing and public legitimacy, the Court needs to pursue a new legal path when overruling a certain precedent, if it cannot be done under the legally admissible grounds set by the Court itself. By distinguishing a current case from a previous one, the Court can leave the precedent untouched while applying a different solution to the new case, even if it is a similar one or shares relevant traits with the previous one. The Court has done this in the past, especially when following a precedent regardless of the concrete circumstances would contradict the deep rationale of the original decision or would damage the Court's credibility if no distinctions are made. For example, after a controversial 1986 ruling decriminalizing the private possession of small amounts of illegal drugs for personal use, subsequent decisions carved out a few exceptions to the first decision without overturning it.[98] This technique will be analyzed in rulings on social rights from the past decade.

III. ARGENTINA'S CONSTITUTIONAL FRAMEWORK ON SOCIAL RIGHTS: GRADUAL RECOGNITION, INTERNATIONAL LAW SOURCES, JUDICIAL ENFORCEABILITY

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[95] ANDREA CASTAGNOLA, MANIPULATING COURTS IN NEW DEMOCRACIES: FORCING JUDGES OFF THE BENCH IN ARGENTINA 30-83 (2018) (discussing a detailed study of the various mechanisms for political manipulation of Argentine Supreme Court along the past century).

[96] *See* Garay, *supra* note 85, at 286, 310 (criticizing the use of a new composition as an argument to depart from precedents).

[97] *See* Juan F. González Bertomeu, Tell Me Who You Cite and I Will Tell You Who You Are. Supreme Court Citations Under Regime Instability in Argentina (Nov. 11, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3487114 (discussing a historical analysis of how the Supreme Court cites its own case law through the tumultuous political context of twentieth century Argentina).

[98] *See* Garay, *supra* note 85, at 296–97 n. 114 (2019) (including at least nine cases decided between 1986 and 1989 where the Court revised the initial holding in light of the specific facts of each case); *see also* Alberto B. Bianchi, *La Corte Bajo la Presidencia de Raúl Alfonsín (1983–1990)*, *in* 3 HISTORIA DE LA CORTE SUPREMA ARGENTINA 1983-2013: EL PERÍODO DE LA RESTAURACIÓN DEMOCRÁTICA 1163, 1248 n. 546 (Alfonso Santiago ed., 2014).

Social rights gradually became part of Argentina's Constitution. A first version, adopted through the 1949 constitutional reform, was eliminated by a military government in 1956.[99] A year later, a constitutional convention drafted a new article, known as article 14 *bis*, to grant labor rights, union rights and social security rights.[100] The 1994 reform significantly expanded social rights by giving constitutional status to various international human rights treaties and declarations.[101] Language from these instruments must be harmonized with the rest of the Constitution since all these elements share an equal rank.[102] The Constitution and the relevant international human rights treaties form what Argentine law scholars label as "[federal] constitutional block,"[103] which is a defined set of legal instruments endowed with the highest domestic rank. As explained in a later section, this reform took place while the

[99] *See* Leticia Vita, *Weimar in Argentina: A Transnational Analysis of the 1949 Constitutional Reform*, 27 RECHTSGESCHICHTE-LEGAL HIST. 176 (2019) (analyzing the influence of the interwar German constitutional process in the adoption of social rights in the Argentine Constitution).

[100] Art. 14 *bis*, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). *See* CARLOS MARUCCI & GERARDO CIRES, HISTORIA CONSTITUCIONAL: REFORMAS CONSTITUCIONALES ARGENTINAS DESDE 1860 A 1994 114–19 (2022); *see also* Dardo Pérez Guilhou, *Los Partidos "del Centro" Ante la Convención*, *in* LA CONVENCIÓN CONSTITUYENTE DE 1957 327, 349 (2007).

[101] *Id.*, Art. 75(22) (explaining that Congress is entitled to remove treaties from the constitutional framework and to incorporate new human rights treaties which requires a supermajority of votes which is two-thirds of all members in each House); *see* Janet Koven Levit, The Constitutionalization of Human Rights in Argentina: Problem or Promise?, 37 COLUM. J. TRANSNAT'L L. 281, 291–92 (1999) (underlining that "Argentina's constitutionalization of human rights was a unique development" in Latin America at the time). In article 75(22), the following treaties are endowed with constitutional rank: (1) American Declaration of the Rights and Duties of Man; (2) Universal Declaration of Human Rights; (3) American Convention on Human Rights; (4) International Covenant on Economic, Social, and Political Rights; (5) International Covenant on Civil and Political Rights, and its Optional protocol; (6) Convention on the Prevention and Punishment of the Crime of Genocide; (7) International Convention on the Elimination of All Forms of Racial Discrimination ; (8) Convention on the Elimination of All Forms of Discrimination Against Women; (9) Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment; (10) Convention on the Rights of the Child.

[102] *See* GELLI, *supra*, note 75, at 716–17; Jason Morgan-Foster, *The Relationship of IMF Structural Adjustment Programs to Economic, Social, and Cultural Rights: The Argentine Case Revisited*, 24 MICH. J. INT'L L. 577, 591–94 (2003).

[103] *See* HUMBERTO QUIROGA LAVIÉ ET AL., DERECHO CONSTITUCIONAL ARGENTINO 562 (Rubinzal – Culzoni, 2d ed., 2009) (explaining the need for the concept of "constitutional block" to encompass a group of dispositions of equal rank distributed in separate instruments, namely, the Constitution and selected human rights treaties); *see also* Alicia Ely Yamin & Agustina Ramón Michel, *Using Rights to Deepen Democracy: Making Sense of the Road to Legal Abortion in Argentina*, 46 FORDHAM INT'L. L. J. 377, 395 (2023) (underscoring that the notion of constitutional block "transformed the nature of the harmonization between the national and international").

government carried out a neoliberal program, started in 1989. The new text, on the other hand, seems to embrace a different, though implicit, economic model which includes "an active Social State."[104] While some commentators describe the Argentine case as a "paradox,"[105] Whitney Taylor considers, in a review of constitutional changes from the 1990s and the early twenty-first century, that social rights and neoliberalism do not necessarily conflict, since both approaches turn socioeconomic issues into individualized claims, duties, or questions.[106]

As a result of this gradual incorporation process, Argentina grants today the right to work under fair conditions with fair pay,[107] the right to rest and leisure,[108] the right to join trade unions,[109] the right to strike,[110] the right to enjoy "the highest attainable standard of physical and mental health,"[111] and the right to have an adequate living standard including housing, food and clothing,[112] the right to tuition-free public education,[113]

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[104] ANDRÉS GIL DOMÍNGUEZ, CONSTITUCIÓN SOCIOECONÓMICA Y DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES 41–42 (AD-HOC, 2009); *see also* SUSANA CAYUSO, CONSTITUCIÓN DE LA NACIÓN ARGENTINA: CLAVES PARA EL ESTUDIO INICIAL DE LA NORMA FUNDAMENTAL 262 (La Ley, 2d ed., 2006).

[105] *See* ALBERTO R. DALLA VIA, DERECHO CONSTITUCIONAL ECONÓMICO 124, 298 (Abeledo Perrot, Buenos Aires 2d ed., 2006).

[106] *See* WHITNEY TAYLOR, THE SOCIAL CONSTITUTION. EMBEDDING SOCIAL RIGHTS THROUGH LEGAL MOBILIZATION 9 (Cambridge Univ. Press ed., 2023) (pondering alternative explanations for the development of social rights language in turn-of-the-century constitutions in the context of simultaneous neoliberal programs).

[107] These rights can be found in International Covenant on Economic, Social, and Cultural Rights article 8(2) Dec. 16, 1966, 993 U.N.T.S. 3, S. EXEC. DOC. NO. D, 95-2 [hereinafter ICESCR]; G.A. Res 217 (III) A, Universal Declaration of Human Rights, art. 23 (Dec. 10, 1948) [hereinafter UDHR]; Art. 14 *bis* para.1, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (granting workers "dignified and equitable working conditions . . . fair remuneration; minimum vital and adjustable wage").

[108] ICESCR, *supra* note 107, at 993 U.N.T.S. 15, S. EXEC. DOC. NO. D, 95-2, 3-4; UDHR, *supra* note 107, art. 24; Art. 14 *bis* para.1, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (ensuring workers are entitled to "limited working hours . . . paid rest and vacations").

[109] ICESCR, *supra* note 107, at 993 U.N.T.S. 15-16, S. EXEC. DOC. NO. D, 95-2, 4-5; UDHR, *supra* note 107, art. 23; Art. 14 *bis* para.1, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (granting workers "free and democratic labor union organizations recognized by the mere registration in a special record").

[110] ICESCR, *supra* note 107, at 993 U.N.T.S. 15-16, S. EXEC. DOC. NO. D, 95-2, 4-5; Art. 14 *bis* para.2, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (establishing trade unions have "the right to strike").

[111] ICESCR, *supra* note 107, at 993 U.N.T.S. 17,S. EXEC. DOC. NO. D, 95-2, 6-7; UDHR, *supra* note 107, art. 25.

[112] ICESCR, *supra* note 107, at 993 U.N.T.S. 16, S. EXEC. DOC. NO. D, 95-2, 6; UDHR, *supra* note 107, art. 25.

[113] ICESCR, *supra* note 107, at 993 U.N.T.S. 17-18, S. EXEC. DOC. NO. D, 95-2, 7-8; UDHR, *supra* note 107, art. 26; Art. 75(19), CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (providing that education statutes enacted by Congress should "guarantee the principles of free and equitable State public education").

the right to social security including mobile pensions,[114] and the right to participate in cultural life, and the right to benefit from scientific progress,[115] among others.[116] The 1994 reform also included two principles relevant for interpreting and applying social rights: "social justice" (art. 75.19) and "real equality of opportunity and treatment" (art. 75.23), both associated with the social constitutionalism tradition.[117] According to article 75.19, Congress has the powers to "provide whatever is conducive to human development, to economic progress with social justice . . . ."[118] The concept had already been included in the abrogated 1949 reform,[119] and the SC recognized it as an implicit principle in *Berçaitz*, a 1974 ruling. Describing it as "justice in its highest expression," the Court added social justice implies ordering resources and activities in order to "ensure that each and every one . . . . shares in the material and spiritual goods of civilization."[120] After 1994, constitutional commentators have linked the notion to a certain "ethical direction" for economic growth,[121] or to the "equitable distribution of wealth among the whole population of the country."[122] On the other hand, the notion of "real equality" complements equality under the law, or formal equality, granted in nineteenth-century article 16. Congress, by virtue of article 75.23, is also entitled to establish

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[114] ICESCR, *supra* note 107, at 993 U.N.T.S. 16, S. EXEC. DOC. NO. D, 95-2, 9; Art. 14 *bis* para. 3, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (establishing workers are entitled to "adjustable retirements and pensions" while the State shall also "grant the benefits of social security, which shall be of an integral nature and may not be waived").

[115] ICESCR, *supra* note 107, at 993 U.N.T.S. 18, S. EXEC. DOC. NO. D, 95-2, 8-9.

[116] The 1994 reform also added some rights and guarantees in the constitutional text, such as consumers' rights or the right to a healthy environment in Art. 42, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); *id.* Art. 41.

[117] Art. 75(19), CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); *id.* Art. 75(23).

[118] *Id*. Art. 75(19).

[119] *See* Luis Guillermo Piazza, *The Argentine Constitution and Its 1949 Reform*, 2 ANUARIO JURIDICO INTERAMERICANO 140, 146-47 (1949).

[120] The ruling also established as an interpretative principle *in dubio pro iustitia socialis*. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/9/1974, "Berçaitz, Miguel Ángel s/ jubilación," Fallos (1974-289-430), at 436 (Arg.) ("[W]hen in doubt, rule in favor of social justice . . . ."). In more recent times, the Supreme Court mentioned the social justice principle again in *Gentini* (2008), majority vote, parag. 1, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 12/8/2008, "Gentini, Jorge Mario y otros c/ Estado Nacional Ministerio de Trabajo y Seguridad s/ part. accionariado obrero," Fallos (2008-331.2-1815).

[121] DALLA VIA, *supra* note 105, at 374.

[122] *See* HUMBERTO QUIROGA LAVIÉ, CONSTITUCIÓN NACIONAL COMENTADA442 (3d ed., 2000).

"positive" or proactive measures to foster human rights enjoyment, for groups like children, women, the elderly, and people with disabilities.[123]

Traditionally, legal scholars considered social rights unenforceable through judicial review in the absence of statutory regulation by Congress. Pensions, on the other hand, were subject to occasional constitutional challenges by plaintiffs seeking improvement in their retirement income.

The 1994 reform modified the applicable framework by explicitly granting courts the power to declare statutes and regulations unconstitutional, a practice already carried out by the judiciary since the mid-1860s.[124] According to article 43 as drafted in 1994, constitutional review can be carried out through the *amparo* action,[125] which provides quick injunctive relief. As previously explained, this action is also suitable to cases involving groups or classes of citizens for claims regarding rights of general public interest, the right to a healthy environment, or consumers' rights. The revised Constitution, in sum, opens the way for judicial enforcement of all rights, including social rights.[126]

The current Argentine Constitution contains a robust set of social rights provisions, including detailed clauses from international law sources. All of these rights are now subject to enforcement through

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[123] *See* QUIROGA LAVIÉ ET AL., *supra note* 103*,* at 415–19 (describing art. 75.23 as inspired by European post-1945 constitutions' focus on substantial equality and connecting the reference in article 75.23 to "positive measures" with article 4.1 of the Convention on the Elimination of All Forms of Discrimination Against Women, which enables States to adopt "temporary special measures . . . aimed at accelerating de facto equality [between men and women]").

[124] *See* Miller, *supra* note 86, at 1548 (observing that recognition of the authority of the Supreme Court to review the conduct of Congress and the Executive predated even the appointment of the first group of Justices).

[125] Previous constitutional reforms in 1949 and 1957 included social rights but did not establish specific judicial enforcement procedures, as the 1994 reform explicitly did in article 43. It should be noted, though, that the *amparo* action emerged in 1957 through a Supreme Court decision in *Siri* (1957). *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/12/1957, "Siri, Ángel s./ interpone recurso de hábeas corpus," Fallos (1957-239-459). A year later, the SC adopted in *Kot* (1958) a similar solution to a case where the amparo challenged conduct carried out by a private party (in the case, a trade union). *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 5/9/1958, "Kot, Samuel s/ recurso de hábeas corpus," Fallos (1958-241-291); *see also* Sagüés, *supra* note 27, at 64.

[126] Art. 43 para. 1, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) ("Any person shall file a prompt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten *rights and guarantees recognized by this Constitution, treaties or laws*, with open arbitrariness or illegality. In such case, the judge may declare that the act or omission *is based on an unconstitutional rule.*" (italics added)).

constitutional judicial review. The 1994 reform empowered the judiciary to act as guardian of constitutionally enshrined social rights.[127]

A. Argentina's Supreme Court: Instability at the Apex

The highest court of law in the country deals with the interpretation of constitutional clauses and functions as a last resort tribunal. Its rulings cannot be appealed and its competence in matters of appeal includes only questions of law. While the Court's original jurisdiction is limited, its appellate jurisdiction is expansive. Multiple mechanisms exist for appealing federal lower court or provincial supreme court decisions to the Court, which must fully consider all properly filed cases. Since 1990, on the other hand, Law 23.774 enables the Court to dismiss non-important cases without giving any formal argument.[128]

The Court is composed of five Justices appointed by the President with confirmation of two-thirds of the Senate. As explained in a previous section, the magistrates' term ends at seventy-five years old, when the President and the Senate can keep the judges for an additional term of five years, following the same process established for the appointment. The five-year extension can be repeated indefinitely.[129]

Over the last thirty years, the SC has undergone significant changes in its composition,[130] as mentioned in a previous section. In the 1990s, a nine-member Court included a majority of members appointed by President Carlos Menem (1989–1999). This Court offered reliable support to his neoliberal agenda, including reforms to labor laws, the pension system, and social welfare programs, under an ample program aimed at Government downsizing, privatization, deregulation, and attracting foreign investment. The Court failed to build public legitimacy, and by the end of Menem's presidency, it ended its term being held in very low public esteem.

A reshaping of the SC took place in the wake of the 2001 crisis. President Néstor Kirchner (2003–2007) started a reform process in 2003:

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[127] *See* TAYLOR, *supra* note 106, at 5 (discussing that the 1994 reform may be included in a "fourth wave of constitutionalism," globally prominent since the 1980s until the early 2000s).

[128] Law No. 23774, Apr. 11, 1990, B. O. 175 (Arg.); *see* KAPISZEWSKI, *supra* note 62, at 71 (arguing that even under Law 23.774, the Supreme Court has no extensive control of its own docket, since it must analyze, at least formally, all cases); Pereira, *supra* note 10, at 716 (pointing out that while the Court has no formal instruments to steer its caseload, "[i]t has ample room for discretion when deciding which cases to consider at what time").

[129] Art. 99(4), CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); *id.* Art 110.

[130] *See generally*, CASTAGNOLA, *supra* note 95.

two Justices were impeached while three resigned. By 2004–2005, a new composition was in place, and a legal reform gradually brought the Court back to its traditional format of five justices.[131]

By 2015, resignations and deaths had left the Court with only three members, and the opposition refused to discuss any nominee by President Cristina Kirchner (2007–2015).[132] In 2016, two new members joined the Court, appointed by President Mauricio Macri (2015–2019). In 2021, the only female sitting member of the Court resigned, and her seat remains vacant as of December 2023.

Reconfiguration of the Court's ideology has generally been "not subtle," according to Martín Oyhanarte: impeachment (1946, 2002–2005), *de facto* dismissal (1955, 1966, 1976), dismissal as a result of a return to constitutional rule (1973, 1983), and modification of the number of members (expansion in 1960 and 1989, reduction in 2006).[133]

In summary, the composition and legitimacy of Argentina's highest court have fluctuated due to appointments by different presidents over the past 30 years. The Court has shifted between different ideologies and has endured periods of understaffing. These changes in membership may affect the Court's technical legitimacy since Justices are expected to follow precedents or argue extensively to justify a departure from previous solutions. The following sections analyze the different roles the Court assumed in the area of social rights, and how it built legal grounds for them.

IV. AFTER THE REFORM, WAITING FOR THE CRISIS TO COME: A DETACHED SUPREME COURT (1994–2000)

A 1996 social security case showed the Court's deferential approach in the area of social rights. The ruling dismissed a retiree's claim for an indexed increase in his pension, as established by the constitutional mobility clause since 1957. According to the Court, Congress has the authority to define the applicable rate for pensions.[134] Despite new rights and innovative judicial attributions included in the 1994 constitutional reform, the majority kept a detached role by maintaining a deferential approach in the adjudication of social rights. This stance was part of the

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[131] Law No. 26183, Dec. 15, 2006, B.O. 123154 (Arg.).

[132] *Rechazo opositor a los candidatos de Cristina Kirchner para la Corte Suprema*, CLARÍN (Oct. 29, 2015, 10:49 AM), https://www.clarin.com/politica/rechazo-cristina-kirchner-corte-suprema_0_B1pg-WYPQl.html.

[133] *See* Oyhanarte, *supra* note 19, at 715.

[134] *See* CSJN, 27/12/1996, "Chocobar, Sixto Celestino," Fallos (1996-319-3264) (underlining Congress is constitutionally entitled to define the indexing methodology for pensions).

general trend of support for President Carlos Menem's neoliberal reform program, which was launched in the wake of the 1989 hyperinflation crisis.

A. From Neoliberal Stability to Increasing Recession and Political Change: a Court in Discredit

Economic stability and growth, under fiscal discipline and a very tight monetary regime,[135] led to President Menem's re-election in 1995, despite criticism of perceived corruption and concentration of power in presidential hands. During his second term, unemployment rose, and external crises led to a recession, while foreign debt continued to grow beyond acceptable risk levels. A coalition of center and left-of-center parties won the 1999 elections[136] and Fernando de la Rúa became President on an anti-corruption and poverty alleviation platform, without an articulate alternative for economic issues.[137]

The SC, in turn, continued to face severe legitimacy problems during this period. Public opinion saw the Court as lacking institutional independence and technical solvency since President Menem packed it

[135] Argentina adopted in 1991 a currency board system, pegging the local peso to the U.S. dollar through Law 23.928 (known as Convertibility Law). *See* Mariana Heredia & Pablo Nemiña, *Beyond the Diffusion of Neoliberalism: Embedded Reasoning and Policy Innovation in the Origins of the Argentinian Currency Board*, 25 REVISTA HISTÓRIA UNISINOS 250, 253–54 (2021) (explaining that Convertibility's success in curbing inflation—endorsed by international organizations—made economists overlook its negative repercussions and its likely demise, which had been clearly visible in its early stages).

[136] On the origins and proposals of the 1999 triumphant coalition, *see* Héctor E. Schamis, *Argentina: Crisis and Democratic Consolidation*, 13 J. DEMOCRACY 81, 85-88 (2002) (attributing part of the political problems of President De la Rúa to the internal differences inside the ruling coalition and the prevalence of personally close advisors to the President in day-to-day decision-making); *see also, generally*, Violeta Dikenstein & Mariana Gené, *De la creación de la Alianza a su vertiginosa implosión. Reconfiguraciones de los elencos políticos en tiempos de crisis*, *in* LOS AÑOS DE LA ALIANZA. LA CRISIS DEL ORDEN NEOLIBERAL 35 (Alfredo Pucciarelli & Ana Castellani, eds., 2014) (explaining the coalition lacked a unified vision of the way out of the recession).

[137] *See also* Brad Setser & Anna Gelpern, *Pathways through Financial Crisis: Argentina*, 12 GLOB. GOVERNANCE 465, 467-68 (2006) (highlighting that after 1998, Argentine recession due to external shocks fostered continuous political tension, which in turn led "successive groups of creditors to lose confidence," sparking an external debt crisis that exploded in 2001). For a general description of the 1990s reform program and its connection to the 2001 crisis, *see generally* Ignacio Hirigoyen, *Bank Crisis in Argentina: The Constitutionality of Bank Deposits Pesification, the Massa Case*, 14 LAW & BUS. REV. AM. 53 (2008).

with six new appointees in 1990.[138] As the economic crisis deepened, a massive popular contempt for political institutions developed at the turn of the century. The Court was one of the main targets of public discontent since it had been consistently deferential to the policy decisions of the Executive branch regarding resource management.[139]

B. A Hands-off Court: Traditional Vision and Conservative Reading of International Human Rights Law

In the area of social rights, the SC exercised a deferential approach during this period to uphold labor law reforms reducing workers' rights under a general deregulation model with a pro-business orientation. In his extensive historical study of the apex tribunal, Alfonso Santiago describes this composition of the Court as "comparatively, the least protective of workers' rights" of all Courts acting during Peronist administrations since 1946.[140] For instance, the 1996 ruling in *Sallago*[141] upheld a Necessity and

[138] The Court increased its size through the Law 23774, which raised the number of Justices from five to nine, and created, as mentioned in a previous section, a procedural mechanism for the Court to dismiss claims without offering grounds. *See* Miller, *supra* note 76, at 394–99 (providing a thorough revision of the subordination of the Supreme Court to the Executive Power during the Menem administration, and describing the consequent loss of public trust in the Court); *see also* Alfonso Santiago (h), *La Corte de los Nueve (1990-2003)*, *in* 3 HISTORIA DE LA CORTE SUPREMA ARGENTINA 1983-2013, EL PERÍODO DE LA RESTAURACIÓN DEMOCRÁTICA 1295, 1669–70 (2014) (describing the Court between 1990 and 2003 as one of the most "politicized, questioned, criticized, controversial and discredited" in Argentine history, and offering a panoramic review of multiple objections against that Court from local and foreign scholars (author's translation)); *see also* CASTAGNOLA, *supra* note 95, at 47–49 (describing the specific process of the 1990 court-packing).

[139] Nonetheless, the Court's most notable concession of power to the Executive took place four years before the 1994 constitutional reform. It concerned government control over private property. In *Peralta* (1990), the majority of Justices upheld a Necessity and Urgency Decree that, in response to the country's severe hyperinflation and the threat of a collapse of the financial system, forcibly converted most private bank accounts into long-term government bonds. With this decision, the Court allowed the Executive to seize control of citizens' private savings in an attempt to stabilize the spiraling inflation and prevent financial chaos. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 27/12/1990, "Peralta, Luis Arcenio y otro c. Estado Nacional (Mrio. de Economía BCRA.) s/ amparos," Fallos (1990-313-1513) (Arg.); *see also* Miller, *supra* note 76, at 400–03 (highlighting that the majority opinion "[S]imply stated that the failure of Congress to explicitly reject the decree allowed the Court to infer Congressional acceptance of the measure," in an extremely deferential approach to Executive decisions over private property).

[140] *See* SANTIAGO (h), *supra note* 138, at 1556-57 (underscoring how the Supreme Court since 1990 reversed lower courts decisions favorable to workers, upheld regressive changes in labor conditions and limitations on severance payments, among other measures objected by trade unions and labor activists).

[141] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 10/10/1996, "Sallago, Alberto Asdrúbal c. Astra C.A.P.S.A. s/ despido," Fallos (1996-319-2267) (Arg.).

Urgency Decree that curtailed statutory rights of merchant marine workers, illustrating the majority of the Court's inclination to confirm the Executive actions aimed at deregulating certain economic activities, even when the President exercised Congressional competences in the emergency context.

In a notable exception to the general deferential approach in labor rights, the majority of the Court struck down a statute on constitutional grounds, only to deny banking personnel a special protection granted by a 1988 law.[142] The statute required private banks to give priority to rehiring workers who had been fired for joining strikes in previous decades. The Bank had to pay a substantial monetary compensation as an alternative to rehiring. In *Agnese* (1998),[143] the Court held that this "preference right" contradicted the constitutionally protected freedom of contract and ruled against the plaintiff, a former employee of a large private bank. In this case, the Court embraced a peremptory approach against an act of Congress, though with a clear orientation in favor of traditional contractual freedoms. Probably, the result also suited the general labor deregulation model spearheaded by the Menem administration.

Throughout this period, pensioners demanded an improvement in their incomes. The privatization of the pension system in 1993 did not substantially benefit pensioners at the time. They were dependent on the pre-existing state-funded system, which remained as a residual institution. In addition, the currency board system adopted in 1991 as an anti-inflationary tool banned all forms of indexation, including any mobility scheme for pensions, required by article 14 *bis* of the Argentine Constitution. The Menem administration left pensions broadly fixed, in an attempt to maintain fiscal balance and avoid inflationary pressures.[144] Congress also failed to adopt an indexing methodology. Judicial demands multiplied as the only channel left open for seeking redress. In considering these claims, the SC would again demonstrate its deferential approach to adjudication of social rights, in this case, the right to social security.

In *Chocobar*[145] a slim majority of the Court acknowledged Congress holds ample discretionary powers to adapt the pension system to new

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[142] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/11/1998, "Agnese, Miguel Angel c. The First National Bank of Boston (Banco de Boston) s/ ac. de reinc. ley 23.523," Fallos (1998-321-3081) (Arg.).

[143] *Id*.

[144] *See* Rafael Rofman, Eduardo Fajnzylber & Germán Herrera, *Reforming the pension reforms: Argentina and Chile,* 101 CEPAL REVIEW 83, 85–86 (2010). The re-nationalization of the pension system is described in a later section of this article.

[145] *See id.* Fallos (1996-319-3264) (highlighting Congress is constitutionally entitled to establish the indexing methodology for pensions).

situations.[146] This deferential approach even found basis in a specific reference to article 22 of the Universal Declaration of Human Rights: the majority of Justices stressed the right to social security is to be implemented "in accordance with the organization and resources of each State;" they quoted similar language from article 26 of the American Convention of Human Rights.[147] In other words, the Court turned to international human rights law to broaden Congressional powers. Pension rights remained conditioned to the available resources as determined by the legislative branch. This specific use of international law differed[148] from the one contemporarily applied in judicial review of civil rights and procedural guarantees, where clauses from human rights treaties set limits to State powers, even before 1994.[149] In *Giroldi* (1995),[150] for instance, the Court relied on decisions by the Inter-American Court of Human Rights to strike down a passage of the applicable criminal procedure code for failing to ensure the right to appeal the judgment to a higher court.[151]

The immediate aftermath of the 1994 reform did not bring a more active Court in the area of social rights. Despite the significant changes in terms of rights and judicial attributions, the apex body sustained the traditional view of social rights as non-enforceable through judicial review

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[146] *See id.* Fallos (1996-319-3269) (emphasizing Congressional authority to completely modify the pension system in light of "the different situations that society may go through," among other changing circumstances).

[147] *See id.* Fallos (1996-319-3265) (emphasizing availability of resources as a limit to the effective realization of the right to social security). The reference to "available resources" is included only in the Spanish-language version of the article 26 of the American Convention on Human Rights, while it is absent in the English version. *See* Damián A. González-Salzberg, *Economic and Social Rights within the Inter-American Human Rights System: Thinking New Strategies for Obtaining Judicial Protection*, 18 INT'L L.: REVISTA COLOMBIANA DE DERECHO INTERNACIONAL 117, 130 (2011) (considering the impact of the textual difference in assessing State duties with regard to social rights).

[148] In analyzing *Chocobar* shortly after its publication, Janet Koven Levit criticized the ruling for forcing international human rights treaties to yield to the Supreme Court precedents on the constitutional rights at stake. *See* Koven Levit, *supra* note 101, at 326–27.

[149] *See* Hernán Victor Gullco, *The Clash of Constitutional and International Law in Argentinean Case Law*, 27 SW. J. INT'L L. 315, 323–27 (2021) (explaining the primacy of international law since a 1992 Supreme Court ruling).

[150] Corte Suprema de Justicia [CSJN], [National Supreme Court of Justice], 7/4/1995, "Giroldi, Horacio David y otro s/ recurso de casación," Fallos (1995-318-514) (Arg.).

[151] Isaías Losada Revol, *The Ministry of Foreign Affairs Case: A Ruling with Unforeseen Consequences in the Enforcement of Human Rights in Argentina*, 49 GEO. J. INT'L L. 461, 468–69 n. 36 (2018) (enumerating a group of Argentine Supreme Court rulings since 1995 based upon Inter-American Court decisions); *see also* Antonio Moreira Maués, Breno Baía Magalhães, Paulo André Nassar & Rafaela Sena, *Judicial Dialogue between National Courts and the Inter-American Court of Human Rights: A Comparative Study of Argentina, Brazil, Colombia and Mexico*, 21 HUM. RTS. L. REV. 108, 117–18 (2021) (explaining that the Argentine Supreme Court in 1992 relied on the 1969 Vienna Convention on the Law of Treaties to justify the direct application of international human rights treaties, even before the 1994 constitutional reform).

but rather conditioned upon Congressional or Presidential regulation. The Court did not find a way to reconcile a social rights discourse and a neoliberal economic model,[152] and chose to stay away from enforcing those rights. Such a deferential role, exercised even in cases related to stagnant pensions, did not help the Court to improve its decaying public image or to show technical proficiency to deal with a renewed Constitution.

V. REBUILDING AN INSTITUTION, REDISCOVERING SOCIAL RIGHTS: A PREDOMINANTLY SUPREMACIST COURT (2000–2012)

In mid-2000, the Argentine SC upheld a lower court ruling that determined the government had an obligation under the 1990 AIDS law to provide treatment to all HIV/AIDS patients registered with health care providers, both Government-funded and private.[153] The Court rejected the Government's argument that economic constraints and the worsening financial situation excused non-compliance, holding that the right to health care was justiciable and that the State was ultimately responsible under the Constitution and the law.[154] This decision marked the start of a gradual transition from the previous detached role to a supremacist one in the adjudication of social rights. This stance would consolidate over the following decade, as the Court suffered the deep social and political crisis that hit Argentina in 2001 and later undertook—with a partially-renewed composition—an institutional effort to restore its public legitimacy, just like the rest of the State branches had to.

As will be discussed in greater detail in the following sections of this article, under an increasing supremacist role, the Court engaged in a constitutional review of the decisions of the elected branches while trying to contain the wider effects of its rulings on healthcare, labor and union rights, and social security in order to prevent an excessive financial impact. During this phase, the Court invalidated legislation and policies on constitutional grounds, as well as decisions by private employers and health providers. Though a deferential approach was still applied in the initial stage of this period to some rights with potential budgetary implications, after 2003 a renewed Court abandoned that position. In the

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[152] As explained before, both developments could be combined in a general individualization of claims and problems. *See* TAYLOR, *supra* note 106, at 9.

[153] *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 1/6/2000, "Asociación Benghalensis y otros c. Ministerio de Salud y Acción Social - Estado Nacional s/ amparo ley 16.986," Fallos (2000-323-1339) (Arg.).

[154] *Id.*

specific case of pension claims, the Court also tried a conversational approach with Congress, considering the financial implications of ruling on such a thorny matter—yet a year later returned to a peremptory stance because of legislative inaction. In embracing this supremacist role the Court, in turn, ran the risk of judicial usurpation and of overtaxing the tribunal with an increasing number of demands by people and groups hit by the crisis. The Court could also get trapped in the day-to-day detailed administration of difficult issues such as social welfare, education, or healthcare. Nonetheless, a Court focused on social needs could achieve growing public legitimacy, after a period of declining popularity and serious attempts of impeachment.[155] All major interventions by a supremacist Court had to be carried out with care in order to maintain public esteem, recognition by the other branches, and acceptance by the legal community. Procedural rules provide the Court with the necessary flexibility to decide when to issue judgments, or to reject claims without providing legal reasons.[156]

From a legal standpoint, the SC based its new role on the explicit presence of social rights in the Constitution and the judicial competence to enforce them in the same way as any other right. An additional legal argument came from international human rights law: the Court emphasized that treaties had to be internally applied—especially those endowed with constitutional rank after the 1994 constitutional reform. At the same time, the Court increasingly turned to decisions and materials issued by the monitoring bodies of human rights treaties as sources of interpretation.[157] This methodology would provide the Court an external, technically sound support for its rulings, separating them from local, day-to-day political pressures and reinforcing its image of independence.

In some cases, the specific construction of a certain social right would use an extensive reading to expand its content for enforcement purposes. In Argentine constitutional scholarship, a legal interpretation that departs from textual meaning is labeled a "corrective" interpretation. If this non-

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[155] *See* Roux, *supra* note 77, accompanying text; Fallon, *supra* note 77, accompanying text; Kapiszewski *supra* note 77, accompanying text.

[156] *See* Garay, *supra* note 85, at 284–85 (explaining articles 280 and 285 of the Argentine National Civil and Commercial Procedure Code explicitly allow the Court to reject appeals from a lower court decision in the absence of a substantial constitutional question); *see also* Kapiszewski, *supra* note 62, accompanying text; Pereira, *supra* note 128, accompanying text.

[157] Walter F. Carnota, *Judicial Globalization: How the International Law of Human Rights Changed the Argentine Supreme Court*, *in* GLOBALIZING JUSTICE. CRITICAL PERSPECTIVES ON TRANSNATIONAL LAW AND THE CROSS-BORDER MIGRATION OF LEGAL NORMS 255, 263–64 (Donald W. Jackson et al., eds., 2010) (explaining the gradual but sustained increase of international human rights law relevance in the Argentine Supreme Court decisions even before the 1994 constitutional reform, initially as a means to accelerate and secure Argentina's integration to global markets).

literal construction renders an expanded reading, it is considered an "extensive" interpretation. In other words, *extensive interpretation* includes—in a certain rule's reach—a case that under everyday language would be excluded.[158] The development of robust legal arguments, including those initially provided by international institutions, cemented the technical legitimacy of the Court.

A. A Court in Flux: From the Social Outbreak to the Arduous Reconstruction

The 2001 crisis marked the end of a decade-long neoliberal reform process. Centrist President Fernando de la Rúa had to resign in the wake of financial collapse and popular outbreaks that were lethally repressed.[159] With a record 20% unemployment rate,[160] half of the population lived below the poverty line and the discredited political elite did not offer a clear way out of a billionaire external debt default[161] combined with a 40% devaluation.[162] Massive street protests put interim President Eduardo Duhalde to the test during his year in tenure.[163]

Center-left Peronist Néstor Kirchner took office after his rival, former President Carlos Menem, declined to participate in the 2003 runoff election. Economic recovery and institutional renewal, including changes in the Court and the reduction of its size, helped the Executive to rebuild political authority and ensure continuity through the election of Cristina Kirchner in 2007.

Between 2003 and 2005, through impeachments and resignations, new vacancies allowed a partial renovation of the Court membership. By

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[158] *See* NÉSTOR P. SAGÜÉS, 1 DERECHO CONSTITUCIONAL 166–167 (2017); Antonio M. Hernández, *Teoría Constitucional*, *in* 1 DERECHO CONSTITUCIONAL TOMO I, 73 (Fedye Fondo Derecho Editorial de Derecho y Economía 2012); GREGORIO BADENI, TRATADO DE DERECHO CONSTITUCIONAL TOMO I 102-03 (2d ed., 2006).

[159] For a general description of the crisis, *see* Santiago (h), *supra* note 138, at 1308–10.

[160] Mugambi Jouet, *The Failed Invigoration of Argentina's Constitution: Presidential Omnipotence, Repression, Instability, and Lawlessness in Argentine History*, 39 U. MIA. INTER-AM. L. REV. 409, 449 (2008).

[161] *Id.* at 452.

[162] Jayson J. Falcone, *Argentina's Plight-An Unusual Temporary Solution to a Sovereign Debt Crisis*, 27 SUFFOLK TRANSNAT'L L. REV. 357, 362 n. 25 (2003).

[163] *See id.* at 449–61 (analyzing the impact of mass protest in the political outcome of the 2001 crisis); *id*. at 359–65 (describing the process that led to the 2001 crisis and the emergency legislation adopted in the immediate aftermath); *see also* John V. Paddock, *IMF Policy and the Argentine Crisis*, 34 U. MIA. INTER-AM. L. REV. 155, 184–85 (2002–2003) (describing the high unemployment and poverty rates in 2002 and highlighting the Supreme Court's clashes with the Executive over emergency economic measures).

Executive Decree,[164] President Néstor Kirchner established a self-restraining, public scrutiny mechanism for every potential Court nominee. The Decree also adopted a series of guidelines to ensure gender and geographic diversity in the candidates, which were to be confirmed or discarded by two-thirds of the Senate. Four new Justices joined the Court in this initial stage through the new procedure.[165]

Leaving behind the neoliberal program, Kirchnerist economic policy focused on the domestic market, involving a greater role for the State.[166] Significant growth, reduced unemployment, and rising wages contributed to the Government's popularity. Large-scale social policies, such as the Universal Child Allowance,[167] increased social security coverage and the renationalization of the pension system,[168] also strengthened the Executive. On the other hand, Kirchnerism clashed with agricultural businesses over export taxes while keeping a protracted conflict with powerful media businesses about the regulation of audiovisual broadcasting. The main criticisms against Néstor and Cristina Kirchner included accusations of poor governance, corruption, and political centralism.[169] After 2011, the relationship between the re-elected President Cristina Kirchner and the Court showed some signs of tension.

As a general trend, the new Court rebuilt its public legitimacy during this period through various means.[170] It adopted institutional transparency measures in dialogue with leading NGOs and created new offices for

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[164] Decree No. 222/2003, Jun. 19, 2003, [30175] B.O. 2 (Arg.).

[165] *See* Alba M. Ruibal, *Self-Restraint in Search of Legitimacy: The Reform of the Argentine Supreme Court*, 51 LATIN AM. POLS. & SOC'Y 59, 51, 67 (2009) (describing the process innovation as a form of strategic self-restriction intended to bolster the legitimacy of the Government and the credibility of the renewed Court in a climate of social and institutional turmoil and mounting pressure from civil society).

[166] *See* Fernando Porta et al., *Un Proyecto Político con Objetivos Económicos. Los Límites de la Estrategia Kirchnerista*, *in* LOS AÑOS DEL KIRCHNERISMO: LA DISPUTA HEGEMÓNICA TRAS LA CRISIS DEL ORDEN NEOLIBERAL 99, 99–102 (Alfredo Pucciarelli & Ana Castellani eds., 2017).

[167] Decree No. 1602/2009, Oct. 29, 2009, [31770] B.O. 1 (Arg.); *see also* Pilar Arcidiácono, *Expansion and Exclusion in the Universal Child Allowance Programme in Argentina*, 13 SUR-INT'L J. ON HUM. RTS. 27, 28–29 (2016).

[168] Law No. 26425, Nov. 20, 2008, [31548] B.O. 1 (Arg.); *see also* Fabio Bertranou et al., *Pension Privatization and Reversal of Pension Reforms in Argentina* 1–7 (Int'l Labour Off., Geneva, Working Paper No. 64, 2018) (analyzing Argentina's changing pension system, specially from the 1993 reform to the re-nationalization in the wake of 2008 global financial crisis).

[169] Ernesto Calvo & M. Victoria Murillo, *Argentina: The Persistence of Peronism*, 23 J. DEMOCRACY 148, 157–59 (2012).

[170] Alba Ruibal, *Innovative Judicial Procedures and Redefinition of the Institutional Role of the Argentine Supreme Court*, 47 LATIN AM. RSCH. REV. 22, 23 (2012) (attributing innovations by the Court since 2003 to the need "to recover its institutional legitimacy" in the context of a vibrant NGO-led demand for reforms).

socially relevant issues, such as domestic violence.[171] The Court also ruled on politically charged questions, including the economic emergency program, the unbearable living conditions of aboriginal peoples and the renewed prosecution of human rights abuses from the 1976–1983 dictatorship era. Moreover, the Court explored new procedures in adjudication, from convening public hearings[172] and receiving *amicus curiae* reports to issuing rulings with collective effect and engaging in structural reform processes. This managerial (in Young's terms) approach guided the Court's intervention in a large-scale environmental case[173] and in a collective habeas corpus promoted by a leading human rights NGO to spark a desperately needed relief on the imprisonment conditions in Argentina's largest province.[174]

As part of the context, the decision handed down in *F., A. L.* (2012)[175] surely counts as one of the most widely discussed rulings of the period. Resolving a decades-long debate over the meaning of the then-current article 86 of the Penal Code (enacted in 1921), the Court defined abortion as legal when the pregnancy results from rape.[176] Based on the right to personal autonomy, the ruling took the right to health only as an additional consideration to be addressed once access to the medical procedure was

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[171] *Id.*

[172] *See* Ricardo Lorenzetti, *Las audiencias públicas y la Corte Suprema*, *in* POR UNA JUSTICIA DIALÓGICA. EL PODER JUDICIAL COMO PROMOTOR DE LA DELIBERACIÓN DEMOCRÁTICA 345 (Roberto Gargarella ed., 2014) (explaining the importance of public hearings, especially in cases with "institutional relevance," for promoting debate in a divided society).

[173] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/8/2008, "Mendoza, Beatriz Silvia y otros c. Estado Nacional y otros s/ daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza – Riachuelo)," Fallos (2008-331-1622) (Arg.). For a complete analysis of the case, *see* Charles Sabel & María Emilia Mamberti, *Participación, Colaboración y Coordinación para Ejecutar Sentencias Estructurales: La Arista Inexplorada de un Conocido Litigio Ambiental*, *in* DIÁLOGO SOBRE LA PROTECCIÓN JURISDICCIONAL DE LOS DERECHOS A LA SALUD, EDUCACIÓN, TRABAJO, SEGURIDAD SOCIAL Y MEDIO AMBIENTE SANO EN PAÍSES DE AMÉRICA LATINA: INFORME DE MEDIO AMBIENTE 91 (Gonzalo Fibla, ed., 2019). *See also* Mario Campora, *The Power to Judge, the Power to Act: the Argentine Supreme Court as a Policymaker,* 10 L. & DEV. REV. 341, 354–56 (2017) (analyzing how the Court's approach contributed to a heightened visibility of the specific environmental question at stake).

[174] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 3/5/2005, "Recurso de hecho deducido por el Centro de Estudios Legales y Sociales en la causa Verbitsky, Horacio s/ habeas corpus," Fallos (2005-328-1146) (Arg.); *see also* Martín Oyhanarte, *Public Law Litigation in the U.S. and in Argentina: Lessons from a Comparative Study*, 43 GA. J. INT'L & COMP. L. 451, 472–77 (2015) (describing the details of the approach used by the Supreme Court in dealing with an overcrowded prison system).

[175] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/3/2012, "F., A. L. s/ medida autosatisfactiva," Fallos (2012-335-197) (Arg.).

[176] CSJN, 13/3/2012, "F., A. L.," Fallos (2012-335-197, 198).

granted. The Court upheld a specific interpretation of the law, settling a politically explosive debate and displaying its willingness to participate in the public conversation.[177]

B. Health, Labor, and Social Security: the Gradual Shift to Supremacy in the Midst of the Crisis

In the area of social rights, the transition to a supremacist role started with two important healthcare cases in 2000. In the context of an impending political and economic crisis, after more than two years of recession and almost five years of double-digit unemployment rates,[178] the Court enforced the right to healthcare against a government hit by rapidly declining popularity levels.

In *Asociación Benghalensis* (2000),[179] the SC ordered the Executive branch to provide HIV/AIDS drugs to both public and private healthcare patients, as established in the 1990 AIDS law,[180] rejecting budgetary and separation of powers arguments. Once a commitment was embodied in a statute, and constitutional rights were at stake, the Court would enforce these commitments. The ruling surprised some observers,[181] given the Court's previous deferential stance and its general support for 1990s austerity policies. The divided decision included concurrent opinions and a dissent.[182] The majority vote focused on the right to health as enabling the exercise of personal autonomy—another constitutional right. Concurring votes grounded the right to treatment in the right to life, which

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[177] *See* Yamin & Ramon Michel, *supra* note 103, at 406–09.

[178] According to the International Labour Organization figures, *see* International Labour Organization, *Unemployment, total (percentage of total labor force) (modeled ILO estimate) – Argentina,* THE WORLD BANK (Sept. 5, 2023), https://data.worldbank.org/indicator/SL.UEM.TOTL.ZS?locations=AR.

[179] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 1/6/2000, "Asociación Benghalensis y otros c. Ministerio de Salud y Acción Social - Estado Nacional s/ amparo ley 16.986," Fallos (2000-323-1339) (Arg.).

[180] Law No. 23798, Aug. 16, 1990, [26972] B.O. 2 (Arg.).

[181] Graciela Biagini, José C. Escudero, Marisa Nan & Marita Sánchez, *Comentarios a la sentencia de la Corte Suprema de Justicia de la Nación con relación a la obligación del Estado Nacional de suministrar tratamiento antirretroviral a las PVVS*, JA 2005-IV, 1033 (describing the ruling as "paradoxical," since the Court had been "an active element" of neoliberal policies).

[182] The Chief Justices and two Associate Justices dissented without offering arguments, as authorized by the already mentioned Law 23774. *See* CSJN, 1/6/2000, "Asociación Benghalensis," Fallos (2000-323-1373).

some Catholic Justices labeled a "natural right" superior to any statute.[183] Either way, enforcing HIV/AIDS patients' rights against Executive objections evidenced a shift. Months later, in *Campodónico* (2000),[184] the Court also held the Federal Government responsible for ensuring a child's healthcare after loss of medical coverage. The majority vote emphasized the right to health in connection with the right to life[185] and turned to international human rights treaties endowed with constitutional rank as grounds for the decision.[186]

Rulings on health rights did not signal a complete shift in the approach toward judicialization of social rights. A day after *Asociación Benghalensis*, the SC upheld austerity pay cuts imposed on public employees by a Necessity and Urgency Decree.[187] Applying an extremely deferential approach, the majority and concurring votes admitted that the economic emergency enabled the President to reduce public wages with no expected compensation or reimbursement.[188] Under these circumstances, the Court argued that constitutional property rights and the constitutional right to a fair retribution were not sufficient grounds for striking down the constitutional property rights and the constitutional right to a fair retribution were insufficient grounds for striking down the Executive decision.[189] Such a divergent stance immediately following a

[183] *See* CSJN,1/6/2000, "Asociación Benghalensis," 323 Fallos (2000-323-1354) (emphasizing the right to health is a part of the "right to life," defined, quoting language from previous Supreme Court's rulings, as "the first natural right of the human person, pre-existent to any positive legislation"). *But see* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 05/03/2002, "Portal de Belén c. Ministerio de Salud Ministerio de Salud y Acción Social de la Nación s/ amparo" Fallos (2002-325-292, 299). Two years later, the majority of the Court, including Justices Boggiano, Moline O'Connor and Vasquez [who also supported, in his separate opinion, the outcome in *Asociacion Benghalensis*], used the same language in a decision that banned the production and sale of an emergency contraception pill. CSJN, 05/03/2002, "Portal de Belén," Fallos, (2002-325-299).

[184] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/10/2000, "Campodónico de Beviacqua, Ana Carina c. Ministerio de Salud y Acción Social – Secretaría de Programas de Salud y Banco de Drogas Neoplásicas," Fallos (2000-323-3229, 3237-38) (Arg.).

[185] *See* CSJN, 24/10/2000, "Campodónico de Beviacqua, Ana Carina," Fallos (2000-323-3239). This time the right to life did not appear as superior to any positive legislation. *See* CSJN, 24/10/2000, "Campodónico de Beviacqua, Ana Carina," Fallos (2000-323-3239).

[186] *See* CSJN, 24/10/2000, "Campodónico de Beviacqua, Ana Carina," Fallos (2000-323-3245) (explaining the dissent signed by one justice dismissed the claim and confirmed the sentence from the lower court, without providing any argument).

[187] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 2/6/2000, "Guida, Liliana c. Poder Ejecutivo Nacional s/ empleo público," Fallos (2000-323-1566, 1596) (Arg.).

[188] *Id. Fallos* (2000-323-1601).

[189] *Id. Fallos* (2000-323-1605-06).

peremptory ruling on health rights illustrates the gradual nature of the Court's change in approach. The worsening crisis and subsequent composition modification would expand and accelerate the shift. In front of a discredited political elite, a supremacist approach would arguably be less affected by the democratic objection.

As the 2001 economic collapse prompted President Fernando de la Rúa's resignation after two years in office, opposition senator Eduardo Duhalde assumed the presidency on an interim basis until the 2003 elections.[190] During 2002, Congress faced extreme difficulties with finding solutions to institutional disarray, economic depression, loss of confidence in the financial system, growing unemployment and skyrocketing poverty levels.[191] The SC also faced extreme public backlash, with repeated demonstrations at its doors where bank customers demanded access to personal savings accounts frozen by emergency decrees, while professional associations called for the impeachment of the Justices.[192] Some legislative blocs moved to impeach all Justices.[193] The Court reacted to the context in *Smith* (2002),[194] holding the unpopular freeze on bank accounts unconstitutional. The ruling asserted the individual plaintiff's right to property against the measures aimed at fighting the crisis.[195] Despite the formally limited impact of the decision, the lower courts soon applied the same criteria in thousands of similar cases. A property rights case, with enormous economic and political effect, was treated through a peremptory approach.

However, social rights now faced a different fate. Just four weeks after *Smith* (2002), the Court rejected in *Ramos* (2002),[196] an unemployed woman's claim for healthcare, food, and education for her eight children. According to the majority vote, the woman had not proved that the Government explicitly refused to comply with her request.[197] At the hardest moment of an unprecedented crisis, the majority took a clearly

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[190] Jouet, *supra* note 160, at 453.

[191] Mauro Benente, *"Fuera La Corte Suprema". Breves Notas Sobre las Protestas Frente al Máximo Tribunal*, 88 LECCIONES Y ENSAYOS, 231, 235–36 (2010).

[192] *Id.* at 232–33 (analyzing the recurrent protests in front of the Supreme Court building in late 2001 and early 2002, with a focus on the Labor Lawyers' Association and its request for the removal of the Court).

[193] *See* Santiago, *supra* note 138, at 1580–89 (outlining the impeachment process and the numerous charges brought against the nine sitting Justices).

[194] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 1/2/2002, "Smith, Carlos Antonio c. Poder Ejecutivo Nacional o Estado Nacional s/ sumarísimo," Fallos (2002-325-28, 40) (Arg.).

[195] CSJN, 1/2/2002, "Smith, Carlos Antonio," Fallos (2002-325-40).

[196] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 12/3/2002, "Ramos, Marta Roxana y otros c. Buenos Aires, Provincia de y otros s/ amparo" Fallos (2002-325-396, 402) (Arg.).

[197] *Id. Fallos* (2002-325-396, 401).

deferential approach. The claim, according to the Justices, "although revealing a dramatic social situation, cannot be solved by the Court."[198] In a crisis context, the Court seemingly took the protection of the right to property—and not social rights, as the path to its political recovery.

A few months later the wages of public sector employees came to the forefront in *Tobar* (2002),[199] though the issue was framed as a property rights case. The majority of the Court held that the pay cuts based on the "zero deficit" policy adopted in 2001 were unconstitutional,[200] since they were not temporary nor reasonable emergency measures and they affected the constitutionally protected right to property.[201] With no clear endpoint in sight, this policy affected the nature of the public employment relationship, and deprived government workers of any certainty as to their futures. This made it different from previous austerity measures, like the one upheld two years before in *Guida* (2000).[202]

As the 2003–2005 membership renovation process took place, the Court affirmed its peremptory approach to social rights, including health but also labor rights, union rights, and social security, and increased its use of human rights language. In the area of healthcare, in *Martín* (2004) the court ordered that the Argentine Air Force office for social services, provide full and comprehensive coverage for a disabled girl affiliated with the institution.[203] Complete protection for people with disabilities—the majority of the Court underscored—is not only a "public policy," enshrined in the law and sustained by Court judgments, but also a commitment before the international community by virtue of international human rights treaties, such as the Convention on the Rights of the Child.[204] This ruling sums up converging argumentative lines developed during this

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[198] *Id. Fallos* (2002-325-396, 402).

[199] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 22/8/2002, "Tobar, Leónidas c. E.N. M° Defensa -Contaduría General del Ejército- Ley 25.453 s/ amparo -Ley 16.986," Fallos (2002-325-2059) (Arg.).

[200] CSJN, 22/8/2002, "Tobar, Leónidas," Fallos (2002-325-2066). In July 2001, the Argentine Government initiated a "zero deficit" policy, incorporating measures such as monthly reductions in wages and pensions to achieve fiscal balance; shortly after the decree, Congress reaffirmed the policy through Law 25.453, but both were invalidated by the Supreme Court in Tobar (2002). CSJN, 22/8/2002, "Tobar, Leónidas," Fallos (2002-325-2066).

[201] CSJN, 22/8/2002, "Tobar, Leónidas," Fallos (2002-325-2072) (grounding the judicial review on article 17 of the Argentine Constitution, which forbids violation of property, and including wages as part of personal property).

[202] CSJN, 2/6/2000, "Guida, Liliana," Fallos (2000-323-1596).

[203] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/6/2004, "Martín, Sergio Gustavo y otros c. Fuerza Aérea Arg. Direc. Gral. Bienestar Pers. Fuerza Aérea s/ amparo," Fallos (2004-327-2127, 2136) (Arg.).

[204] CSJN, 8/6/2004, "Martín, Sergio Gustavo," Fallos (2004-327-2127, 2135).

period: the reference to rights as a central foundation, the emphasis on the plaintiff's welfare as guiding concern, the "real equality" for disadvantaged groups such as people with disabilities,[205] the connection to international law and the continuity of a State's duties, beyond changes in the Government. On the other hand, the dissent rejected the claim since the Air Force had properly followed the duties established by the applicable statute, and no additional obligations could be imposed on the institution.[206] A key argument for the dissenters was the literal reading of the statutes, with no review based on the right to healthcare.

A year later, in *Orlando* (2005), the Court ordered the federal government to provide an expensive life-saving medication to a woman affected by a serious degenerative disease.[207] The ruling emphasized the connection between the right to health and the right to life.[208] Moreover, the Court recalled the international nature of State obligations in this area, including positive duties.[209] In an extensive construction of applicable legislation, the ruling issued the order, although the plaintiff's specific medical condition was not included in the official list of covered diseases. In other words, the Court's reading made it possible to expand the scope of State obligations to a disease absent in the literal legislative language. A similar extensive construction appears in *Reynoso* (2006):[210] going beyond the literal content of the medical benefits established by a resolution of Federal Health authorities (known as the Mandatory Medical Program),[211] the Court ordered PAMI, the public health insurance agency

[205] Art. 75(23), CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

[206] CSJN, 8/6/2004, "Martín, Sergio Gustavo," Fallos (2004-327-2136).

[207] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/5/2005, "Orlando, Susana Beatriz c. Buenos Aires, Provincia de y otro s/ amparo," Fallos (2005-328-1708, 1713) (Arg.).

[208] CSJN, 24/5/2005, "Orlando, Susana Beatriz," Fallos (2005-328-1708, 1714).

[209] *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/7/2006, "Floreancig, Andrea Cristina y otro por sí y en representación de su hijo menor H., L. E. c. Estado Nacional s/ amparo," Fallos (2006-329-2561) (Arg.). Under a similar reasoning, which also included a reference to the right to personal autonomy in connection with the right to health, the Court ordered the Federal Government to provide medication for a disabled child after his trade union-run health insurance could not afford it. CSJN, 11/7/2006, "Floreancig, Andrea Cristina," Fallos (2006-329-2552, 2561).

[210] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/5/2006, "Reynoso, Nilda Noemí c. I.N.S.S.J.P. s/ amparo," Fallos (2006-329-1638).

[211] *See* Ministerio de Salud, Programa Médico Obligatorio (P.M.O.), Resolución 201/2002, ARGENTINA.GOB.AR (Apr. 9, 2002), https://www.argentina.gob.ar/sssalud/programa-medico-obligatorio (created by Executive Decree 492 in 1995, the Medical Mandatory Program includes all medical services that public health providers must cover as established by resolution of the Minister of Health).

for retirees, to provide medicines and disposable items to a patient who has senile dementia and impaired mobility.[212]

Private for-profit health insurance companies were also subject to a peremptory approach. The SC, through an extensive interpretation of applicable clauses, ordered these entities to provide comprehensive assistance for people with disabilities, though applicable legislation did not explicitly mandate it. In *Cambiaso Péres* (2007),[213] the majority vote extended to private companies the assistance required by union-owned health providers and state-financed health facilities. Despite being organized as commercial businesses, the majority of Justices argued that these companies assume a "social commitment" to patients in order to ensure "constitutional guarantees such as life, health, personal safety, and personal integrity."[214] The case involved medication and other items, such as disposable adult diapers, for a twenty year old patient with cerebral palsy.[215] The decision had two dissenting opinions, which followed different lines of reasoning. Justice Argibay and Justice Highton offered a literal construction of applicable statutes to exclude the private health provider from the most demanding legislation.[216] On the other hand, Justice Lorenzetti based his dissent on the notions of property and contract, which enjoy "constitutional protection."[217] Since the agreement between the patient and the company did not provide for the specific assistance claimed by the plaintiff, a judicial decision should not go beyond the clear terms of the agreement against any of the contracting parties. This recourse of strict statutory construction and the contract as the defining element will gain greater relevance in the ensuing decade.

In another example of extensive construction of relevant statutes, *Chamorro* (2008) determined that mutual assistance associations—health providers linked to civil society organizations—must furnish the same medical services required of both union-run health insurers, and private for-profit companies.[218] The ruling underscored the serious medical

[212] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/5/2006, "Reynoso, Nilda Noemí c. I.N.S.S.J.P. s/ amparo," Fallos (2006-329-1638).

[213] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 28/8/2007, "Recurso de hecho deducido por la demandada en la causa Cambiaso Péres de Nealón, Celia María Ana y otros c. Centro de Educación Médica e Investigaciones Médicas" Fallos (2007-330-3725, 3739) (Arg.).

[214] *Id.*, *Fallos* (2007-330-3725, 3735).

[215] *Id.*, Fallos (2007-330-3725, 3730).

[216] *Id.*, Fallos (2007-330-3725, 3745).

[217] *Id.*, Fallos (2007-330-3725, 3754).

[218] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 1/4/2008, "Chamorro, Carlos c. Sociedad Argentina de Autores y Compositores de Música s/ amparo," Fallos (2008-331-453, 455) (Arg.).

condition of the plaintiff and as highlighted in previous cases, the connection between the rights to life, health, and personal autonomy, with specific references to international human rights treaties endowed with a constitutional rank. To justify its extensive construction, the majority reasoned by means of analogy: much like private insurers, mutuals collect regular fees from members to guarantee care when health issues eventually surface.[219] Thus, given the similarities in their financing models, these non-profit organizations should provide comparable coverage.

Beyond healthcare cases, the renewed composition of the SC also exercised a peremptory approach regarding other social rights. In late 2004, the Court invoked constitutional social rights to invalidate clauses included in labor laws passed during the 1990s neoliberal era.[220] In *Aquino* (2004), citing article 14 *bis* among other legal provisions, the Court declared the prohibition of suing employers in civil courts for work-related injuries, unconstitutional.[221] Similarly, in *Vizzoti* (2004), the Court struck down strict ceilings imposed on severance pay.[222] The *ATE* (2008)[223] and *Rossi* (2009)[224] rulings strengthened protections for workers' representatives not affiliated with dominant unions and promoted trade union pluralism against the interests of the centralized trade union confederation, allied to the Government.[225]

Decisions by private employers also underwent constitutional review. *Álvarez* (2010), involved the discriminatory firing of six private-sector employees after their company discovered the workers' attempts to

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[219] *Id.*, Fallos (2008-331-453, 456).

[220] *See* Alberto B. Bianchi, *La Corte en la Era de los Kirchner (2003-2011)*, *in* 3 HISTORIA DE LA CORTE SUPREMA ARGENTINA. 1983-2013. EL PERÍODO DE LA RESTAURACIÓN DEMOCRÁTICA 1677, 1872-75 (Alfonso Santiago (h), ed.) (2014) (highlighting the main constitutional arguments of the Court, namely, the workers' rights to a full reparation for labor-related injuries and to proper working conditions and noting that the 2004 Court did not share the philosophy of the labor law reforms from the preceding decade).

[221] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 21/9/2004, "Aquino, Isacio c. Cargo Servicios Industriales S.A.," Fallos (2004-327-3753, 3760) (Arg.).

[222] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/9/2004, "Vizzoti, Carlos Alberto c. AMSA S.A. s/ despido," Fallos (2004-327-3677, 3693) (Arg.).

[223] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/11/2008, "Recurso de hecho deducido por la actora en la causa Asociación Trabajadores del Estado c. Ministerio de Trabajo s/ Ley de Asociaciones Sindicales" Fallos (2008-331-2499-15) (Arg.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 9/12/2009, "Recurso de hecho deducido por la actora en la causa Rossi, Adriana María c. Estado Nacional – Armada Argentina s/ sumarísimo," Fallos (2009-332-2715, 2715-35) (Arg.).

[224] CSJN, 11/11/2008, "Asociación Trabajadores del Estado," Fallos (2008-331-2499); CSJN, 9/12/2009, "Rossi, Adriana María," Fallos (2009-332-2715, 2726).

[225] *See* Ruibal, *supra* note 170, at 29 n. 33.

unionize management.[226] The majority of the Court ordered the employees reinstated.[227] The ruling distinguished between simple dismissal without cause, which entitles an employee to severance pay, and termination for discriminatory reasons like union activity, which should be considered null and void.[228] Specifically, the Court ruled that the employer unlawfully targeted the six workers for trying to organize.[229] As such, the firings could not stand, and the company had to reinstate the employees. Legal grounds for the decision included quotes from at least eight international human rights treaties with constitutional rank, since the majority of Justices highlighted that the nondiscrimination principle is a part of international *ius cogens*, in other words, a legal principle applicable to any State.[230] The dissenters, in contrast, emphasized that the protection of workers in private employment relationships should be enforced without infringing on the constitutionally protected freedom of contract: a mandatory reinstatement may amount to an excessive restriction of that right.[231] A year later, a similar decision in *Pellicori* (2011) fleshed out the anti-discrimination review.[232] If a dismissal has a *prima facie* discriminatory reason, the employer must prove the existence of an "objective and reasonable" motivation to characterize it as a simple firing without cause.[233] The Court also included several references to international human rights instruments, decisions of the Inter-American organisms, and judgments of various foreign and regional courts.[234] Moreover, it underlined that it would consider materials issued by international monitoring bodies, which it described as "authoritative interpreters" of human rights treaties.[235] These decisions on discriminatory dismissals show a peremptory approach to the judicial review of private employers' decisions, traditionally considered an expression of contractual freedom.

Furthermore, the *Madorrán* (2007) decision recognized public sector personnel's right to job stability, grounded in Article 14 *bis*, and struck

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[226] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/12/2010, "Alvarez, Maximiliano y otros c. Cencosud S.A. s/ acción de amparo," Fallos (2010-333-2306, 2307-08) (Arg.).

[227] *Id.*, Fallos (2010-333-2306, 2307-08).

[228] *Id.*, Fallos (2010-333-2306, 2318).

[229] *Id.*, Fallos (2010-333-2306, 2310).

[230] *Id*., Fallos (2010-333-2306, 2311).

[231] *Id.*, Fallos (2010-333-2328).

[232] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 15/11/2011, "Pellicori, Liliana Silvia c. Colegio Público de Abogados de la Capital Federal s/ amparo," Fallos (2011-334-1387) (Arg.).

[233] *Id*., Fallos (2011-334-1387, 1404-05).

[234] *Id.*, Fallos (2011-334-1387, 1403-04).

[235] *Id.*, Fallos (2011-334-1393).

down a particular set of rules for Customs employees.[236] Under this revised approach, no state employee can be fired without just cause. Additionally, citing Article 7(c) of the ICESCR, the majority ruled that stability constitutes part of the "just and favorable conditions of work," that the State must respect and provide.[237] Although the majority opinion did not differentiate among categories of public servants, Justice Highton and Justice Maqueda's concurring opinion did, noting that treatment could vary depending on each agent's contract.[238] This distinction would become relevant in the following period.

The ruling in *Rodríguez* (2006) also revealed the renewed Court's change in approach.[239] Dealing with a claim like the one rejected in *Ramos* (2002),[240] the majority of the Court ordered—as an interim measure—the provision of food to children at risk of malnutrition. Though the majority vote reaffirmed that the Court had no jurisdiction to consider the case, it took this emergency measure while the case was being referred to a lower tribunal.[241] A more flexible attitude toward formalities allowed for a timely intervention that could easily qualify as part of a peremptory stance, notably in contrast to the deferential decision in *Ramos* (2002).[242]

As a general trend, all these cases on labor and union rights and the right to food show a peremptory approach because the SC exercises constitutional review and strikes down statutes, sector-specific regulations (such as working conditions for Customs employees), and even private employers' decisions.

A conversational approach, however, appeared at an individual pension claim, which included an issue with substantial budgetary implications. As explained in a previous section, article 14 *bis* of Argentine Constitution grants mobility for pensions.[243] In *Badaro* (2006), a unanimous Court ruled that the absence of an adequate pension indexing mechanism in prior annual budgets, resulted in the plaintiff's pension

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[236] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 3/5/2007, "Madorrán, Marta Cristina c. Administración Nacional de Aduanas s/ reincorporación," Fallos (2007-330-1989, 1998-97) (Arg.).

[237] *Id.*, Fallos (2007-330-2005).

[238] *Id.*, Fallos (2007-330-2011).

[239] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/3/2006, "Rodríguez, Karina Verónica c. Estado Nacional y otros s/ acción de amparo," Fallos (2006-329-553) (Arg.).

[240] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/6/2002, "Marta Roxana Ramos y otros c. provincia de Buenos Aires y otros," Fallos (2002-325-1603) (Arg.).

[241] CSJN, 7/3/2006, "Rodríguez, Karina Verónica," Fallos (2006-329-553).

[242] CSJN, 12/3/2002, "Ramos, Marta Roxana," Fallos (2002-325-396).

[243] Art. 14 *bis*, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

lagging far from an adequate level.[244] This infringed on his constitutional right to a sufficient pension. However, the Court declined to unilaterally impose a specific indexing rate, cognizant that general financial implications must be considered in order to determine appropriate levels, given that any increase would sooner or later extend to all pension recipients.[245] Embracing a conversational approach, the Court held that Congress should define an updated formula to preserve pensions' real value within the "sufficient" time to enact the requisite measures.[246] While undoubtedly affirming pensioners' rights, the ruling sought to spark a dialogue with lawmakers to ensure reforms that balance retirees' interests, fiscal sustainability, and the Court's proper role in guiding policy for issues with immense economic and social impacts. The conversational stance seemed to recognize not only the democratic legitimacy of Congress, but also its technical expertise to conduct an assessment of pension levels. In a broader analysis, the choice of a conversational approach may be seen as an attempt to temper the political impact of declaring the infringement of a constitutional right held by millions of potential plaintiffs.[247]

Nonetheless, the approach did not yield the desired effect. A little more than a year later, Congress had not made any progress. The plaintiff came back to the Court asking for relief since the new annual budget did not adjust pensions according to the past ruling's guidelines. *Badaro* (2007),[248] marked the return to the peremptory position. Thus, in light of legislative inaction, the SC had no alternative but to establish a reasonable adjustment mechanism, based on the official general wage index—to be applied only to the individual case.[249]

In sum, during this period, the Court assumed mostly a supremacist role in the area of social rights. The key arguments to justify this shift, strengthened after a change in the Court's composition, were a recovery of the social rights explicitly included in the Constitution and the Court's

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[244] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/8/2006, "Badaro, Adolfo Valentín c. ANSeS s/ reajustes varios," Fallos (2006-329-3089, 3095-96) (Arg.).

[245] *Id.*, Fallos (2006-329-3094).

[246] *Id.*, Fallos (2006-329-3096).

[247] *See* Pereira, *supra* note 10, at 720–23 (describing the 2006 *Badaro* ruling as a way to avoid full confrontation with the political branches, and underlining the "strongly positive public reactions" to the decision).

[248] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/11/2007, "Badaro, Adolfo Valentín c/ ANSeS s/ reajustes varios," Fallos (2007-330-4873) (Arg.).

[249] *Id.*

authority to enforce these rights similarly to any other right, particularly after the 1994 reform. Related legal rationale came from international human rights law, as the Court fostered the domestic application of ratified treaties, particularly those given constitutional rank. Furthermore, the Court turned to interpretations and documents from human rights treaty monitoring bodies. In certain cases, the Court extensively construed a specific social right to broaden its scope for enforcement. All these interpretive resources cemented the technical legitimacy of the Court but also created new risks, such as judicial usurpation, confrontation with the elected branches, and the overburdening of the tribunal with insurmountable social issues.

VI. RECLAIMING AUTONOMY AND SHIFTING COURSE WITHOUT LOSING LEGITIMACY: A NEW DETACHED COURT (2012–2021)

In 2012, the Court ruled on the right to housing in a high-profile case involving a mother and her disabled infant, who were living on the streets.[250] While the Court ordered the Government of the City of Buenos Aires to provide a dwelling place for them, it made clear that judicial enforcement of the right to housing was exceptional, subject to the existence of survival risk for the affected parties.[251] This ruling marked the beginning of a return to a detached role in social rights adjudication. To preserve its technical legitimacy, the Court did not explicitly overturn any of its previous rulings on the matter. This turn rested on reducing the judicial enforceability of social rights, and restricting the scope of entitlement to some of them by applying a restrictive approach to interpretation. In a more general perspective, the Court also moved toward a more distant and cautious approach to international human rights law, affirming its position as the apex of the domestic legal system.

Regarding the new attitude toward international law, the Court took steps to assert its autonomy from external, multilateral oversight.[252] During this period, a specific decision stood out: in *Ministerio de Relaciones Exteriores* (2017), where a majority of Justices[253] declined to

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[250] *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/4/2012, "Q. C., S. Y. c. Gobierno de la Ciudad de Buenos Aires s/ amparo," Fallos (2012-335-452) (Arg.).

[251] *Id.*

[252] Young points out that discrepancies between international law and national law emerge over time, as do claims to legal authority between the global, regional, and local systems. *See* YOUNG, *supra* note 1, at 294.

[253] Justices Highton, Lorenzetti and Rosenkrantz drafted a single opinion, while Justice Rosatti concurred and Justice Maqueda dissented. *See generally,* CSJN, 14/2/2017, "Ministerio de Relaciones Exteriores," Fallos (2017-340-62).

enforce a resolution by the Inter-American Court of Human Rights ordering to revoke in its entirety a 2001 Argentina's SC ruling found to be in violation of the American Convention.[254] This challenge surprised legal commentators and law academics.[255] The Argentinean Court explicitly scaled back its previous favorable approach to the incorporation of international law:[256] "It is beyond discussion that the state is, *in principle*, obliged to comply with decisions by the Inter-American Court pronounced in compulsory proceedings against the state," according to the majority vote.[257] This qualified, cautious commitment to the hemispheric system also implied that the nation's apex court claimed authority to review the scope of the regional tribunal's competence granted by the American Convention on Human Rights (ACHR).[258] The Argentinean Court concludes the Inter-American tribunal cannot function as a "fourth instance," as it lacks authority to revoke a decision by the highest local tribunal. The SC also emphasized that complying with this regional ruling would undermine the highest rank of the Argentine court, which would contradict Argentina's "public law principles" protected by article 27 of the Constitution.[259]

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[254] *See* Gullco, *supra* note 149, at 327.

[255] *See* Jorge Contesse, *Resisting the Inter-American Human Rights System*, 44 YALE J. INT'L L. 179, 219–20 (2019) (citing opinions and articles by Argentine legal scholars who voiced their perplexity in the wake of the national apex court's decision). For a favorable comment on the Supreme Court's decision, *see* Alberto F. Garay, *La Corte Interamericana No Puede Ordenar que se Dejen sin Efecto Sentencias Firmes*, in ANALES DE LA ACADEMIA NACIONAL DE CIENCIAS MORALES Y POLÍTICAS 415, 436–37 (2017) (underscoring that the Supreme Court, by virtue of its own position in the Argentine judicial system, is entitled to review whether the regional court's decision is consistent with the national Constitution).

[256] *See* Gullco, *supra* note 149, at 323–27, 341 (discussing Argentine Supreme Court's "exemplary conduct of compliance" in cases between 1992 and 2017, where international law and the rulings by the Inter-American Court prevailed over local law found to be in breach of human rights treaties).

[257] CSJN, 14/2/2017 "Ministerio de Relaciones Exteriores," Fallos (2017-340-57) (author's translation).

[258] *See* Contesse, *supra* note 255, at 220 (describing this approach by the Argentinean Court as "astonishing," since it placed itself above the regional tribunal).

[259] Art. 27, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) ("The Federal Government is under the obligation to strengthen its relationships of peace and trade with foreign powers, by means of treaties in accordance with the *principles of public law* laid down by this Constitution." (emphasis added) (author's translation)). Unmodified since 1853, this article sets guidelines for the Executive and Congress in the area of foreign relations, requiring international treaties to be consistent with the basic lines of domestic constitutional law. *See* Julián Rotenberg, *Comentario al art. 27*, *in* 1 CONSTITUCIÓN DE LA NACIÓN ARGENTINA. COMENTADA 928, 939 (Roberto Gargarella & Sebastián Guidi eds., 2019) (explaining that the

After a compliance monitoring hearing held a few weeks later, the Inter-American Court underscored that Argentina had not objected in the past to similar remedies, and it explained that alternatives to revoking the local decision could also be considered. For instance, the regional tribunal explained that the Argentine SC may include a specific annotation to the decision, officially stating it was incompatible with the ACHR.[260] In a brief resolution, the Argentine SC accepted that option, highlighting it was in line with "public law principles."[261] This significant and widely debated episode[262] revealed Argentina's SC had reclaimed its autonomy under the Inter-American human rights system, at least as the local court of last resort.[263] Social rights cases analyzed in this section show another version of this autonomist turn. In some instances, the Argentine Court refused to follow the guidance of the Inter-American Court of Human Rights interpretive contributions, while in other cases the Justices omitted any reference to relevant human rights treaties endowed with constitutional rank or made a selective use of materials from international human rights monitoring bodies.

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majority vote in *Ministerio de Relaciones Exteriores* reads article 27 as defining a "sovereign sphere" that prevails over international treaties and considers that the protected public law principles include the Supreme Court's highest rank in the domestic judicial system (author's translation)).

[260] Inter-Am. Ct. H.R., Judgment Supervision Hearing, (Aug. 21, 2017), ¶ 21.

[261] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 5/12/2017, Resolución No. 4015/17 (Arg.), https://www.cij.gov.ar/nota-28770-La-Corte-considera-compatible-con-la-Constituci-n-el-requerimiento-de-la-Corte-Interamericana-de-dejar-asentada-su-decisi-n-en-una-sentencia-nacional-previa.html.

[262] *See, e.g.*, Rolando Gialdino, *Incumplimiento de una Sentencia de la Corte Interamericana de Derechos Humanos: Un Acto Internacionalmente Ilícito de la Corte Suprema Argentina*, 15 ESTUDIOS CONSTITUCIONALES 491, 492–93 (2017) (criticizing the Argentine ruling); Juan Carlos Hitters, *Control de Convencionalidad: ¿Puede la Corte Interamericana de Derechos Humanos Dejar Sin Efecto Fallos de los Tribunales Superiores de los Países? (El caso Fontevecchia vs. Argentina)*, 22 PENSAMIENTO CONSTITUCIONAL 109, 127–28 (2017) (underlining that the competence of the Inter-American Court cannot be defined by the Argentine Court); Víctor Abramovich, *Comentarios Sobre* "*Fontevecchia", la Autoridad de las Sentencias de la Corte Interamericana y losPrincipios de Derecho Público Argentino*, 10 PENSAR EN DERECHO 9, 12–13 (2017) (emphasizing the Inter-American Court did not act as a "fourth instance" since it did not interpret domestic law, but the international duties imposed to Argentina by the ACHR (author's translation)).

[263] According to Juan F. González Bertomeu and Ramiro Álvarez Ugarte, the Court in 2017 Court "expressed an apparent will to distance itself from the commands of international courts." *See* Juan F. González-Bertomeu & Ramiro Álvarez-Ugarte, *Argentina: The State of Liberal Democracy*, *in* 2017 GLOBAL REVIEW OF CONSTITUTIONAL LAW 13, 17 (Richard Albert et al., eds., 2018); *see also* Claudina Orunesu, *Conventionality Control and International Judicial Supremacy: Some Reflections on the Inter-American System of Human Rights*, 40 REVUS: J. CONST. THEORY & PHIL. LAW 45, 60 (2020) (taking into account objections to the lack of democratic legitimacy of the regional tribunal and highlighting that the conflict illustrates the need for a dialogue between the two Courts, leaving behind the notion of mandatory application of the Inter-American Court's interpretive criteria).

A. A Court in the Midst of Political Alternation and Institutional Controversy

During this period, the Court coexisted with three different Presidents: Cristina Kirchner (until 2015), Mauricio Macri (from 2015 to 2019), and Alberto Fernández (since 2019). In the final years of President Kirchner's term, tensions grew between her Peronist administration and the Court over media regulation and judiciary reform, among other issues. In 2013, while the Government in *Grupo Clarín*[264] secured a conditioned validation of the long-debated Law of Audiovisual Communication Services,[265] the Court dealt a serious blow to the Executive by holding that a reform to the Council of the Magistracy statute, which heightened electoral accountability of its members, was unconstitutional.[266] The Council, according to article 114 of the Constitution, oversaw the selection and removal of lower federal court judges. To establish a more transparent and impartial process, the 1994 constitutional reform introduced a fair balance of representation from the judiciary, the elected branches, academia, and legal professionals. Only forty days after Congressional approval, the Court struck down a 2013 statute, which made judicial representatives dependent on the votes of the general electorate, in addition to their peers' votes.[267] Meanwhile, social and economic policies from the previous decade began faltering, with rising inflation as a salient issue.[268] In early 2015, President Christina Kirchner's allies in Congress

[264] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 29/10/2013, "Grupo Clarín SA y otros c. Poder Ejecutivo Nacional y otro s/ acción meramente declarativa," Fallos (2013-336-1774) (Arg.) (upholding the limits on the number of broadcast stations an entity can own but also underlining the need to respect property rights of media businesses in applying those limits); *see also La Corte Suprema Declaró la Constitutionalidad de la ley de Medios*, CENTRO DE INFORMACIÓN JUDICIAL (Oct. 29, 2013), https://www.cij.gov.ar/nota-12394-La-Corte-Suprema-declar--la-constitucionalidad-de-la-Ley-de-Medios.html.

[265] Law No. 26522, Oct. 10, 2009, B.O. 25 (Arg.).

[266] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/6/2013, "Rizzo, Jorge Gabriel (apoderado Lista 3 Gente de Derecho) s/ acción de amparo c. Poder Ejecutivo Nacional, ley 26.855, medida cautelar (Expte. N° 3034/13)," Fallos (2013-336-780) (Arg.).

[267] Law No. 26855, May 8, 2013, B.O. 1 (Arg.).

[268] ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN (ECLAC), ARGENTINA 1 (2016), https://repositorio.cepal.org/server/api/core/bitstreams/b9a3e81f-44ce-4b87-ad36-c45a5b836aba/content (describing Argentina's inflation in the preceding years as "well above the regional average").

unsuccessfully tried to impeach ninety-seven year-old, Justice Carlos Fayt, who resigned a day after she left office.[269]

Peronism lost the November 2015 presidential runoff election to center-right Buenos Aires Mayor Mauricio Macri, leader of the *Cambiemos* coalition. Due to resignations and deaths in the preceding year, the SC in late 2015 had only three members left out of five, since Kirchner could not secure the Senate's approval for any of her three successive nominees for the two vacant seats. In turn, President Macri appointed two new Justices, Carlos Rosenkrantz and Horacio Rosatti, during the first semester of his administration, having previously failed to do so through temporary appointments in his first week in office.[270] Despite the two new appointees' academic and professional credentials,[271] this renewed Court soon faced widespread criticism for its ruling in *Muiña* (2017),[272] which granted pre-trial detention benefits to indicted military officers accused of dictatorship-era human rights abuses, and provided the opportunity for an anticipated release.[273] Massive street protests expressed a deep rejection of the ruling, and Congress immediately passed an "interpretive statute" that excluded these inmates from the benefits in question. A little more than a year later, a Court majority in *Batalla*

[269] *See* CASTAGNOLA, *supra* note 95, at 88–90.

[270] *See* Oyhanarte, *supra* note 19, at 728 (pointing out that President Macri's attempt to temporarily appoint both Justices by Executive Decree met "marked disapproval from a large portion of the political spectrum" and had to be reversed); *see also* Andrés del Río, *President Macri and Judicial Independence on the Argentine Supreme Court*, BLOG INT'L J. CONST. L., (Feb. 5, 2016), https://www.iconnectblog.com/president-macri-and-judicial-independence-on-the-argentine-supreme-court/ (suggesting that attempting to bypass the Senate in the confirmation process affected the chance "to provide legitimacy and stability to the new judges").

[271] *See, e.g., Vacantes en la Corte: Macri envió los pliegos de Rosatti y Rosenkrantz al Senado*, LA NACION, (Feb. 1, 2016), https://www.lanacion.com.ar/politica/vacantes-en-la-corte-macri-envio-los-pliegos-de-rosatti-y-rosenkrantz-al-senado-nid1867267.

[272] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 3/5/2017, "Recurso de hecho deducido por la defensa de Luis Muiña en la causa Bignone, Reynaldo Benito Antonio y otro s/ recurso extraordinario," Fallos (2017-340-549) (Arg.).

[273] The Court held, by a 3-2 majority, that Luis Muiña, member of a military "death squad" that operated at a public hospital between 1976 and 1977, was eligible for a law that counts each day spent in pre-conviction detention as two towards the total sentence. *See id.* at 569 (author's translation).

(2018),[274] reversed its previous decision.[275] The tribunal kept a generally peaceful relationship with the Macri administration. The Executive did not appeal a 2017 lower court decision that allowed Justice Highton to stay in the Argentine SC after turning 75[276] by virtue of a 1999 precedent that was overturned by the Court itself a few days later.[277] In 2018, after eleven years in office, Ricardo Lorenzetti stepped down as Chief Justice. Carlos Rosenkrantz, the member considered most closely attuned to the Executive Office,[278] became the new head of the Court in a contested vote that received significant media attention.[279]

Mounting economic troubles and steady inflation undermined Macri's reelection bid in 2019. Earlier in 2018, his administration had

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[274] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 4/12/2018, "Recurso de hecho deducido por Batalla, Rufino en la causa Hidalgo Garzón, Carlos del Señor y otros s/ inf. art. 144 bis inc. 1—último párrafo—según ley 14.616, privación ilegal libertad agravada (art. 142 inc. 1), privación ilegal libertad agravada (art. 142 inc. 5), inf. art. 144 ter 1° párrafo—según ley 14.616—inf. art. 144 ter 2° párrafo—según ley 14.616—homicidio agravado con ensañamiento—alevosía, sustracción de menores de diez años (art. 146)—texto original del C.P. ley 11.179 y supresión del est. civ. de un menor," Fallos (2018-341-1768) (Arg.).

[275] Luciana Bertoia, *Supreme Court Set to Finally Overturn Controversial '2x1' Ruling*, BUENOS AIRES TIMES (Dec. 3, 2018), https://www.batimes.com.ar/news/argentina/supreme-court-set-to-finally-overturn-2x1-ruling.phtml.

[276] Centro de Información Judicial, *El JuezLavié Pico hizo Lugar a un Amparo Presentado por Elena Highton de Nolasco, Vicepresidenta de la Corte Suprema,* CENTRO DE INFORMACIÓN JUDICIAL (Feb. 10, 2017), https://www.cij.gov.ar/nota-24789-El-juez-Lavi--Pico-hizo-lugar-a-un-amparo-presentado-por-Elena-Highton-de-Nolasco--vicepresidenta-de-la-Corte-Suprema.html (Arg.).

[277] Centro de Información Judicial, *La Corte Suprema, por Mayoría, Reconoció las Facultades de la Convención Constituyente de 1994 y Restableció el Límite Constitucional de 75 Años de Edad para la Función Judicial,* CENTRO DE INFORMACIÓN JUDICIAL(Mar. 28, 2017), https://www.cij.gov.ar/nota-25386-La-Corte-Suprema--por-mayor-a--reconoci--las-facultades-de-la-Convenci-n-Constituyente-de-1994-y-restableci--el-l-mite-constitucional-de-75-a-os-de-edad-para-la-funci-n-judicial.html.

[278] Juan F. González Bertomeu & Ramiro Álvarez Ugarte, *Argentina*, *in* 2018 GLOBAL REVIEW OF CONSTITUTIONAL LAW 8 (Richard Albert, David Landau, Pietro Faraguna & Simon Drudga eds., 2019).

[279] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/9/2018, Acordada No. 29/2018, https://www.csjn.gov.ar/documentos/descargar/?ID=111978 (detailing the 4 votes for Justice Rosenkrantz, including his own) (Arg.); Luciana Bertoia, *Supreme Court Enters New Era as Lorenzetti is Squeezed Out*, BUENOS AIRES TIMES, (Sept. 15, 2018, 11:32 AM), https://www.batimes.com.ar/news/argentina/supreme-court-enters-new-era-as-lorenzetti-is-squeezed-out.phtml.

secured a record $50 billion IMF loan.[280] However, these efforts did not reverse his waning public approval ratings.[281]

Alberto Fernández went on to win the October 2019 election, with Cristina Kirchner as his running mate in a broad Peronist coalition. Following their criticism of alleged political interference with the judiciary during Macri's presidency, the victors pledged to implement judicial reforms. After Fernández took office, failed reform attempts increased tensions with the Court. A 2020 Presidential Commission released a report on reorganizing the judiciary;[282] however, the recommendations did not gain sufficient political momentum. As a result of the most severe stage of the pandemic, confrontation with the Executive intensified. Two decisions stand out as examples of this tension. In early 2021, the SC sided with opposition leader and Buenos Aires mayor, Horacio Rodríguez Larreta, in a high-profile lawsuit[283] to keep the City's elementary schools open for in-person classes after the Federal Government extended COVID-19-related school closures on public health grounds.[284] A few months later, the Court strengthened its supremacist role in the institutional area by holding the 2006 reform of the Council of the Magistracy unconstitutional.[285] According to the Court, the reduced thirteen-member Council granted the elected branches a disproportionate

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[280] *Press Release No.18/25:IMF Executive Board Approves US $50 Billion Stand-By Arrangement for Argentina*, INT'L MONETARY FUND (June 20, 2018), https://www.imf.org/en/News/Articles/2018/06/20/pr18245-argentina-imf-executive-board-approves-us50-billion-stand-by-arrangement.

[281] Benjamin N. Gedan, *Opinion: Much of Argentina Wants its Populists Back*, (Aug. 10, 2019, 9:00 AM), https://www.npr.org/2019/08/10/748419903/opinion-much-of-argentina-wants-its-populists-back (pointing out that President Macri's popularity had dropped below 40% on the eve of a re-election bid, after a yearlong economic crisis).

[282] *See* Decree No. 635/2020, July 30, 2020, [29737] B.O. 6, (creating the Presidential Advisory Council for Strengthening the Judiciary and the Attorney General's Office) (Arg.); *see also Reforma judicial: Recomendaciones del Consejo Consultivo para el Fortalecimiento del Poder Judicial y el Ministerio Público*, UNIDAD DE INFORMACIÓN FINANCIERA (Nov. 23, 2020), https://www.argentina.gob.ar/noticias/reforma-judicial-recomendaciones-del-consejo-consultivo-para-el-fortalecimiento-del-poder.

[283]Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 4/5/2021, "Gobierno de la Ciudad de Buenos Aires c. Estado Nacional (Poder Ejecutivo Nacional) s/ acción declarativa de inconstitucionalidad," Fallos (2021-344-809) (Arg.).

[284] The case did not center on the right to education, but rather on which level of government, local or federal, had the authority to order school closures. *See* Magdalena Rochi Monagas & Maricel Asar, *Legal Battle Over the Closure of Schools in the City of Buenos Aires*, LEX-ATLAS: COVID-19 (June 1, 2021), https://lexatlas-c19.org/legal-battle-over-the-closure-of-schools-in-the-city-of-buenos-aires.

[285] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/4/2022, "Colegio de Abogados de la Ciudad de Buenos Aires y otro c. EN - ley 26.080 - dto. 816/99 y otros s/ proceso de conocimiento," Fallos (2021-344-3636) (Arg.). The 2006 reform was different from the already mentioned 2013 statute struck down in *Consejo de la Magistratura* (2013).

clout in the decision making process, in contradiction with the constitutional mandate for balance with lawyers, judges, and academics. While all actions taken since 2006 were deemed legitimate for legal stability, the Council had to be restored to twenty members, and led by the Chief Justice, as stipulated by the original 1997 statute—or a new one to be approved—within 120 days.[286] Failure to comply would result in a nullification of the Council's decisions.[287] The previous law was eventually reinstated when Congress did not reach a consensus on a new statute in time. These two rulings offer an adequate illustration of the Court's confrontational stance, aimed at setting clear limits to the Executive and its Congressional allies, while retaining a decisive role in highly visible political conflicts. Inside the Court, the period ended with an increasing internal rift, particularly after 2018, when Lorenzetti's tenure as Chief Justice ended. In October 2021, Justice Horacio Rosatti, joined by Justices Maqueda and Rosenkrantz, voted himself as the new Chief Justice. Their other two colleagues, Highton and Maqueda, were absent. Justice Highton resigned in protest, leaving Rosatti presiding over an all-male four-member Court. This marked the end of a five-year period of institutional normalcy. As of August 2024, Highton's seat remains vacant.

B. After Supremacy, Time for Detachment

In the last decade, the CSJN has gradually returned to a detached role in the area of social rights, applying mostly a deferential review. First, the scope of judicial enforcement of social rights narrowed as the Court set certain conditions for admitting claims based on social rights. It also upheld legislation or policy against constitutional challenges. Deference also extended to contractual agreements, which prevailed in the face of constitutional objections. Furthermore, the Court denied certain individuals or groups the entitlement to specific rights, excluding the opportunity to perform a constitutional review of challenged legislation, decisions, or policies.

In reducing the scope of judicial review and excluding groups or individuals as rights holders, the Court performed a restrictive construction of constitutional clauses. In Argentine constitutional scholarship, a "restrictive" interpretation is a form of non-literal

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[286] *See Supreme Court Rules 2006 Reform of Magistrates Council was 'Unconstitutional'*, BUENOS AIRES HERALD (Dec. 17, 2021), https://www.batimes.com.ar/news/argentina/supreme-court-rules-2006-reform-of-magistrates-council-was-unconstitutional.phtml.

[287] *Id.*

interpretation, in other words, a legal interpretation that diverges from the textual plain meaning that emerges from common word usage. In an alternate reading of any clause or term, a *restrictive interpretation* narrows the scope of application compared to the literal construct. Simply put, restrictive interpretation excludes situations that would otherwise be encompassed under a plain reading of the textual terminology from a rule's reach. It can be contrasted to the extensive interpretation the Court applied in certain social rights rulings from the previous period. Whereas literal interpretation construes legal dictates per conventional lexical understandings, restrictive construction denies coverage for specific cases under a statute or provision that linguistic conventions would normally include.[288] This section outlines how the Court evolved toward a detached role, highlighting the legal arguments provided in the challenging political context to justify this change and to protect the SC's own legal legitimacy, as described in a previous section of this article.

By playing a detached role, the Justices kept the Court out of direct confrontation with the elected branches over social rights and out of detailed management or oversight of thorny social issues. While running the risk of judicial abdication, the Court never completely ruled out the possibility of exercising a more demanding review, provided that certain conditions or circumstances are met. During this period, the Court, in general, did not return to conversational review in social rights. Its detached role rested on a deferential stance, built without formally overturning its previous holdings about judicial enforceability of social rights. The first step took place in 2012: a high-profile case provided the opportunity to adopt a narrower reading of judicial review.[289]

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[288] *See* Sagüés, *supra* note 158, at 166–67; Hernández, *supra* note 158, at 73; BADENI, *supra* note 158, at 102–03.

[289] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/4/2012, "Q. C., S. Y. c. Gobierno de la Ciudad de Buenos Aires s/ amparo," Fallos (2012-335-452) (Arg.).

i. Reducing the Scope of Social Rights Justiciability

The Court reduced the scope of judicial enforcement of social rights by excluding—in principle—cases requiring positive State action with budgetary impact. In *Q. C.* (2012),[290] the first significant housing rights case to reach the Court, the majority of Justices introduced a distinction among constitutional rights regarding their justiciability. According to this new position, the judiciary should not directly enforce rights that require positive State action and the use of public resources. In those cases, courts should defer to the elected branches' regulations, except if they are unreasonable. Both the SC and lower courts could skip cases with budgetary implications, a usual point of conflict in applying a stricter review, such as a peremptory stance, or a managerial one, as the Court did in the preceding years.[291]

The new rule seemed to offer the Court an elegant way out of a difficult crossroad embodied in this right to housing case. A homeless woman and her son, a severely disabled infant, filed an *amparo* against the City of Buenos Aires requiring a place to live, based on their constitutional and human right to housing.[292] After holding a public hearing on the case,[293] the dilemma became clearer. If the SC followed the logic of its previous decisions on social rights, the plaintiffs could expect a favorable answer, either under a peremptory or a conversational orientation. The former would result in ordering the city to provide at least a basic housing solution, with no significant budgetary impact. A conversational approach, on the other hand, would prompt the local government to start a dialogue about feasible alternatives for the mother and her son. Yet both solutions, while consistent with the preceding positions of the Court, elicited serious questions. Since widespread housing problems existed throughout Argentina, a positive response to this case would surely inspire hundreds of similar cases in both the city of Buenos Aires and the rest of the country,

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[290] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/4/2012, "Q. C., S. Y. c. Gobierno de la Ciudad de Buenos Aires s/ amparo," Fallos (2012-335-452) (Arg.).

[291] *See generally* Pereira, *supra* note 10 (examples of a managerial approach can be found in the large-scale environmental case and in the system-wide habeas corpus for prisoners described in the previous section).

[292] *See La Corte Suprema realizó audiencia pública en un caso por el derecho a una vivienda digna,* CENTRO DE INFORMACIÓN JUDICIAL (Sept. 15, 2011), https://www.cij.gov.ar/nota-7670-La-Corte-Suprema-realiz--audiencia-p-blica-en-un-caso-por-el-derecho-a-una-vi-vienda-digna.html.

[293] *See id.* For a detailed study of public hearings as an innovative procedure by the Supreme Court, *see* MIGUEL ÁNGEL BENEDETTI & MARÍA JIMENA SÁENZ, LAS AUDIENCIAS PÚBLICAS DE LA CORTE SUPREMA (Siglo Veintiuno Editores, ed., 2016).

giving rise to a backlash from the elected authorities. Preserving technical legitimacy and legal consistency would come at a substantial cost to the political stability of the Court.

On the other hand, a flat rejection of the claim would raise a different set of issues. First, it would contradict a discernible, decade-long trend in the Court's jurisprudence on social rights. Although technically the Court is not bound by its earlier rulings, modifying this course of action would demand a comprehensive legal rationale, necessary to safeguard the Court's technical authority. Additionally, a negative response would reflect poorly on the judges, as no sympathetic court would disregard a disabled child and his mother's suffering just to avoid political turbulence. Under these pressing circumstances, even a conversational approach would amount to judicial abdication. This would not only harm the technical record of the Court, but also its image in the larger public.

Caught between a rock and a hard place, the Court needed to devise a legal answer to provide rights-based relief to these specific petitioners and, at the same time, to prevent a storm of similar cases. A new, narrower scope for judicial enforcement appeared to be an adequate solution. The Court should be able to decide on this petition while remarking on its exceptional character.

Quoting article 11 of the ICESCR and the General Comment (GC) No. 5 (1994),[294] issued by the United Nations Committee on Economic, Social and Cultural Rights (CESCR), the majority vote admitted that the right to housing is a constitutional and human right, yet not always judicially enforceable. Since it demands positive State action and involves the use of public funds, Congress and the Executive are entitled to fulfill the right to adequate housing through their informed, reasonable regulations.[295]

The Court offers an explanation to differentiate this case from prior legal decisions. Although all constitutional rights are "operative," in a sense traditionally recognized by Argentine constitutional scholars, the Court notes that some are not "directly" operative and only become so through administrative or legislative regulation.[296] The Court calls these rights "derivatively operative."[297] In other words, instead of abandoning

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[294] Comm. on Econ., Soc., & Cultural Rts. [CESCR] Gen. Comment No. 5: Persons with Disabilities, U.N. Doc E/1995/22 (Dec. 9, 1994) (stating that "[t]he obligation of States parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities").

[295] CSJN, 24/4/2012, "Q. C., S. Y.," Fallos (2012-335-470) (Arg.).

[296] *Id.*, para 11.

[297] *Id.*

the ample notion of "operative rights," the majority vote chooses to distinguish a subset of those rights that will receive a different judicial treatment.[298]

Having established this deferential approach as a general rule for "derivatively operative" rights, the majority vote introduced a crucial exception: judicial intervention proceeds only when regulation by the elected branches fails to ensure a "minimum guarantee." This happened in the case at stake, where there was "a grave threat to the very existence of the person," who was in a "desperate" situation.[299] As an exceptional measure, the Court could judicially enforce this right and require the local Government to produce a solution for mother and child, in addition to counseling and other social support provisions.

To sum up, *Q. C.* (2012) set a narrower scope for judicial review: a deferential approach applies to costly rights, unless the other branches do not ensure a "minimum guarantee" construed merely as survival conditions. Social rights would be judicially enforceable only when they become context-dependent instances of the right to life, impacted by inattentive, life-threatening regulations or their absence. In an important passage, the Court also recognized the CESCR as the "authorized interpreter" of the ICESCR, confirming the relevance of international sources in local constitutional interpretation. Yet the Justices did not consider GC No. 3 (1990)[300] or GC No. 9 (1998)[301] to discuss the "minimum guarantee" content. This case shows an early selective approach to materials from the CESCR: while a GC provides the basis for a rights framework, other relevant GC on a crucial concept such as "minimum core" are not part of the legal justification of the ruling.[302]

By devising this new position, the Court could defend its deferential turn in light of its prior jurisprudence while sending a friendly signal to the elected branches and leaving open an avenue to enforce even onerous rights in exceptionally relevant or urgent cases, like the one at stake in *Q. C.*

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[298] Laura Clérico, *Sobre la Insuficiencia desde el Prisma de la Igualdad Real: Pistas para Evaluar una Violación del derecho a la Vivienda*, 11 PAPELES DE TRABAJO 10, 16 (2013) (describing this distinction as "confusing").

[299] CSJN, 24/4/2012, "Q. C., S. Y.," Fallos (2012-335-470) (Arg.).

[300] CESCR Gen. Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), U.N. Doc. E/1991/23 (Dec. 14, 1990).

[301] CESCR Gen. Comment No. 9: The domestic application of the Covenant, U.N. Doc. E/C. 12/1998/24 (Dec. 3, 1998).

[302] CESCR Gen. Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), U.N. Doc. E/1991/23 (Dec. 14, 1990).

In the only social rights-related case of conversational approach, the SC suspended income tax collection from an individual pensioner until Congress adopted a new scheme with a differentiated treatment for groups that could be described as "vulnerable." The plaintiff in *García* (2019),[303] a seventy-nine years old pensioner, challenged the constitutionality of income taxes that claimed over one-quarter of her pension payments.[304] A majority of Justices sided with her, reasoning that the tax code failed to adequately account for pensioners' "condition of vulnerability due to old age or illness" as required by the Argentine Constitution since 1994.[305] The Court ordered the Administration to stop requiring payment from the plaintiff until Congress devised a new tax scheme, considering special factors apart from income amount. Justice Rosenkrantz dissented since Congress had set a high threshold for pensioners to pay income tax, and the plaintiff had not shown proof of financial hardship. The majority boldly struck down a portion of the tax code, but the ruling had only the usual individual effect. When sending the question back to Congress, the financial impact remained scarce. Since the Court provided no clear criteria to define "vulnerability," potential new cases would be subject to a discretionary, individual examination by lower courts before reaching the Court's bench again. This would prevent the risk of flooding the SC with similar cases, a risk present at the right to housing case. This conversational solution, undoubtedly, may not necessarily be inconsistent with the highly deferential approach in *Q. C.* (2012). While income tax exemptions have a budgetary impact, the plaintiff in *García* (2019) did not request positive action from the State. Instead of requiring the pensioner's situation to be "desperate" or under survival risk to hear the case, the Court turned to a conversational approach, as it had done before in *Badaro* (2006), yet this time as part of a generally detached role, not as a steppingstone to a supremacist position.

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[303] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/3/2019, "García, María Isabel c. AFIP s/ acción meramente declarativa de inconstitucionalidad," Fallos (2019-342-411) (Arg.).

[304] Juan F. González Bertomeu & Ramiro Álvarez Ugarte, *Argentina*, *in* 2019 GLOBAL REVIEW OF CONSTITUTIONAL LAW 13, 14 (Richard Albert et al., eds., 2020).

[305] Art. 75(23), CONST. NAC., (Arg.). (explaining this article allows Congress to take "positive" or proactive measures to benefit groups hit by social discrimination, explicitly including older persons and persons with disabilities).

ii. Confirming Legislation and Policies Against Rights-Based Claims

The deferential stance made an early appearance in right-to-health cases, which were usually treated under a peremptory approach in the previous period. Now, the Court has skipped the constitutional review of statutes and regulations on state-funded medical care, even for people with disabilities.

Argentina's fragmented healthcare system includes private, public, and union-based options that vary in coverage, costs, and quality for individuals, depending on their employment and income level.[306] This section analyzes claims filed against the state-run system. In *P., A.*, a decision from 2015 mentioned earlier, the Court upheld the Government's denial of disability-related health services to a plaintiff who required full medical coverage to improve her condition.[307] In a strict construction of the applicable 1997 statute,[308] the Court unanimously ruled that persons with disability must prove both lack of health insurance and personal inability to afford healthcare costs as a condition to require medical services financed by the Government. In a departure from *Campodónico* (2000),[309] the Justices considered that evidence of the breach of the right to health did not suffice to hold the Federal Government responsible.[310] Statutory conditions determine the access to State-funded healthcare. The opinion also fails to address the United Nations Convention on the Rights of Persons with Disabilities (CRPD), a key constitutional-rank treaty. None of the Justices felt it necessary to evaluate the 1997 statute in light of the superior international convention, which has held constitutional rank since 2014. Moreover, the unanimous decision does not refer to the CESCR's GC No. 14 (2000),[311] further illustrating the Court's selective incorporation of GC.

Yet there is a mention of international human rights law: in reversing the lower court's decision favorable to the plaintiff, SC judges underscored all judicial resolutions must provide "consistent, rationally sustainable

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[306] *See* Leticia Vita, *Modelos de Estado y derecho a la salud en Argentina: descubriendo los presupuestos políticos de un sistema estructuralmente desigualitario*, *in* 1 TRATADO DE DERECHO A LA SALUD 17 (Laura Clérico et al., eds., 2013).

[307] CSJN, 16/6/2015, "P., A," Fallos (2015-338-488).

[308] Law No. 24901, Dec. 2, 1997, B.O. (Arg.).

[309] CSJN, 24/10/2000, "Campodónico de Beviacqua, Ana Carina," Fallos (2000-323-3237, 3238).

[310] CSJN, 16/6/2015, "P., A," Fallos (2015-338-488).

[311] CESCR Gen. Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), U.N. Doc. E/C. 12/2000/4 (Aug. 11, 2000).

foundations," according to the ACHR.[312] Since the lower court had set aside a clear statute in order to grant the petitioner's claim, that decision did not respect the Government agency's right to defense on trial and to effective judicial protection included in the Convention.[313] International human rights law here provided a basis for a deferential approach and for protecting the state agencies instead of patients. The right to a fair trial implied that courts should stick to the application of statutes and regulations, while constitutional review did not explicitly appear as part of the right of the plaintiff to a legally reasoned decision.

Politically sensitive cases also received deferential treatment. In *Sindicato Policial* (2017),[314] the Court by a 3-2 majority, and after holding a public hearing on the case,[315] upheld a provincial Governor's decree that prevented local police officers from taking part in "union activities," and the local decision to deny official recognition of a police union. The officers' claim involved no positive action from the State, so the deference based on the *Q. C.* (2012) framework did not apply. The right to form and join a union is included in the Constitution[316] and at least in three constitutional-rank international human rights treaties.[317] Since the Constitution did not formally exclude the police from the right to unionize, the Court turned to the 1957 Constitutional Convention debates, where some speeches made it clear that police members should not have the right to strike.[318] According to the Court, this limitation, though absent in the approved version of the Constitution, provided a safe legal basis for distinguishing police officers from other workers in trade union rights at large.[319] As striking is one of the main competences of unions, a total restriction of the right to strike expressed in some Convention speeches can be considered as an implicit prohibition of unionization.

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[312] CSJN, 16/6/2015, "P., A," Fallos (2015-338-488, 492).

[313] Organization of American States, American Convention on Human Rights, arts. 8 & 25, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[314] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/4/2017, "Sindicato Policial Buenos Aires c. Ministerio de Trabajo s/ ley de asociaciones sindicales," Fallos (2017-340-437) (Arg.).

[315] *See La Corte realizó una audiencia pública en una causa por la inscripción gremial de un sindicato policial*, CENTRO DE INFORMACIÓN JUDICIAL (Aug. 13, 2015), https://www.cij.gov.ar/nota-17295-La-Corte-realiz--una-audiencia-p-blica-en-una-causa-por-la-inscripci-n-gremial-de-un-sindicato-policial.html.

[316] Art. 14 *bis*, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (stating that "[l]abor in its diverse forms shall enjoy the protection of the law, which shall ensure to workers . . . free and democratic organization of labor unions, recognized simply by inscription in a special register" (author's translation)).

[317] ICESCR, *supra* note 107, at 993 U.N.T.S. 15,S. EXEC. DOC. NO. D, 95-2, 5; G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, at 22(2) (Dec. 16, 1966); American Convention on Human Rights, *supra* note 313, at 1144 U.N.T.S. 149.

[318] CSJN, 11/4/2017, "Sindicato Policial Buenos Aires," Fallos (2017-340-437, 452).

[319] CSJN, 11/4/2017, "Sindicato Policial Buenos Aires," Fallos (2017-340-437, 459).

The Court also needed to justify its deferential approach, in light of union rights granted in international human rights treaties endowed with constitutional rank. Article 8.2 of the ICESCR allows any State party to establish "lawful restrictions," but not to eliminate the right to form a union.[320] Yet the Court based its reasoning on article 16.3 of the ACHR, which not only allows "legal restrictions" but also a formal "deprivation" of the right of association in the case of police officers or members of the armed forces.[321] The Convention requires such a prohibition to be "legal;" the Court held that in the absence of a statute approved by the local Legislature, a provincial Governor's decree satisfied that requirement.[322] In doing so, the Argentinean Court explicitly refused to consider the Inter-American Court of Human Rights advisory opinion OC 6/86.[323] According to that opinion, the majority vote admitted, "the word 'law' must be understood as formal law."[324] This, in principle, excluded Executive decrees as a valid instrument to forbid unionization. However, the majority added: "*Regardless of the relevance assigned to such opinion* [OC 6/86], the fact remains that the requirement of 'formal law' is satisfied if a regulatory decree merely clarifies a provision already contained in the law"—emphasis added. While the Court based its decision on the ACHR because it allows for a more restrictive regulation of the right at stake, it did not rely on the regional tribunal's advisory opinion on the matter. This stance toward the Inter-American body should be read in the context of the contemporary stand-off started by the Argentinean apex court in the already mentioned *Ministerio de Relaciones Exteriores* (2017), issued a few weeks earlier. Beyond this important development, this selective use of international law exemplifies a more general trend. In 2020, a similar decision by a four to one vote upheld a provincial ban on correction officers from forming a union.[325]

iii. Giving Contracts Priority Over Rights-Based Claims in Health-Related Cases

[320] ICESCR, *supra* note 107, at 993 U.N.T.S. 15, S. EXEC. DOC. NO. D, 95-2, 5.

[321] CSJN, 11/4/2017, "Sindicato Policial Buenos Aires," Fallos (2017-340-437, 456-57).

[322] *Id.*, Fallos (2017-340-437, 458-59).

[323] The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86, Inter-Am. Ct. H.R. (ser. A) No. 6 (May 9, 1986).

[324] CSJN, 11/4/2017, "Sindicato Policial Buenos Aires," Fallos (2017-340-437, 458).

[325] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/8/2020, "Rearte, Adriana Sandra y otro c. Superior Gobierno de la Provincia de Córdoba s/ amparo—recurso de apelación," Fallos (2020-343-767) (Arg.).

Deference was also extended to private law contracts related to healthcare provisions. As mentioned earlier, many Argentines have private health insurance plans allowing them to access private clinics and hospitals. In addition to this profit-driven sector, large groups of workers get their healthcare coverage through non-profit *obras sociales*, which are insurance plans backed by labor unions from all sectors of the economy. Despite their differences, both groups of healthcare providers can be considered non-state actors, although their activities are subject to state regulation.

In *S., D.* (2016),[326] the Court confirmed that for-profit entities are not obliged to cover health practices indicated by medical professionals not included in their official list of selected providers. The SC did not subject this agreement between a patient and a private company to a constitutional analysis based on the right to health.[327] In turn, *V., D.* (2019)[328] reversed a lower court decision ordering a private insurance company to provide a disabled child educational services not explicitly required by the contract or the applicable statutes.

Obras sociales also benefited from this deferential approach. In *P., V. E* (2017)[329] and in *V. I., R.* (2017),[330] the Court upheld the maximum expenditure limits imposed by these non-profit providers in their internal regulations on home care services afforded to disabled patients. The Court declined to engage in further substantive constitutional review regarding the limits. In *L. S., M. T.* (2020),[331] the Court exempted the non-profit entity from covering health practices indicated by physicians not on its official list of selected providers. This judicial restraint avoided questions about the appropriate calibration of cost considerations by *obras sociales*

[326] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 15/3/2016, "S., D. c. Centro de Educación Médica e Investigaciones Clínicas Norberto Quirno s/ sumarísimo," Fallos (2016-339-290) (Arg.).

[327] *Id.*, Fallos (2016-339-290).

[328] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/7/2019, "V., D. c. Centro de Educación Médica e Investigaciones Clínicas Norberto Quirno s/ amparo," Fallos (2019-342-1261) (Arg.).

[329] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 9/11/2017, "P., V. E. c. Obra Social del Poder Judicial de la Nación s/ amparo de salud," Fallos (2017-340-1600) (Arg.).

[330] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 19/9/2017, "V. I., R. c. Obra Social del Poder Judicial de la Nación s/ ordinario," Fallos (2017-340-1269) (Arg.).

[331] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 29/10/2020, "L. S., M. T. c. Obra Social del Poder Judicial de la Nación s/ amparo de salud," Fallos (2020-343-1406) (Arg.).

against the right to healthcare in the disability area.[332] Unlike healthcare cases from the previous period, these decisions did not discuss international human rights treaties such as the CRPD, showcasing the new selective trend in utilizing international law sources.

In analyzing labor relations in the private health sector, the SC also applied its deferential approach to contracts. The SC held in *Rica* (2018) that the relationship between a private medical facility and affiliated health personnel is not inherently one of employment, but can be legitimately based on an independent, service-based contractual arrangement, thereby placing such personnel beyond the scope of constitutional and statutory employment protections.[333] In this specific case, the Court denied relief under employment statutes to a neurosurgeon after his seven-year affiliation with a medical center was terminated.[334] A salient aspect of the Court's reasoning was the lapse before the neurosurgeon first asserted statutory employment rights against the medical center.[335] This argument privileged procedural regularity and disregarded that substantive workplace entitlements often remain unclaimed out of economic constraints rather than consent with their deprivation. Here, a meaningful analysis of the real, material circumstances around the neurosurgeon's practice was set aside in favor of an emphasis on the timeliness of the claim to such status. *Pastore* (2019) reinforced this line a year later, holding that no employment relationship between a physician and a private entity exists unless there was an obligation to work exclusively for that institution.[336] The Court added that a disciplinary measure taken by the clinic against the professional did not suffice to prove a labor relationship, but it only indicated a supervisory role.[337] In these cases that centered around a labor relationship, contracts ultimately prevailed over the exercise of constitutional review.

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[332] *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/4/2008, Acordada No. 5/2008 (Arg.). It should be noted that in these three cases the non-profit health provider was the *Obra Social del Poder Judicial de la Nación*, at the time organized as an autonomous entity with a Directorate appointed by the Supreme Court. CSJN, 7/4/2008, Acordada No. 5/2008, art. 16.

[333] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/4/2018, "Rica, Carlos Martín c. Hospital Alemán y otros s/ despido," Fallos (2018-341-427) (Arg.).

[334] *Id.*, Fallos (2018-341-427, 434).

[335] *Id.*, Fallos (2018-341-427, 437).

[336] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/4/2019, "Pastore, Adrián c. Sociedad Italiana de Beneficencia en Buenos Aires s/ despido," Fallos (2019-342-681) (Arg.).

[337] *Id.*, Fallos (2019-342-681, 683).

iv. Denying Individuals or Groups Their Entitlement to Certain Social Rights

A deferential approach also found a basis in excluding plaintiffs as holders of the right at stake. Judicial enforcement became inapplicable with no constitutional or human right involved in the case. Argentina's Supreme Court unanimously held in *Orellano* (2016) that the constitutional right to strike belongs exclusively to formally registered trade unions, not to individual workers acting in concert informally.[338] The Court affirmed the dismissal of an employee for participating at a workplace assembly voted for by employees but lacking formal trade union endorsement.[339]

Through this decision, the SC effectively established that individual employees, even in large groups are not entitled to the right to strike. While article 14 *bis* of the Argentine Constitution grants this right to unions only, international human rights treaties with constitutional rank provide otherwise. Article 8 of the ICESCR makes no distinction between individual workers and labor unions. In sections b and c, the article explicitly labels certain rights as rights "of trade unions," but section d simply recognizes an unqualified "right to strike," without explicitly designating it as a right of trade unions. Yet the Court's reading of article 8, section d, has restricted this right solely to unions, citing the CESCR's Concluding Observations on Burundi (2015) and the Concluding Observations on Kazakhstan (2010).[340] However, these two reports are inadequate in resolving the issue concerning the Argentinian case. The mere reference did not include any in-depth discussion of these Concluding Observations, reinforcing the selective use of international human rights materials.

Likewise, the Justices neither cited nor analyzed GC No. 23 (2016),[341] released forty-five days prior to the ruling, which does not define the right to strike as a trade union right. Thus, while domestic law reserves an explicit right to strike only for labor organizations, binding international commitments confer those same privileges upon informal employee groups.

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[338] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/6/2016, "Orellano, Francisco Daniel c. Correo Oficial de la República Argentina S.A. s/ juicio sumarísimo," Fallos (2016-339-760) (Arg.).

[339] *Id.*, Fallos (2016-339-760, 765).

[340] *Id.*, Fallos (2016-339-760, 778) (citing the UN Committee on Economic, Social and Cultural Rights Concluding Observations on Burundi, issued in 2015, and on Kazakhstan, issued in 2010).

[341] CESCR Gen. Comment No. 23 (2016) on the right to just and favourable conditions of work (Art. 7), U.N. Doc E/C.12/GC/23 (Apr. 27, 2016).

The Court also excluded certain workers on the public payroll from special constitutional protections. Since the 1957 constitutional reform, article 14 *bis* includes the right of public employees to "stability."[342] As the Court ruled in the previously cited in *Madorrán* (2007), after a few decades of interpretive disputes, these workers cannot be dismissed without good or just cause stemming from either misconduct or incompetence.[343] Procedural protections have to be followed before termination, including written notification, an opportunity for the workers to defend themselves, and administrative or judicial review. Yet a few years later, the Court introduced some distinctions among public employees, in order to exclude some groups from the right to stability without formally overturning the holding of *Madorrán*.[344]

The process started in the previous period, when the Court in *Ramos* (2010),[345] and also later in *Galeano Torres* (2016),[346] established that fixed-term public employees, despite their prolonged recurrent contracts, are not protected by stability and may be terminated without proper cause, equating them with private sector workers entitled only to severance pay. Additionally, in *Luque* (2015),[347] the Court determined that workers at state-owned enterprises lack protection against arbitrary discharge, similarly qualifying solely for severance. However, this distinction contrasts with the Court's majority holding in *Madorrán* (2007), discussed in a previous section, which did not differentiate fixed-contract direct government employees from the tenure rights article 14 *bis* grants to public sector workers as a class.[348]

In sum, a deferential review became dominant in the Court's return to a detached role. The rulings confirmed the elected branches' regulations, or private parties' contractual agreements, rejecting constitutional challenges to them. In other cases, the Court ruled plaintiffs

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[342] *See* Art. 14bis, CONST. NAC. (ensuring "stability of the civil servant").

[343] *Id.*, Fallos (2007-330-1989, 1995).

[344] *Id.*, Fallos (2007-330-1989).

[345] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 6/4/2010, "Ramos, José Luis c. Estado Nacional s/ indemnización por despido," Fallos (2010-333-311) (Arg.).

[346] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 19/4/2016, "Galeano Torres, Facundo Martín y otro c. Municipalidad de la Ciudad de Mendoza s/ varios," (2016) (Arg.), https://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumentoByIdLinksJSP.html?idDocumento=7295982.

[347] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/10/2015, "Luque, Rolando Baltazar c. Sociedad del Estado Casa de Moneda s/ despido," Fallos (2010-338-1104, 1109) (Arg.).

[348] CSJN, 3/5/2007, "Madorrán, Marta Cristina," Fallos (2007-330-1989).

were not entitled to the constitutional right supposedly at stake, or conditioned the judicial enforcement of the right to one or more conditions absent in the specific case. For any of these reasons, the Court ruled no constitutional question was at stake, and no judicial response was in order. The elected branches and private parties prevailed, while the Court did not flatly overturn its precedents from the previous period.

CONCLUSIONS

This article examined the Argentine Supreme Court's changing roles from 1994 to 2021 in social rights adjudication, building on Katharine Young's typologies of judicial review and court roles. In particular, the article focused on how the Court provides a set of legal arguments to justify its evolving position along the way, in order to preserve its technical and public legitimacy. Young's typologies provide insight into the Argentine court's shifting approaches to social rights in challenging contexts and with varying memberships. These concepts illuminate that changes in roles over time do not always align with electoral cycles or specific political events, which surely have an impact on the institution. However, Young identifies a different view, centered on the Court's self-conception within the broader political milieu. This article explored the Argentine case and distinguished three periods in the Argentine Court's recent history, based in Young's categories.

During the first one, from the 1994 reform until 2000, the Court maintained a *detached* role in regard to social rights adjudication, aligning with the Executive's neoliberal program. A shift towards a *supremacist* role began in 2000. This new stance prevailed until 2012, resulting in the Court gaining increasing authority over social rights issues as part of a legitimacy-building effort. The third period started in 2012 and marked a gradual return to a *detached* role without overturning the precedents set in the second period, to protect the credibility of the Court.

The article centered on the legal justification built by the Supreme Court to justify the roles assumed at every stage. Three elements incorporated through the 1994 reform appear as the main building blocks for that justification: the new social rights clauses, the explicit judicial attributions to enforce them, and the connection with international human rights law. While these three elements remained constant during the past three decades, the Court shifted its role. This required an effort on the part of the Court to combine all of them as parts of a legally persuasive argument.

During the first period (1994–2000), the Court applied the traditional conception to the new social rights clauses, leaving enforcement to Congress and the Executive. Therefore, the ample judicial review powers

granted by the Constitution remained inapplicable to these rights, in light of a long-established distinction between "operative" and "programmatic" rights. Finally, international human rights law did not modify the model as the "available resources" language seemed to confirm the time-honored vision. As budget-dependent rights, only Congress or an emergency-empowered Executive had the authority to define their contours. In the context of a neoliberal project, the Court did not see a way to reconcile new social rights clauses with the unfolding economic reforms. A detached role appeared to be a technically appropriate option. However, the possible perception of judicial abdication did not help the Court to improve its image in a rapidly deteriorating socioeconomic reality.

In the second period (2000–2012), the three elements offered grounds for legally justifying the shift from a detached role to a supremacist one. In other words, a renewed consideration of the 1994 reform and its potential provided a sound basis for a change in role. Social rights clauses could be read extensively, and their fresh language called for a renewed approach. The clauses on judicial review powers, precisely, made no distinction between social rights or civil rights because all of them were justiciable. The notion of "programmatic rights" lost its weight since no constitutional language seemed to support it. Finally, international human rights law, rediscovered in the area of social rights, provided not only concepts, rulings, and materials, but also a sense of global obligation and of global connection, expressed in generous quotations from foreign and regional courts. The technical legitimacy of the Court's supremacist role contributed to its public esteem, but also carried with it the double risk of inter-branch confrontation over perceived judicial usurpation and overburdening of the Court's capacity. At the same time, the reliance on international human rights organs could curtail the Court's autonomy in the future.

A narrowing of the judicial enforcement scope inaugurated the third period (2012–2021). Soon after, the Court went on to apply a restrictive reading of social rights clauses, even denying certain persons or groups the entitlement to these rights. This return to a detached role did not require overturning previous rulings since the Court distinguished the new cases in order to justify a different treatment. Finally, the third element, international human rights law, underwent a new construction which undermined its binding character. The global obligation weakened while the domestic "public law principles" grew stronger. This more distant approach to international human rights law affirmed the Court's autonomy as a domestic high court, while attracting criticism from legal commentators. In certain areas of social rights, the Argentine Court did

not refer to relevant human rights treaties endowed with constitutional rank, while in other cases, it made a selective use of materials from international human rights monitoring bodies. At the same time, a detached model in social rights coexisted with a more supremacist role in confrontations in the realm of institutional design or federalism issues.

However, the Court's recent strategy could soon reach its limits. Even the most proficient legal scholars may struggle to distinguish a new case from previous ones. For example, if the government tries firing tenured employees without cause, the court will have to differentiate this from an earlier case protecting employee job stability, such as the ruling in *Madorrán* (2007). However, it may be hard to justify why these cases are truly different. Which employee's feature would validate these terminations without overturning the 2007 decision? At the same time, the basis for interpretation should remain consistent across cases. If a distinction is grounded in a literal construction of a clause, the next one cannot find its basis on an extensive reading. As the Justices try to make increasingly fine distinctions, they risk contradicting past rulings from the supremacist era or weakening their legitimacy by overturning past rulings.

In an alternative strategy, the Court could also account for its recent role shift by further distancing itself from international law materials. The Court has already paid a cost by prioritizing the local Constitution's "principles of public law" over rulings from the Inter-American Court of Human Rights. Following this logic, the Court may be able to justify revising some of its past decisions from the supremacist era if reliance on international law was integral to the original reasoning. By diminishing the importance of international law relative to domestic law, the Court gives itself more latitude to depart from precedents shaped by the former without losing legitimacy.

Katharine Young's work provides valuable insights into the shifting roles of the Argentine Supreme Court in adjudicating social rights since the 1994 constitutional reform. Her conceptual framework enables deeper analysis of national high courts while also facilitating comparison across different legal systems. Based on Young's typologies, this article distinguishes periods in the Argentine Court's recent history. It also explores how its roles shifted over time and how this Court justified these changes using legal concepts to maintain its technical legitimacy. In doing so, this article adds a longitudinal or diachronic perspective to Young's theoretical framework. The conclusions presented regarding the Argentine Supreme Court's evolving jurisprudence may constitute a useful addition to the growing body of comparative judicial research, showing how Young's typologies can be utilized to conduct diachronic analysis of high court decision-making and legitimacy. This article intends to contribute to a deeper understanding of the Argentine Court's present and future in

social rights: how it changes while remaining constant, and how it sheds its legal skin.

ABORTION POLICY IN MEXICO: A CHANGING ROLE FOR THE SUPREME COURT

Caroline Beer*

INTRODUCTION

Starting in the year 2000, just as Mexico was transitioning from a one-party authoritarian regime to a multi-party democracy, a slow process to liberalize abortion laws began. The effort was driven by feminist activists and left parties and culminated in a series of Supreme Court rulings in 2021 and 2023 that opened the path to decriminalization of abortion across the country. Until 2018, abortion policy debates largely took place in state

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legislatures while the Supreme Court affirmed the autonomy of state governments to regulate abortion however they chose. As a result, there was a radical diversity of abortion laws across the country. In some jurisdictions, abortion was legal and available for free in government clinics. In other parts of the country, women who had abortions were charged with murder and imprisoned for twenty or more years. After 2018, the Supreme Court began to take a central role in determining abortion policy across the country. What explains the transformation of abortion politics over the past two decades and the changing role of the Supreme Court? Rather than analyzing the legal arguments of Supreme Court decisions, this paper focuses on the political causes of Supreme Court behavior. It examines the votes of Supreme Court justices on abortion cases since 2000 to understand the interplay between federal judicial review and subnational policy decisions. It finds that the liberalization of abortion laws in Mexico and the changing behavior of the Supreme Court has been the result of strategic litigation by feminist groups, massive feminist mobilization, and electoral victories of left parties. In contrast to common wisdom about the Supreme Court in the United States, in Mexico, there is little relationship between the ideology of the president who appoints the justice and the voting record of the judge. Instead, there is some suggestive evidence that justices finishing their terms may be more likely to rule in accordance with the preferences of the sitting president to enhance their career opportunities after leaving the Court. Judicial reforms undertaken during the transition to democracy greatly enhanced the ability of the Supreme Court to address controversial issues such as abortion.

I. DEMOCRATIZATION AND THE JUDICIARY IN MEXICO

During most of the twentieth century, Mexico was governed by an authoritarian one-party system.[1] A transition to multiparty democracy took place in the 1990s and ended in the victory of opposition party candidate Vicente Fox for the presidency in 2000.[2] Under one-party rule (1928-2000), power was highly centralized in the hands of the President, who resolved

[1] *See* Jodi Finkel, *Judicial Reform as Insurance Policy: Mexico in the 1990s*, 47 LAT. AM. POL. & SOC'Y 87, 91 (2005); Silvia Inclán Oseguera, *Judicial Reform in Mexico: Political Insurance or the Search for Political Legitimacy?*, 62 POL. RSCH. Q. 753, 754 (2009); Julio Ríos-Figueroa, *Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994-2002*, 49 LAT. AM. POL. & SOC'Y 31 (2007).

[2] *See* Finkel, *supra* note 1, at 91.

disputes between different territorial levels and branches of government.[3] The judiciary and the legislature remained weak and subservient to the executive throughout the period of one-party rule.[4] A major reform to strengthen the judiciary was carried out in 1994 as part of the transition to democracy.[5] Judicialization of politics increased in Mexico's new multiparty democracy. Before 1994, the only access to judicial review came through the amparo suit.[6] According to Pou Giménez:

> The amparo is a writ that citizens can file to denounce before a federal judge—not any judge: it is a semi-centralized system—that a public authority has violated her constitutional rights. It broadly protects against acts and norms from all authorities: the police, the administration, judges, the legislative branch, etc. It can operate as a habeas corpus, as a way to activate the judicial review of legislation, or as a forum where federal judges check whether other judges have adjudicated the conflicts between private parties with due respect for fundamental rights, thus ensuring horizontal enforcement (Drittwirkung). Rulings against statutes have *inter pars* effects and result in their disapplication in the case at hand.[7]

The 1994 judicial reforms gave the federal judiciary the power of abstract review, and further reforms in 1999 strengthened the amparo.[8] Since 1994, various government institutions have had the power to file an "Act of Unconstitutionality" to challenge the constitutionality of statutes.[9] The federal judiciary can also review "Constitutional Controversies" to resolve disputes between different government branches and territorial levels.[10] Since 2011, all judges have had the power to review the constitutionality of statutes, but lower judges cannot create precedents and must abide by precedents set by higher-level judges.[11]

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[3] *See* Finkel, *supra* note 1, at 91; Osegura, *supra* note 1, at 764; Ríos-Figueroa, *supra* note 1, at 35.

[4] *See* Finkel, *supra* note 1, at 91; Osegura, *supra* note 1, at 765; Ríos-Figueroa, *supra* note 1, at 35.

[5] *See* Finkel, *supra* note 1, at 87; Osegura, *supra* note 1, at 753; Ríos-Figueroa, *supra* note 1, at 37.

[6] *See* Ríos-Figueroa, *supra* note 1, at 38.

[7] Francisca Pou Giménez, *The Constitution of Mexico*, *in* THE OXFORD HANDBOOK OF CONST. L IN LATIN AM. 203, 223 (Conrado Hübner Mendes et al. eds., 2022).

[8] *See id.* at 222-23.

[9] *See id.*

[10] *See id.* at 223.

[11] *Id.* at 223-24.

The Supreme Court is made up of eleven Justices who serve fifteen-year terms.[12] The Senate chooses justices from a list of three candidates provided by the President.[13] Senators publicly question the three candidates about the technical aspects of the law and their judicial experience.[14] Two-thirds of the Senators present must vote in favor to confirm one of the designees.[15] If the Senate does not act within thirty days, the President can choose the justice from the slate of three.[16] If the Senate rejects all three candidates, the President must send another slate of three candidates to the Senate.[17] If the Senate rejects the second slate, the President can appoint anyone to the bench.[18] There was not a lot of interest group involvement in the selection of judges, and the process was not especially politicized by partisan conflict until 2023.[19] In 2023, the Senate rejected the first slate of candidates sent by López Obrador because opposition parties considered all three candidates close loyal partisans to the President rather than legal experts.[20]

Gender equality and reproductive rights are explicitly guaranteed in the Mexican Constitution. Since 1974, Article 4 of the Mexican Constitution has included a statement of gender equality: "Men and women are equal before the law," and a statement guaranteeing reproductive rights: "Everyone has the right to decide in a free, responsible, and informed manner about the number and spacing of their children," thus enshrining access to contraception as a constitutional right.[21] In 2014, the Mexican Constitution was amended to guarantee gender parity in the candidacies for all legislative elections, meaning no more than half of the candidates for legislative positions can be of the same gender.[22] The parity provision was

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[12] *See* Finkel, *supra* note 1, at 91-92.

[13] *See id.* at 91.

[14] *See id.* at 91-92.

[15] *See id.* at 91.

[16] *See* Diana Lastiri, *Del Senado al "dedazo" presidencial, así es la ruta para designar a la nueva ministra de la Corte*, PROCESO (Nov. 16, 2023), https://www.proceso.com.mx/nacional/2023/11/16/del-senado-al-dedazo-presidencial-asi-es-la-ruta-para-designar-la-nueva-ministra-de-la-corte-318602.html.

[17] *See id.*

[18] *See id.*

[19] *See id.*

[20] *See* Georgina Zerega, *El Senado rechaza la terna para la Suprema Corte enviada por López Obrador*, EL PAÍS (Nov. 30, 2023), https://elpais.com/mexico/2023-11-30/el-senado-rechaza-la-terna-para-la-suprema-corte-enviada-por-lopez-obrador.html.

[21] Constitución Política de los Estados Unidos Mexicanos, CP, Art. 4, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014.

[22] *See id.* at Art. 41.

updated in 2019 to require "parity in everything," including all elective and appointed offices in the country.[23]

Mexico has a federal system with thirty-one states and Mexico City (with political institutions similar to the other thirty-one states). Each state has its own courts and criminal code that regulate abortion. The federal penal code applies only to federal territories.

The transition to democracy in Mexico strengthened the judiciary and generated more judicialization of politics as more political actors began to use strategic litigation to promote their interests. The transition to democracy also created a more polarized partisan environment, with the left and the right providing radically different visions for the future of Mexico, setting the stage for intense conflict over abortion policy.[24]

II. ABORTION POLICY IN MEXICO: PARTY IDEOLOGY AND ABORTION

The Institutional Revolutionary Party (PRI) dominated the authoritarian one-party system that controlled Mexican politics through most of the twentieth century. While the party often espoused revolutionary rhetoric, in reality, it is a pragmatic and centrist party. It has a strong anticlerical tradition and was often at odds with the Catholic Church.[25] The PRI has had a somewhat ambivalent attitude towards abortion. Since the 1970s, the PRI government provided access to contraception and encouraged family planning.[26] Some members of the PRI have pushed to legalize abortion, but fear of conflict with the Catholic Church often held back more progressive policy. PRI governors signed abortion decriminalization laws in Oaxaca and Hidalgo.[27] Ernesto Zedillo from the PRI was the last president in the authoritarian era and governed over the transition to a multiparty democracy (1994-2000).[28] Zedillo was responsible for the judicial reforms of 1994.[29] Enrique Peña Nieto from the PRI was president from 2012 to 2018. The cases that decriminalized abortion in 2021 were originally brought by members of Peña Nieto's administration.

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[23] *See id.*

[24] *See* Oseguera, *supra* note 1, at 762.

[25] *See generally* Ríos-Figueroa, *supra* note 1.

[26] *See* Caroline Beer, *Making Abortion Laws in Mexico: Salience and Autonomy in the Policymaking Process*, 50 COMPAR. POL. 41 (2017).

[27] *See* Caroline Beer, *Contradicciones y conflicto entre la Cuarta Transformación y el movimiento feminista*, 28 POLÍTICA Y GOBIERNO 9 (2021).

[28] *See* Ríos-Figueroa, *supra* note 1, at 38.

[29] *See* Oseguera, *supra* note 1, at 753.

The National Action Party (PAN) is a conservative, Catholic party.[30] President Vicente Fox (2000-2006) and President Felipe Calderón (2006-2012) were PAN members.[31] The PAN has deeply opposed any type of liberalization of abortion laws and has led efforts to adopt fetal life amendments and further criminalize abortion.[32]

Early decriminalization efforts were led by the leftist Party of the Democratic Revolution (PRD). Andrés Manuel López Obrador, mayor of Mexico City from 2000 to 2006, was the PRD's presidential candidate in 2006 and 2012.[33] After narrowly losing the 2012 presidential election, he left the PRD and started a new party, Morena.[34] Morena is a populist left party that has demonized the traditional parties, weakened governing institutions, and centralized power.[35] López Obrador won the presidential elections in 2018 with Morena. López Obrador has not been publicly supportive of abortion rights. While mayor of Mexico City, he blocked legislative efforts to decriminalize abortion. Abortion was decriminalized just after he left office.[36] As president, he refused to take a public position either for or against legalizing abortion and maintained that the question of abortion should be resolved with a national referendum.[37] Feminists disagree, arguing that public opinion should not determine basic human rights.[38] López Obrador has also engaged in substantial conflict with the feminist movement and has been critical of the massive feminist mobilizations during his presidency, characterizing the feminist leaders as pawns of the conservative opposition.[39] See Table 1 for a list of recent Mexican Presidents.

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[30] *See* Beer, *supra* note 26.

[31] *See id.* at 52; *see* Marta Lamas, *La despenalización del aborto en México*, 220 NUEVA SOCIEDAD 154, 167 (2009).

[32] *See* Beer, *supra* note 26, at 54.

[33] *See generally id.*

[34] *See* Beer, *supra* note 27, at 11.

[35] *See id.* at 9.

[36] *See id.* at 11.

[37] *See id.*

[38] *See* Jessica Xantomila, *Rechazan feministas propuesta de AMLO sobre consulta para legalizar aborto*, LA JORNADA (Jan. 6, 2021), https://www.jornada.com.mx/noticia/2021/01/06/sociedad/rechazan-feministas-propuesta-de-amlo-sobre-consulta-para-legalizar-aborto-3774.

[39] *See* Beer, *supra* note 27; Daniela Cerva Cerna, *La protesta feminista en México. La misoginia en el discurso institucional y en las redes sociodigitales*, 65 REVISTA MEXICANA DE CIENCIAS POLÍTICAS Y SOCIALES 177, 193 (2020).

Table 1. Mexican Presidents			
Name	*Years in Office*	*Party*	*Abortion Cases*
Ernesto Zedillo	1994-2000	PRI	No major cases, major judicial reform
Vicente Fox	2000-2006	PAN	Mexico City "Ley Robles"
Felipe Calderón	2006-2012	PAN	Mexico City decriminalization Emergency Contraception Fetal Life Amendment
Enrique Peña Nieto	2012-2018	PRI	Multiple amparo suits
Andrés Manuel López Obrador	2018-2024	Morena	Coahuila Decriminalization Fetal Life Amendment

While López Obrador has not publicly supported legalized abortion, many people in his government have. Olga Sánchez Cordero, a former Supreme Court Justice and prominent feminist, served as López Obrador's Secretary of Gobernación, the second most powerful position in government.[40] Upon taking office, she stated that she would push for a nationwide liberalization of abortion laws. Members of Morena proposed a bill in the federal legislature to decriminalize abortion nationwide in 2019, but it stalled without support from many members of Morena (and no support from the conservative religious parties).[41] Since Argentina legalized abortion in late 2020, there has been increasing pressure from women's groups for the López Obrador administration to follow suit.[42] But in January 2021 (as midterm election campaigns were starting), Olga Sánchez Cordero announced that there would be no federal push for abortion liberalization.[43]

Female members of López Obrador's Morena party led efforts to decriminalize abortion in Oaxaca (2019), Veracruz (2021), and Hidalgo (2021). However, votes from Morena helped defeat bills decriminalizing abortion in Hidalgo and Quintana Roo in 2019. Also, decriminalization bills failed in Baja California Sur and Puebla in 2021. While López Obrador has

[40] *See* Beer, *supra* note 27, at 11-12.

[41] *See* Grupo de Información en Reproducción Elegida (GIRE), *Constitucionalidad de la ley sobre aborto en la Ciudad de México*, GIRE 5, 9 (2009).

[42] *See* Beer, *supra* note 27, at 13.

[43] *See id.*

not been especially sympathetic to the feminist movement, many members of his Morena party have pushed for feminist reforms, including the decriminalization of abortion.[44]

III. HISTORICAL OVERVIEW OF ABORTION POLICY

Abortion has been illegal in Mexico since Spanish colonization.[45] After the Revolution in the early twentieth century, the 1931 Federal Penal Code continued to criminalize abortion in most cases but permitted exceptions to the general ban in the case of rape and to protect the life of the mother.[46] Most of the state penal codes included similar language on abortion as the federal penal code, though the state of Yucatán allowed abortion for economic reasons.[47] These codes remained unchanged until the late 1970s and early 1980s when about half of the states added new legal exemptions for either the health of the mother or for fetal abnormality.[48] There were a few efforts to liberalize abortion laws in the 1990s further. Most notably, the Chiapas state legislature passed a bill to decriminalize abortion in 1990, but the governor vetoed the bill.[49] President de la Madrid proposed a federal bill to liberalize abortion, but it was withdrawn before a vote.[50]

The topic of abortion emerged as a central political issue in 1999 when the case of a thirteen-year-old girl named Paulina was widely covered in the national press.[51] Paulina became pregnant after a man broke into her home and raped her.[52] She and her mother requested an abortion under the rape exemption in the state of Baja California, where they lived, but officials at the public hospital refused to provide an abortion, and a thirteen-year-old rape victim was forced to carry the fetus to term.[53] Since Paulina's case, abortion has remained highly salient in Mexican politics.[54] This particular

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[44] *See id.*

[45] Beer, *supra* note 26, at 42.

[46] *Id.* at 49.

[47] *Id.* at 48.

[48] *See* Adriana Nohemi Ortiz-Ortega, The Feminist Demand for Legal Abortion: A Disruption of the Mexican State and Catholic Church Relations (1871-1995) (1996) (Ph.D. dissertation, Yale University) (ProQuest).

[49] Beer, *supra* note 26, at 52.

[50] *Id.*

[51] *See Historia de Paulina*, PROCESO (Jan. 30, 2002), https://www.proceso.com.mx/nacional/2002/1/30/historia-de-paulina-64173.html.

[52] *Id.*

[53] *Id.*

[54] See Rosario Cruz Taracena, *Analisis del discurso sobre el aborto en la prensa mexicana: El caso Paulina* (2004) (M.A. thesis, CIESAS) (on file with author); PROCESO, *supra* note 51.

story made national headlines because of the work of feminist organizations that supported Paulina and publicized her case, sparking a polarized debate. After the transition to democracy in 2000, politics in Mexico became ideologically polarized between the conservative Catholic party PAN that held the presidency, and the secular left party PRD that governed Mexico City, the most important subnational jurisdiction.[55] In response to the Paulina case, a number of conservative states attempted to eliminate the rape exemption from their penal codes,[56] while more liberal states created new mechanisms to ensure access to abortion in cases where it was legal.

The policymaking process for abortion law in Mexico evinces a complex interplay between federal court decisions and subnational legislation within a context shaped by social movement activism and partisan politics. The Supreme Court first engaged with the issue of abortion after Mexico City added new legal exceptions for abortion in 2000.[57] Mexico City was at the forefront of progressive change on abortion.[58] In response to the Paulina tragedy, the Mexico City legislature added new exceptions to the general ban on abortion.[59] In addition to already existing exceptions for rape and safeguarding the life of the mother, the new reforms allowed the procedure in the case of fetal malformation, the risk to the health of the pregnant person, and non-consensual artificial insemination.[60] These reforms also established regulations to guarantee access to abortion in cases when it was legal.[61] Members of the conservative PAN party in the Mexico City legislature challenged the constitutionality of the reforms. The Supreme Court heard the case and upheld the reforms.

Most abortions remained illegal in Mexico until 2007, when the Mexico City government reformed the criminal code, allowing abortion for any reason during the first twelve weeks of pregnancy.[62] Since these reforms, abortion has been provided free of cost in public clinics in the

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[55] *See* Beer, *supra* note 26.

[56] *See* Martín Diego Rodríguez, *Niegan derecho a abortar a joven violada*, LA JORNADA (May 5, 2008), https://www.jornada.com.mx/2008/05/05/index.php?section=estados&article=044n1est; *see* Beer, *supra* note 26.

[57] *See* María Luisa Sánchez Fuentes, Jennifer Paine & Brook Elliott-Buettner, *The Decriminalisation of Abortion in Mexico City: How Did Abortion Rights Become a Political Priority?*, 16 GENDER & DEV. 345 (2008).

[58] *See id.*

[59] *See* Lamas, *supra* note 31.

[60] *See id.*

[61] *See id.*

[62] In the first year after Mexico City decriminalized abortion, the procedure was carried out more than 7,000 times in public hospitals. *See* GIRE, *supra* note 41.

city.[63] The reforms were intentionally written to include language similar to the 2000 reforms deemed constitutional by the Supreme Court. Thus, "during the first twelve weeks of gestation" was added as a new exception to the general ban on abortion.[64] Although conservatives challenged the constitutionality of the new reforms in the Supreme Court, they were upheld.[65] In response to their loss in the Supreme Court, the anti-abortion movement gained new momentum, and an anti-abortion backlash unfolded in other states across the country.[66] Conservative activists and the PAN party turned to state legislatures to try to prevent further liberalization of abortion. In just one year (from 2008 to 2009), fifteen states added language to their state constitutions declaring that life begins at the moment of conception.[67] By 2021, twenty-one (of the thirty-two) states had enacted constitutional amendments protecting life from the moment of conception. Feminist groups challenged the constitutionality of these fetal life amendments, but in 2011, the court upheld these state provisions, thus establishing nearly unfettered state autonomy over abortion policy.

Other states replicated some of the advances made in Mexico City, and the federal government took steps to ensure access to abortion in cases where it was legal. The PRD governor of Guerrero proposed a bill to decriminalize abortion in 2014, but it was tabled in the face of intense opposition. No other state decriminalized abortion until 2019, after two important Supreme Court decisions.[68] The first expanded the rape exemption in 2018, ruling that abortion was always legal in the case of rape and that no legal authorization was necessary to access abortion services after rape.[69] The second, in 2019, affirmed that abortion was always legal when the woman's health was at risk, ruling that abortion access is necessary to ensure the constitutional right to health.[70] These two cases signaled an important shift in the national abortion debate. Following these decisions, in September 2019, the state of Oaxaca decriminalized abortion during the first twelve weeks of gestation. Women deputies from Morena pushed for the changes to the penal code to liberalize abortion policy,

[63] *See* Sánchez Fuentes et al., *supra* note 57.
[64] *See id.*
[65] *See* Beer, *supra* note 26.
[66] *See id*.
[67] *See id.*
[68] *See generally* Alba Ruibal, *Using Constitutional Courts to Advance Abortion Rights in Latin America*, 23 INT'L FEMINIST J. POL. 579 (2021).
[69] *See id.*
[70] *See id.*

especially Laura Estrada Mauro, the coordinator for Morena in the state legislature.[71] The reforms were passed with the support of legislators from Morena, the Workers Party (PT), and Mujeres Independientes (Independent Women). The bill was signed into law by Governor Murat Hinojosa from the PRI.

During the summer of 2021 (just *after* the 2021 midterm elections in June), two more states, Hidalgo and Veracruz, decriminalized abortion. The state of Hidalgo became the third subnational entity to decriminalize abortion in Mexico. Like Oaxaca, the bill was pushed by legislators from Morena and signed by Governor Omar Fayad of the PRI. In Veracruz, Morena had twenty-three of thirty-five seats in the legislature. All twenty-three deputies from Morena voted to decriminalize abortion, as well as the deputies from PRD and MC. The Governor of Veracruz, who signed the legislation, was also from Morena.

Perhaps emboldened by the legislative action, after these three state legislatures decriminalized abortion, the Supreme Court released three decisions in the fall of 2021. The cases were all brought during President Peña Nieto's (from the centrist PRI) term by his Attorney General and the Commission on Human Rights. The first decision ruled unconstitutional the Coahuila state penal code that completely criminalized abortion. In the second case, the Court ruled against the Sinaloa state constitution's declaration that life begins at conception.[72] The Court ruled that the state of Sinaloa did not have the authority to determine when life began; rather, the federal government did. [73] Between the Supreme Court rulings on abortion from fall 2021 until January 2024, eight more state legislatures decriminalized abortion: Coahuila, Baja California, Baja California Sur, Colima, Sinaloa, Guerrero Quintana Roo, and Aguascalientes for a total of twelve subnational entities where abortion is not criminalized during the first twelve weeks of gestation.[74]

In September of 2023, the Supreme Court struck down the criminalization of abortion in the federal penal code.[75] This ruling made

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[71] *See generally* Beer, *supra* note 27.

[72] *See* Melissa S. Ayala García, *Caso Sinaloa y aborto: sentencias que no decepcionan*, NEXOS (Sept. 28, 2022), https://eljuegodelacorte.nexos.com.mx/caso-sinaloa-y-aborto-sentencias-que-no-decepcionan/.

[73] *See id.*

[74] *See* Simon Romero & Emiliano Rodriguez Mega, *Mexico's Supreme Court Decriminalizes Abortion Nationwide*, N.Y. TIMES (Sept. 6, 2023), https://www.nytimes.com/2023/09/06/world/americas/mexico-abortion-decriminalize-supreme-court.html.

[75] *See id.*

abortion legal in all federal health institutions, even in the twenty states where abortion continues to be illegal.[76] The court stated that the "criminalization of abortion constitutes an act of gender-based violence and discrimination, as it perpetuates the stereotype that women and people with the capacity to get pregnant can only freely exercise their sexuality to procreate and reinforces the gender role that imposes motherhood as a compulsory destiny."[77]

Thus, following the expectations of judicial federalism, we see federal court decisions shaping the policymaking process for subnational legislatures, and state legislatures influencing the decisions of the Court. Liberalizations of abortion laws in Mexico began in state legislatures where left parties had won the majority and were upheld by the Supreme Court in the face of significant national pressure against the reforms.[78] Some states decriminalized abortion, while others further criminalized abortion by granting legal personhood to fetuses and charging women who had abortions with murder. From 2000 until 2018, the Supreme Court acted to uphold states' autonomy, allowing both policies to decriminalize and further criminalize abortion. The tendency to uphold state laws both in favor of legal abortion and against can partly be explained by the fact that the Mexican Constitution requires a two-thirds supermajority for the Supreme Court to overturn local laws.[79] There was a simple majority in favor of decriminalizing abortion during most of this time, but not a supermajority. Explanations of changes in abortion policy from 2000 to 2018 focused on explaining why some states enacted liberalizing reforms and other states enacted conservative reforms. Methodologically, these studies focused on subnational comparisons, highlighting differences among states. Hypotheses examined the variation of the influence of the Catholic Church, the ideology of the party in power, and the strength of feminist groups across states.[80] Since the Supreme Court's rulings upheld state autonomy during this period, scholarly research generally did not focus on the Supreme Court as a factor.[81] Since 2018, the Supreme Court

[76] *See id.*

[77] *Id.*

[78] *See* Sánchez Fuentes et al., *supra* note 57.

[79] *See* Beer, *supra* note 26.

[80] *See* Beer, *supra* note 26; Camilla Reuterswärd, *Pro-Life and Feminist Mobilization in the Struggle over Abortion in Mexico: Church Networks, Elite Alliances, and Partisan Context*, 63 LAT. AM. POL. & SOC'Y 21 (2021).

[81] *See* Beer, *supra* note 26.

has played a central role in establishing abortion law, overriding state legislatures. What explains this change in court behavior?

IV. COURTS AND POLITICAL CHANGE

While existing analyses of abortion policymaking in Mexico have focused on state legislatures and subnational politics, an explanation of changes to abortion policy since 2018 requires a new focus on the national level and the Supreme Court. International human rights cases, especially the *Artavia Murillo v. Costa Rica* case at the InterAmerican Court of Human Rights have been important in shaping court decisions in the region.[82]

Abortion was decriminalized in Uruguay and Argentina in the national legislature, but courts have taken a central role in establishing abortion policy in many other countries across Latin America in recent decades,[83] enacting progressive legal changes regarding reproductive rights.[84] Colombia's 2006 Supreme Court order to liberalize abortion laws marked the beginning of greater judicial involvement in the politics of abortion in Latin America.[85] Courts increased access to abortion by expanding exemptions to general bans in Brazil and Argentina in 2012 and Bolivia in 2014.[86] Courts in Mexico and Chile affirmed the constitutionality of legislative actions to liberalize abortion, but courts in El Salvador and Costa Rica upheld the criminalization of abortion.[87] In 2022, the Colombian Supreme Court decriminalized abortion for any reason during the first twenty-four weeks of gestation. Courts may be more likely to liberalize abortion laws than legislatures because they are more elite, they focus on legal arguments rather than religious or moral arguments, and courts are more insulated from religious pressure and less responsive to public opinion than legislatures.[88] Transitions to democracy across the region created constitutional courts with judicial review powers that provided greater opportunities for a judicial path to reproductive rights. Not only have

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[82] *See* Artavia Murillo et al. v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No.12361 (Nov. 28, 2012).

[83] *See* Agustina Ramón Michel et al., *Abortion as an Essential Health Service in Latin America During the COVID-19 Pandemic, and Partisan Context*, 3 FRONTIERS IN GLOB. WOMEN'S HEALTH 1 (2022).

[84] *See* Ruibal, *supra* note 68.

[85] *See id.*

[86] *See id.*

[87] *See* Ramón Michel et al., *supra* note 83.

[88] *See* Ruibal, *supra* note 68.

Courts ruled in favor of greater access to abortion care in many countries across Latin America, but Courts have also encouraged public discussion of abortion and provided a public forum that is less dominated by religious actors.[89]

Just as scholars of abortion politics in the United States have pointed to the complex interplay among activists, state legislatures, and federal courts in determining abortion policy outcomes in the US, similar patterns have emerged in Mexico's federation. Wilson's description of abortion politics in the US could also describe abortion politics in Mexico:

"A cycle is created where the Court speaks, activists and legislators experiment, and abortion providers and supporters challenge the legislative results in court, whereupon the cycle starts again."[90]

Patton finds that state abortion policy adoption in the US is strongly influenced by Supreme Court decisions.[91] She outlines four types of constitutional contexts: unknown, unconstitutional, constitutional, and suspect.[92] Patton finds that policy adoption is most likely to occur when the constitutionality of the proposal is affirmed or unknown.[93] Policies are least likely to be adopted by states when they are clearly unconstitutional.[94] Thus, abortion policymaking in the United States followed a pattern whereby a new court decision led to a wave of replication of now clearly constitutional reforms.[95] Then, activists would push for further restrictions with unknown or suspect constitutionality, which would require a new court decision, and the cycle would begin again.[96]

In a federal system such as Mexico with vertical judicial review, we should expect to see the interaction between subnational legislatures and federal courts because federal courts can set limits for allowable subnational policy options.[97] Federal judicial review of subnational legislation is an important component of federalism.[98] In fact, federalism

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[89] *See id.*

[90] Joshua C. Wilson, *Striving to Rollback or Protect* Roe*: State Legislation and the Trump-Era Politics of Abortion*, 50 PUBLIUS: J. FEDERALISM 370, 372 (2020).

[91] *See* Dana Patton, *The Supreme Court and Morality Policy Adoption in the American States: The Impact of Constitutional Context*, 60 POL. RSCH. Q. 468 (2007).

[92] *See id.*

[93] *See id.*

[94] *See id.*

[95] *See id.*

[96] *See id.*

[97] *See* Jonathan P. Kastellec, *How Courts Structure State-Level Representation*, 18 STATE POL. & POL'Y Q. 27 (2018).

[98] *See* Jonathan P. Kastellec, *Judicial Federalism and Representation*, 6 J. L. & CTS. 51 (2018).

may lead to a stronger judiciary because the central government may use vertical judicial review to rein in the excesses of subnational jurisdictions.[99]

During the transition to democracy in Mexico, President Ernesto Zedillo (1994-2000) strengthened the judiciary to rein in the authoritarian excesses of some state governors.[100] While Kasttellec argues that courts can only set floors for constitutional rights, not ceilings, that depends on how constitutional rights are defined.[101] This is particularly tricky when considering abortion laws because decisions may consider the constitutional rights of pregnant people or they may consider the constitutional rights of a fetus. A higher "floor" of rights for a fetus implies a lower "ceiling" of rights for pregnant people. It is certainly possible for a federal court to impose a ceiling on rights for pregnant people by providing a "floor" for constitutional rights for a fetus.

Kastellec argues that subnational policy innovation is more likely when there are low federal floors for rights protection.[102] He points to the case of LGBTQ rights in the USA, where state courts and policymakers were more active when federal floors for LGBTQ rights were low.[103] Early efforts for greater LGBTQ rights recognition in the USA focused on state courts in more liberal states. The pattern of abortion policymaking in the USA provides an example of an opposite pattern where *Roe* provided a high floor for women's rights, which led to extensive state legislation to undermine the court's decision by lowering the "ceiling."[104] Others have found a more complex pattern, such as the rush to pass new state laws in anticipation of a new court ruling, either to pressure the Court or to set the stage for the anticipated result of the new ruling.[105] Wilson finds that in the years leading up to the overruling of *Roe v. Wade,* changes in the court's ideological makeup incentivized new legislative activity that was unconstitutional to push the courts to overturn *Roe v Wade*.[106]

Evidence from Mexico suggests that early innovation to extend rights will likely come from subnational governments. Then courts weigh in later after a number of subnational units adopt reforms. Court rulings are likely to influence new legislative responses at the state level.

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[99] *See* Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137 (2011).

[100] *See* Finkel, *supra* note 1.

[101] *See* Kastellec, *supra* note 98, at 52.

[102] *See id.* at 65.

[103] *See id.* at 79.

[104] *See* Kastellec, *supra* note 98.

[105] *See* Patton, *supra* note 91; Wilson, *supra* note 90.

[106] *See* Wilson, *supra* note 90.

V. FEMINIST MOBILIZATION

In Mexico, the changing Supreme Court decisions on abortion were influenced by feminist activism.[107] Legal, professional feminist activists from the Information Group on Reproductive Choice (known by its Spanish acronym GIRE) built alliances with legal networks and designed amparo cases and constitutional challenges to push the courts to liberalize abortion access.[108] Massive mobilization of young feminists in street protests drew public attention to the horrific everyday consequences of gender inequality in Mexico.

Ruibal and Fernández-Anderson[109] distinguish between three different strategies used to promote greater access to abortion services in Argentina. The first strategy, *political* mobilization, is emphasized in much of the literature. The second strategy, *legal* mobilization, includes the activism of feminist lawyers and public health professionals pushing judicial strategies to make change through the courts.[110] Legal mobilization requires a professionalized sector within the feminist movement with technical expertise to bring legal cases.[111] The third strategy emphasized by Ruibal and Fernández-Anderson is direct action to promote safe self-induced abortion through the distribution of information and telephone hotlines.[112]

After courts across Latin America gained new powers of judicial review, social movements began to make demands in the language of constitutional rights and used strategic litigation to gain greater access to legal abortion.[113] Success also required that the Courts were receptive to feminist demands and accessible to social group participation. The Supreme Court in Mexico greatly increased access and social participation in 2008 as they decided the case about Mexico City's abortion decriminalization law.[114]

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[107] *See* Sánchez Fuentes et al., *supra* note 57.

[108] *See id.*

[109] *See* Alba Ruibal & Cora Fernandez Anderson, *Legal Obstacles and Social Change: Strategies of the Abortion Rights Movement in Argentina,* 8 POL. GRPS. & IDENTITIES 698 (2018).

[110] *See id.*

[111] *See id.*

[112] *See* Alba Ruibal, *Moving Constitutional Courts for Social Change in Latin America,* 53 LASA FORUM 30 (2022).

[113] *See* Alba Ruibal, *Federalism and Subnational Legal Mobilization: Feminist Litigation Strategies in Salta, Argentina*, 52 LAW & SOC'Y REV. 928 (2018); Ruibal, *supra* note 68.

[114] *See* Ruibal, *supra* note 112; Alba Ruibal, *Feminismo, religión y democracia en el proceso de legalización del aborto en la Ciudad de México*, 27 ESTUDIOS 13 (2012).

Strategic litigation by feminist activists has been central to the changes in the Supreme Court regarding abortion. The Information Group on Reproductive Choice (GIRE), founded in Mexico City in 1992, is the main feminist group advocating for the decriminalization of abortion in Mexico.[115] They developed relationships with legal scholars and helped train feminist lawyers to bring into the movement.[116] Since its foundation, it has worked to promote reasoned debate on reproductive rights in the media, engaged with public officials to promote gender equality policies, and used strategic litigation to promote policy change on abortion.[117] GIRE engages in legal accompaniment of cases, juridical research, and technical assistance.[118] GIRE coordinated and prepared *amicus curiae* briefs from NGOs and academics to support abortion decriminalization in the courts.[119] Feminist legal activists have succeeded in getting allies into influential positions in the Courts. Zaremberg and Almeida's[120] network analysis of the Mexican feminist movement finds that next to GIRE, the strongest node of contact in feminist networks is the Supreme Court. Zaremberg and Almeida quote activists who point to the importance of feminist clerks and legal advisors in the Supreme Court who help promote feminist arguments.[121]

Massive feminist mobilization erupted in Mexico in 2019, following smaller protests starting in 2016 and increasing with the spread of the #MeToo movement from the USA in 2017 and similar movements across Latin America.[122] The Mexican movement had its roots in women's activism in Ciudad Juárez in the 1990s to protest the violence against women at the US-Mexico border. Argentine activists inspired by the Mexican movement started "Ni Una Menos" in 2015, which in turn inspired more activism in Mexico.[123] "Ni Una Menos" evolved to include broader

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[115] *See* Lamas, *supra* note 31.

[116] *See id.*

[117] *See* Sánchez Fuentes et al., *supra* note 57.

[118] Grupo de Información en Reproducción Elegida (GIRE), *Caso Sinaloa: el derecho a interrumpir el embarazo frente el derecho a la vida desde la concepción*, NEXOS (Sept. 2021), https://eljuegodelacorte.nexos.com.mx/caso-sinaloa-el-derecho-a-interrumpir-el-embarazo-frente-el-derecho-a-la-vida-desde-la-concepcion/.

[119] *See* Sánchez Fuentes et al., *supra* note 57, at 357.

[120] GISELA ZAREMBERG & DEBORA REZENDE DE ALMEIDA, FEMINISMS IN LATIN AMERICA : PRO-CHOICE NESTED NETWORKS IN MEXICO AND BRAZIL (Maria Victoria Murillo et al. eds., Cambridge Univ. Press 2022).

[121] *Id.* at 47.

[122] *See* Cerna, *supra* note 39, at 180.

[123] Jaclyn Diaz, *How #NiUnaMenos Grew from the Streets of Argentina into a Regional Women's Movement*, NAT'L PUB. RADIO (NPR) (Oct. 15, 2021, 5:00 AM),

demands for gender equality, and in 2018, the Argentine Marea Verde (Green Wave) protests began calling for the legalization of abortion.[124]

In Mexico City on International Women's Day, March 8, 2020, nearly 100,000 people marched in protest of the gruesome murders of Ingrid Escamilla and 7-year-old Fatima.[125] On September 4, 2020, feminist protesters occupied the National Human Rights Commission Offices and turned it into a shelter for victims of violence.[126] A year later, on International Women's Day, March 8, 2021, another massive march turned violent, and 81 people were injured.[127]

While most of the feminist mobilizations in Mexico during the few years preceding the Supreme Court's decision in 2021 were focused on gender violence, not abortion, there are important links between demands for government protection against gender violence and demands to decriminalize abortion. Early efforts to liberalize abortion laws in Mexico focused on access to abortion for victims of rape. Rape is a common cause of unwanted pregnancy, and pregnancy in children is almost always the result of rape.[128] There have been some very high-profile cases of men killing their pregnant girlfriends because of unwanted pregnancies. The Argentine movement "Ni Una Menos" was inspired by the death of fourteen-year-old Chiara Paéz, who was killed by her boyfriend because of her pregnancy.[129] Many feminists have argued that a lack of access to basic healthcare, including abortion care, is a form of sexual violence. In 2023, the Mexican Supreme Court agreed, recognizing the criminalization of abortion as a form of violence against women. There are also important institutional links between antiviolence organizations and abortion rights groups. The Mexican group Marea Verde, inspired by the Argentine Marea

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https://www.npr.org/2021/10/15/1043908435/how-niunamenos-grew-from-the-streets-of-argentina-into-a-regional-womens-movemen.

[124] *Id.*

[125] Paulina Villegas, *In Mexico, Women Go on Strike Nationwide to Protest Violence*, N.Y. TIMES (Mar. 9, 2020), https://www.nytimes.com/2020/03/09/world/americas/mexico-women-strike-protest.html.

[126] https://elpais.com/mexico/2020-09-07/la-toma-de-la-comision-de-derechos-humanos-de-mexico-exhibe-las-carencias-en-la-ayuda-a-las-victimas.html?event=regonetap&event_log=regonetap&prod=REGONETAP&o=regonetap

[127] Maria Abi-Habib & Oscar Lopez, *A Women's March in Mexico City Turns Violent, With at Least 81 Injured*, N. Y. TIMES (Mar. 8, 2021), https://www.nytimes.com/2021/03/08/world/americas/mexico-city-womens-day-protest.html.

[128] IPAS, SALUD ACCESO DERECHOS, VIOLENCIA SEXUAL Y EMBARAZO INFANTIL EN MEXICO: UN PROBLEMA DE SALUD PUBLICA Y DERECHOS HUMANOS (Laura Andrade, ed., 2018).

[129] *See* Diaz, *supra* note 123.

Verde Movement, was founded in June 2018 by Renata Villarreal from Cancun.[130] The goal of Marea Verde is to eradicate violence against women *and* legalize abortion. In November 2020, Marea Verde activists occupied the state legislatures in Puebla and Quintana Roo, demanding the decriminalization of abortion.[131]

Daby and Moseley trace the process to decriminalize abortion in Argentina to the "Ni Una Menos" movement that started in 2015 to protest violence against women.[132] The movement for reproductive rights in Argentina built upon the organizational framework and the political base of the "Ni Una Menos" movement and borrowed the social justice framing from the anti-violence movement, focusing on the unequal effects of abortion restrictions across economic groups and the heavy costs paid by those without economic resources, emphasizing the dangers of clandestine abortion.[133] This focus on public health and maternal mortality is connected with the "Ni Una Menos" discourse. An official "Ni Una Menos" manifesto described a woman serving a prison term for abortion as a victim of patriarchal violence.[134]

VI. THE RISE OF LEFT PARTIES

Changes in Court behavior can also be attributed to the rising influence of the left. When new parties win presidential elections they can change the makeup of the courts, and justices may try to appeal strategically to the interests of sitting presidents. Left parties have been proponents of gender equality across the globe.[135]

Partisan politics has been central in U.S. abortion policy adoption. Leftist women seem to be especially important. In the U.S., leftist women leaders are effective in blocking conservative policy adoption, but not in promoting liberalizing reforms.[136]

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[130] *Id.*

[131] *Id.*

[132] Mariela Daby & Mason W. Moseley, *Feminist Mobilization and the Abortion Debate in Latin America: Lessons from Argentina*, 18 POL. & GENDER 1, 27-30 (2022).

[133] *Id.*

[134] *Id.*

[135] Merike Blofield & Christina Ewig, *The Left Turn and Abortion Politics in Latin America*, 24 SOCIAL POLITICS: INTERNATIONAL STUDIES IN GENDER, STATE & SOCIETY 481, 481 (2017); ELISABETH J. FRIEDMAN, SEEKING RIGHTS FROM THE LEFT: GENDER, SEXUALITY, AND THE LATIN AMERICAN PINK TIDE (Duke University Press. 2019).

[136] Rebecca J. Kreitzer, *Politics and Morality in State Abortion Policy*, 15 STATE POLITICS & POLICY QUARTERLY 41, 58 (2015).

The ideological composition of the court is a central variable in studies of the U.S. Supreme Court. As Republican appointees to the U.S. Supreme Court shifted the ideological composition of the court in the 1980s, dissenting opinions against the court's majority support for abortion rights increased in prominence. These dissents invigorated anti-abortion activism and new efforts to restrict abortion at the state level. The *Casey* decision in 1992 allowed many new abortion restrictions and inspired further state-level action to restrict abortion access.[137] After the election of Donald Trump in 2016, the reality that the Supreme Court might soon overturn federal protection of abortion inspired a spate of radical abortion bans that were patently unconstitutional under current precedent.[138] And in 2022, the Right in the US achieved its goal of overturning *Roe v. Wade* after President Trump had appointed three new conservative Supreme Court justices. It seems likely that a similar tendency of ideological influence would influence the Mexican Court, but in the opposite direction as the Left has increased its influence.

VII. HYPOTHESES

Why was there a shift in the Court's behavior, from affirming subnational autonomy for abortion law to national decriminalization? Why did the Court take a central role in abortion law after 2018? This section examines hypotheses that the change in court behavior regarding abortion in Mexico can be explained by the increasing electoral influence of the left and the rise in feminist activism.

Hypothesis 1. The ideological makeup of the court will influence court decisions: Justices will vote according to the ideology of the appointing president. As the left appoints more justices, the Court is more likely to rule in favor of abortion.

Hypothesis 2. The ideology of the sitting president will influence court decisions because the President can pressure justices, especially those who are leaving the Court soon. Those justices may promote the interests of the sitting President in order to enhance their career options after leaving the Court. Thus, we are likely to see more decisions in favor of abortion when a left president is in power.

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[137] *See generally,* Planned Parenthood of Southeastern Pennsylvania v. Casey, 533 U.S. 833 (1992).

[138] *See* Wilson, *supra* note 90.

Hypothesis 3. More intense feminist mobilization and feminist strategic litigation will influence Court decisions and lead to greater liberalization of abortion laws.

Following the logic of Hypothesis 1, we would expect justices to rule on controversial issues in ways that are consistent with the preferences of the president who nominated them. Thus, we might expect that the justices nominated by Vicente Fox (2000-2006) and Felipe Calderón (2006-2012) from the conservative, Catholic PAN would be more likely to rule against efforts to liberalize abortion laws. And we would expect judges appointed by Ernesto Zedillo (1994-2000) and Peña Nieto (2012-2018) from the centrist, secular PRI and López Obrador (2018-2024) from the populist left Morena to be more sympathetic to reproductive rights. However, because the selection of Supreme Court justices was not especially politicized, Presidents may not have had a lot of information about prospective judges. Therefore, we may see some misalignment between the President's ideology and their appointee's votes.

Alternatively, following the logic of Hypothesis 2, we would expect to see justices who are nearing the end of their terms ruling in accordance with the preferences of the current president in the hopes of winning an appointment to an important position in the executive branch when their term is over. This alternative hypothesis is consistent with common understandings of how the PRI functioned under one-party authoritarian rule. There was a longstanding practice under the PRI's authoritarian rule of term limits being used so that the party leaders could control public officials.[139] Traditionally, a position in the Supreme Court was not seen as an especially prestigious or influential position, but rather a stepping stone to more powerful positions.[140] As a result, there were high turnover rates for Supreme Court Justices, and many went on to serve in important political posts immediately after leaving the Court.[141] Thus, a convergence with the preferences of the sitting president, as the justice leaves the bench, may be more important than the ideology of the appointing president.

Finally, Hypothesis 3 contends that more feminist strategic litigation bringing cases and seeding feminist legal experts in the judiciary is an important factor in shifting Supreme Court rulings. Moreover, massive

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[139] Luis Javier Garrido, *The Crisis of Presidencialismo*, *in* MEXICO'S ALTERNATIVE POLITICAL FUTURES (Wayne A. Cornelius, et al. eds., 1989).

[140] Pilar Domingo, *Judicial Independence: The Politics of the Supreme Court in Mexico*, 32 J. OF LAT. AM. STUD. 705, 723 (2000).

[141] Beatriz Magaloni, *Authoritarianism, Democracy, and the Supreme Court: Horizontal Exchange and the Rule of Law in Mexico*, *in* DEMOCRATIC ACCOUNTABILITY IN LATIN AMERICA (Scott Mainwaring & Christopher Welna eds., 2003).

feminist mobilization brings attention to the consequences of gender inequality and may generate new public and court sympathy for feminist demands.

It is also important to consider that Courts may enact change slowly in a strategic attempt to avoid overplaying their power and getting too far ahead of public opinion. Courts do not want to see their rulings not enforced; thus, they may prefer incremental change. This preference may explain the gradual progression toward the legalization of abortion.

VIII. EVIDENCE

A. Ideological Influence of Presidents

This section analyzes how the ideologies of the appointing president and the sitting president relate to justices' votes on abortion cases. While each case on abortion addresses different legal issues, and there are many reasons justices may vote in favor of abortion access in one case and against it in another, this section uses a simple political analysis to assess which justices vote in favor of greater abortion access and which vote against greater abortion access. In each table below the vote on the left side of the table represents a vote to increase abortion access, while a vote on the right side of the table represents a vote to decrease abortion access. Names are in bold if the nature of their vote changed from earlier votes. After the name of each justice is the president who appointed them and the year they left the Court (or for those still on the court in 2024, the year their term ends).

The Supreme Court first engaged with the issue of abortion after Mexico City added new legal exceptions to the ban on abortion (for safeguarding the health of the mother, fetal malformation, and non-consensual artificial insemination) in 2000, a reform known as the "Robles Law." Conservative members of the Mexico City legislative assembly challenged the constitutionality of the new legal exceptions (Acción de Inconstitucionalidad 10/2000). In 2002, the Supreme Court upheld the new reforms with a vote of 7 to 4.[142]

[142] Aborto. Requisitos para que se configure la excusa absolutoria prevista en el artículo 334, fracción III, del Código penal para el distrito federal, Pleno de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo XV, Marzo de 2002, Tesis P./J. 10/2000, página 878 (Mex.).

Mexico City's new legal exemptions "Ley Robles" 2002 Acción de Inconstitucionalidad 10/2000[143] *author of decision	
Justices to uphold law 7	Justices to overturn 4
Juventino Victor Castro y Castro Appointed by: Zedillo Left the Court in: 2003	José Vicente Aguinaco Alemán Appointed by: Zedillo Left the Court in: 2003
Humberto Román Palacios Appointed by: Zedillo Left the Court in: 2004	Juan Díaz Romero Appointed by: de la Madrid (1986-1994); Zedillo Left the Court in: 2006
Mariano Azuela Güitrón Appointed by: de la Madrid, (1983-1994;) Zedillo Left the Court in: 2009	Salvador Aguirre Anguiano Appointed by: Zedillo Left the Court in: 2012
Genaro Góngora Pimentel Appointed by: Zedillo Left the Court in: 2009	Guillermo I. Ortiz Mayagoitia Appointed by: Zedillo Left the Court in: 2012
José de Jesús Gudiño Pelayo Appointed by: Zedillo Left the Court in: 2010	
Juan N. Silva Meza Appointed by: Zedillo Left the Court in: 2015	
*Olga Sánchez Cordero Appointed by: Zedillo Left the Court in: 2015	

In 2002, all of the justices had been appointed by Ernesto Zedillo from the PRI. Zedillo reformed the judiciary in 1994 and appointed a new Court, keeping just two ministers from the previous court. All of Zedillo's appointees were still on the bench two years into Vicente Fox's presidential term. Therefore, all votes for and against were from justices appointed by President Zedillo from the centrist, secular PRI.

[143] *Id*.

It is also important to note that although the 2002 decision allowed the new abortion liberalization, the opinion was framed in conservative language and upheld the right to life of the fetus. According to Madrazo and Vela:

> For the court, the fact that the conduct was not technically "decriminalized" was key. The bottom line is this: the state is still sending the message that abortion is wrong (it is illegal), but it chooses not to punish under certain conditions as long as the court affirmed [sic] once again, all the requisites established by the law are fulfilled. The constitutionality of the reform lies in the fact that, under its terms, abortion remains a crime.[144]

The Supreme Court again took up the issue of abortion after Mexico City further decriminalized the procedure in 2007. Legislators intentionally structured the new reforms to resemble the Robles Law, simply adding "during the first twelve weeks of gestation" to the list of exemptions to the general criminalization of abortion. The National Human Rights Commission (CNDH), which was controlled by appointees of the Conservative PAN President, challenged the constitutionality of Mexico City's new law (Acción de Inconstitucionalidad 147/2007).[145] The court established an unusually participatory process to decide the case. They invited experts to present evidence, accepted amicus briefs, and held open public forums to inform their deliberations.[146] In 2008, the Court ruled 8-3 to uphold the Mexico City law.[147]

Mexico City law to decriminalize abortion, 2008 Acción de Inconstitucionalidad 146/2007 y su acumulada 147/2007[148] *author of decision	
Justices to uphold 8	**Justices to overturn 3**

[144] Alehandro Madrazo & Estefania Vela, *The Mexican Supreme Court's (Sexual) Revolution?*, 89 TEX. L. REV. 1863, 1871 (2011).

[145] *Id.* at 1874-77. *See* Despenalización del aborto antes de las 12 semanas de gestación, Pleno de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo XXIX, Marzo de 2009, Tesis P./J. 147/2007, página 1581 (Mex.) [hereinafter Mexico Abortion Decriminalization Case].

[146] *See* Ruibal, *supra* note 68, at 593-94.

[147] Mexico Abortion Decriminalization Case, *supra* note 145.

[148] *Id*.

Genaro Góngora Pimentel Appointed by: Zedillo Left the Court in: 2009 José de Jesús Gudiño Pelayo, Appointed by Zedillo Left the Court in: 2010 Juan N. Silva Meza, Appointed by: Zedillo, Left the Court in: 2015 Olga Sánchez Cordero Appointed by: Zedillo Left the Court in: 2015 *José Ramón Cossío Díaz Appointed by: Fox Left the Court in: 2018 Sergio Valls Hernández Appointed by: Fox Left the Court in: 2014 Margarita Beatriz Luna Ramos Appointed by: Fox Left the Court in: 2019 José Fernando Franco González-Salas Appointed by: Fox Left the Court in: 2021	Mariano Azuela Güitrón Appointed by: Zedillo Left the Court in: 2009 Salvador Aguirre Anguiano Appointed by: Zedillo Left the Court in: 2012 Guillermo I. Ortiz Mayagoitia, Appointed by: Zedillo Left the Court in: 2012

The ruling found that there was no constitutional obligation to criminalize abortion.[149] While both this opinion and the 2002 opinion allowed greater liberalization of abortion, this opinion reversed the finding of 2002 that the fetus has a right to life.[150]

All three of the justices who voted against the Mexico City law decriminalizing abortion were appointed by Ernesto Zedillo, from the

[149] *Id.*

[150] Madrazo & Vela, *supra* note 144, at 1876.

centrist PRI. Four of the eight voting to uphold the law were appointed by Vicente Fox, from the conservative PAN. All three of the justices who opposed the law were in line to leave the court while Calderón (from the conservative PAN) was still in office.[151] Their votes may have been a strategic attempt to curry favor with the sitting president in the hopes of landing a job in the executive branch when their term was up. Azuela Güitrón voted in favor of abortion liberalization in 2002 but against it in 2008.[152] Perhaps this reflects some influence from the sitting president, though he was 73 when he left office and was not appointed to any powerful positions after he left the court. Sergio Aguirre Anguiano also voted against the reforms. He had been a member of PAN, attended the conservative Law School at the Autonomous University of Guadalajara and had always been conservative.[153] Zedillo appointed him, but Zedillo had appointed a number of prominent members of the PAN, including the attorney general, as part of his effort to democratize the one-party system.[154] Guillermo Ortiz Mayagoitia had not been considered especially conservative, and some commentators suggested Calderón had pressured him to vote against abortion, but like Aguirre Anguiano, he had also voted against abortion in 2002.[155]

In 2009, the governor of Jalisco from the conservative PAN filed a constitutional controversy against the federal government and the Secretary of Health (Controversia Constitucional 54/2009).[156] The new Health Law (Norma Oficial Mexicana NOM-190-SSA2-2005) required public health clinics to provide emergency contraception to victims of sexual violence. The state of Jalisco argued that emergency contraception was abortive and, therefore, illegal. The Court held that emergency contraception was a method of contraception and not abortion. The Court confirmed the

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[151] Mexico Abortion Decriminalization Case, *supra* note 145.

[152] *Id*.

[153] *Id*.

[154] *Id.*

[155] *See* Edgar González Ruiz, *Aborto*: *el Clero, la Derecha y la Corte*, CONTRALINEA (Oct. 2011), https://contralinea.com.mx/opinion/aborto-el-clero-la-derecha-y-la-corte/.

[156] Controversia constitucional. La modificación a la norma oficial mexicana nom-190-ssa1-1999. Prestación de servicios de salud. Criterios para la atención médica de la violencia familiar, para quedar como nom-046-ssa2-2005. Violencia familiar, sexual y contra las mujeres. Criterios para la prevención y atención, publicada en el diario oficial de la federación el 16 de abril de 2009, no vulnera los principios de legalidad, reserva de ley y seguridad jurídica. controversia constitucional. Una norma oficial mexicana en materia de salubridad general es aplicable en todas las entidades que componen el sistema nacional de salud, Pleno de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo XXXIII, Enero de 2011, Tesis P./J. 54/2009, página 2779 (Mex.) [hereinafter Controversial Constitution Case].

constitutionality of the Health Law with a unanimous 9-0 decision. It ruled that all federal, state, and municipal health agencies (including Jalisco, which brought the suit) must provide access to emergency contraception.[157]

Emergency Contraception 2010 Controversia Constitucional 54/2009[158] *author of decision	
Justices to uphold Health Law 9	Justices absent 2
Guillermo I. Ortiz Mayagoitia Appointed by: Zedillo Left the Court in: 2012	José de Jesús Gudiño Pelayo Appointed by: Zedillo Left the Court in: 2010
Juan N. Silva Meza Appointed by: Zedillo Left the Court in: 2015	Salvador Aguirre Anguiano Appointed by: Zedillo Left the Court in: 2012
Olga Sánchez Cordero Appointed by: Zedillo Left the Court in: 2015	
*José Ramón Cossío Díaz Appointed by: Fox Left the Court in: 2018	
Sergio Valls Hernández Appointed by: Fox Left the Court in: 2014	
Margarita Beatriz Luna Ramos Appointed by: Fox Left the Court in: 2019	
José Fernando Franco González Salas Appointed by: Fox Left the Court in: 2021	

[157] *Id.*
[158] *Id.*

Arturo Zaldívar Lelo de Larrea Appointed by: Calderón Left the Court in: 2023 Luis María Aguilar Morales Appointed by: Calderón Left the Court in: 2023	

After the Supreme Court upheld Mexico City's decriminalization of abortion, conservatives turned to state legislatures to forestall decriminalization in other states.[159] Within just one year (from 2008 to 2009), fifteen states had adopted constitutional amendments declaring that life begins at conception.[160] Feminist groups challenged these fetal life amendments with parallel cases in 2009 (Acción de Inconstitutionalidad 11/2009 and 62/2009).[161] In 2011, the Court upheld the constitutionality of the fetal life amendments in Baja California and San Luís Potosí. The vote was 7 to 4, with the majority voting to overturn the fetal life amendments, but the Constitution requires a two-thirds majority (8/11 votes) to overturn a state law.[162]

Fetal Life Amendments 2011 Acción de Inconstitutionalidad 11/2009 and 62/2009[163] *author of decision	
Justices opposed 7 (strike down)	Justices in favor 4 (uphold)

[159] *Constituciones que Protegen la Vida desde la Concepción*, GIRE (2018), https://gire.org.mx/plataforma/constituciones-que-protegen-la-vida-desde-la-concepcion/.

[160] GIRE, *supra* note 159.

[161] *See* La vida humana prenatal, las mujeres y los derechos humanos, Pleno de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Novena Época, Septiembre de 2009, Tesis P./J. 11/2009 y 62/2009 (Mex.).

[162] *See id.*

[163] *See id.*

Juan N. Silva Meza Appointed by: Zedillo Left the Court in: 2015	Salvador Aguirre Anguiano Appointed by: Zedillo Left the Court in: 2012
Olga Sánchez Cordero Appointed by: Zedillo Left the Court in: 2015	Guillermo I. Ortiz Mayagoitia, Appointed by: Zedillo Left the Court in: 2012
José Ramón Cossío Díaz Appointed by: Fox Left the Court in: 2018	*Margarita Beatriz Luna Ramos Appointed by: Fox Left the Court in: 2019
Sergio Valls Hernández Appointed by: Fox Left the Court in: 2014	Jorge Mario Pardo Rebolledo Appointed by: Calderón Leaves Court in: 2026
José Fernando Franco González-Salas Appointed by: Fox Left the Court in: 2021	
Arturo Zaldívar Lelo de Larrea Appointed by: Calderón Left the Court in: 2023	
Luis María Aguilar Morales Appointed by: Calderón Left the Court in: 2024	

The two justices still on the Court who voted against Mexico City's decriminalization both voted to uphold the fetal life amendments, along with a new member whom conservative President Calderón had recently appointed. Luna Ramos, who had voted to uphold Mexico City's decriminalization, switched sides to uphold the fetal life amendments. Some news reports implied that Calderón had also pressured Luna Ramos into voting to uphold the fetal life amendments.[164]

[164] Andrea Becerril & Roberto Garduño, *Calderón viola la Carta Magna, acusan legisladores de PRD y PT*, LAJORNADA POLITICA (Oct. 2011), https://www.jornada.com.mx/2011/10/01/politica/002n2pol.

In 2014, the Court voted unanimously to order the immediate release from prison of an indigenous woman in Guerrero who was sentenced to 22 years in prison for having an abortion (Amparo Directo 21/2012).[165]

Amparo Directo 21/2012[166] *(full court does not hear amparo suits)* *author of decusion	
Justices in favor 5	Justices opposed 0
*Olga Sánchez Cordero Appointed by: Zedillo Left the Court in: 2015 José Ramón Cossío Díaz Appointed by: Fox Left the Court in: 2018 Arturo Zaldívar Lelo de Larrea, Appointed by: Calderón Left the Court in: 2023 Jorge Mario Pardo Rebolledo Appointed by: Calderón Leaves Court in: 2026 Alfredo Gutiérrez Ortiz Mena Appointed by: Calderón Leaves Court in: 2027	

In 2017, two amparo suits were brought by rape victims who had been denied abortion care (Amparo en Revisión 601/2017) (Amparo en Revisión 1170/2017).[167] Amparo en Revisión 601/2017 was brought by the parents of

[165] Amparo a mujer indígena por violación a sus derechos fundamentales de defensa adecuada y presunción de inocencia en su vertiente de regla probatoria y estándar de prueba, Pleno de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Enero de 2014, Tesis P./J. 21/2012 (Mex.).

[166] *Id.*

[167] *See* Interrupción legal del embarazo de un producto con alteraciones congénitas concebido como consecuencia de una violación sexual, Pleno de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, abril de 2018, Tesis P./J. 601/2017 (Mex.) [hereinafter Child Abortion Cases]; Eflexionar sobre las obligaciones a cargo de los juzgadores

a young child who had been raped and denied abortion in the state of Morelos.[168] Amparo en Revisión 1170/2017 was brought by a woman in Oaxaca.[169] In 2018, the Court upheld the rape exception and ruled that authorization from the Public Ministry was not required to obtain an abortion in the case of rape.[170]

Amparo en Revisión 601/2017 and 1170/2017[171] *author of decusion	
Justices in favor 5	Justices opposed 0
Margarita Beatriz Luna Ramos Appointed by: Fox Left the Court in: 2019 *José Fernando Franco González-Salas Appointed by: Fox Left the Court in: 2021 Alberto Pérez Dayán Appointed by: Calderón Leaves Court in: 2027 Javier Laynez Potisek Appointed by: Peña Nieto Leaves Court in: 2030 Eduardo Medina Mora Appointed by: Peña Nieto Left the Court in: 2019	

durante la tramitación de los juicios de amparo en que se reclame la negativa a practicar la interrupción legal del embarazo. y se aduzca la actualización de tratos crueles e inhumanos equiparables a tortura, relacionadas, por ejemplo, con el otorgamiento de la suspensión de plano. también se podrá emitir un criterio que defina si el término de la gestación durante la tramitación del juicio de amparo actualiza la causa de improcedencia prevista en el artículo 61, fracción xxii, de la ley de la materia a la luz de las reformas constitucionales en materia de derechos humanos y amparo y, además, se podrán definir estándares y criterios relacionados con los efectos reparadores del amparo, Pleno de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, abril de 2018, Tesis P./J. 1170/2017 (Mex.) [hereinafter Oaxaca Rape Exception Case].

[168] *See* Child Abortion Case, *supra* note 167.

[169] *See* Oaxaca Rape Exception Case, *supra* note 167.

[170] *Id.*

[171] *See id;* Child Abortion Case, *supra* note 167.

In May 2019, the court ruled unanimously that abortion is legal when the mother's health is at risk (Amparo en Revisión 1388/2015).[172] The Court ruled that the right to health implies a right to terminate a pregnancy, therefore, access to therapeutic abortion is a constitutional right. It also included a broad definition of health, including physical, mental, and social well-being.[173] Because the case did not explicitly refer to criminal law, the ruling remained silent on the constitutionality of the criminalization of abortion.[174] An important part of the case involved technical issues about amparo suits.[175] A lower court had rejected the case because the petitioner had already had an abortion in Mexico City before the case came to court. The decision to hear the amparo was important for the use of an amparo for abortion litigation because cases will likely never be resolved in less than nine months, so the pregnancy at issue will no longer exist by the time the case is heard.[176] If amparos are thrown out because the pregnancy no longer exists, then the amparo cannot be used to address abortion access. The Supreme Court held that an amparo suit could proceed even though the pregnancy had been terminated.[177]

Amparo en Revisión 1388/2015[178] *(full court does not hear amparo suits)* *author of decision	
Justices in favor 5	Justices opposed 0
Luis María Aguilar Morales Appointed by: Calderón	

[172] Melissa S. Ayala Garía, *La Corte y el aborto terapéutico: un derecho de todas*, NEXOS (May 2019), https://eljuegodelacorte.nexos.com.mx/la-corte-y-el-aborto-terapeutico-un-derecho-de-todas/. *See also* En el presente caso, esta Primera Sala debe resolver si los funcionarios y la institución pública de salud que representan y que fueron señaladas como autoridades responsables incumplieron con las obligaciones que les impone el derecho constitucional a la protección de la salud, al negarse a practicarle una interrupción de embarazo por causas de salud a la señora Marisa, Pleno de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Mayo de 2019, Tesis P./J. 1388/2015 (Mex.) [hereinafter Mother's Health at Risk Case].

[173] *See* GIRE, *supra* note 118.

[174] *Id.*

[175] *Id.*

[176] Estefanía Vela Barba, *The Mexican Supreme Court's Latest Abortion Ruling: In Formalities, A Path to Decriminalization*, REPROHEALTHLAW BLOG (Nov. 1, 2019), https://ilg2.org/2019/11/01/the-mexican-supreme-courts-latest-abortion-ruling-in-between-formalities-a-path-to-decriminalization/.

[177] Mother's Health at Risk Case, *supra* note 172.

[178] Mother's Health at Risk Case, *supra* note 172.

Left the Court in: 2024 Jorge Mario Pardo Rebolledo Appointed by: Calderón Leaves Court in: 2026 *Alfredo Gutiérrez Ortiz Mena Appointed by: Calderón Leaves Court in: 2027 Norma Lucía Piña Hernández Appointed by: Peña Nieto Leaves Court in: 2030 Juan Luis González Alcántara Carrancá Appointed by: López Obrador Leaves Court in: 2033	

The amparo suits in 2018 and 2019 substantially liberalized abortion access in the case of rape and safeguarding the health of the mother, effectively decriminalizing many more cases and significantly increasing access to abortion.

In 2020, the Court rejected an opportunity to decriminalize abortion with Amparos 1191/2017 and 636/2019.[179] In April of 2016, a Declaration of Gender Violence Alert was issued for the state of Veracruz. The National Commission to Prevent and Eradicate Violence against Women (Comisión Nacional para Prevenir y Erradicar la Violencia contra las Mujeres CONAVIM) and the National Institute of Women (Instituto Nacional de Mujeres INMUJERES) issued a report in response to the alert that recommended the state change the criminal code to decriminalize abortion

[179] *See* La problemática jurídica a resolver por esta Primera Sala de la Suprema Corte de Justicia de la Nación, consiste en analizar la legalidad de la resolución trece de junio de dos mil diecisiete, por medio de la cual se declaró cumplida la ejecutoria del juicio de amparo directo 176/2017, dictada por el Cuarto Tribunal Colegiado en Materia Civil del Primer Circuito, Pleno de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Abril de 2018, Tesis P./J. 1191/2017 (Mex.) [hereinafter Amparo 1191 Case]; Problemática jurídica a resolver. En el caso, se advierte que el Congreso del Estado de Veracruz (recurrente), hace valer diversos argumentos con los que pretende desvirtuar la legalidad del pronunciamiento emitido por el Juez de Distrito en relación con la concesión del amparo, Pleno de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Julio de 2020, Tesis P./J. 636/2020 (Mex.) [hereinafter Amparo 636 Case].

during the first twelve weeks of gestation, add a legal exemption if the woman's health is at risk, and eliminate the ninety-day window for abortion in the case of rape.[180] These changes would harmonize the local criminal code with the national Victim's Law, NOM-046. Based on this report, some members of the local legislature proposed changes to the criminal code to decriminalize abortion, but the legislature rejected the changes. Feminist groups filed an amparo and a district judge ordered the state legislature to follow the recommendations of the CONAVIM/INMUJERES report.[181] The state legislature refused to comply with the judicial order, so the conflict went to the Supreme Court. In July 2020, the Supreme Court overturned the district judge's orders to reform the Veracruz criminal code.[182] The logic of this case was more legalistic than substantive; the court found that the amparo suit had not been properly argued.[183]

Acción de Amparo 1191/2017 and 636/2019[184] *(full court does not hear amparo suits)* *author of decision	
Justices in favor 1	Justices opposed 4
Juan Luis González Alcántara Carrancá Appointed by: López	Jorge Mario Pardo Rebolledo Appointed by: Calderón Leaves Court in: 2026

[180] *See* INSTITUTO NACIONAL DE MUJERES, INFORME DE LAS ACCIONES, (Agosto 4 de 2016), https://www.gob.mx/cms/uploads/attachment/file/747600/5.3._Informe_estatal_Veracruz_.pdf (Mex.).

[181] *See id.*

[182] Gloria Leticia Díaz, *Fallo de SCJN sobre aborto deja en 'estado de indefensión a las mujeres de Veracruz": ONG*, PROCESO, (July 29, 2020), https://www.proceso.com.mx/nacional/2020/7/29/fallo-de-scjn-sobre-aborto-deja-en-estado-de-indefension-las-mujeres-de-veracruz-ong-246932.html.

[183] Anayeli García Martínez, *Desecha Primera Sala de la SCJN amparo por Agravio comparado en Veracruz en materia de aborto*, CIMACNOTICIAS (July 29, 2020), https://cimacnoticias.com.mx/2020/07/29/desecha-primera-sala-de-la-scjn-amparo-por-agravio-comparado-en-veracruz-en-materia-de-aborto/#gsc.tab=0.

[184] Amparo 1191 Case, *supra* note 179; Amparo 636 Case, *supra* note 179.

Obrador Leaves Court in: 2033	Alfredo Gutiérrez Ortiz Mena Appointed by: Calderón Leaves Court in: 2027 *Norma Lucía Piña Hernández Appointed by: Peña Nieto Leaves Court in: 2030 Ana Margarita Ríos Farjat Appointed by: López Obrador Leaves Court in: 2034

In fall 2021, the Mexican Supreme Court handed down three important decisions that provided important precedent for the decriminalization of abortion across the country. While the Supreme Court rulings did not immediately legalize abortion across the entire country, they did provide an important path for decriminalization in other states, and abortion will likely be legal in most of the country within a few years. The first of the 2021 abortion decisions struck down the law criminalizing abortion in the state of Coahuila.[185] The case was brought by Peña Nieto's Federal Attorney General's Office. The decision was unanimous, 10-0, with one justice absent. The ruling was also retroactive in that anyone imprisoned for the crime of abortion should be released, and no woman could be tried for the crime of abortion in the country without violating the Supreme Court's order.[186] While the ruling only strikes down the law in Coahuila, the recent reforms to the judiciary mean that all future judges must follow the findings of this case. Therefore, in states where abortion remains illegal, if a pregnant person requests an abortion at a medical center and it is denied, they can challenge the decision in the courts with an amparo suit and the medical center will be required to provide the abortion services.

[185] *See* Temas. Aborto, derecho a decidir, derechos de las mujeres y personas con capacidad de gestar, autodeterminación en materia de maternidad, autonomía reproductiva, libertad reproductiva, derecho a la salud, derecho a la igualdad jurídica, autonomía personal, libre desarrollo de la personalidad, violencia de género, integridad sexual, violación entre cónyuges, Pleno de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Septiembre de 2021, Tesis P./J. 148/2017 (Mex.) [hereinafter Coahulia Case].

[186] Fernanda Rodríguez-Pliego, *La "marea verde" llega a la Corte Suprema mexicana*, NUEVA SOCIEDAD, Oct. 2021, https://www.nuso.org/articulo/se-aprobo-o-no-el-aborto-en-mexico/.

Coahuila Penal Code's criminalization of abortion, 2021 Acción de Inconstitucionalidad 148/2017[187] *author of decision	
Justices in favor (strike down) 10	Justices absent 1
José Fernando Franco González-Salas Appointed by: Fox Left the Court in: 2021 Arturo Zaldívar Lelo de Larrea Appointed by: Calderón Left the Court in: 2023 *Luis María Aguilar Morales Appointed by: Calderón Left the Court in: 2024 Alfredo Gutiérrez Ortiz Mena Appointed by: Calderón Leaves Court in: 2027 Alberto Pérez Dayán Appointed by: Calderón Leaves Court in: 2027 Javier Laynez Potisek Appointed by: Peña Nieto Leaves Court in: 2030 Norma Lucía Piña Hernández Appointed by: Peña Nieto Leaves Court in: 2030 Juan Luis González Alcántara Carrancá Appointed by: López Obrador Leaves Court in: 2033	Jorge Mario Pardo Rebolledo Appointed by: Calderón Left the Court in: 2026

[187] *See* Coahulia Case, *supra* note 185.

Yasmín Esquivel Mossa Appointed by: López Obrador Leaves Court in: 2034 Ana Margarita Ríos Farjat Appointed by: López Obrador Leaves Court in: 2034	

The second case in the Fall of 2021 rejected the fetal personhood amendments (Acción de Inconstitucionalidad 106/2018 and its accumulated 107/2018).[188] The case was brought by deputies from the Sinaloa State Legislature and the National Commission for Human Rights. The Court ruled that states cannot establish a right to life from the moment of conception because states do not have the authority to determine when life begins, that power is reserved for the federal government.[189] Moreover, the Court built on the precedents of 1388/2015 and 148/2017 and found that the language in the state constitution of Sinaloa protecting life from the moment of conception was also unconstitutional because it allowed for unacceptable state intervention in the bodies of pregnant people, which affects women's right to health, life, and not to be discriminated against.[190]

Sinaloa Fetal Personhood, 2021 Acción de Inconstitucionalidad 106/2018 y su acumulada 107/2018[191] *author of decision	
Justices in favor (strike down) 10	Justices absent 1
José Fernando Franco González-Salas Appointed by: Fox Left the Court in: 2021	Jorge Mario Pardo Rebolledo Appointed by: Calderón Leaves Court in: 2026

[188] Tema. Determinar si el artículo 4 Bis A, fracción I, de la Constitución Política del Estado de Sinaloa es constitucional, al establecer que desde el momento en que un individuo es concebido entra bajo la protección de la Ley correspondiente hasta su muerte, Pleno de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Septiembre de 2021, Tesis P./J. 106/2018 y su acumulada 107/2018 (Mex.) [hereinafter the Sinaloa State Legislature Case].

[189] *Id.*

[190] *Id. See also* Irlanda D. Ávalos Núñez, Melissa S. Ayala García & Patricia Cruz Marín, *Conversación. El fin del aborto como derecho constitucional: las implicaciones de Dobbs v. Jackson*, NEXOS (June 28, 2022), https://eljuegodelacorte.nexos.com.mx/el-fin-del-aborto-como-derecho-constitucional-las-implicaciones-de-dobbs-v-jackson/.

[191] *See* Sinaloa State Legislature Case, *supra* note 188.

Arturo Zaldívar Lelo de Larrea Appointed by: Calderón Left the Court in: 2023 Luis María Aguilar Morales Appointed by: Calderón Left the Court in: 2024 *Alfredo Gutiérrez Ortiz Mena Appointed by: Calderón Leaves Court in: 2027 Alberto Pérez Dayán Appointed by: Calderón Leaves Court in: 2027 Javier Laynez Potisek Appointed by: Peña Nieto Leaves Court in: 2030 Norma Lucía Piña Hernández Appointed by: Peña Nieto Leaves Court in: 2030 Juan Luis González Alcántara Carrancá Appointed by: López Obrador Leaves Court in: 2033 Yasmín Esquivel Mossa Appointed by: López Obrador Leaves Court in: 2034 Ana Margarita Ríos Farjat Appointed by: López Obrador Leaves Court in: 2034	

The third case (Acción de Inconstitutionalidad 54/2018) found unconstitutional a rule in the General Health Law that granted doctors the

right to conscientious objection.[192] The Court held that the rule did not provide sufficient regulation to ensure access to health care and the rights of patients.[193] The case was brought by the National Commission for Human Rights.

Conscientious obection, 2021 Acción de Inconstitucionalidad 54/2018[194] *author of decision	
Justices in favor 9	Justices absent 2
José Fernando Franco González-Salas Appointed by: Fox Left the Court in: 2021 Arturo Zaldívar Lelo de Larrea Appointed by: Calderón Left the Court in: 2023 *Luis María Aguilar Morales Appointed by: Calderón Left the Court in: 2024 Jorge Mario Pardo Rebolledo Appointed by: Calderón Leaves Court in: 2026 Alfredo Gutiérrez Ortiz Mena Appointed by: Calderón Leaves Court in: 2027 Javier Laynez Potisek Appointed by: Peña Nieto Leaves Court in: 2030	Alberto Gelacio Pérez Dayán Appointed by: Calderón Leaves Court in: 2027 Yasmín Esquivel Mossa Appointed by: López Obrador Leaves Court in: 2034

[192] Presentación de la acción, autoridades emisora y promulgadora, y norma impugnada. Preceptos constitucionales que se estiman vulnerados, Pleno de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Ciudad de México. Acuerdo del Tribunal Pleno de la Suprema Corte de Justicia de la Nación, Septiembre de 2021, Tesis P./J. 54/2021 (Mex.).

[193] *Id.*

[194] *Id.*

Norma Lucía Piña Hernández Appointed by: Peña Nieto Leaves Court in: 2030 Juan Luis González Alcántara Carrancá Appointed by: López Obrador Leaves Court in: 2033 Ana Margarita Ríos Farjat Appointed by: López Obrador Leaves Court in: 2034	

In all three of the 2021 decisions, five of the justices voting to expand abortion access had been appointed by presidents from the conservative Catholic PAN. In just ten years, the Court switched from upholding fetal life provisions in state constitutions in 2011 to striking them down in 2021 with surprising unanimous votes and radical shifts in abortion law. Changes in the membership of the Supreme Court can help explain why there were different outcomes on fetal personhood in 2021 than in 2011. The only justice who voted to uphold fetal life amendments in 2011 on the Court in 2021 was Pardo Rebolledo, and he was absent from the unanimous ruling in 2021. Across all the abortion cases, the party of the president who appointed the justice is not patently related to votes on abortion. All three justices who voted to overturn Mexico City's 2007 decriminalization were appointed by Zedillo (from the centrist, secular PRI), while half of those who voted to uphold the law were appointed by Fox (from the rightist, Catholic PAN). In 2021, half of the justices who voted to decriminalize abortion were appointed by Fox or Calderón, both from the conservative, Catholic PAN. Moreover, the main proponent of abortion access (and gender equality more broadly) was the Court's President (2019-2022) Arturo Zaldívar Lelo de Larrea. He was appointed in 2009 by Calderón, from the conservative Catholic PAN. Zaldívar was born in the conservative state of Querétaro, one of the two states that do not allow abortion to save the life of the mother. He attended Catholic schools and studied law at the conservative Escuela Libre de Derecho (the Alma Mater of Calderón and several other prominent conservatives) and earned a Ph.D. in Law at UNAM with a specialization in amparo law. He was a professor at UNAM

and had a private practice for 25 years.[195] He was an unusual pick for the court because he had no judicial experience and was considered an outside candidate.[196] Calderón thought he would be conservative, but he turned out to be very independent. During his early time on the bench, he allied with feminist (and future Secretary of Gobernación) Olga Sánchez Cordero.[197] Zaldívar is active on social media and gives lots of interviews. Zaldívar saw abortion as a class issue as much as a feminist issue and was influenced by the feminist protests.[198]

When justices do not serve a life term, perhaps we should expect them to strategically rule in the interests of the president who will be in power when they leave the Court (in the hopes of getting appointed to a good position when they leave the Court) rather than stay loyal to preferences of the president who nominated them. Former Supreme Court Justice Arturo Zaldívar may provide a good example of this tendency. In 2023, Zaldívar stepped down early from the Court to serve in the presidential campaign of Claudia Sheinbaum, perhaps suggesting an alliance with Sheinbaum's political mentor, President López Obrador. Zaldívar has been criticized for being too close and too accommodating to López Obrador.[199] Zaldívar was appointed by conservative Calderón but ruled against his personal interests in an important case (the ABC Daycare case).[200] When Peña Nieto was elected, Zaldívar moved towards the center to support the new president's

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[195] *See* Natalie Kitroeff, *How Mexico's Top Justice, Raised Catholic, Became an Abortion Rights Champion*, THE NEW YORK TIMES (July 9, 2022), https://www.nytimes.com/2022/07/09/world/americas/mexico-abortion-chief-justice.html.

[196] *See id.*

[197] *Senadora Olga María del Carmen Sánchez Cordero Dávila*, SENADO GOB, https://www.senado.gob.mx/65/senador/1276 (last visited Mar. 16, 2024). Olga Sánchez Cordero also went on to hold many prominent political positions after leaving the court in 2015. She was Senator in 2018, Secretary of Gobernación in 2018, and President of the Senate 2021-2022. However, Sánchez Cordero's political career started after Peña Nieto's term, and she has been appointed to leadership roles by Morena, not the PRI. Thus it seems unlikely she ruled in favor of Peña Nieto at the end of her term in the hopes promoting her political career.

[198] *See* Kitroeff, *supra* note 195.

[199] *See* Zedryk Raziel, *Las cuatro transformaciones de Arturo Zaldívar: el ministro apuesta su futuro político al proyecto presidencial de Claudia Sheinbaum*, EL PAÍS (Nov. 7, 2023, 11:30 PM), https://elpais.com/mexico/2023-11-08/las-cuatro-transformaciones-de-arturo-zaldivar-el-ministro-apuesta-su-futuro-politico-al-proyecto-presidencial-de-claudia-sheinbaum.html#?rel=mas; Kitroeff, *supra* note 195.

[200] Derecho a la salud. Es un derecho fundamental de titularidad universal, cuya satisfacción corresponde tanto a la federación como a los estados en sus respectivos ámbitos de competencia, Pleno de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo XXXII, Noviembre de 20010, Tesis P./J. 1/2009, página 875 (Mex.) [hereinafter ABC Daycare Case.

positions, and then he moved to the left after López Obrador was elected in 2018.[201]

B. Feminist Activism

Evidence also suggests that feminist activism influenced the changing role of the Supreme Court in Mexico's abortion policy. GIRE's professionalized legal expertise put multiple cases in front of the Supreme Court. The feminist mobilizations have reshaped the abortion debate by empowering young women and drawing attention to the horrors of many women's daily experiences with violent misogyny. The protests also brought demands for abortion into the public consciousness and bolstered the strategic litigation efforts already underway by more traditional feminist groups. The legal cases that liberalized abortion law reached the Supreme Court because of the activism of professionalized feminist legal scholars working with GIRE. GIRE developed technical expertise and made alliances with legal experts to file cases. Together, the professionalized feminist lawyers and the protesters on the street helped shift public opinion and the Court's opinion on issues related to gender equality.

The Supreme Court Justices cited the Marea Verde feminist movement in their analysis of the 2021 abortion cases.[202] The President of the Supreme Court, Arturo Zaldívar, emphasized the role of feminist mobilization in influencing the court. In an interview, Zaldívar stated:

> …this trio of historic decisions is not an accomplishment of the Supreme Court. It is an achievement that women have won through hard work, fighting for their freedoms for years. It is a conquest of the young women who have taken to the streets all over the world to demand their sexual and reproductive rights. It is their voices and their arguments that have been unmasking the oppressive structures

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[201] *See* Raziel, *supra* note 196; *Yo no intervengo en asuntos de otros poderes": López Obrador aseveró que no se interpone en los asuntos de Morena en el Senado*, INFOBAE (Sep. 2, 2022, 10:36 AM), https://www.infobae.com/america/mexico/2022/09/02/yo-no-intervengo-en-asuntos-de-otros-poderes-lopez-obrador-asevero-que-no-se-interpone-en-los-asuntos-de-morena-en-el-senado/. López Obrador bemoaned the independence of the judges he selected ""Me equivoqué porque hice propuestas, pero ya una vez que propuse ya por el cargo, o porque cambiaron de parecer, ya no están pensando en el proceso de transformación y en hacer justicia", expresó en la mañanera del 2 de septiembre pasado en referencia a Juan Luis González Alcántara (2018), Margarita Ríos-Farjat (2019),Yasmín Esquivel (2019) y Loretta Ortiz Ahlf (2021)," (INFOBAE 2022).

[202] Rodríguez-Pliego, *supra* note 155.

> and have given new significance to what it means to live in equality.[203]

Zaldívar credited the women's movement with advances in women's rights and raising the public consciousness in the country. He stated, "It kept getting harder and harder to go against their legitimate demands. They're getting killed, they're getting raped, no one listens to them."[204]

CONCLUSION

The Supreme Court took on a central role in the abortion policy debate in 2018 after the election of leftist President Andrés Manuel López Obrador. The growing electoral power of the Left is related to the changing behavior of the Supreme Court, but not because the Left has been able to change the ideological makeup of the Courts through new appointments. In the cases examined here, there appears to be very little relationship between the ideology of the president who appoints a justice and how the justice votes. Insofar as presidential preferences influence the Court, it seems the sitting president may have some influence over justices, especially those whose term is ending and may be looking to start a political career after leaving the Court. The largest factors affecting the changing behavior of the Court are generational changes in the Court and the changes in the broader political climate. These changes are largely a consequence of feminist activism.

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[203] Arturo Zaldívar, *Arturo Zaldívar: La conquista del derecho a decidir en México*, WASHINGTON POST (Oct. 3, 2021), https://www.washingtonpost.com/es/post-opinion/2021/10/03/scjn-despenalizacion-del-aborto-objecion-conciencia-mexico-zaldivar/. "Con todo, esta triada de decisiones históricas no es un mérito de la Suprema Corte. Es un logro que han conquistado las mujeres a pulso, luchando durante años por sus libertades. Es una conquista de las jóvenes que en todo el mundo han salido a las calles para exigir sus derechos sexuales y reproductivos. Son sus voces y sus argumentos los que han ido desenmascarando a las estructuras opresoras y han resignificado lo que implica vivir en igualdad."

[204] Natalie Kitroeff, *How Mexico's Top Justice, Raised Catholic, Became an Abortion Rights Champion*, N. Y. TIMES (July 9, 2022), https://www.nytimes.com/2022/07/09/world/americas/mexico-abortion-chief-justice.html.

ABORTION RIGHTS IN THE WESTERN HEMISPHERE

Judy Beckner Sloan*

If the twenty-first century can be called the century of Women's Rights, then abortion can certainly be seen as the final frontier of those rights. And the ultimate issue in abortion rights is whether abortion is a crime. Caroline Beer's article, *Abortion Policy in Mexico: A Changing Role for the Supreme Court*, is a welcome addition to the Southwestern Journal of International Law's coverage of abortion issues in the Western Hemisphere.

The Journal has published significant articles on abortion issues beginning with Andrea Noguera's 2019 article *Argentina's Path to Legalizing Abortion: A Comparative Analysis of Ireland, the United States and Argentina*.[1] This was followed in 2023 by Nayla Luz Vacareza's analysis in *Abortion Rights in Uruguay, Chile, and Argentina Movements Shaping Legal and Policy Change*[2] and Donna Guy's comments in *The Long History of Women's Rights Campaigns in Three South American Countries: The Recent Legal History of Abortion Law in Uruguay, Argentina, Chile.*[3] An additional source for analyzing this important issue can be found in Kolber and Kay's helpful book analyzing the way that Ireland dealt with the issue of abortion.[4]

These excellent sources agree that there are three ways for a country to achieve abortion rights for women: through the legislature, through the

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[1] Andrea Noguera, *Argentina's Path to Legalizing Abortion: A Comparative Analysis of Ireland, the United States and Argentina*, 25 SW. J. INT'L L. 356 (2019).

[2] Nayla Luz Vacareza's, *Abortion Rights in Uruguay, Chile, and Argentina Movements Shaping Legal and Policy Change*, SW. J. INT'L L. 309 (2023).

[3] Donna Guy, *The Long History of Women's Rights Campaigns in Three South American Countries: The Recent Legal History of Abortion Law in Uruguay, Argentina, Chile*, 29 SW. J. INT'L L. 348 (2023).

[4] KATHRYN KOLBERT & JULIE F. KAY, CONTROLLING WOMEN: WHAT WE MUST DO NOW TO SAVE REPRODUCTIVE FREEDOM (2021).

courts, or through direct plebiscite. Each of these routes is analyzed in all the sources. Each of them has its strong points and its weak points. Each avenue presents opportunities for U-turns on the road to progress. United States history shows the perils of the judicial route when the forty-nine-year-old precedent of *Roe v. Wade*[5] was overturned when the Supreme Court handed down its decision in *Dobbs v. Jackson Women's Health Organization*.[6] Argentine history is currently showing the perils of the legislative route when in February 2024 six deputies from the new president's coalition presented a bill to overturn the 2020 law which legalized abortion.[7] Even the direct plebiscite, the referendum which succeeded in Ireland in 2018, has current problems. The referendum provides for abortion for only the first twelve weeks of pregnancy, and abortion services are not available to all women in all parts of Ireland.[8]

With all of these questions in mind, we can turn to Professor Caroline Beer's thorough analysis of the situation in Mexico. In her article *Abortion Policy in Mexico: A Changing Role for the Supreme Court*, Professor Beer provides us a comprehensive analysis of Mexico's unique road to the goal of providing abortions to the women of Mexico.[9] She begins with a review of the political and judicial history of Mexico. While we in Los Angeles live only 136 miles from Mexico, most of us are completely ignorant of Mexican history, especially political and judicial history. Professor Beer provides us a concise political history starting at the beginning of the twentieth century. I am grateful to her for giving us this political background, because we can't understand the abortion issue without it. She also schools us in the history of the Mexican judiciary and ties it to the democratization going on in Mexico. The history of women's rights in Mexico took a leap forward in 1974 when an "Equal Rights Amendment" to its constitution was passed.[10]

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[5] Roe v. Wade, 419 U.S. 113 (1973).

[6] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).

[7] Amy Booth, *Milei's deputies present bill to overturn legalization of abortion*, BUENOS AIRES HERALD (Feb. 8, 2024), https://buenosairesherald.com/society/mileis-deputies-present-bill-to-overturn-legalization-of-abortion.

[8] Niamh Kennedy & Emily Blumentha, *Five years after Ireland's historic abortion referendum, access to care is still 'patchy'*, CNN WORLD (May 25, 2023, 10:17 AM), https://www.cnn.com/2023/05/25/europe/ireland-abortion-referendum-5-years-intl-cmd/index.html. In nine of Ireland's 26 counties, there are fewer than five general practitioners registered to provide abortions.

[9] Caroline Beer, *Abortion Policy in Mexico: A Changing Role for the Supreme Court*, 30 SW. J. INT'L L. 452 (2024).

[10] Constitución Política de los Estados Unidos Mexicanos, CP, Art. 4, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 02-12-2024.

I appreciated her discussion of the Amparo, a writ which provides the only access to judicial review.[11] The final level of judicial review is by the Mexican Supreme Court, which is made up of eleven justices who serve fifteen-year terms. To an American like myself, the idea of a fixed term was intriguing. Later in her article, when Professor Beer analyzes the individual votes of the Mexican justices, she raises a unique issue which can arise with term limits. Could a justice's vote be influenced by her ambitions for a position of power after her service on the Supreme Court was over? Could her vote be swayed by the politics of the person or party that she looks to for a job after her term on the highest court has expired?[12] These questions should be considered by anyone considering term limits.

The Mexican process for appointing justices was also explained. The President submits a list of three names to the Senate. Two-thirds of the senators must vote in favor of the candidate to be confirmed. If this doesn't happen, then the President can select one name from the slate to be confirmed. If this doesn't happen, the President submits a second slate. If this second slate is rejected by the Senate, then the President can appoint anyone to the bench. As an American, I wonder what would have happened to our Court under this system![13] Only two of our nine current justices have received two-thirds of the votes of our senate.

Again, comparing the United States and Mexico, the US has 50 states plus the District of Columbia, whereas Mexico has 31 states and Mexico City. Like individual American states, each Mexican state has its own courts and criminal codes. Like US states, Mexican states are polarized with, as Professor Beer puts it, "[L]eft and right providing radically different visions for the future of Mexico, setting the stage for intense conflict over abortion policy."[14]

The PAN (National Action Party) is conservative, and the PRD (Democratic Revolution Party) is more liberal. The current president, Andres Manuel Lopez Obrador, broke with the PRD to start a new party called Morena, which can be described as a populist left party, which has

[11] Beer, *supra* note 9, at 454.

[12] *See* Beer, *supra* note 9, at 470-71.

[13] The last American justice on the U.S. Supreme Court to get a two-thirds vote was Justice Sotomayor, who received 68 votes in 2009. The only other currently serving justice to receive a two-thirds vote was Chief Justice Roberts in 2005. No other currently serving justice has received the votes of two-thirds of the United States Senate! The next closest to 2/3's was Justice Kagan in 2010 with 63 votes.

[14] Beer, *supra* note 9, at 456.

"demonized the traditional parties, weakened governing institutions, and centralized power."[15]

Another powerful catalyst to change the law on abortion has been the rise of the feminist movement throughout the world,[16] and Mexico and the United States have both been affected by this movement. As politics churned over the issue of abortion throughout the world, it is notable that, although in all countries the feminist movement of the late 20th century and early 21st century was working to liberalize abortion laws, still it took the actual plight of a young woman to galvanize the public, and Mexico was no exception.

In many countries, it took the death of a young woman. In Ireland it was Saita Halappanavar, who had to die in 2021 and become the rallying cry for the abortion rights movement.[17] In Argentina, it was Chiara Paez, a fourteen-year-old girl beaten to death and buried by her boyfriend for being pregnant, who became a symbol.

In Mexico it was not the death of a young girl, but the tragedy of a 13-year-old rape victim, named Paulina, who was denied an abortion and forced to carry a baby to term that forced the public to face abortion, and made abortion a political issue.[18] Paulina became a rallying cry, and in 2000 Mexico City added new exceptions to the general abortion law ban. The Supreme Court of Mexico upheld these reforms.[19]

And who is this rallying cry against? Often, it is the Catholic church. This was true in Argentina, Ireland, and Mexico. But religion is powerful. In the United States, religion fought back. A majority of the current Supreme Court justices are Catholic, and the *Dobbs* opinion closes with Justice Alito, a practicing Catholic, saying that "abortion [is a] profound moral question."[20] The answer to this moral question in the United States was the overturning of *Roe v. Wade* after forty-nine years. This has resulted

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[15] Beer, *supra* note 9, at 457.

[16] *See* the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

[17] KOLBERT & KAY, *supra* note 4, at 164.

[18] Beer, *supra* note 9, at 459.

[19] *Id*.

[20] Dobbs v. Jackson Women's Health Organization, 597 U.S. 222 (2022). Of the nine current justices, six are practicing Catholics: Roberts, Thomas, Alito, Kavanaugh, Sotomayor, and Barrett. And Gorsuch attended Catholic schools in Washington, D.C. Justice Alito closing the Dobbs opinion by calling abortion a moral question raises First Amendment questions of separation of church and state. Because the Catholic church is so identified as being against abortion, and because Alito is a practicing Catholic, his description of the issue as a moral question comes pretty close to that line of separation, perhaps even crossing it.

in the current spate of state trigger laws and restrictions culminating this week in the Alabama Supreme Court ruling that a frozen embryo was a fetus with protectable rights.[21]

A similar backlash has occurred in Mexico, where twenty-one of thirty-two states enacted laws protecting life from the moment of conception. This follows the same pattern as in the United States where pro-life advocates turned to state legislatures to block abortion.

The most extreme of these measures in Mexico and the United States has been to make abortion a crime. By criminalizing abortion, states put women's lives at risk and terrify doctors and hospitals. Mexico City lead the march against criminalization with reforms beginning in 2007 which provided for abortion for any reason, free of charge, during the first twelve weeks of pregnancy. This puts the two sides of the argument in stark relief: criminalization of abortion vs. abortion available for free during the first twelve weeks of pregnancy. The march against criminalization was steady throughout the states of Mexico.

By 2024, twelve Mexican subnational entities decriminalized abortion,[22] following the most significant legal step in Mexican legal history when in September of 2023, the Supreme Court of Mexico stuck down criminalization of abortion in the federal penal code. The court stated:

> [C]riminalization of abortion constitutes an act of gender-based violence and discrimination, as it perpetuates the stereotype that women and people with the capacity to get pregnant can only freely exercise their sexuality to procreate and reinforces the gender role that imposes motherhood as a compulsory destiny.[23]

This is the gold standard in the protection of women's rights. This is a national court ruling that it has the power to overrule any law on the question of abortion, state or federal. It has not yet been achieved in the United States. How did the Mexican Supreme Court do it? The answer to this profound question is the heart of Professor Beer's incisive article. While other writers have hypothesized that the answer lies in the differences among the Mexican states, the varying influence of the Catholic

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[21] *See* LePage v. Ctr. for Reprod. Med., No. SC-2022-0515, 2024 WL 656591 at *1-34 (Ala. Feb. 16, 2024).

[22] Compare this to the fifteen U.S. states which the Guttmacher Institute considers "protective, very protective, or most protective" of abortion rights. States.Guttmacher.org (last accessed 2/2/24)

[23] Beer, *supra* note 9, at 463.

Church, the ideology of the party in power, and even the strength of feminist groups across the country, Professor Beer zeroed in on the Supreme Court itself. Simply put, Professor Beer gets behind the critical decisions of the court and counts the votes. She charts these votes, justice by justice, with the name of the president who appointed them listed.[24]

The Mexican constitution provides that a two-thirds supermajority is required to overturn local laws. Professor Beer then gives some possible influences which achieved this supermajority. She notes that courts may be more likely to liberalize abortion laws because they are more elite. They focus on legal arguments, rather than religious or moral arguments that might sway a legislature.[25]

She notes the interplay between federal law and state law in Mexico, and she describes the cycles as the system struggles to balance the rights of pregnant people with the rights of a fetus. She cites the example of *Roe v. Wade*[26] as a case where the Court set a high "floor" for women's rights, which state legislatures spent years to undermine on behalf of the rights of a fetus. Mexico's experience was different. The move to protect pregnant people's rights by decriminalizing abortion bubbled up from the states. The federal supreme court could mold and modify the various state laws.[27] Justice Ruth Bader Ginsburg criticized *Roe* for short circuiting this process in the United States. She felt that it seemed "to have stopped the momentum on the side of change."[28] She would have preferred that abortion rights be secured more gradually in a process that included state legislatures and the courts.[29] This is exactly what happened in Mexico!

Beer then analyzes other critical influences on the Mexican Supreme Court. She credits feminist activism in many forms as having a decisive effect. This activism included legal and professional feminist activists from

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[24] She also lists justices who were absent from critical votes. It would be interesting to have these absences explained. Beer, *supra* note 9, at 474-90.

[25] Beer, *supra* note 9, at 463. Professor Beer notes that courts are insulated from religious pressure and "less responsive to public opinion than legislatures." *Id*. "Courts have ruled for greater access to abortion throughout Latin America." *Id.* at 465.

[26] Roe v. Wade, 419 U.S. 113 (1973).

[27] Justice Ginsburg made a similar argument criticizing Roe when she spoke at the University of Chicago. Meredith Heagney, *Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit*, THE UNIV. CHIC. L. SCH. (May 11, 2013), https://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit.

[28] *Id.*

[29] Significantly, and presciently, she was troubled by the fact that Roe focused on the right to privacy rather than on women's rights. Considering the trouble Justice Alito found in Dobbs with the right to privacy, she was correct in her misgivings. *Id.*

the Information Group on Reproductive Choice (GIRE). This group, much like the ACLU's Women's Civil Rights Project in the United States, designed the amparo cases and constitutional challenges which served as strategic litigation to further women's rights. Legal activism also included amicus briefs and, most critically, feminist clerks and legal advisors to the court.

Street protests, and direct-action providing information on abortion, and hotlines joined in the effort. In addition, femicide resulted in street protests -- culminating in Mexico City in 2020 on Women's Day, March 8th, when nearly 100,000 people marched in protest of the gruesome femicides of Ingrid Escamilla Vargas and 7-year-old Fatima. The National Human Rights Commission Offices were turned into a shelter for victims of violence. While abortion was not the issue here, the criminalization of abortion linked it to these murders, sexual violence being the key.

In addition to feminism in Mexico, Professor Beer attributes the change in the court's attitude toward abortion to what she calls: The Rise of Left Parties.[30] To evaluate the play between these two important factors, Beer gives three hypotheses to explain Mexico's move to national decriminalization of abortion. All three are fascinating, but to an American, her second one is most intriguing because it involves term limits for justices. Could a sitting justice be influenced by the politics of the current president because that president would be the person who gave the justice their next job?[31]

Beer then gives a detailed analysis of the eleven critical cases, beginning in 2002 when the court reviewed Mexico City's exceptions to the ban on abortions for the health of the mother, fetal malformations and nonconsensual artificial insemination, to 2021 when the court found a doctor's rights to refuse to do an abortion unconstitutional. Beer is describing, in detail, the steps taken by the court as it reviews state court opinions and moves, in baby steps, from a position of a total ban on abortion, to a position where abortion is not a crime, and a woman cannot be prosecuted for having one.

Of these eleven steps, seven are full court reviews of state laws' constitutionality, and four are amparo suits not heard by the full court. This

[30] Beer, *supra* note 9, at 470.

[31] The other two hypotheses are the ideological makeup of the court and intense feminist mobilization. While these other two hypotheses are important, they are not as fascinating to me as the one involving term limits.

amparo process has no equivalent in American Supreme Court cases.[32] Professor Beer analyzes and charts each of these eleven cases and asks why and how the justices changed Mexican law in such a fundamental way.

Can the votes of the justices be predicted by the politics of the president who appointed them? Is it because the Mexican left has been able to change the ideological makeup of the court by mobilizing to determe the person who is elected president? The conclusion is no. "There appears to be very little relationship between the ideology of the president who appoints a justice and the way the justice votes."[33] This reminds me of President Eisenhower's reflections on having appointed Earl Warren as the chief justice of the United States.[34]

Could the change be affected by the person who is the current president? Because of the unique feature of Mexican law that justices have term limits, Beer does find that there is some influence exerted by the sitting president. A justice facing the end of her term could be influenced by a sitting president who might be able to offer her a position after the justice left the court.

But Beer closes her fine article with this conclusion:

"The largest factors affecting the changing behavior of the Court is generational change in the Court and the changes in the broader political climate. These changes are largely a consequence of feminist activism."[35]

What lessons can we Americans take from Mexico's experience?

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[32] This amparo law was strengthened, refined and re-enacted in 2013. It has been called a "constitutional protection lawsuit" providing for "extraordinary constitutional appeal." It can be used for the protection of an individual's constitutional rights. *See* Norma Gutierrez, *Mexico: New Amparo Law is Enacted*, LIB. CONG. (April 30, 2013), https://www.loc.gov/item/global-legal-monitor/2013-04-30/mexico-new-amparo-law-is-enacted/ (last accessed Dec. 12, 2024). In my opinion, it has a somewhat similar effect as a writ of habeus corpus.

[33] Beer, *supra* note 9, at 494.

[34] "I have made two mistakes, and they're both sitting on the Supreme Court." *See* William Fassuliotis, *Ike's Mistake: The accidental Creation of the Warren Court*, VA. L. WKLY, (Oct. 17, 2018), https://www.lawweekly.org/col/2018/10/17/ikes-mistake-the-accidental-creation-of-the-warren-court.

[35] Beer, *supra* note 9, at 494.

A DORMANT FOREIGN COMMERCE CLAUSE VIOLATION: TEXAS' OVERREACH IN RESTRICTING ABORTION TRAVEL TO MEXICO

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INTRODUCTION[1]

> "It has come to our attention that Sidley Austin has decided to reimburse the travel costs of employees who leave Texas to murder their unborn children . . . We are writing to inform you of the consequences that you and your colleagues will face for these actions."[2]

On July 7, 2022, lawmakers from the Texas Freedom Caucus wrote a letter to the law firm Sidley Austin LLP, threatening to get the firm partners disbarred and charged with criminal penalties for covering their employees' travel costs for abortions conducted out of the state.[3] The caucus sent this letter less than a month after the Supreme Court decision in *Dobbs v. Jackson Women's Health*,[4] which struck down fifty years of precedent of women's constitutional right to an abortion. In other words, the Supreme Court wasted no time showing their power in influencing the new abortion laws.

The group based their threats on a 1975 Texas abortion law that resurfaced into good law after *Dobbs*.[5] This law criminalizes the conduct of anyone who facilitates or furnishes the means for an abortion, which includes abortion pills acquired out of state but ingested in-state.[6] Because the group accused Sidley of assisting in travel for women's abortion procedures, they helped furnish the means for abortions within this law. To conclude its letter, the group announced that it will introduce legislation that "impose[s] additional civil and criminal sanctions on law firms that pay for abortions or abortion travel" regardless of the jurisdiction it occurs in.[7]

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[1] While abortion is a hot-button topic today, I must first recognize those in opposition who may argue their stance using a non-legal or religious analysis. I respect those with conflicting views, but a non-legal debate is beyond the scope of this note. This note will only address abortion and commerce in a legally rooted analysis.

[2] Letter from Rep. Mayes Middleton, Chairman, Tex. Freedom Caucus., to Yvette Ostolaza, Chair of the Mgmt. Comm. (July 7, 2022) https://www.freedomfortexas.com/uploads/blog/3b118c262155759454e423f6600e2196709787a8.pdf.

[3] *Id.*

[4] Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2303 (2022).

[5] *See* TEX. REV. CIV. STAT. ANN. art. 4512.1 (West 1974).

[6] *See* Middleton, *supra* note 2; TEX. REV. CIV. STAT. ANN. art. 4512.1 (West 1974) (prev. codified at TEX. PENAL CODE ANN. art. 1191 (1925)).

[7] Middleton, *supra* note 2, at 1.

Ultimately, Texas wants to extend its extraterritorial reach to penalize out of state actors that aid with out of state abortions for Texas women.[8]

This letter is not the first to discuss legislation plans that restrict travel for abortions. Legal experts, politicians, and conservative organizations began to grapple with this uncharted territory and the feasibility of travel restrictions.[9] To what extent can states enforce their laws on residents who travel across state lines to obtain an abortion? How would travel bans affect commerce both domestically and internationally? How closely would states look at the chain of events leading to an abortion in order to punish those who assisted? Abortion travel restrictions fall within untested territory with no established legal precedent, which opens the door for states to innovate their arguments for or against travel bans.[10] These discussions will likely result in the "next frontier in anti-abortion legislation."[11]

Despite Texas' clear and explicit statements regarding its intent for such legislation, some conservative, anti-abortion public figures claim that the right to travel for an abortion is not in danger.[12] In response to the Freedom to Travel for Health Care Act of 2022,[13] which would have protected travel across state lines for abortions, conservative party members believe those in favor of protecting travel are overexaggerating an issue that will not occur.[14] Additionally, they stand on the argument that the laws themselves do not criminalize the pregnant woman, only the conduct of

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[8] *See* Amanda Zablocki & Mikela T. Sutrina, *The Impact of State Laws Criminalizing Abortion*, LEXISNEXIS, PRACTICAL GUIDANCE J. (Sept. 28, 2022), https://www.lexisnexis.com/community/insights/legal/practical-guidance-journal/b/pa/posts/the-impact-of-state-laws-criminalizing-abortion ("Certain states, like Texas, are aggressively seeking to enforce abortion bans against out-of-state residents who aid or assist residents of their state in obtaining abortions, whether because such out-of-state residents helped fund travel expenses, provided abortion-related counseling via telehealth, or engaged in other activity with the intention of facilitating an abortion.").

[9] *See* Lydia Wheeler & Patricia Hurtado, *Abortion Travel Bans Are 'Next Frontier' With Roe Set To Topple*, BL (May 4, 2022), https://news.bloomberglaw.com/health-law-and-business/abortion-travel-bans-emerge-as-next-frontier-after-roes-end.

[10] *Id.*

[11] *Id.* (quoting professor David S. Cohen, Drexel Sch. of L.).

[12] *See Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring) (stating that other constitutional rights would still be upheld, for example, a resident's right to travel to another state to get an abortion).

[13] Freedom to Travel for Health Care Act, S. 4504, 117th Cong. (2022).

[14] Ali Zaslav, *Republicans block taking up Senate bill to guarantee freedom to travel across states for abortions*, CNN (July 14, 2022), https://www.cnn.com/2022/07/14/politics/republicans-block-senate-bill-abortion-travel-states/index.html (explaining Republican Senator Lankford dismissed a bill guaranteeing a woman's right to travel because such bill only "inflamed" and raised "what-ifs" to travel bans).

those who help, like businesses.[15] Therefore, the laws do not deter women from traveling. However, these assumptions and potential arguments made by public figures would be egregiously untrue due to current and anticipated laws.

To restrict access to abortion across state lines, Texas may try and pass laws that either explicitly or implicitly restrict a woman's access to abortion across state lines.

Organizations like the Thomas More Society and the National Association of Christian Lawmakers have already *explicitly* stated that they began drafting laws with legislators that would restrict a woman's right to travel for an abortion.[16] However, enacting this type of legislation would be difficult. The Biden administration warned states that they would fight against any state law that restricts travel for abortions, as such legislation would violate interstate commerce.[17] Additionally, the right to travel is deeply embedded in the Fourteenth Amendment of the Constitution, which protects individual liberty, allows citizens to travel freely through the states, and grants visitors from other states the same rights and benefits as the arrival state through privileges and immunity.[18] A law that, on its face, explicitly restricts travel for out-of-state abortions would be difficult to pass.

On the other hand, Texas and other conservative states anticipated this hurdle and began searching for loopholes to restrict access to abortion across state lines.[19] Current legislation does not explicitly restrict travel, but rather achieves the same outcome. Like the law referenced in the Sidley letter, which criminalizes those who help furnish the means for an abortion,[20] another Texas law allows citizens to bring civil actions against those who help.[21] These actions include payments and insurance

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[15] S.B. No. 8, 87th Leg., § 171.206(B)(1) (Tex. 2021) ("This subchapter may not be construed to . . . authorize the initiation of a cause of action against or the prosecution of a woman on whom an abortion is performed or induced").

[16] *See* Caroline Kitchener & Devlin Barrett, *Antiabortion lawmakers want to block patients from crossing state lines*, THE WASH. POST (June 30, 2022), https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines/ (stating that Thomas More Society and National Association of Christian Lawmakers have been working with legislators to explore model legislation that would restrict travel across state lines for abortions).

[17] Kitchener & Barrett, *supra* note 16, at 1.

[18] U.S. CONST. amend. XIV, § 1

[19] Wheeler & Hurtado, *supra* note 9, at 1.

[20] *See* TEX. REV. CIV. STAT. ANN. art. 4512.1, (West 1974) (prev. codified at TEX. PENAL CODE ANN. art. 1191 (1925)).

[21] S.B. No. 8, 87th Leg., § 171.208(a)(2) (Tex. 2021).

reimbursements, regardless of whether the party knew it was for an abortion.[22]

These laws deter third parties like employers, insurance companies, and unrelated businesses, from helping because of the severity of repercussions. First, out-of-state abortion services are costly when factoring in the procedure price, airfare or gas, Uber fees, lodging, food, etc.[23] Employers and health insurance companies are forced to remain uninvolved, causing many women to endure a cost they likely cannot afford. Additionally, abortion restrictions affect uninsured or low-income women the most,[24] and many women would not be able to pay those costs on their own. If women are unable to fund the means of an out-of-state abortion, they are implicitly restricted from that abortion travel altogether.

Second, this raises questions about the pilot flying the plane or the Uber driver to and from the airport. Under Texas' laws, these parties play a role in furnishing means for an abortion too.[25] With a society that is so interconnected, it is nearly impossible to engage in travel, and the channels of commerce, without the aid of a third party. The laws would deter these industries from providing their services to these women, which directly results in restricting a woman's access to abortions across state lines.

Another type of legislation that would inexplicitly restrict access to abortions across state lines would be one that penalizes pregnant women who receive abortions. As stated above, Texas laws exclude pregnant women from liability for their abortions.[26] Conservatives in other states,

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[22] *Id.*

[23] *See* Allison McCann, *What It Costs to Get an Abortion Now*, THE N.Y TIMES (Sept. 28, 2022), https://www.nytimes.com/interactive/2022/09/28/us/abortion-costs-funds.html (ranging between $1,321 and $4,884 for an abortion procedure and travel under varying circumstances).

[24] *See e.g.*, Dan Keating, et al., *Abortion access is more difficult for women in poverty*, THE WASH. POST (July 10, 2019), https://www.washingtonpost.com/national/2019/07/10/abortion-access-is-more-difficult-women-poverty/; Amy Roeder, *The negative health implications on restricting abortion access*, HARV. T.H. CHAN SCH. OF PUB. HEALTH (Dec. 13, 2021), https://www.hsph.harvard.edu/news/features/abortion-restrictions-health-implications/; Lindsay Johnson, *The Disparate Impact of Texas' Abortion Ban on Low-Income and Rural Women*, GEO. L. ON POVERTY L. & POL'Y (Feb. 14, 2022), https://www.law.georgetown.edu/poverty-journal/blog/the-disparate-impact-of-texas-abortion-ban-on-low-income-and-rural-women/.

[25] *See* Tina Bellon & Jessica DiNapoli, *U.S. companies lash out at Texas law changes, including abortion ban*, REUTERS (Sept. 4, 2021), https://www.reuters.com/legal/government/lyft-will-pay-legal-fees-drivers-sued-under-texas-abortion-ban-ceo-2021-09-03/ (referencing Texas bill which allows Uber and Lyft drivers to face legal repercussions for knowingly or unknowingly transporting a pregnant woman to her abortion procedure).

[26] *See* Wheeler & Hurtado, *supra* note 9, at 1; TEX. REV. CIV. STAT. ANN. art. 4512.1 (West 1974).

however, attempt and continue to promote legislation that holds pregnant women to the same punishment as those who perform the abortions.[27]

Given Texas' momentum of laws that restrict abortion access, criminalizing the women themselves may not be far from the agenda. In fact, it is already happening. A Texas woman was arrested on murder charges for allegedly causing a self-induced abortion in January 2022.[28] Dana Sussman with the National Advocates for Pregnant Women noted that the arrest was unconstitutional but "somewhat expected."[29] Many women in the last decade have been held criminally liable for their abortions by anti-abortion prosecutors who successfully stretched criminalization charges.[30] Scholars believe that prosecutors will continue on this path by using both trigger laws and pre-Roe laws to target pregnant women who furnish the means to their own abortions.[31] Any future laws that penalize women seeking out-of-state abortions would deter them from engaging in that travel.

Texas lawmakers will continue experimenting with legislation until they restrict access to all out-of-state abortions and hold those out-of-state actors liable. Texas lawmakers spoke on the ability to do so in the letter and the press, freely and without hesitation. But after looking at the feasibility of execution, hesitation is needed. Any legislation that restricts access to abortions outside of Texas would also attempt to restrict access to abortions

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[27] *See* Blake Ellis & Melanie Hicken, *These male politicians are pushing for women who receive abortions to be punished with prison time*, CNN POLITICS (Sept. 21, 2022), https://www.cnn.com/2022/09/20/politics/abortion-bans-murder-charges-invs (stating that Louisiana bill HB813 included homicide charges for women who receive abortions, was the "first time such an extreme anti-abortion measure made it out of any state committee" and the proponents plan on introducing a similar bill next year).

[28] Jolie McCullough, *After pursuing an indictment, Starr County district attorney drops murder charge over self-induced abortion*, THE TEX. TRIB. (Apr. 10, 2022), https://www.texastribune.org/2022/04/10/starr-county-murder-charge/.

[29] *Id.*

[30] *Id.* (finding prosecutors back-doored abortion criminalization through child neglect charges); Eleanor Klibanoff, *Lawyers preparing for abortion prosecutions warn about health care, data privacy*, THE TEX. TRIB. (July 25, 2022), https://www.texastribune.org/2022/07/25/abortion-prosecution-data-health-care/ (finding more than 1,700 people faced criminal charges over pregnancy outcomes since 1972); Barbara Rodriguez, *Criminal convictions for abortion, miscarriage? Texas abortion ban previews life without Roe v. Wade*, THE 19TH (Sept. 2, 2021) https://19thnews.org/2021/09/criminal-convictions-abortion-miscarriage-texas-abortion-ban/ (stating that the National Advocates for Pregnant Women, which provides pro bono criminal and civil defense on behalf of people who face charges of abortions, miscarriages, or stillbirths, discloses that criminal cases around pregnancy have been going on for years despite legislation that promises not to).

[31] *See* Wheeler & Hurtado, *supra* note 9, at 1.

in foreign countries. This raises an international issue that has remained absent from abortion travel discussions.

This note discusses the scenario of a Texas resident who travels to Mexico for an abortion. It answers the following question: Could Texas create new legislation or enforce current legislation that restricts a woman's ability to obtain an abortion in Mexico? Examples would be civil or criminal penalties against third parties helping the woman obtain the abortion, or penalties against the pregnant woman for her abortion performed in Mexico.

The answer is no. Texas would not be able to create or enforce legislation that restricts a woman's access to abortion care in Mexico because such legislation would violate the Dormant Foreign Commerce Clause. This is because (1) abortion services are within Congress' foreign commerce power, (2) Texas would risk retaliation from Mexico, and (3) limitations on travel frustrate the channels of foreign commerce. Texans who go to Mexico will remain protected because their legislation is barred by Congress' foreign commerce power, despite Congress' silence on restricting international travel for abortions.

I. BACKGROUND

The starting point for this note is Article 1, Section 8, Clause 3 of the U.S. Constitution, which gives Congress the power "[t]o *regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes*."[32] This clause captures both the Interstate Commerce Clause, giving Congress the power to regulate commerce "among the several states," and the Foreign Commerce Clause, giving Congress the power to regulate commerce "with foreign Nations."[33]

A. Commerce and the Interstate Commerce Clause

The meaning of the word "commerce" was the source of many debates and controversies, partially because it is not explicitly defined in the Constitution.[34] The 1787 Federal Convention determined that Congress' commerce power allows them to "legislate in all cases . . . to which the

[32] U.S. CONST. art. I, § 8, cl. 3.

[33] *Id.*

[34] Legal Information Institute Wex Toolbox, *Commerce Clause*, Cornell L. Sch., https://www.law.cornell.edu/wex/commerce_clause.

States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation," which later translated into the clause itself.[35] Given the Federal Convention's intent for defining commerce, one could assume that courts should broadly interpret commerce to include topics that states cannot solve separately. However, disagreements still ensued—which is hardly shocking in the legal community.

Initially, commerce only covered the trading and exchanging of goods, but eventually grew to include transportation and the streams of foreign or interstate commerce.[36] The Supreme Court broadened the framework of Congress' commerce power in *United States v. Lopez*,[37] allowing Congress to regulate the use of interstate commerce channels, regulate and protect the instrumentalities of interstate commerce or the persons or things in interstate commerce, and regulate the activities that have a substantial relation to or substantially affect interstate commerce.[38]

Additionally, Congress may use its commerce power to regulate criminal activity when it affects interstate commerce. Typically, the structure of the Constitution allows for states to determine local criminal activity.[39] In *Perez v. United States*,[40] Congress successfully exercised its commerce power under the Consumer Credit Protection Act[41] for criminalizing loan sharking that was purely intrastate because of the link between local loan sharking and interstate commerce. In *Gonzales v. Raich*,[42] Congress could regulate criminal activity under the Controlled Substances Act, prohibiting the defendants from manufacturing marijuana, even though marijuana is legal in California.[43] The court found an economic nexus between the act's purpose, combatting illegal drug trade domestically and internationally, and interstate commerce.[44]

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[35] Max Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787 (1937).
[36] Gibbons v. Ogden, 22 U.S. 1, 72 (1824).
[37] United States v. Lopez, 514 U.S. 549, 558 (1995).
[38] United States v. Morrison, 529 U.S. 598, 609 (2000) (referencing the *Lopez* test).
[39] Bond v. United States, 572 U.S. 844, 848 (2014).
[40] *See* Perez v. United States, 402 U.S. 146, 154 (1971).
[41] 18 U.S.C. § 891.
[42] *See* Gonzales v. Raich, 545 U.S. 1, 5 (2005).
[43] 21 U.S.C. § 801.
[44] *Gonzales*, 545 U.S. at 5.

B. The Dormant Interstate Commerce Clause

An Interstate Commerce Clause analysis is triggered when Congress passes a law onto the states, and the question becomes whether Congress has overreached its commerce authority.[45] The "negative" application of this, or the Dormant Commerce Clause, would be triggered if a state enacts its own legislation that discriminates against, or poses a burden on interstate commerce.[46] This power prevents states from "retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders[.]"[47] Generally, the rule for the dormant Commerce Clause is to balance the state laws, whether the burden on interstate commerce outweighs local state benefits.[48]

While both the Interstate Commerce Clause and the dormant Interstate Commerce Clause have been heavily debated and scrutinized,[49] the Foreign Commerce Clause has not.[50]

C. The Foreign Commerce Clause

Even though Congress' power to regulate interstate commerce and foreign commerce are parallel phrases in the same clause, Congress has an

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[45] *Id.* (debating 21 U.S.C. § 801); *Perez*, 402 U.S. at 154-56 (debating 18 U.S.C. § 891).

[46] *See* Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 441 (1978) (stating that an inquiry for the dormant Commerce Clause "involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce."); Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995) ("[N]egative command, known as the dormant Commerce Clause, prohibit[ed] certain state taxation even when Congress has failed to legislate on the subject.").

[47] *Okla. Tax Comm'n*, 514 U.S. at 180.

[48] *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."); City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (citing the balancing test).

[49] *See e.g.*, United States v. Darby, 312 U.S. 100, 114 (1941) (allowing regulation of minimum wages for workers for workers producing goods sold in interstate commerce); Wickard v. Filburn, 317 U.S. 111, 115 (1942) (regulating the volume of wheat moving in interstate and foreign commerce, as well as the amount produced for the farmer's own consumption).

[50] *See* Scott Sullivan, *The Future of the Foreign Commerce Clause*, 83 Fordham L. Rev. 1955, 1965 (2015) ("[T]he Foreign Commerce Clause has largely evaded close attention by courts or scholars"); Leanne M. Wilson, *The Fate of the Dormant Foreign Commerce Clause after Garamendi and Crosby*, 107 Colum. L. Rev. 746, 749 (2007) ("The dormant Interstate Commerce Clause originated close to 200 years ago; the dormant Foreign Commerce Clause's pedigree does not stretch quote so far back").

extremely broad scope of foreign commerce power, as opposed to its narrower interstate commerce power.[51] The Founders intended for Congress to have a greater foreign commerce power because of the "special need for uniformity" when handling international relations, foreign intercourse, and foreign trade, all which require the constraint of states' power.[52] Matters that seem small in a domestic context should be treated with more sensitivity internationally because foreign relations and national sovereignty are triggered.[53]

Under the Foreign Commerce Clause, Congress has the power to create laws that have an extraterritorial reach to criminal conduct in foreign countries, which is a nationality principle recognized in international law.[54] Examples of these laws include prohibiting citizens from traveling abroad to engage in sexual activity with minors ("PROTECT Act"),[55] committing genocide abroad,[56] and engaging in kidnapping abroad.[57]

The rationale for finding these laws constitutional under the Foreign Commerce Clause stems from *some* effect on foreign commerce. For example, the PROTECT Act recognizes a connection between foreign commerce and citizens' use of foreign commerce channels, i.e., an airplane, regardless of whether the sexual act was commercial or non-commercial.[58] Congress has the power to keep the channels of foreign commerce free from "immoral and injurious uses," even if there is no attached economic purpose.[59]

However, the Supreme Court has yet to fully explore the scope of Congress' foreign commerce power.[60] Legal scholars recognize that this lack of framework causes confusion in lower courts, and many anticipate an increase in foreign commerce discussion.[61] Lower courts approach cases

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[51] *See* Atl. Cleaners & Dyers v. United States, 286 U.S. 427, 434 (1932).

[52] *See* Wardair Can. Inc. v. Fla. Dept. of Revenue, 477 U.S. 1, 8 (1986); Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448, 451-54 (1979).

[53] *Japan Line,* 441 U.S. at 456.

[54] *See* United States v. Baston, 818 F.3d 651, 667 (11th Cir. 2016) ("[N]othing in the Foreign Commerce Clause limits Congress's authority to enact exterritorial criminal laws."); United States v. Thomas, 893 F.2d 1066, 1069 (9th Cir. 1990) ("International law permits a country to apply its statutes to extraterritorial acts of its nationals.").

[55] 18 U.S.C. § 2423.

[56] *Id.* at § 1091.

[57] *Id.* at § 1201.

[58] *See* 18 U.S.C.A. § 2423(c) (emphasizing "any illicit sexual conduct").

[59] *See* United States v. Pendleton, 658 F.3d 299, 308 (3rd Cir. 2011).

[60] *See* Baston v. United States, 580 U.S. 1182, 1184 (2017) (Thomas, J., dissenting) ("[T]his court has never thoroughly explored the scope of the commerce power.").

[61] *See* Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 Va. L. Rev. 949, 950 (2010) ("[T]he Foreign Commerce Clause has received little sustained analytical attention. That is about

cautiously and analyze Congress' foreign power in three different ways: by using the *Lopez*[62] interstate commerce test directly;[63] by using the *Lopez* test but recognizing Congress' greater foreign commerce power; and by interpreting the clause broadly for a tenable nexus between the constitutionality of a statute and foreign commerce.[64]

Although few Supreme Court cases involve the Foreign Commerce Clause, these few primarily address the "negative" application of the clause: the Dormant Foreign Commerce Clause.

D. The Dormant Foreign Commerce Clause

Like the Interstate Commerce Clause, which can have a "negative" application recognized as dormant, the dormant Foreign Commerce Clause prohibits states from passing legislation that would affect commerce with foreign nations.[65] The Supreme Court recognizes *Japan Line, Ltd. v. County of Los Angeles*[66] as the major case for the Dormant Commerce Clause, which articulated the limits on state's legislation. In *Japan Line, Ltd.*, California's law imposed an *ad valorem* tax on Japanese shipping containers that were temporarily stored in the state.[67]

Any state law that restricted Congress from speaking with "one voice" or caused a risk of retaliation from a foreign national would violate the Dormant Commerce Clause.[68] Congress has primarily used the "one voice"

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to change"); Naomi Harlin Goodno, *When the Commerce Clause Goes International: A Proposed Legal Framework for the Foreign Commerce Clause*, 65 Fla. L. Rev. 1139, 1148 (2013) ("[The Foreign Commerce Clause] may soon take center-stage"); United States v. Clark, 435 F.3d 1100, 1116 (9th Cir. 2006) (explaining the confusion that courts have in deciding whether to analyze foreign commerce equally to interstate commerce, since the Supreme Court has not issued framework that's exclusive or mandatory).

[62] *See* United States v. Lopez, 514 U.S. 549, 558 (1995).

[63] *See* United States v. Bredimus, 352 F.3d 200, 205-06 (5th Cir. 2003) (analyzing foreign commerce under interstate commerce principles to find the use of channels implicates Congress' foreign commerce power); United States v. Cummings, 281 F.3d 1046, 1049 & n.1 (9th Cir. 2002).

[64] *See* Baston v. United States, 580 U.S. 1182, 1184 (2017) (Thomas, J., dissenting) (recognizing the split laid out in *United States v. Bollinger*, 798 F.3d 201, 214 (4th Cir. 2015)).

[65] Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 434 (1979).

[66] *See Japan Line*, 441 U.S. at 449 (referring to the "negative implications" of foreign commerce power, which was later coined as the Dormant Commerce Clause.); Baston v. United States, 580 U.S. 1182, 1184 (Thomas, J., dissenting) (recognizing *Japan Line* as the Supreme Court's Dormant Commerce Clause case).

[67] *See Japan Line*, 441 U.S. at 449.

[68] *Id.*

test to limit several states from intervening in matters affecting international trade.[69]

II. THE FOREIGN COMMERCE CLAUSE WOULD BAR ANY LEGISLATION TEXAS CREATES THAT WOULD PREVENT A WOMAN TO OBTAIN AN ABORTION IN MEXICO

If Texas creates legislation restricting a woman's access to abortion care in Mexico, such legislation will violate the Dormant Foreign Commerce Clause. Texas cannot create bills that explicitly or implicitly restrict a woman's right to travel for an abortion in Mexico.

By using the model in *Japan Line, Ltd. v. County of Los Angeles*,[70] these types of laws would violate the Dormant Foreign Commerce Clause for three reasons: (1) Abortion services are within Congress' foreign commerce power, (2) Texas would risk retaliation from Mexico, and (3) limitations on travel frustrate the channels of foreign commerce.

A. Abortion services are within Congress' foreign commerce power

1. Abortion and Interstate Commerce

Reproductive care, including abortions, accounts for a substantial part of the billion-dollar healthcare system. In 2021, the U.S. national healthcare expenditure, or the collective amount that citizens spent on healthcare, reached $4.3 trillion and is estimated to reach $6.2 trillion by 2028.[71] U.S. healthcare providers and facilities spent $11.36 billion on cloud-based technology alone—a 33% increase from the year prior in 2019.[72] Women's reproductive care lies within the bounds of these amounts, which includes reproductive care like pregnancies, contraceptives, and abortions.

To get an estimate on the costs for reproductive healthcare in a woman's lifetime, Leena Kulkarni of Harvard T.H. Chan School of Public Health conducted a study in 2018, *only* accounting for Pap smears, HPV

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[69] United States v. Pendleton, 658 F.3d 299, 306-07 (3d Cir. 2011), *cert. denied*, 2012 WL 2197195 (U.S. June 18, 2012) (No. 11-7711).

[70] *Japan Line*, 441 U.S. at 449 (explaining that the law violates the dormant Foreign Commerce Clause because the tax would enhance the risk of multiple taxations imposed upon Japan and would impair federal uniformity when uniformity is essential).

[71] Insider Intelligence, *US Healthcare Industry in 2022: Analysis of the health sector, healthcare trends, & future of digital health*, (Jan. 11, 2022), https://www.insiderintelligence.com/insights/healthcare-industry/.

[72] *Id.*

tests, birth control, feminine hygiene products and loss earnings resulting from one year off work.[73] On these factors alone, women endure $154,643 a year in reproductive costs, compared to $28,866 for an average male's reproductive health in his lifetime.[74] Costs associated with pregnancy, childbirth, and post-partum care average between $14,768-$26,280.[75] Reproductive care has a substantial economic footprint not only on patients, but on the healthcare system in general.

Additionally, abortion clinics implicate commerce because they are "income-generating businesses that employ physicians and other staff to provide services and goods to the patients."[76] A Texas court recognized abortion clinics' impact on interstate commerce in *United States v. Texas*,[77] a case that sparked media attention just a few months prior to the overturning of *Roe v. Wade*.[78] In *United States v. Texas*, the Department of Justice challenged the constitutionality of Texas S.B. 8, banning almost all abortions in the state after six weeks of pregnancy, with no exception for rape or incest.[79] The Department of Justice based its argument on the Fourteenth Amendment, which at that time protected abortions, and successfully argued that the bill violated the constitutional right to an

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[73] Leena Kulkarni, *My Uterus Costs more Than A Porche*, HUFFPOST (Aug. 31, 2018, 5:45 AM EDT), https://www.huffpost.com/entry/opinion-uterus-costs-porsche_n_5b7da92fe4b0348585fce17c, (calculating only a small selection in woman's health, not including other essential costs for mammograms, ultrasounds, pregnancies, etc.).

[74] *Id.*

[75] Matthew Rae, et al., *Health costs associated with pregnancy, childbirth, and postpartum care*, HEALTH SYSTEM TRACKER (July 13, 2022), https://www.healthsystemtracker.org/brief/health-costs-associated-with-pregnancy-childbirth-and-postpartum-care/#Average%20additional%20health%20spending%20by%20people%20with%20large%20employer%20coverage%20who%20give%20birth,%20relative%20to%20those%20who%20do%20not%20give%20birth,%202018-200.

[76] United States v. Gregg, 226 F.3d 253, 262 (3d Cir. 2000) (holding that the Freedom of Access to Clinic Entrances Act, also known as, "FACE," was constitutional under Congress' commerce power because abortion facilities are income-generating businesses).

[77] United States v. Texas, 566 F.Supp.3d 605, 620 (W.D. Tex. 2021) (granting a preliminary injunction blocking S.B. 8 because it was unconstitutional under the Fourteenth Amendment).

[78] Roe v. Wade, 410 U.S. 113 (1973); *See e.g.*, Press Release, Att'y Gen. Merrick B. Garland, U.S. Dep't of Just., Press Release No. 21-975 (Oct. 6, 2021); ACLU, *Texas Abortion Ban Blocked for Now* (Oct. 6, 2021), https://www.aclu.org/press-releases/texas-abortion-ban-blocked-now; Ryan Lucas, *A U.S. judge blocks enforcement of Texas' controversial new abortion law*, NPR (Oct. 6, 2021), https://www.npr.org/2021/10/06/1040221171/a-u-s-judge-blocks-enforcement-of-texas-controversial-new-abortion-law.

[79] S.B. No. 8, 87th Leg. (Tex. 2021).

abortion.[80] The court granted a preliminary injunction and temporarily blocked the bill for an uncertain amount of time.[81] However, after the Supreme Court no longer recognized abortion under the Fourteenth Amendment, the bill became good law.[82]

Although the rationale for blocking the bill was not based on the Commerce Clause, the judge engaged in noteworthy dialogue related to abortion and interstate commerce to establish standing for the case. The court noted that in a previous instance, Congress recognized the connection between abortion and interstate commerce in 18 U.S.C. § 1531, the partial-birth abortion ban.[83] The court then saw that Texas' bill would extend liability to persons outside state lines, implicating interstate commerce such as outside insurance companies reimbursing Texas abortions, banks processing payments, medical device suppliers outfitting providers, and persons transporting patients to the appointments.[84] Lastly, the influx of individuals crossing Texas state lines implicates commerce not only by affecting clinics in nearby states (or countries), but also by impeding on other pregnant individuals' access in those states due to backlogged clinics.[85]

The Woman's Health Protection Act ("WHPA") also recognized the relationship between reproductive health and interstate commerce. The House of Representatives introduced the WHPA in June 2021, and assigned the WHPA to the Energy and Commerce committee. This assignment to the Energy and Commerce committee is noteworthy because the House recognizes how WHPA grounds itself in the commerce clause, giving Congress authority for enactment.[86] Section 21 of the Act states that "[a]bortion restrictions substantially affect interstate commerce in

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[80] *See Texas*, 566 F.Supp.3d at 665 ("It is substantially likely that S.B. 8 violates the Fourteenth Amendment, whether as an unconstitutional pre-viability abortion ban, or as an unconstitutional undue burden on pre-viability abortion.").

[81] Ryan Lucas, *A U.S. judge blocks enforcement of Texas' controversial new abortion law*, NPR (Oct 6, 2021), https://www.npr.org/2021/10/06/1040221171/a-u-s-judge-blocks-enforcement-of-texas-controversial-new-abortion-law ("Pitman's ruling blocks enforcement of the Texas law on a temporary basis, and it's unclear how long it will be in effect.").

[82] Erin Douglas & Eleanor Klibanoff, *Abortions in Texas have stopped after Attorney General Ken Paxton said pre-Roe bans could be in effect, clinics say*, THE TEXAS TRIBUNE (June 24, 2022, 1:00 PM CST), https://www.texastribune.org/2022/06/24/texas-clinics-abortions-whole-womans-health/.

[83] 18 U.S.C. §1531(a) ("Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion . . .").

[84] *See Texas,* 566 F.Supp.3d at 641.

[85] *Id.*

[86] H.R. 3755, 117th Cong. § 25(A).

numerous ways."[87] Healthcare providers purchase medicine and medical equipment, obtain and provide training, and employ doctors and staff.[88] Restricting the access to abortion would substantially impact interstate commerce.

Abortion care can easily be linked with interstate commerce and has survived many Interstate Commerce Clause analyses by the courts and Congress. Therefore, given the more liberal interpretation of an analysis under the Foreign Commerce Clause, abortion abroad falls under Congress' foreign commerce power.

2. Texas is Barred from Legislation because Abortions Abroad Implicate Foreign Commerce.

With the expansion of technology and global accessibility, new markets will emerge, and existing markets will evolve under the foreign commerce umbrella. The medical tourism industry is a market that continues to evolve under this umbrella.

Medical tourism is the act of traveling outside one's home country to seek medical treatment in another foreign country.[89] The global medical tourism market size was approximately $104.68 billion in 2019 and is projected to reach $273.72 billion by 2027.[90]

This industry is recognized worldwide by global organizations like the OEC, Joint Commission International, Quality Healthcare, and health insurance companies like Medicaid. Other insurance companies like Blue Shield, Anthem Blue Cross, Aetna, and CIGNA include medical tourism insurance as part of their coverage, which is an attractive option for both the insurance company and the patient because of the cost saving benefits.[91]

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[87] *Id.* at § 21.

[88] *Id.*

[89] CDC, *Medical Tourism: Travel to Another Country for Medical Care*, TRAVELERS' HEALTH (June 1, 2023), https://wwwnc.cdc.gov/travel/page/medical-tourism.

[90] Sahil S. Sanjivan, *Medical Tourism Market by Treatment Type . . . Global Opportunity Analysis and Industry Forecast*, 2019-2027, ALLIED MKT. RSCH. (Nov. 2020), https://www.alliedmarketresearch.com/medical-tourism-market.

[91] *See, e.g.*, Neil Lunt et. al., *Medical Tourism: Treatments, Markets and Health System Implications: A scoping review*, OECD, (including organizations like OECD, Joint Comm'n Int'l, Quality Healthcare Advice Trent Accreditation); David Paul et. al., *Insurance Companies Adapting to Trends by Adopting Medical Tourism*, The Health Care Manager vol. 36, n. 4, 326, 327 (Sept. 2017); MED. TOURISM MAGAZINE, *Insurers Changing the Game in Medical Tourism*, https://www.magazine.medicaltourism.com/article/insurers-changing-game-medical-tourism.

For centuries, people have been engaging in this type of tourism for various reasons, such as lower costs or procedure availability when it is illegal or unavailable at home.[92] For example, Switzerland treats patients who seek assisted suicide, which is illegal in certain U.S. states.[93] Moreover, a Florida resident went to Chennai for a hip replacement surgery that saved her money and was unavailable in the United States.[94]

Abortions abroad are also recognized under medical tourism, where clinics noticed an increase in patients after *Dobbs*, especially in Mexico.[95] While some argue that abortion tourism is not a great idea because of unclear access to post-operative care,[96] others find innovative ways to encourage abortion tourism, like a floating abortion clinic in the Gulf of Mexico.[97] Medical tourism, including abortion tourism, directly impacts the importing and exporting of healthcare services between foreign nations, which is strictly within Congress' foreign commerce power.[98] Foreign commerce is defined broadly in *United States v. Clark*: "foreign commerce . . . includes commerce with a foreign country."[99] If the court found that getting on a plane from the United States to Cambodia was enough activity for foreign commerce, driving a car or taking a plane to fly to Mexico is, too.

B. Texas Legislation Could Cause Retaliation from Mexico

For the next two sections, I will be using rationales from the dormant foreign commerce case *Japan Line, Ltd. v. County of Los Angeles*.[100] In the

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[92] Lisa Schaffer, *Patients With Passports: Is Medical Tourism Legal?*, FIND LAW (Aug. 29, 2018, 7:00 AM), https://www.findlaw.com/legalblogs/law-and-life/patients-with-passports-is-medical-tourism-legal/.

[93] *Id.*

[94] Levi Burkett, *Medical Tourism: Concerns, Benefits, and the American Legal Perspective*, 28 J. LEGAL MED. 223, 233-34 (2007) (explaining the FDA had not approved the procedure that was still in clinical trial).

[95] *See infra*, note 104.

[96] Allyson O'Daniel & Elizabeth Ziff, *International Travel to Access Abortions is a Global Health Problem—Not a Solution*, MS. MAGAZINE (June 3, 2022), https://msmagazine.com/2022/06/03/international-travel-abortion-access/.

[97] Bold Business, *Medical Tourism In Action: A Floating Abortion Clinic* (July 29, 2022), https://www.boldbusiness.com/society/medical-tourism-action-floating-abortion-clinic/.

[98] I. Glenn Cohen, *Medical Tourism: The View from Ten Thousand Feet*, 40 HASTINGS CTR. REP. 2010 Mar-Apr; 11-2. doi: 10.1353/hcr.0.0238. PMID: 20391844.

[99] *See* United States v. Clark, 435 F.3d 1100, 1114 (9th Cir. 2006).

[100] *See* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449 (1979) (referring to the "negative implications" of foreign commerce power, which was later coined as the Dormant Commerce Clause); Baston v. United States, 580 U.S. 1182, 1184 (Thomas, J., dissenting) (recognizing *Japan Line* as the Supreme Court's Dormant Commerce Clause case).

case, California's law imposed an *ad valorem* tax on Japanese shipping containers stored temporarily in the state.[101] The Supreme Court held that the law violated the Dormant Commerce Clause by considering two rationales from the case.[102] First, the tax would enhance the risk of multiple taxations imposed upon Japan.[103] Second, it would impair federal uniformity when uniformity is essential.[104] Federal uniformity would be frustrated if the state law could cause disputes to arise between the U.S. and foreign nation.[105] The risk of retaliation from the foreign nation is too significant, as it would not only impact the state but the entire nation.[106] Like the policy behind the extraterritorial laws, Congress holds the power to regulate the vehicles of commerce between the U.S. and foreign nation. State actions would restrict Congress' ability to "speak with one voice."[107]

In Mexico, medical tourism is a $6.75 billion industry. Approximately 800,000 to 1 million Americans travel to Mexico to seek medical procedures, a substantial amount being Texas residents.[108] The medical tourism industry plays a vital role in Mexico's economy, so much so that the federal government is actively involved with medical tourism. The government created the National Program for Medical Tourism and continues to contribute to the hospital accreditation process.[109] Together with the Ministry of Tourism, it launched promotional campaigns in the United States and Canada to promote its medical tourism services and dedicated specific attention to residents of Texas and California without health insurance.[110]

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[101] *Japan Line*, 441 U.S. 434, 436.

[102] *Id.* at 446-47

[103] *Id.*

[104] *Id.* at 448.

[105] *Id.* at 449-50.

[106] *Id.* at 450 (allowing a foreign nation to endure multiple taxations on its instrumentalities of foreign commerce would result in a retaliation on American-owned instrumentalities, effecting transportation equipment on a national level).

[107] *Id.* at 449 (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

[108] Hair Center Mexico, *Medical Tourism Mexico: High Quality, Affordable Prices*, PRNEWSWIRE (Nov. 5, 2021, 8:31 ET), https://www.prnewswire.com/news-releases/medical-tourism-mexico--high-quality-affordable-prices-301416810.html; Emanuel Orozco Núñez, et al., *An Overview of Mexico's Medical Tourism Industry – The Cases of Mexico and Monterrey*, ver. 1.0, SFU MED. TOURISM RSCH. GRP., at 78 (Aug. 2014) (finding that in the border city of Monterrey, 30% of users are from Texas or Chicago).

[109] Emanuel Orozco Núñez, *supra* note 108, at 68-69.

[110] *Id.* at 69, 85.

Abortion clinics in Mexico, which are income-generating businesses,[111] also play a role in the medical tourism industry. Because of Mexico Supreme Court's decision in 2021 to decriminalize abortion,[112] many women in the United States have been participating in medical tourism to seek abortion treatments in Mexico.[113] An abortion clinic in Mexico estimated that Americans made up 25% of patients receiving abortions there in May 2022, rising to 50% in July.[114] A pharmacy in Mexico recognized a sharp increase in clientele for over-the-counter abortion pills that sell for $400.[115]

Given how vital medical tourism is to Mexico's economy and how impactful Texans are to that contribution, Texas legislation restricting a woman's ability to seek an abortion in Mexico may result in foreign conflict and retaliation. If Texas passed legislation that had civil or criminal repercussions for women seeking abortions in Mexico or third parties assisting, women would be indirectly prohibited from engaging in abortion services in Mexico out of fear of prosecution or fine. Beyond abortion services, the legislation may even restrict women who want other reproductive medical procedures in Mexico for cost saving or emergency purposes.

Although lawmakers claim that their restrictive abortion laws do not affect those who have miscarriages or pregnancy complications, there is a lot of gray area in reproductive health.[116] Texas, along with many other states, has often confused other feminine health conditions with abortions.[117] For example, in 2021, a woman in Texas arrived at the hospital

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[111] *See* Baston v. United States, 580 U.S. 1182, 1184 (2017) (Thomas, J., dissenting) ("[T]his court has never thoroughly explored the scope of the commerce power.").

[112] Coahuila Penal Code art. 196.

[113] Catherine E. Shoichet, *More Americans who want abortions are turning to Mexico for help*, CNN (July 25, 2022, 1:18 PM), https://www.cnn.com/2022/07/21/health/mexico-abortion-assistance-cec/index.html.

[114] Lilly Quiroz, *This Mexican clinic is offering discreet abortions to Americans just over the border*, NPR (Aug. 31, 2022, 5:00 AM ET), https://www.npr.org/2022/08/31/1119886629/abortion-mexico-roe-wade-ban-texas-supreme-court-border-tijuana.

[115] John Burnett, *Mexico border town sees an increase in abortion drugs to women from the U.S.*, NPR (May 9, 2022, 12:39 PM ET), https://www.npr.org/2022/05/09/1097210654/mexican-border-town-sees-an-increase-in-sales-of-abortion-drugs-to-women-from-th (describing the amount of women that get abortion pills as "[a] lot. Like crazy").

[116] Maria Mendez, *Texas laws say treatments for miscarriages, ectopic pregnancies remain legal but leave lots of space for confusion*, TEX. TRIB. (July 20, 2022, 5:30 PM CDT), https://www.texastribune.org/2022/07/20/texas-abortion-law-miscarriages-ectopic-pregnancies/.

[117] Pam Belluck, They Had Miscarriages, and New Abortion Laws Obstructed Treatment, N.Y. TIMES (July 17, 2022) https://www.nytimes.com/2022/07/17/health/abortion-miscarriage-treatment.html.

after experiencing a miscarriage in her first trimester.[118] The doctor performed a safe and standard medical procedure used to quickly remove tissue from failed pregnancies.[119] A year later, this same woman suffered another miscarriage and arrived at the same hospital for the same procedure.[120] This time, she was denied care because of a new Texas law banning abortions after six weeks.[121] The procedure to remove tissue from miscarriages was the same procedure used for some abortions.[122] This woman then endured a gruesome and scarring experience, holding her husband's hand as she sat in a dark red bathtub, enduring forty-eight hours of constant bleeding and pain.[123]

Medical professionals cannot risk jail time or expensive fines, so they often deny or delay care for pregnancy complications in fear of being confused with abortion care.[124] Moreover, an OB-GYN in San Antonio had to wait a day to treat a patient who started to miscarry and developed a womb infection.[125] Furthermore, a patient in Dallas had to carry her dead fetus around for two weeks until she found an OB-GYN willing to remove it.[126] Pharmacists refuse to fill prescriptions for certain medications that are related to abortions, but are used for other treatments.[127]

These foregoing medical procedure and prescription issues are just scratching the surface of the current issues going on throughout the nation. If Texas implements laws restricting abortion services in Mexico, they may also restrict other necessary services that could be confused with abortion care.

Therefore, even if Texas argues that abortion services do not make up a substantial amount of Mexico's GDP, many other services would be affected if related to abortion services. Restricting access to health care services would affect the stream of foreign commerce. With the Mexican government's immense involvement in medical tourism and purposefully attracting residents from Texas, foreign conflict may arise between Mexico

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[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *See* Mendez, *supra*, note 116, at 1.
[125] *Id.*
[126] *Id.*
[127] *Id.*

and the United States. Like how the courts in *Japan Line*[128] recognized double charging a country could lead to retaliation, no country likes losing money.

C. Texas Legislation Would Impose Restrictions on the Channels of Foreign Commerce

If Texas passed legislation restricting travel for abortion, that would directly affect the vehicles of foreign commerce. In *Japan Line*, the court recognized that Congress holds the power to regulate the vehicles of commerce between the U.S. and foreign nations.[129] Congress has the power to keep the channels of foreign commerce free from "immoral and injurious uses," even if there is no attached economic purpose.[130]

Women who travel to Mexico would be using the vehicles of foreign commerce, whether on a plane or in a car. Additionally, women may not even be able to engage in the vehicles of foreign commerce without the help of third parties, such as employers, travel agencies, or the Uber to the airport. Any law restricting that ability would be barred by Congress' foreign commerce power.

Only Congress can create laws and limitations on a woman's ability to travel to Mexico for abortion care. The U.S. government is fully aware that citizens seek medical treatment outside of the country, but it has never legislated this area.[131] That alone does not mean Texas has that right to legislate it.[132] Although unlikely to occur because of the undue burdens that would result,[133] Congress does have the power to restrict travel to foreign countries for abortions just as it made laws with extraterritorial reach. However, as of now, in an absence of a statement by Congress, states like

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[128] *Japan Line*, 441 U.S. at 448 (holding that Congress needs to avoid multiple taxation to Japan).

[129] *Id.*

[130] *See* United States v. Pendleton, 658 F.3d 299, 308 (3d Cir. 2011) (quoting Caminetti v. United States, 242 U.S. 470, 491 (1917)).

[131] *See The Globalization of Health Care: Can Medical Tourism Reduce Health Care Costs?: Hearing Before the Spec. Comm. on Aging*, 109th Cong. 18 (2006) (statement of Dr. Arnold Milstein), http://www.gpo.gov/fdsys/pkg/CHRG-109shrg30618/pdf/CHRG-109shrg30618.pdf.

[132] This is the "dormant" part of the clause. *See* supra, under *Dormant Commerce Clause* ("Dormant Commerce Clause invalidates any state law regardless of whether Congress debated the issue before").

[133] I. Glenn Cohen, *Protecting Patients with Passports: Medical Tourism and the Patient-Protective Argument*, 95 IOWA L. REV., 1467, 1511 (2010) (showing difficulties such as foreign countries alerting the U.S., discovery into pre-travel, establishing primary purpose of trip was in fact for medical tourism).

Texas are barred from passing legislation that restricts abortion access in Mexico.

CONCLUSION

To conclude, Texas is barred from creating legislation that would restrict a woman's access to abortion care in Mexico, as such legislation would violate the dormant Foreign Commerce Clause. Additionally, Texas cannot create bills that implicitly restrict a woman's right to travel for an abortion in Mexico. Abortion services are within Congress' foreign commerce power, which would risk retaliation and frustrate foreign commerce channels.

THE CASE FOR ELIMINATING CONSENT AS AN AFFIRMATIVE DEFENSE TO RAPE IN INHERENTLY COERCIVE ENVIRONMENTS AND REINTERPRETING THE ROME STATUTE'S ELEMENTS OF CRIMES

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INTRODUCTION

Rape of civilians during an armed conflict has long been grounds for criminal prosecution.[1] However, instances of sexual coercion remain less well documented, although they occur just as frequently during armed conflicts. What if a prison guard asks a prisoner on a date and the prisoner later agrees to an ongoing sexual relationship with the prison guard? Is that a consensual relationship? Should a prosecutor have to prove the victim did not consent in order to charge the prison guard with rape? Further, could the defendant use the fact that the prisoner engaged in a long-term sexual relationship as evidence of consent and assert an affirmative defense to escape the charge? The answer to these questions requires a nuanced and careful analysis of how coercion operates on consent.

Sex crimes, both under domestic and international law, are uniquely characterized by the fact that a defendant may use an affirmative defense of consent to avoid conviction. In some jurisdictions, the defense is valid even if the defendant only had a reasonable belief that the victim consented,

[1] Scott A. Anderson, *Conceptualizing Rape as Coerced Sex*, 127 Ethics 50, 55-56 (2016).

regardless of the fact that the belief was mistaken.[2] International criminal law also allows defendants to raise the affirmative defense of consent.[3] However, this is an inconsistency that leaves those victims who may have been coerced into sex with the defendant without legal recourse when the facts may be construed to say that the victim consented.

Instead, international law must recognize the effect of coercion on a victim's ability to give consent. An inherently coercive environment, like a prisoner of war camp or an invasion of one's homeland, makes genuine consent impossible. This note proposes both the elimination of an affirmative defense when circumstances are so coercive as to render genuine consent impossible. Further, this note argues that the Rome Statute's Elements of Crimes should be interpreted as prohibiting defendants from raising an affirmative defense of consent when circumstances are inherently coercive.

The Rome Statute defines rape through a lens of coercion, convicting defendants who take advantage of a person incapable of genuine consent in

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[2] The basic principle of consent as an affirmative defense is exemplified by what is sometimes known as the "Mayberry Defense," taking its name from *People v. Mayberry*, 542 P.2d 1337, 1346 (Cal. 1975). *See* Rosana Cavallo, *A Big Mistake: Eroding the Defense of Mistake of Fact about Consent in Rape*, 86 J. Crim. L. and Criminology 815, 816 (1996) (explaining that the defendant may raise an affirmative defense of the victim's consent to the charge of rape against him if the belief was bona fide and reasonable; further explaining that the defendant need only raise a reasonable doubt in the jury's mind as to whether he held that belief). Other U.S. states, besides California, allow an affirmative defense of consent as a mistake of fact defense (the mistake being the defendant's incorrect belief that the victim consented), *Id.* at 817 n.6 (citing to *Reynolds v. State*, 664 P.2d 621 (Alaska Ct. App. 1983); *People v. Lowe*, 565 P.2d 1352 (Colo. Ct. App. 1977); *State v. Smith*, 554 A.2d 713 (Conn. 1989); *In Interest of J.F.F.*, 341 S.E.2d 465 (Ga. Ct. App. 1986); *State v. Dizon*, 390 P.2d 759 (Haw. 1964); *State v. Williams*, 696 S.W.2d 809 (Mo. Ct. App. 1985); *Owens v. Nevada*, 620 P.2d 1236 (Nev. 1980); *People v. Crispo*, No. 3105-85 (N.Y. Sup. Ct. Oct. 16, 1988); *Green v. State*, 611 P.2d 262 (Okla. Crim. App. 1980) as other U.S. states who have adopted an approach similar to California.

Other jurisdictions across the world also utilize the reasonable belief defense (*see also, e.g.* Strafgesetzbuch [STGB] [Criminal Code], §177, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html; Sexual Offenses Act 2003, c.42, §1 (governing Eng. and Wales); The Sexual Offenses (N. Ir.) Order 2008 No. 1769 (N.I. 2), §5.

[3] In some international law, even if they presume non-consent of the victim from coercive circumstances, they still do not explicitly prohibit the defendant from raising an affirmative defense of consent. *See* Prosecutor v. Kunarac, Case No. ICTY 96-23, Judgement (Int'l Crim Trib. for the Former Yugoslavia (Feb 22, 2001); *see also* Michael Cottier, *art. 8 ¶ 2(b)(xxii): Rape and other forms of sexual violence*, 440 n.836 in *Comment. on the Rome Statute of the Int'l Crim. Ct.: Observers' Notes, Article by Article*, (Otto Triffterer, ed., Hart Publishing 2d ed. 2008) (discusses the report by UN Special Rapporteur on Forms of Slavery (1998)); *see also* Wolfgang Schomburg and Ines Peterson, *Genuine Consent to Sexual Violence Under Int'l Crim. Law*, 101 AM. J. INT'L L. 121, 124.

a coercive environment.[4] However, its language does not explicitly prohibit defendants from raising an affirmative defense of consent.[5] Thus, there is a gap where defendants may still be able to assert facts that seem to indicate the victim consented. Thus, this note argues that the Rome Statute should prohibit defendants from raising the affirmative defense of consent under inherently coercive circumstances. Doing so would allow for the more just and efficient prosecution of sexual coercion and rape in future armed conflicts. While some may argue that refusing to recognize the affirmative defense of consent deprives the defendant of essential rights, doing so: (1) recognizes the reality of coercion and its effect on a victim's ability to genuinely consent, (2) creates a better mechanism for bringing justice to victims of sexual violence, and (3) may deter relationships based on severe power imbalances.

This note will begin with an examination of examples from various armed conflicts that illustrate the subtle nature of sexual coercion and the challenges it poses to prosecutors. Next, it will provide a brief background on the existing jurisprudence of international criminal tribunals on sexual violence. This note will then argue for a solution that addresses the gaps in the tribunals' current jurisprudence, which still lacks proper legal recourse for victims of sexual coercion. Finally, this note will make the case for why denying defendants the use of an affirmative defense of consent through a specific interpretation of the Rome Statute[6] will be more consistent with the reality of coercion and lead to more successful prosecutions of rape by sexual coercion in the future.

This article primarily utilizes examples and references to female victims and survivors. The reason is that the female experience of rape and sexual violence during war and armed conflict is distinctly linked to

[4] Rome Statute of the Int'l Crim. Ct., art. 7(1)(g), July 17, 1998, 2187 U.N.T.S 3844 (rape as a crime against humanity); *Id.* at art. 8(2)(b)(xxii) (rape as a war crime); Elements of a Crime of the Int'l Crim. Ct., art. 8(2)(b)(xxii)-1, Sept. 10, 2002, 2187 U.N. No. E.03.V.2 (defining the elements of rape as a war crime); Cottier, *supra* note 3 at 438-40.

[5] Rome Statute of the Int'l Crim. Ct., art. 7(1)(g), July 17, 1998, 2187 U.N.T.S 3844 (rape as a crime against humanity); *Id.* at art. 8(2)(b)(xxii) (rape as a war crime); Elements of a Crime of the Int'l Crim. Ct., art. 8(2)(b)(xxii)-1, Sept. 10, 2002, 2187 U.N. No. E.03.V.2 (defining the elements of rape as a war crime); Cottier, *supra* note 3 at 438-40.

[6] The Rome Statute and the International Criminal Court will likely be the source of international criminal law on rape in the future, *see* Preface, *The Rome Statute of the International Criminal Court: A Commentary (Vol. 1)*, v (Antonio Cassese, Paola Gaeta, John R.W.D. Jones, ed. 2002).

societal attitudes toward women, gender, and masculinity.[7] The explicit targeted rape of female civilians as a political means of humiliating and subjugating the local population leans heavily on attitudes towards women that aggressors often show, mainly the belief that defiling women is a means of humiliating their nation or community.[8] This is a poignant reality that this article also seeks to highlight. However, the relevance of the historical subjugation of women should not detract from the concurrent reality that men may also be victims of wartime rape and sexual violence. This article intends to provide a solution that brings justice to victims regardless of their gender.

I. REALITY OF COERCION

Rape is recognized under criminal law in jurisdictions across the world.[9] One of the primary elements of rape, at least in a number of jurisdictions, is the lack of consent to sexual activity by the victim.[10] Sexual coercion challenges common sensibilities of what genuine consent is. One scholar offers the following helpful definition for coercion that outlines the dynamics of power between two parties:

> Coercion is best understood as a use of asymmetric power that one sort of agent may hold over another sort based in the former's ability to inhibit broadly the ability of the latter to act, by means such as killing, injuring, disabling, imprisoning, or drugging. When a party demonstrates an ability and willingness to use such means against another, that party is then in a position to threaten in order to induce compliance with demands he might make.[11]

When someone is coerced into having sex, the person does not genuinely consent to the act. However, sexual coercion often operates so subtly that a single instance of seemingly consensual sex is in fact, part of a larger context of coercion that destroys the victim's ability to offer genuine consent. The same author offers a helpful paradigm through which to understand the mechanism of coercion: "If P is able to use direct force or

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[7] Sara E. Davies and Jacqui True, *Reframing Conflict-Related Sexual and Gender-Based Violence: Bringing Gender Analysis Back In*, 46 Sec. Dialogue 495, 497 (2015).

[8] *Id.* at 496-98.

[9] *See supra* note 2 for other jurisdictions that recognize rape as a crime (albeit some allow the defendant to raise the affirmative defense of consent).

[10] Anderson, *supra* note 1 at 56; *see also* Dana Berliner, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L. J. 2687, 2691-92 (1991) for a discussion on the force requirement in rape that some jurisdictions require.

[11] Anderson, *supra* note 1, at 58.

violence that Q is unable to defend against (or retaliate against afterward), then that can be used to constrain Q's actions or impose other disadvantages on Q (pain and injury) that may convince Q of P's powers and willingness to use them."[12] Often, the question of whether someone was coerced into sex requires an intensely fact-specific analysis.

A. Examples of Sexual Coercion in Armed Conflicts

The following examples illustrate the kind of facts that might give rise to sexual coercion. All examples are taken from countries during a period of armed conflict because sexual coercion is inherently bound up with the idea of power imbalance. The presence of an occupying army creates an imbalance of power between the citizenry under occupation and the occupying army. The same power imbalance manifests itself between a prisoner and a captor. The examples below offer a brief context for each armed conflict, focusing on the voice of a victim of sexual violence that resulted from coercion by a stronger party.

1. Argentina

The sexual abuse of female prisoners at Argentina's Navy Mechanics School (known as ESMA) illustrates the problematic gray area between consent and coercion. A military coup toppled Argentina's government in 1976 and lasted until 1983.[13] Many civilians suspected of involvement with communism were captured, tortured, and killed. Many more "disappeared" while the military government denied all connection with their disappearances.[14] Survivors remember ESMA as one of the largest centers for these horrors.[15] Here, many female prisoners were sexually assaulted and tortured in cases that were obviously blatant instances of rape.[16]

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[12] *Id.* at 76.

[13] JOHN CHARLES CHASTEEN, BORN IN BLOOD AND FIRE: A CONCISE HISTORY OF LATIN AMERICA 294-96 (Third ed. 2011); *see also* Alfonso Daniels, Chasten, *Argentina's Dirty War: The Museum of Horrors*, The Tel. (London), (May 17, 2008), https://www.telegraph.co.uk/culture/3673470/Argentinas-dirty-war-the-museum-of-horrors.html.

[14] Daniels, *supra* note 12.

[15] *Id.*

[16] *Id.*

However, a particularly disturbing aspect of life at ESMA was the occasional "date" with the officers assigned there. As one survivor of ESMA recalled:

> We would be sleeping in the middle of the night and a guard would shake us and say, "Wake up, you have to go." We didn't know if we were going out for a meal or to die. A girlfriend of mine was taken dancing by the guy who had killed her husband two weeks earlier.[17]

This striking description highlights the precarious situation of female prisoners at ESMA. These "dates" may blur the line between consent and coercion. However, this survivor, as is evident from her account, and those of numerous women imprisoned at ESMA[18] recognized the consequences of denying these officers a "date" (and presumably, the officers expected sex on these dates given the prevalence of sexual assault within the walls of ESMA). Refusing an officer may have meant physical punishment or even death. Thus, many women, like the survivor who offered this story, did not truly have a choice. It may seem that they consented because they agreed to go out on the date. Even so, the threat they faced if they refused to go and entertain the officers clearly makes the situation a highly coercive one. This level of coercion makes genuine consent impossible. However, under current international law, a prosecutor may have trouble proving that these women did not consent to any sexual activity that followed because they did agree to go on these "dates."

2. Peru

A second poignant example is the rape and consequent marriage of women to army soldiers living near the Manta and Vilca military bases in Peru.[19] Between 1980-1997, the people of Peru struggled under the weight of a civil conflict between the national government and a Marxist/Leninist guerrilla force called the Shining Path.[20] The local community around the Manta and Vilca bases is just one of the many that the national army and guerilla forces abused. The women of that community were primarily

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[17] *Id.*

[18] *Id.*

[19] PASCHA BUENO-HANSEN, FEMINIST AND HUMAN RIGHTS STRUGGLES IN PERU: DECOLONIZING TRANSITIONAL JUSTICE 108-09 (2015).

[20] Chasten, *supra* note 12, at 312, 326-27; *see also* Center for Justice and Accountability, "Peru," https://cja.org/where-we-work/peru/ (last visited Sept. 4, 2023).

indigenous and had a primary school education.[21] The power imbalance created by the occupation particularly devasted this already vulnerable population.

The community of Manta challenges the traditional assumptions about consent and coercion because it forces the law to look beyond the narrow scope of a single act of consent and to a broader context of coercion. For the women of Manta and Vilca, genuine consent to sexual relations with the soldiers occupying their homes was impossible. As Pascha Bueno-Hansen notes, "These kinds of cases become very complicated to prove since the victim 'consented' to maintaining a relationship after the violation."[22]

In her article, Pascha Bueno-Hansen[23], a professor and scholar, expresses the dire circumstances facing women and the horrific choices they were forced to make (or rather, were forced into making).[24] One resident of Manta at the time of the army's occupation, known as Aurelio, told the story of his sister and daughter.[25] Both women were raped by soldiers from the base.[26] His sister agreed to become the girlfriend of her assailant. She became pregnant during the course of their relationship but not as a result of the initial rape.[27] The soldier later abandoned her to raise the child on her own.[28] A situation like this posed challenges to prosecutors because Aurelio's sister's agreement to a relationship with the man who had raped her could be construed as consent if viewed narrowly. She chose to remain with her assailant, and in the eyes of some, she may have lost her legitimacy as a victim by doing so.[29] But viewed in the broader context of the military occupation, no one would believe Aurelio's sister could genuinely consent to any kind of sexual relationship with a soldier who had raped her and remained more than capable of hurting her again.

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[21] BUENO-HANSEN, *supra* note 18, at 115.

[22] *Id.* at 117.

[23] Pascha Bueno-Hansen is an associate professor of Women and Gender Studies and Political Science and International Relations at the University of Delaware. Her work primarily focuses on gender and sexuality in Latin America, sometimes within the context of armed conflict and political oppression. For her full biography, *see* University of Delaware, *WGS Faculty,* University of Delaware, (date last visited Aug. 28, 2023), https://www.wgs.udel.edu/faculty/wgs-faculty/pbh?uid=pbh&Name=Pascha%20Bueno-Hansen.

[24] BUENO-HANSEN, *supra* note 18, at 116.

[25] *Id.* at 118-19. *The author changed the real names of all subjects to protect their privacy.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 119.

Bueno-Hansen points to the relative lack of understanding of the realities of sexual coercion as a challenge to seeing cases prosecuted.[30] She points out that under domestic law in Peru, "marriage between perpetrator and victim resolves sexual violence and the children of rape… therefore, individual cases of sexual violence that have the goal of seeking justice do not receive much support."[31] This lack of understanding, while discussed in the context of domestic law in Peru, undoubtedly also still in some ways permeates international law despite the progress that has been made in recent decades.

3. Sierra Leone

The civil war in Sierra Leone offers a final example of sexual coercion. The Revolutionary United Front (RUF) committed numerous atrocities against women during the civil war in Sierra Leone.[32] These horrors include rape, human trafficking, and even the carving of RUF initials into the bodies of women, giving government army officials the impression the women were part of the RUF and leaving them vulnerable to retribution. However, not every instance of sexual coercion involved that level of violence. As with the examples above from Peru and Argentina, coercion operated so subtly in the lives of victims of sexual violence that even their own narratives describing the incident nearly erase all traces of it.

Zoe Marks, who set out to chronicle the stories of women in Sierra Leone and their interactions with RUF, prefaced her research by saying, "Women's stories, and the words and phrases used to tell them, carry intrinsic value for analysing power structures in the highly subjective realm of violent and non-violent sexual relations."[33] This focus on the specific facts, context, and conditions under which sexual relations happen is necessary to understand how coercion operates so subtly in these interactions.

One woman, Elizabeth, told Marks the story of her relationship with her RUF husband:[34]

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[30] *Id.* at 120-21.

[31] *Id.* at 120.

[32] Elisabeth Wood, *War and Sexual Violence*, in *Cultures of Fear: A Critical Reader* 222, 226-227 (Uli Linke & Danielle Taana Smith eds., 2009).

[33] Zoe Marks, *Sexual Violence in Sierra Leone's Civil War: 'Virgination', Rape, and Marriage*, 113 Afr. Aff. 67, 70 (2014).

[34] *Id.* at 79. * The author altered the names of subjects to protect their privacy.

> …I came to the next village, [and] I was captured by Commander D. In the RUF they gave me medicine, and I explained my story to them. After some time he asked me to have sex with him and to have his baby. I told him we're not staying in one place, we are just moving location to location and so it's not good to be pregnant… at first the sex was every day, and after some time I refused and then it was only every two days.[35]

Marks points out that while Elizabeth's capture against her will seems to suggest she had little choice but to acquiesce to her new husband's request for sex, Elizabeth still paints his delay in approaching her after her arrival as a positive.[36] She also highlights the ways she negotiated the terms of their relationship and her fertility.[37] Marks notes that in light of a prior violent rape Elizabeth had survived, this treatment by her RUF husband seemed relatively kind.[38]

Marks' emphasis on these nuances and her attempts to contextualize Elizabeth's story are commendable. However, they also underscore the point that coercion operates very subtly. Upon reading Elizabeth's story, one cannot help but conclude that her position as a captive of the RUF still left her without the power to genuinely consent to sex. Although the sexual encounters that occurred after the initial capture may well have been consensual, they still occurred in the context of captivity. Again, if viewed in that larger context of coercion, no one could believe that Elizabeth could genuinely consent to a sexual relationship with a man who had captured her and consistently disregarded her attempts to deny him. Her story is representative of that of numerous women affected by the RUF, and likely of women all over the world whose lives have been touched by armed conflict. These examples from Argentina, Peru, and Sierra Leone expose the prevalence of victims who were coerced into sex and the glaring need for a legal solution that adequately redresses their unique injury.

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[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*

II. CURRENT JURISPRUDENCE AND REMAINING CHALLENGES

A. Brief Explanation of the Relationship Between Consent and the Reasonable Belief Standard

The law's current failure to fully address sexual coercion is at least partially the result of the reasonable belief standard. In jurisdictions across the world, a defendant may raise the affirmative defense of consent, which is measured under a reasonable belief standard. In other words, if the defendant can prove that he or she could have reasonably believed the victim consented, their defense succeeds. This defense survives even a finding that the victim did not in reality consent.[39] The danger is that a court, if it chooses to take a narrow view of the facts before it, will see that the defendant could have reasonably believed the victim consented, when in fact a broader view of the facts will reveal coercive circumstances made consent impossible. A brief explanation of the reasonable defense standard's place in the law is necessary to understand how deeply entrenched it is in rape law generally and the problems it can create when applied to inherently coercive circumstances.

The law's prioritization of a victim's consent is a relatively recent development in rape law. Historically, rape prosecutions were concerned primarily with proving that the defendant used force (or the threat of force) to make the victim submit.[40] Along with proving force, the prosecution needed to show that the victim resisted in order to prove she had not consented to sex with the defendant.[41] This approach places an inappropriately heavy concentration on the victim's actions, leading to an intensive inquiry into the particulars of the victim's behavior, "using her actions as evidence of her lack of consent, the defendant's use of force, and his intent."[42] This intense focus on the victim's actions (rather than on the actions of the defendant, the person actually being charged with a crime) led some courts to interpret a victim's submission or lack of resistance as consent.[43] In other words, the lack of resistance meant there must have been a lack of force, and thus the defendant had not done anything to overpower the victim's will.

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[39] *See supra* note 2 (providing a fuller explanation of the affirmative defense of consent); *see generally* Ashlee Gore, *It's All or Nothing: Consent, Reasonable Belief, and the Continuum of Sexual Violence in Judicial Logic,* 30(4) SOC. & LEGAL STUD. 522, 522-40 (2014).

[40] Berliner, *supra* note 9.

[41] *Id.*

[42] *Id.*

[43] *Id.*

More recently, several jurisdictions have adopted an approach that asks whether the defendant had sex with the victim without the victim's consent.[44] The prosecution of rape and related sexual assault crimes then centers on the defendant's disregard for the victim's will in carrying out the assault. Other jurisdictions still require a showing of force to prove a charge of rape.[45] The force requirement approach is inadequate as it fails to recognize those instances of rape and sexual assault where the defendant takes advantage of the victim with little explicit force, but instead does so through more subtle and coercive methods. The force requirement approach is slowly being abandoned in favor of the approach that focuses more on whether the victim gave consent or not.

However, some scholars still insist that the consent approach does not adequately redress the harm of sexual violence but instead perpetrates dangerous stereotypes. Some argue that a legal approach emphasizing consent "reinforces the idea of women as property, concerned primarily with the unsanctioned use of the body" and "reduces sex to a transaction" where consent is given by one party and taken by another.[46] Others harbor concerns that a legal focus on consent "may produce new sexual subjects who comply with these standards out of fear of criminalization 'rather than insistence on sexual autonomy or recognition of the harmful consequence of coerced sex.'"[47] Scholars also worry that such a mechanical approach to consent may fail to adequately emphasize the fluidity of consent that, once given, can still be withdrawn at any point.[48] While scholars maintain concerns about the use of the consent-focused approach to rape and sexual violence prosecution, the approach far outshines the once widely used force requirement approach and is one step closer to a comprehensive legal approach that properly recognizes the reality of coercion in rape and sexual assault prosecutions.

Countries across the world vary in their approach to the prosecution of rape and sexual assault. A number of them apply the reasonable belief

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[44] *See* Anderson, *supra* note 1, at 52 (discussing the standard in the Canadian Criminal Code); Anderson, *supra* note 1, at 58 (describing how the UK Sexual Offenses Amendment Act of 1976 explicitly omitted any mention of force as a required element of rape).

[45] IONL ZAMFIR, DEFINITIONS OF RAPE IN THE LEGISLATION OF EU MEMBER STATES 2, 8 (Eur. Parl. Rsch. Serv. eds. 2024).

[46] Eithne Dowds, *Redefining Consent: Rape Law Reform, Reasonable Belief, and Communicative Responsibility,* 49 J. L. AND SOC'Y 633, 834 (2022).

[47] *Id.* at 833, (quoting Lise Gotell, *Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women* 41 AKRON L. REV. 865, 876 (2008)).

[48] Dowds, *supra* note 41, at 834.

standard when evaluating the defendant's actions toward the victim. Germany is just one jurisdiction that utilizes the reasonable belief standard.[49] Germany's Criminal Code defines rape as:

> (1) Whoever, against a person's discernible will, performs sexual acts on that person or has that person perform sexual acts on them, or causes that person to perform or acquiesce to sexual acts being performed on or by a third person incurs a penalty of imprisonment for a term of between six months and five years.[50]

This definition's explicit use of the term "discernable will" places an emphasis on the victim's ability to discernably verbalize or otherwise indicate consent. This indicates that the defendant's guilt hinges on whether he had a reasonable belief that the victim consented. Similarly, England, Wales, and Northern Ireland also evaluate the defendant's actions under the reasonable belief standard.[51] There, the courts ask the jury to consider any steps taken by the defendant to obtain the victim's consent when determining whether the defendant's belief that the victim consented was reasonable, which still leaves the defendant free to present evidence of consent.[52]

However, allowing defendants to use consent as an affirmative defense where consent is impossible denies the reality of coercion. As one author points out, "…Such oppositions like…rape/not rape are completely inappropriate to the ambiguity of sexual violence…Women's experiences of such violence include a range of connected sexual acts involving different levels of consent, coercion, or force."[53] Again, coercion may operate incredibly subtly. The law's failure to recognize this fact ignores victims who are subjected to sexual abuse through coercion so subtly that a defendant may overcome it through an affirmative defense of consent. The elimination of consent as an affirmative defense under inherently coercive circumstances would eliminate the problems created by this reasonable belief standard on which the affirmative defense of consent is based.

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[49] *Id.* at 829.

[50] Strafgesetzbuch [StGB] [German Crim. Code], § 177 (1998), as last amended by art. 2 of the Act of 22 Nov. 2021.

[51] Sexual Offenses Act 2003, c.42, §1 (governing Eng. and Wales); The Sexual Offenses (N. Ir.) Order 2008 No. 1769 (N.I. 2), §5; *see generally*, Dowds, *supra* note 41, at 829-830.

[52] Dowds, *supra* note 41, at 829-830.

[53] Gore, *supra* note 36, at 531.

B. History and Existing State of International Law Jurisprudence on Sexual Violence

International criminal law and international human rights law undoubtedly condemn rape and all forms of sexual violence. Following World War II, the Geneva Conventions were among the first bodies of law to universally condemn sexual violence.[54] Article 27 of the Fourth Geneva Convention represents international law's first modern attempt to criminalize sexual violence. It reads: "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[55] The Fourth Convention also defines which crimes constitute "grave breaches" under the Convention. The grave breaches, which include heinous crimes like wilful killing, torture, unlawful deportation and confinement, and the taking of hostages, are a specific enumerated list that the Convention drafters regarded as particularly egregious (and were obviously conceptualized specifically in the wake of WWII).[56] While rape and sexual violence meet the qualifications for a grave breach (since the crime of "wilfully causing great suffering or serious injury to body or health" is on the list), they still are not specifically enumerated.

Since the Geneva Convention's creation, sexual violence has commanded ever greater attention, and scholars have endeavored to understand its complexities better. Both international criminal law and international human rights law condemn any form of sexual violence, and it has been prosecuted as genocide, a crime against humanity, and a war crime.[57] The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) produced landmark sexual violence jurisprudence.[58] The ICTY was the first international tribunal to recognize an individual instance of rape as a crime against humanity.[59] Both criminal tribunals developed case law for other national and international institutions, and perhaps most importantly,

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[54] Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, U.N.T.S. 170.

[55] *Id.* at 177.

[56] *Conventions and Additional Protocols,* INT'L COM. OF THE RED CROSS, (author's access date/time needed), https://www.icrc.org/en/doc/resources/documents/faq/5zmgf9.htm.

[57] Triffterer, *supra* note 4 at 434.

[58] *Crimes of Sexual Violence,* U.N. INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, (author's access date/time needed), https://www.icty.org/en/features/crimes-sexual-violence.

[59] *Id.*

created norms that shape the practice of international criminal law in the International Criminal Court.[60]

In 2002, the Rome Statute created the International Criminal Court (ICC), which investigates and tries individuals charged with crimes of concern to the international community under four categories: genocide, war crimes, crimes against humanity, and the crime of aggression.[61] The Rome Statute represents another significant step forward in sexual violence jurisprudence for its recognition of rape specifically as a crime against humanity and a war crime. Article 7(1)(g) of the Rome Statute includes "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" as a crime against humanity.[62] Article 8(2)(b)(xxii) similarly condemns rape as a war crime.[63] These two provisions, read together, reflect a condemnation of rape during armed conflict and an intention to prosecute it seriously.

C. Challenges Remaining in Sexual Violence Jurisprudence

While the body of international criminal law has developed dramatically since the Geneva Convention, significant gaps continue to leave certain victims without legal recourse. International criminal law and international human rights law undoubtedly condemn rape and all forms of sexual violence. However, there is still not completely adequate legal recourse for victims under the existing laws. Some have noted that the phrase, "indecent assault" in the Geneva Convention is too broad a term to be effective in prosecuting the crime and undercuts the severity of the crime by framing acts of sexual violence as assaults merely against a woman's honor.[64] The Convention clearly wrote this language during this time because it alludes to traditional gender norms and conceptions of felinity and women's bodies.

The other notable problem with Article 27 is that nowhere in the text does it address sexual relations resulting from coercion. While the term "indecent assault" in Article 27[65] may be broadly construed to encompass such instances, an instance of sexual activity as a result of coercion may not

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[60] *Id.*

[61] *About the Court,* INT'L CRIM. CT., (author's access date/time needed), https://www.icc-cpi.int/about/the-court.

[62] Rome Statute of the Int'l Crim. Ct., art. 7, July 17, 2002, 90 U.N.T.S 2187.

[63] Rome Statute of the Int'l Crim. Ct., art. 7, July 17, 2002, 90 U.N.T.S 2187.

[64] Aileen S. Kim, Note, *Sexual Violence in Armed Conflict under International Law*, 36 CONN. J. INT'L L. 2, 12 (2020).

[65] *See supra* note 49.

qualify under even this part of the Convention because sexual coercion is not explicitly prohibited in the text of the Convention.[66] Article 27's protections do not extend far enough to cover victims of sexual relations that resulted from coercive control.[67] The specific enumeration of rape as a crime against humanity in the Rome Statute largely solved this problem. However, not every country has yet signed onto the Rome Statute, including major geopolitical powers like the United States, Russia, and China. Thus, crimes committed by the militaries of those countries do not fall under the jurisdiction of the ICC, leaving only the Geneva Convention (to which many more countries are a party) as a means of recourse for victims of crimes by members of those countries. Further, the Convention does not explicitly include rape or sexual violence in its list of "grave breaches."[68] Again, some have advocated having rape added to the list of grave breaches in order to ensure greater protection for victims[69] but this has yet to come to fruition. This would indeed be a step in the right direction toward protecting victims.

Finally, and perhaps most importantly, there is no consensus among international criminal tribunals on whether "non-consent" should be an element of rape. The ICTR and ICTY have announced different definitions of rape through their respective case law. When the ICTR decided the *Akayesu* case, it eliminated "non-consent" as an element, meaning the Prosecutor no longer needed to prove beyond a reasonable doubt that the victim did not consent.[70] That Chamber reasoned that the inherently coercive circumstances during which the rape occurred (during the genocide in Rwanda) made genuine consent impossible.[71] However, the ICTY announced in its *Kunarac* decision that the Prosecutor must prove consent. However, it explained that consent, for purposes of the law, could be "assessed in the context of the surrounding circumstances."[72] Thus, the ICTY acknowledged the effect of coercion on consent but did not rule out

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[61] Kim, *supra* note 59, at 11.

[67] *Id.*

[68] *Id.* at 12.

[69] *Id.*

[70] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Trial Chamber Judgement, ¶ 488-489 (Sept. 2, 1998); *See also* Patricia Viseur Sellers, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation*, 21 (Nov. 6, 1997), https://www2.ohchr.org/english/issues/women/docs/paper_prosecution_of_sexual_violence.pdf.

[71] Sellers, *supra* note 65, at 20.

[72] Prosecutor v. Kunarac, Case No. ICTY 96-23, Trial Chamber Judgement, ¶ 460 (Feb. 22, 2001).

the possibility of genuine consent under coercive circumstances. The ICTR's *Gacumbitisi* decision similarly recognized the need for the court to examine background circumstances and held that a trial chamber was "free to infer non-consent from the background circumstances, such as an on-going genocide campaign or the detention of the victim."[73] This patchwork of decisions does admittedly recognize the effect of coercion on consent and the necessity of broadening the scope of the inquiry when examining the facts of a rape charge. However, none of these cases carries more legal weight than another because they exist concurrently. Therefore, no one of them is the controlling precedent.[74]

In recent years and in response to the criminal tribunals' decisions, legal scholars have debated the best approach to the consent element of rape and other crimes of sexual violence.[75] Three approaches to prosecuting sexual violence have emerged as the clearest elucidation of the debate. The first approach treats non-consent as an element that the prosecution must prove to get a conviction.[76] A second approach eliminates non-consent as an element.[77] A third approach incorporates the second, yet allows the defendant to use consent as an affirmative defense.[78] The latter two approaches are grounded in the increasingly recognized idea that victims may not be able to genuinely consent in an inherently coercive environment like a prisoner of war camp.[79] There is still dispute on which approach international law ought to take in its view of consent.[80]

While the international criminal tribunals offer helpful examples for courts like the ICC, they still exist simply as a patchwork of suggestions that lack the force to effectively shape future case law in this area. If applied to a set of facts similar to the examples from Argentina, Peru, and Sierra Leone, it is unclear how an international criminal court would treat the issue of coercion. Clearly, some of the above criminal tribunal decisions treat non-consent as an element to be proved, while others presume non-consent under coercive circumstances. However, none are clear on whether the defendant may still raise an affirmative defense of consent. Thus, the Geneva Convention, the ICTY, and ICTR still fail to fully recognize the reality of coercion in their application of the law.

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[73] Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, Judgment, ¶ 153 (July 7, 2006).
[74] Sellers, *supra* note 65, at 27.
[75] *See* Schomburg, *supra* note 3, at 123.
[76] *See* Schomburg, *supra* note 3, at 123-24; Anderson, *supra* note 1, at 52.
[77] *See* Schomburg, *supra* note 3, at 123-24; Anderson, *supra* note 1, at 52.
[78] *See* Schomburg, *supra* note 3, at 123.
[79] *Id.*
[80] *Id.*

III. A STRONGER MECHANISM IS NECESSARY FOR VICTIMS OF SEXUAL COERCION

International criminal law and sexual violence jurisprudence can better redress the harm to victims now than at any other point in history. Nonetheless, prosecutors still face glaring inconsistencies in how the law treats rape and sexual violence, which cripple their prosecutions. The fact that a defendant may bring forward the affirmative defense of consent under inherently coercive circumstances creates a barrier to justice for victims of sexual coercion. Victims of rape perpetrated under circumstances like those of the examples from Argentina, Peru, and Sierra Leone may be left without legal recourse. Eliminating this defense when circumstances are inherently coercive creates a stronger mechanism for prosecuting crimes involving sexual coercion.

A. Eliminating an Affirmative Defense of Consent Resolves a Legal Loophole in the Current Structure of the Law

The third scholarly approach to non-consent mentioned above allows the defendant to use consent as an affirmative defense. Despite being the most progressive of the three, it still contains a glaring inconsistency: if the prosecution is not required to prove consent under inherently coercive situations, why is the defendant permitted to use consent as an affirmative defense under the same set of inherently coercive circumstances? This loophole that leaves victims of sexual coercion without legal redress.

A further explanation of the ICTR statute will better illustrate this inconsistency. The ICTR, in a leading precedent, recognized rape as a crime against humanity. A single instance of rape was used to secure convictions under ICTR Article 3(c) enslavement, 3(e) torture, 3(h) persecution, and 3(i) other inhumane acts.[81] The prosecution did not have to prove the victim did not consent to the acts under any of those charges. However, if that same instance of rape were to be prosecuted under 3(g) rape, it would then be necessary for the prosecution to prove that the victim did not consent.[82]

This necessity to prove consent leaves victims of sexual coercion without adequate legal recourse. Under a set of facts similar to the above

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[81] S.C. Res. 955 art. 3 (Nov. 8, 1994).
[82] Schomburg, *supra* note 3, at 126.

examples from Argentina, Peru, and Sierra Leone, where there were no acts of violence that could constitute torture, a victim's only option may be to bring a claim under Article 3(g). But in cases where the defendant obtained "consent" through more subtle coercion, a defendant may walk away simply because a court may construe the victim's agreement to continue a sexual relationship with their captor as consent. Refusing defendants an affirmative defense of consent under inherently coercive circumstances would resolve this inconsistency.

Both the ICTY and ICTR have proven that cases of sexual assault can be successfully prosecuted in the international criminal context. The ICTY provided a landmark moment for sexual violence jurisprudence as the first instance in which rape was prosecuted as a crime against humanity. Likewise, at the ICTR, Jean-Paul Akayesu, a Hutu leader, was charged and ultimately convicted of the crime of genocide based on his and his subordinates' acts of rape and sexual violence against Tutsi victims.[83] These convictions demonstrated that sexual violence, even if perpetrated by individuals, can and should be considered as an act of genocide and a crime against humanity when perpetrated in the context of war.[84] Breakthrough convictions like these demonstrate all the more reasons the barriers to justice for victims who have suffered under coercive circumstances must be removed. Barring defendants from utilizing consent as an affirmative defense in cases fraught with coercive circumstances is vital to securing convictions and clearing the way to justice for victims.

The examples from Peru, Argentina, and Sierra Leone illustrate the necessity to fill this gap. The gap will very well persist during future armed conflicts. The victims of the sexual assaults that took place under intense coercion and were framed to look consensual have limited access to legal recourse because of this gap in the sexual violence jurisprudence of international criminal tribunals.

Some may argue that the Rome Statute and the ICC have replaced the need to rely on the jurisprudence of past international criminal tribunals like the ICTY and ICTR. However, as the next section will show, the same gap persists in the Rome Statute. The following pages will thus also advocate for an interpretation of the Rome Statute that will address and resolve this gap.

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[83] Kim, *supra* note 59, at 13.
[84] Kim, *supra* note 59, at 13-14.

IV. DETERRING RELATIONSHIPS BASED ON SEVERE POWER IMBALANCES BY REINTERPRETING THE ROME STATUTE

A. Implications for Future Prosecutions of Rape Under International Law

The international criminal tribunals of the past already serve as a model for the ICC's jurisprudence on sexual violence.[85] They will likely also serve as a model for the prosecution of future crimes that occur during armed conflicts. This underscores the need for consistent case law that adequately addresses the claims of victims of sexual coercion. A legal approach that fully recognizes the impossibility of consent under coercive circumstances could have important implications for the next criminal rape trials when they take place.

The next opportunity for real change in sexual violence jurisprudence may be in the eventual prosecution of Russian soldiers for crimes committed during the invasion of Ukraine. The atrocities perpetrated against Ukrainian citizens demonstrate the continuing reality of sexual violence. Reports of women being raped, sometimes by multiple offenders, are already well publicized.[86] These violent incidents, which obviously constitute rape, could still be challenging to prosecute. Imagine the even greater challenge in prosecuting any subtle cases of sexual coercion in Ukraine that mirror the cases of women in Argentina, Peru, and Sierra Leone.

Thankfully, the ICC will have jurisdiction over crimes against humanity committed by Russian soldiers in Ukraine, including rape.[87] In 2015, Ukraine, although not a party to the Rome Statute, placed itself under the jurisdiction of the ICC indefinitely.[88] But the affirmative defense gap in international criminal tribunal jurisprudence will still bear heavily on the future prosecution of Russian soldiers for crimes against Ukrainians.

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[85] *See generally* Cottier, *supra* note 3, at 434-440 (describing the jurisprudence of the ICTY and ICTR to explain its effect on the drafters of the Rome Statute).

[86] Laura Wamsley, *Rape has reportedly become a weapon in Ukraine. Finding justice may be difficult*, NPR (Apr. 30, 2022, 9:00 AM), https://www.npr.org/2022/04/30/1093339262/ukraine-russia-rape-war-crimes.

[87] Oona A. Hathaway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I)*, Just Security (Sept. 20, 2022), https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/.

[88] *Id.*

Reinterpreting the Rome Statute as prohibiting the defendant from bringing an affirmative defense of consent when circumstances are inherently coercive will resolve this gap.

B. Reinterpreting The Rome Statute's Elements of Crimes to Prohibit an Affirmative Defense of Consent Under Inherently Coercive Circumstances

The Rome Statute can be read to better address the subtle nature of sexual coercion. The Rome Statute contains a supplement known as Elements of Crimes ("EoC") that defines the crimes addressed in the Statute itself. Article 9 of the Rome Statute explains that "Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8, and 8 *bis*," and that "Elements of Crimes and amendments thereto shall be consistent with this statute."[89] The drafters of the Rome Statute, therefore, intended for the EoC to be read as part of the Statute although not directly included in it. Article 8(2)(b)(xxii)-1 of the EoC explains that sexual assault can be perpetrated "by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."[90] This clarification is a powerful acknowledgment of the reality of coercion and its effect on genuine consent during armed conflict.

A reading of the Rome Statute that bars the affirmative defense of consent is consistent with the goals of the drafters. The Rome Conference, which ultimately developed the Rome Statute and the EoC that exists today, was particularly dedicated to addressing the issue of rape.[91] Multiple delegates from countries all over the world unequivocally expressed support for stronger protections for women through the ICC's jurisdiction and a need to recognize rape specifically as a crime against humanity and a war crime.[92] This focus on punishing perpetrators of sexual violence against women in wartime most certainly influenced not only the drafting of the Rome Statute itself, but also of the accompanying EoC. The choice by the drafters to recognize coerced sex as sexual assault in the elements highlights the reality that violence against women can take many shapes and subtle coercive forms.

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[89] Rome Statute of the Int'l Crim. Ct., *supra* note 4, at 8.

[90] Elements of Crimes, *supra* note 4, at 28.

[91] Cottier, *supra* note 3 at 432; *See also* TUBA INAL, LOOTING AND RAPE IN WARTIME: LAW AND CHANGE IN INTERNATIONAL RELATIONS, at 133-34 (Uni. of Penn. Press, 2013).

[92] Inal, *supra* note 84, at 141-142.

However, the Rome Statute and the Elements of Crimes do not go so far as to explicitly eliminate the affirmative defense of consent for the defendant. This note instead insists on a strict approach rather than a fact-specific inquiry into the case by eliminating the affirmative consent defense entirely. Suppose the defendant had a sexual relationship with the victim in inherently coercive circumstances where genuine consent was impossible. In that case, he or she should not be able to mount the affirmative defense of consent no matter the particulars of the case. However, the Rome Statute's EoC can be read as a bar to the affirmative defense of consent when circumstances are inherently coercive.

The drafting of both rape laws in Articles 7 and 8 of the Rome Statute was largely influenced by the case law of international criminal tribunals before it.[93] None of the ICTY or ICTR's decisions outright bar defendants from raising an affirmative defense of consent.[94] The closest any of those decisions reach to barring consent as an affirmative defense is the *Kunarac* Appeals Chamber, which noted that several national legislatures which imposed strict liability on a person in power who engaged in sexual acts with a victim by exploiting that victim's particular vulnerability.[95] However, the Chamber itself did not announce a rule prohibiting an affirmative defense of consent.[96]

One commentator on the drafting of the Rome Statute notes that at least one influential source on the drafters actually allowed room for defendants to raise an affirmative defense of consent.[97] The UN Special Rapporteur on Contemporary Forms of Slavery (1998) concluded that coercive situations "establish a presumption of non-consent and negates the need for the prosecution to establish a lack of consent as an element of the crime."[98] However, the UN Special Rapporteur also clarified that, "the issue of consent may, however, be raised an affirmative defense as provided for in the general rules and practices established by the International Criminal Tribunal for the Former Yugoslavia."[99]

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[93] Cottier, *supra* note 4, at 438.

[94] Cottier, *supra* note 4, at 440.

[95] Prosecutor v. Kunarac, Case No. ICTY 96-23, Appeals Judgement, ¶ 131 (June 12, 2002); *See also* Cottier, *supra* note 4, at 440.

[96] Kunarac, Case No. ICTY 96-23, ¶ 131.

[97] Cottier, *supra* note 3, at 440 n.836.

[98] *Id.*

[99] Gay J. McDougall (Special Rapporteur on Forms of Slavery), *Systematic Rape, Sexual Slavery, and Slavery-like Practices during Armed Conflict: Final Report,* para. 25, U.N. Doc

Ultimately, the Preparatory Committee, which drafted the Rome Statute and the Elements of Crimes, seems silent on the affirmative defense issue specifically. Instead, the Committee laid out four alternative circumstances in the Elements under which a sexual act could constitute rape as a war crime under Article 8:

1. The invasion was committed by force,
2. [O]r by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person,
3. [O]r by taking advantage of a coercive environment,
4. [O]r the invasion was committed against a person incapable of giving genuine consent.[100]

Despite its silence on the issue of whether to allow an affirmative defense of consent, the Rome Statute and its accompanying EoC could be read as allowing an affirmative defense given the influences the drafters considered as they developed the EoC. That is why this note seeks to show that the Rome Statute and its Elements should instead be read as to bar defendants from raising consent as an affirmative defense when circumstances are inherently coercive. This reinterpretation is equally supported by the drafting history of the Statute and the Elements and reflects the drafters' desire to prosecute rape committed under coercive circumstances.

C. Future Prosecutions of Rape under Inherently Coercive Circumstances by Domestic Tribunals

The ICC's power to adjudicate only goes as far as the parties subject to the Rome Statute. Again, not every country has signed onto the Rome Statute, including major geopolitical power players like the United States and China. Thus, if the perpetrator of rape is a citizen of one of the countries not party to the Statute, the Rome Statute is not binding on that defendant. Other countries, unlike Ukraine, have not subjected themselves to the ICC's jurisdiction will not be so lucky as to benefit from its protection if neither they nor the perpetrator's country are parties to the Statute. Victims are then left only with the existing jurisprudence laid down by international criminal tribunals like the ICTY and ICTR. Therefore, the change this note proposed earlier in the legal approach to the consent

E/CN.4/Sub.2/1998/13 (June 22, 1998); *see also* Cottier, *supra* note 4, at 440 (particularly footnote 836 on that page).

[100] Elements of Crimes, *supra* note 4, at 28.

element in a charge of rape (i.e., the elimination of consent as an affirmative defense) will almost certainly have deep implications for future prosecutions of rape during armed conflicts that do not come under the jurisdiction of the ICC.

Article 17 of the Rome Statute grants the court jurisdiction over certain domestic cases in the event that they were not adequately prosecuted.

> (1) The Court shall determine that a case is inadmissible where: (a) The case is being investigated by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.[101]

Allowing an affirmative defense of consent is arguably not a genuine prosecution, as articulated under Article 17. This is because a consent defense is logically impossible due to the coerced victim's inability to offer genuine consent. As illustrated above in the cases in Argentina, Peru, and Sierra Leone, a defendant may escape conviction on the basis that victim seemingly consented. Suppose a member State allows the defendant to do so. In that case, the ICC should consider this an "inability to genuinely prosecute" the case because such an approach is inconsistent with the reality of coercion. If domestic war tribunals would prefer to keep their cases out of the jurisdiction of the ICC, they should refuse to allow defendants to use the affirmative defense of consent.

If allowing an affirmative defense is considered an inability to genuinely prosecute, the ICC gains jurisdiction over even more cases than it would otherwise have. This arguably expands the jurisdiction of the ICC far beyond what member States may be comfortable with or envisioned when they signed onto the Rome Statute. However, if domestic tribunals decided not to allow the affirmative defense of consent, then the ICC would no longer be able to take jurisdiction over those domestic cases through the "genuine prosecution" exception. Prohibiting the consent defense would keep more cases within the exclusive jurisdiction of domestic tribunals that are arguably better equipped to litigate them and eliminate the need to expand the jurisdiction of the ICC. Therefore, this note also calls for domestic tribunals prosecuting cases under international law to prohibit

[101] Rome Statute of the Int'l Crim. Ct., *supra* note 4, at 10-11.

defendants from raising an affirmative defense of consent when circumstances are inherently coercive.

CONCLUSION

While much of this note deals with a proposed modification to international criminal law, there may also be applications for domestic law. This note argues that consent should be unavailable as an affirmative defense under inherently coercive circumstances. While coercive circumstances certainly prevail during armed conflicts where towns are invaded, and people are taken prisoner, coercion still exists in all kinds of circumstances that are normally governed by domestic law. Some authors have called for a greater emphasis on this through the use of a coercion standard when it comes to a legal approach to rape.[102]

Scott Anderson, one proponent of the coercion standard, argues that approaching the crime by asking whether a victim was coerced more accurately captures the wrong central to the crime of rape and recognizes the role that power dynamics play in the crime.[103] Anderson goes on to argue that where an imbalance of power creates a coercive situation, "it is possible to see these cases of acquaintance rape as employing coercion as well, and thus justifiably prohibited on the same basis as more stereotypical cases."[104] The coercion standard that Anderson and other advocate for aligns with the third approach mentioned above that calls for eliminating non-consent as an element of rape.

But even Anderson would not go as far as to eliminate consent as an affirmative defense that the defendant may raise at trial.[105] However, once again, allowing an affirmative defense remains inconsistent with the reasoning behind eliminating non-consent as an element in the first place. While not specifically addressed in this note, the solution proposed here could also be applied to rape under inherently coercive circumstances under domestic law in the U.S. and other common law systems.

In conclusion, rape and sexual violence during armed conflict remain a consistent threat to the safety of citizens affected by conflict, particularly women. While international criminal law has evolved to better protect and redress the serious harm done to victims of sexual violence, it still fails to adequately address the harm of sexual coercion. While approaches that

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[102] *See also* Anderson, *supra* note 1, at 73.
[103] *Id.* at 58-59, 74.
[104] *Id.* at 79.
[105] *Id.* at 52.

expand the definition of consent to include an examination of the background circumstances and power dynamics at play between two parties, there still remains a lack of consistent or controlling jurisprudence on the consent element. While some would argue that prosecutors should still have to prove non-consent, this ignores the reality of coercion and how it affects a victim's ability to give genuine consent. Even those who advocate for eliminating the non-consent element would still allow the defendant to raise consent as an affirmative defense, which stands inconsistent with the whole rationale for eliminating non-consent as an element in the first place. Completely eliminating consent as an affirmative defense when circumstances are inherently coercive both recognizes the reality of coercion and resolves this inconsistency in the existing jurisprudence. Thus, doing so will create a stronger mechanism for successfully prosecuting sexual coercion that has powerful implications for rape victims in the international criminal context.

MEDICAL TOURISM: THE NEED FOR THE U.S. TO REQUIRE JOINT COMMISSION INTERNATIONAL ACCREDITATION OF FOREIGN HOSPITALS AS A PREREQUISITE FOR DOMESTIC MARKETING

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INTRODUCTION

Medical tourism is a multi-billion-dollar industry.[1] Every year, medical tourism sends millions of prospective patients to foreign countries for

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medical procedures, with no assurance of the quality of care they will receive.[2] Procedures range from necessary, live-saving operations to elective, alternative therapies.[3] With the increased cost of medical procedures, the increased disparity of access to affordable health care, and the prospective savings of forty to eighty percent, the boom of medical tourism by Americans abroad will continue to dominate.[4] However, with this excitement of new medical options comes a new dilemma: how do we protect prospective patients traveling abroad for healthcare?

The Joint Commission International (JCI) is one possibility. The JCI (the international branch of the Joint Commission, which provides accreditation standards in the U.S.) is a non-governmental organization that accredits international hospitals, clinics, and similar facilities.[5] On the one hand, JCI-accreditation is beneficial and needed, as it allows for standardization in patient safety. On the other hand, JCI-accreditation is problematic, as it only provides a recommendation that is not legally binding and, thus, not required by hospitals. Additionally, JCI provides for accreditation for hospitals and other facilities, but does not regulate the health care providers, including the physicians.[6] This leaves major differences and ambiguity in healthcare standards. However, JCI-accreditation is still a better alternative than no accreditation at all.

Currently, no single regulation exists to monitor medical tourism.[7] Consumers are essentially at their own risk to research and identify potential destinations for their health care needs. Although the American Medical Association (AMA) and the World Medical Association (WMA)

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[1] Angeleque Parsiyar, *Medical Tourism: The Commodification of Health Care in Latin America,* 15 LAW & BUS. REV. AM. 379, 381 (2009).

[2] *See generally* Elizabeth Astrup, *Passport to Plastics: Cosmetic Surgery Tourism, Medical Malpractice, and the Automatic Establishment of Personal Jurisdiction by Way of the Joint Commission International,* 27 IND. J. GLOBAL LEGAL STUD. 347, 351 (2020).

[3] M. Neil Browne et al., *American Medical Tourism: Regulating a Cure That Can Damage Consumer Health,* 25 LOY. CONSUMER L. REV. 319, 321 (2013).

[4] *Id.* at 321-22.

[5] Parsiyar, *supra* note 1, at 388 ("While there is no international regulatory standard of care, the Joint Commission International (JCI) (the international counterpart to the Joint Commission Accreditation for Hospital Organizations—an independent entity that certifies American hospitals) sends its review board to foreign hospitals to determine whether that hospital is deserving of accreditation").

[6] *Id.* at 389 ("Currently, there is no database for complaints and there is no central or universal system of licensing for the doctors or the intermediaries who send them patients").

[7] *See* I. Glenn Cohen, *Medical Tourism, Access to Health Care, and Global Justice*, 52 VA. J. INT'L L. 1, 36 (2011).

have each developed guidelines that make it easier for consumers to identify and understand key points, these guidelines are simply guidelines and do not adequately aid in protecting consumers. The AMA and WMA need a counterpart to establish regulations based on their established guidelines.

The Federal Trade Commission (FTC) is a regulatory agency whose function includes establishing consumer protection regulations, including curbing deceptive advertisements.[8] Specifically, the Federal Trade Commission Act states that "unfair or deceptive acts in or affecting commerce" are unlawful.[9] Deceptive acts that hinder the average consumer from obtaining all the relevant facts needed to make an informed decision.[10]In other words, deceptive acts include those actions which are not disclosed or "hidden" from the consumer.

The FTC must regulate the way in which medical tourism is advertised. Specifically, the FTC must create regulations that require *all pertinent* information to be disclosed, including the positives, benefits and risks, to prospective consumers. Pertinent information should include: cost, success rates, hospital or medical clinic accreditation information, procedure risks, and post-care. Further, the FTC must restrict medical tourism to JCI-accredited facilities through strict regulation of U.S.-based advertising. These regulations can be accomplished because the FTC has the legal authority to make such a regulation, JCI-accredited organizations have a higher quality of care, and JCI-accredited organizations are more trusted by leading local and international health organizations.

This note will examine the reasons why U.S.-based advertising must work hand-in-hand with the FTC to ensure that prospective consumers of medical tourism are informed before embarking on their journey. Specifically, this note does not advocate for a total ban on medical tourism, but rather advocates for regulations to ensure patient safety. Indeed, medical tourism is needed to ensure equal access to healthcare and to allow for patient autonomy. Section II explores the background of medical tourism, including the advantages, and the role of the Joint Commission International ("JCI"). Section III analyzes the value of JCI-accreditation by examining various studies conducted on the benefit of JCI accreditation. These studies show that JCI accreditation positively correlates with key performance indicators. This section also discusses the various shortcomings of JCI accreditation, but overall concludes that JCI

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[8] Browne, *supra* note 3, at 348.
[9] 15 U.S.C. § 45(a)(1).
[10] *See* Browne, *supra* note 3, at 348-349.

accreditation is a *better* alternative than the absence of any protection. Section IV provides the legal framework that makes regulating medical tourism possible. Mainly, this section recognizes that while the FTC has not regulated medical tourism in the past, the FTC has the legal authority to do so based on previous regulations in analogous fields. Section V discusses how the U.S. utilizes international regulatory bodies. Section VI discusses the trustworthiness of the JCI. Lastly, Section VII concludes that the FTC must limit medical tourism to only accredited international facilities.

I. BACKGROUND

"I've not yet had a patient with zero options, but this is as close as I've had."[11]

That was the shock expressed by an infectious disease doctor when learning of the horror Ms. Capone experienced. She thought she was making a "smart call" by traveling to Mexico for bariatric surgery, since the surgery in Tijuana would only cost $4,000, compared to $17,500 in Arkansas.[12] Upon returning to Arkansas, Ms. Capone developed a rare and potentially deadly strain of bacteria resistant to virtually all antibiotics. Yet, she wasn't alone. She was one of at least a dozen U.S. residents who returned from surgeries in Tijuana with this deadly bacterium, with eight of the infections occurring at a single hospital.[13]

In the United States, medicine is one of the most heavily regulated fields. Every patient interaction, every healthcare decision, and every stitch must comply with some regulation. However, medical tourism invariably escapes this regulation, allowing prospective patients to travel elsewhere at their own risk.[14] Many factors have contributed to the dramatic rise of the industry, including, but not limited to, cost savings, availability of treatments, and cultural preferences.

Patients who cannot afford or are ineligible for procedures in their home country travel internationally to level the playing field—to have

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[11] Lena H. Sun, *They Went to Mexico for Surgery. They CameBback with a Deadly Superbug,* WASH. POST, (Jan. 23, 2019, 6:00 AM). https://www.washingtonpost.com/national/health-science/they-went-to-mexico-for-surgery-they-came-back-with-a-deadly-superbug/2019/01/23/ac0ca280-1dcb-11e9-9145-3f74070bbdb9_story.html.

[12] *Id.*

[13] *Id.*

[14] *See* Parsiyar, *supra* note 1, at 391 ("The level of standardization that exists in the United States does not exist in the rest of the world, and there is currently not a sufficient system in place to guide people through determining where good medical care exists").

access to affordable healthcare.[15] Additionally, other patients may travel internationally to undergo procedures labeled as "unapproved" or "experimental" in their home countries.[16] Patients may also feel inclined to travel internationally for cultural comfort, preferring providers who share the same cultural beliefs and language.

A. Medical Tourism from a Bird's Eye View

The exact number of patients traveling abroad for treatment is unknown, but the overall trend continues to climb upwards.[17] In 2007, approximately 750,000 American patients traveled abroad for medical treatment.[18] In 2017, that estimate roughly doubled, with more than 1.4 million American patients traveling abroad for medical treatment.[19] The trajectory is expected to continue to rise, with cost being a major contributing factor. Specifically, more Americans have become medical tourists to combat the expensive nature of U.S. healthcare, with treatments being available at 30-65% of the cost of care in the U.S.[20]

According to *Patients Beyond Borders*, the most current average range of savings, using U.S. costs as a benchmark, include: 20-30% in Brazil, 45-65% in Costa Rica, 65-90% in India, 45-60% in Mexico, 50-75% in Thailand, and 50-65% in Turkey.[21] The savings are even more profound when examined on a procedure-to-procedure basis. By one estimate, a heart bypass surgery has a U.S. retail cost of $210,842, compared with $10,000, $12,000, and $20,000 in India, Thailand, and Singapore, respectively.[22] While these estimates may provide a broad overview of the types of savings

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[15] Tamara L. Hill, Comment, *The Spread of Antibiotic-Resistant Bacteria through Medical Tourism and Transmission Prevention Under the International Health Regulations,* 12 CHI. J. INT'L L. 273, 279 (2011).

[16] *Id.*

[17] *Id.*

[18] *Id.* at 279-30.

[19] James E. Dalen & Joseph S. Alpert, *Medical Tourists: Incoming and Outgoing,* 132 AM. J. OF MED. 9, 9 (2019).

[20] *Id.*

[21] Patients Beyond Borders, https://www.patientsbeyondborders.com/media (last visited Nov. 5, 2022).

[22] I. Glenn Cohen, *Protecting Patients with Passports: Medical Tourism and the Patient-Protective Argument,* 95 IOWA L. REV. 1467, 1473 (2010) (stating that these estimates are based on a 2007 report from the National Center for Policy Analysis; though current estimates are not provided, it may be reasonably inferred that since medical tourism has dramatically increased since the date of the report in 2007, the prices of common procedures most likely have not significantly changed).

possible, consider the following case study of U.S. medical tourists, as described in a recent New York Times article.

Ms. Jackson laid curled up, unable to move due to the excruciating and debilitating pain.[23] This, however, was not a one-off occurrence. Instead, it was the sixth consecutive week that Ms. Jackson was unable to work.[24] As her symptoms worsened and her options dimmed, Ms. Jackson began exploring options for medical tourism. She needed a hysterectomy to "free [herself] from pain" caused by endometriosis.[25] "As if the surgery isn't bad enough, I need to find $20,000 bucks to pay for it," she said.[26] Faced with uncertainty, Ms. Jackson started to plan a trip to Mexicali, Mexico, where the same procedure was available for $4,000, one-fifth the cost of the same procedure she was offered in New Jersey.[27] Ms. Jackson was not alone.

The same was equally true for dental treatment. For example, take the case of Mr. Somerville, who traveled to Los Algodones, Mexico to get his crowns replaced, a procedure that cost him $7,000, compared to $25,000 in Florida.[28]

Cost aside, medical tourism raises issues concerning quality, standards, and acceptability of care. Overshadowed by the surge of the industry, adverse side effects may arise, and at times, be more dangerous. Risks include susceptibility to antibiotic-resistant bacteria, infectious diseases, lower quality of care, lack of a continuum of care, and language barriers. Given the risks, the AMA established guidelines to best combat the risks and called for more public awareness. The guidelines include:

(1) Medical care outside of the U.S. must be voluntary;[29]

(2) Financial incentives to travel outside the U.S. for medical care should not inappropriately limit the diagnostic and therapeutic

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[23] Ceylan Yeginsu, *Why Medical Tourism is Drawing Patients, Even in a Pandemic,* N.Y. TIMES, https://www.nytimes.com/2021/01/19/travel/medical-tourism-coronavirus-pandemic.html (Jan. 19, 2021).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Am. Med. Assoc., *New AMA Guidelines on Medical Tourism*, http://www.medretreat.com/templates/UserFiles/Documents/Whitepapers/AMAGuidelines.pdf (last visited Nov. 11, 2022) [hereinafter AMA Guidelines].

> alternatives that are offered to patients, or restrict treatment or referral options;[30]
>
> (3) Patients should only be referred for medical care to institutions that have been accredited by recognized international accrediting bodies (e.g., the Joint Commission International or the International Society for Quality in Health Care);[31]
>
> (4) Access to physician licensing and outcome data, as well as facility accreditation and outcomes data, should be arranged for patients seeking medical care outside the U.S.[32]

Though not an exclusive exhaustive list, the guidelines provide and emphasize patient safety, all while noting the importance and need for medical tourism.

Despite the risks associated with medical tourism, this industry is needed because its benefits maintain and provide individuals with essential medical care. Organizations and agencies such as the JCI and the FTC are crucial for maximizing and ensuring patient safety.

B. The Joint Commission International

Patient safety is the foremost factor in regulating medical tourism. Currently, no authoritative accreditation body for international healthcare exists.[33] In the U.S., the Joint Commission provides certification and licensing of hospitals and sets standards that hold the medical staff to a higher level of responsibility.[34] Although Joint Commission accreditation is not required for licensing in the United States, Joint Commission accreditation indicates that the hospital "meets at least minimum acceptable standards of care as recognized by the federal government and most states."[35] The certification process improves the quality of patient care by reducing variation, providing a framework for disease management, and promoting a "culture of excellence."[36]

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[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Hill, *supra* note 15, at 281.

[34] Browne, *supra* note 3, at 333 ("Today, the Joint Commission accredits eighty-eight percent of the nation's hospitals.").

[35] *Id.*

[36] *Benefits of Joint Commission International*, WOLTERS KLUWER, https://www.wolterskluwer.com/en/expert-insights/benefits-of-joint-commission-accreditation (Apr. 14, 2017).

Internationally, the JCI operates in the same manner as the Joint Commission in the U.S. The JCI is a non-profit international organization that accredits and certifies healthcare organizations and programs across the globe.[37] JCI standards extend beyond hospitals, including ambulatory care centers, clinics, home care, laboratories, and medical transport organizations.[38] The JCI maintains its best practices and upkeep of international standards through its Standards Advisory Panel, which consists of physicians, nurses, and public policy experts from Latin America, Asia, the Middle East, Europe, and the United States.[39] As in the U.S., JCI accreditation "generally signals that a facility meets the minimum standards of competence and quality."[40]

In order to achieve JCI accreditation status, "the hospital must achieve the requisite score on JCI's six patient goals and its more than 100 standards."[41] JCI accreditation lasts three years, at which point the organization is again fully evaluated.[42] Currently, there are more than 250 JCI-accredited hospitals outside the U.S., in countries like India, Thailand, Singapore, China, and Saudi Arabia, with many more accredited clinics, ambulatory centers, and home care centers.[43]

The benefits of JCI-accreditation are two-fold. First, JCI standards for quality and care are comparable with their U.S. counterparts. JCI developed the International Patient Safety Goals as a means of "helping accredited organizations address specific areas of concern on some of the most problematic areas of patient safety."[44] The JCI describes its International Patient Safety Goals as: identifying patients correctly; improving effective communication; improving the safety of high-alert medications; ensuring safe surgery; reducing the risk of healthcare-associated infections; and reducing the risk of patient harm resulting from falls.[45]

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[37] THE JOINT COMM'N INT'L, https://www.jointcommissioninternational.org/about-jci/who-we-are/ (last visited Oct. 23, 2022).

[38] *Id.*

[39] *Id.*

[40] Browne, *supra* note 3, at 338.

[41] Cohen, *supra* note 22, at 1485.

[42] *Id.*

[43] *Id.*

[44] THE JOINT COMM'N INT'L, INTERNATIONAL *Patient Safety Goals*, https://www.jointcommissioninternational.org/standards/international-patient-safety-goals/ (last visited Nov. 12, 2022).

[45] *Id.*

Similarly, in the U.S., the Joint Commission publishes the National Patient Safety Goals, which include identifying patients correctly, improving staff communication, using medicines safely, preventing infections, and identifying patient safety risks.[46] The JCI and the Joint Commission base their accreditation standards on closely resembling safety goals, further signifying the hope that the care one receives internationally will closely resemble the "American model" of healthcare.

The second benefit of JCI-accreditation is that JCI-accreditation is advocated by the AMA. Specifically, the AMA advocates that "patients should only be referred for medical care to institutions that have been accredited by recognized international accrediting bodies (e.g., the Joint Commission International or the International Society for Quality in Health Care)."[47] Yet, through its guidelines, the AMA does not have any regulatory power to regulate medical tourism. A regulatory authority is needed, such as the FTC.

II. VALUE OF JCI-ACCREDITATION

All medical treatments and interventions carry the risk of complications. Yet, medical tourism invariably increases the likelihood of contracting a serious, medical complication. Data on clinical outcomes associated with medical travel is rather limited. On the one hand, patients may travel abroad and receive professional, timely, affordable, and high-quality health care.[48] On the other hand, patients may receive the exact opposite. Evidence suggests that "poorer outcomes are attributable to substandard surgical care," infections arising from "inadequate infection control measures in surgical settings, deep vein thrombosis," and "inadequate post operative care following departure from the treating facility."[49] Given the potentiality for serious complications, oversight and regulations, such as JCI accreditation, must be adopted. Though not perfect, JCI-accreditation would help reduce the risk of serious complications by standardizing healthcare delivery.

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[46] THE JOINT COMM'N, *Hospital National Safety Goals* (2022), https://www.jointcommission.org/-/media/tjc/documents/standards/national-patient-safety-goals/2022/simple_2022-hap-npsg-goals-101921.pdf.

[47] New AMA Guidelines on Medical Tourism, *supra* note 20.

[48] Leigh G. Turner, *Quality in Health Care and Globalization of Health Services: Accreditation and Regulatory Oversight of Medical Tourism Companies,* 23 INT'L J. FOR QUALITY IN HEALTH CARE 1, 2 (2010).

[49] *Id.*

Destination hospitals often boast their JCI accreditation to attract patients from around the world. JCI-accreditation is preferred since it effectively suggests that the hospital has earned the same rigorous accreditation as hospitals in the U.S. aim for and, therefore, just as reliable.[50] Further, to maintain accreditation, hospitals must consent to rigorous evaluation by the JCI review board every three years.[51]

Accreditation has often been viewed as an accurate marker of quality, and several international healthcare organizations have "discussed the effectiveness of using accreditation as a tool to enhance organizational and clinical performance."[52] However, the literature remains scarce.[53] In a literature review assessing seventy-six studies concerning the relationship between accreditation status and quality of care, the most studied scheme of accreditation was the JCI approach.[54] Of the studies examining hospital accreditation's impact on patient outcomes, the results showed a clear positive trend between accreditation and clinical outcomes.[55]

One of these studies examined the impact of JCI-accreditation on infectious control performance in a Dubai Hospital. The study examined the following four variables, before and after JCI-accreditation to evaluate their impact: ventilator assisted pneumonia (VAP), central line associated bloodstream infection (CLABSI), catheter associated urinary tract infection (CAUTI), and surgical site infection (SSI).[56] For VAP, pre-accreditation showed "no significant month-to-month decline."[57] However, after accreditation, the rate of VAP dropped significantly by 1.7% per month.[58] For CLABSI, pre-accreditation showed a significant month-to-month decline, but post-accreditation, the rate of CLABSI dropped significantly *immediately* after accreditation.[59] Similarly, for CAUTI, pre-accreditation showed a significant month-to-month decrease, yet after accreditation, a

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[50] Levi Burkett, *Medical Tourism: Concerns, Benefits, and the American Legal Perspective,* 28 J. LEGAL MED. 223, 230 (2007).

[51] Parsiyar, *supra* note 1, at 388.

[52] Mohammed Hussein et al., *The Impact of Hospital Accreditation on the Quality of Healthcare: A Systematic Literature Review,* 21 BMC HEALTH SERV. RSCH. 1, 2 (2021).

[53] *Id.*

[54] *Id.* at 4.

[55] *Id.* at 6.

[56] Fatima Mahmoud Salim & Mohammad Rahman, *The Impact of Joint Commission International Healthcare Accreditation on Infection Control Performance: A Study in Dubai Hospital*, 5 GLOB. J. OF BUS. & SOC. SCI. REV. 37, 40 (2017).

[57] *Id*. at 41.

[58] *Id.*

[59] *Id.*

significant increase in CAUTI.[60] This increase was likely due to the identification of more infections due to further developed processes and standards post-accreditation, rather than deficiencies in JCI-accreditation.[61] Lastly, for SSI, there was a month-to-month increase pre-accreditation, but immediately post-accreditation, the rate of SSI decreased by half a percent per month.[62]

Another similar study was conducted in Saudi Arabia, which ranks second on the list of countries with the highest number of JCI-accredited organizations.[63] At King Fahd Hospital of the University (KFHU), a mixed-methods approach was used to determine the efficacy of JCI-accreditation in improving quality at KFHU, as well as to investigate the perceptions of the healthcare providers of the accreditation process.[64] The first leg of the study assessed the impact of JCI-accreditation on twelve key performance indicators.[65] These indicators included: hand hygiene compliance, rate of hospital-acquired infections, patient identification, radiology reporting, lab reporting, pressure ulcer, operating room cancellations, patients leaving the emergency room without being seen, mortality rate, patient falls, length of stay, and bed occupancy.[66] The results of the study indicated that:

> Nine out of [twelve] outcomes were improved throughout the accreditation process. The outcomes that did not improve after the accreditation process included the rate of patients who left the [emergency room] without being seen, the percentage of [operating room] cancellations, and the rate of patient falls, which had both immediate and lagged increases.[67]

More specifically, in the three years following the accreditation survey, there was a statistically significant monthly improvement in hand hygiene compliance, pressure ulcer rate, and mortality rate.[68]

In the second leg of the study, which measured the attitudes and perceptions of health professionals towards the accreditation process, "all the participants interviewed had an overall positive perception of the JCI-

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[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] Deema Al Shawan, *The Effectiveness of the Joint Commission International Accreditation in Improving Quality at King Fahd University Hospital, Saudi Arabia: A Mixed Methods Approach*, 13 J. HEALTHCARE LEADERSHIP 47, 48 (2021).

[64] *Id.* at 48.

[65] *Id.*

[66] *Id.* at 49.

[67] *Id.* at 52.

[68] *Id.*

accreditation process."[69] Some themes included: improvement of training and education at the hospital, improvements in quality outcomes, such as reduction of medication errors, and improved processes, policies, and procedures.[70] Overall, this study demonstrated the improvements of health services and patient safety offered through JCI-accreditation procedures.[71]

The Dubai and Saudi Arabia studies illustrate that while results are not definitive, the JCI-accreditation process possesses potential benefits. It is uncontested that JCI standards are not a one-size-fits-all solution to regulating medical tourism, and inherently possess certain disadvantages. However, requiring JCI-accreditation is a better, and more advantageous option to having no regulation at all.

Nonetheless, JCI standards also present challenges. One of the biggest shortcomings of JCI-accreditation is that it is not required for hospitals, only highly advised. While accreditation has become a "de facto" industry standard, accreditation is entirely voluntary.[72] Hospitals and other organizations are not required to apply, and many do not, because of the feasibility of the process itself.[73] The process to become JCI-accredited lacks appeal as it takes most hospitals eighteen to twenty-four months and costs about $30,000 to complete.[74] Another concern involves the quality of the JCI reviews. In assessing foreign healthcare facilities, it is very difficult to evaluate the quality of practitioners and the quality of facilities from outside the country.[75]

However, JCI-accreditation still remains the *better* alternative for regulating the industry. Hospitals and other facilities that attract medical tourists have reputational incentives to comply with these standards, and a loss of accreditation can lead to catastrophic effects.[76] As a result, nearly a thousand healthcare organizations, including hundreds of foreign hospitals, meet international quality standards, not because they are required to do so

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[69] *Id.* at 55.

[70] *Id.*

[71] *Id.* at 58.

[72] Nathan Cortez, *Into the Void: The Legal Ambiguities of an Unregulated Medical Tourism Market, in* RISKS AND CHALLENGES IN MEDICAL TOURISM: UNDERSTANDING THE GLOBAL MARKET FOR HEALTH SERVICES 187, 197 (Jill Hodges ed., 2012).

[73] Parsiyar, *supra* note 1, at 391; *see also* Jennifer Wolff, *Passport to Cheaper Health Care,* https://www.goodhousekeeping.com/health/a17363/cheaper-health-care-1007/ (Aug. 20, 2007).

[74] Parsiyar, *supra* note 1, at 391.

[75] Wolff, *supra* note 73.

[76] Cortez, *supra* note 72, at 197.

by law, but because of competitive pressures that have made accreditation an expectation.[77]

III. THE FTC HAS LEGAL AUTHORITY TO REGULATE MEDICAL TOURISM

Broadly speaking, the FTC is a regulatory agency established for the purpose of "protecting the public from deceptive or unfair business practices" through the use of "law enforcement, advocacy, research, and education."[78] The FTC Act provides that "unfair or deceptive acts in or affecting commerce" are unlawful.[79] Further, "unfair or deceptive acts" include acts involving foreign commerce that cause or are likely to cause foreseeable injury within the United States.[80] "Deceptive," as used in the statute, includes any omission likely to mislead a consumer, acting reasonably, under the circumstances.[81] More relevant, however, is unfairness, which is defined as any "practice that causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[82]

Medical tourism fits into this definition. Although controlling the "travel" aspect of medical tourism is likely not feasible, it is imperative that the FTC regulate the initial step—the advertising. Medical tourism is a part of foreign commerce because U.S. consumers travel internationally for the purpose of "purchasing" healthcare, and that commerce is likely to cause foreseeable injury within the U.S. because the risks and adverse side effects would be treated stateside.

False advertising, as defined by the FTC Act means:

> An advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the *advertisement fails to*

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[77] *Id.*; *see also* The Joint Commission International, *supra* note 28.

[78] *Mission,* FEDERAL TRADE COMMISSION, https://www.ftc.gov/about-ftc/mission (last visited Nov. 4, 2022).

[79] 15 U.S.C. § 45(a)(1).

[80] 15 U.S.C. § 45(a)(4)(A).

[81] *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FEDERAL TRADE COMMISSION, https://www.ftc.gov/about-ftc/mission/enforcement-authority (May 2021).

[82] 15 U.S.C. § 45(n).

> *reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement*, or under such conditions as are customary or usual.[83]

For example, a quick Google search for "medical tourism in Mexico" yields the following: Medical Tourism Corporation—"medical tourism in Mexico can help you save up to 80%. You can enjoy an exotic vacation and top notch medical services at safe locations in Mexico."[84] It continues, "with its colors and beaches, Mexico offers a great vacation stay!"[85] The website does caution that "one may want to research more," but provides statistics and factors that do not even mention the possibilities of risks or adverse side-effects.[86] Most striking, the Medical Tourism Corporation claims that "most Mexican cities have at least one world-class hospital," and although the claim may be true, it is misleading, as defined by the FTC.[87]

The FTC must mandate that advertisers of medical tourism place consumer protection at the forefront by only allowing JCI-accredited hospitals to be advertised to prospective consumers. Mexico currently has eight JCI-accredited hospitals.[88] While the Medical Tourism Corporation's claim may be true, it misleads consumers into thinking that all the "world-class" hospitals have similar accreditation standards, when in reality, the claim is likely false.[89] Mandating U.S. medical tourism agencies to advertise only JCI-accredited organizations would protect consumers from their compulsive decision-making tendencies, which are inherently aided by prospects of a vacation and top-notch medical services.[90]

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[83] 15 U.S.C. § 55(a)(1)(emphasis added).

[84] Med. Tourism Corp., *Medical Tourism in Mexico*, https://www.medicaltourismco.com/medical-tourism-in-mexico/ (last visited Nov. 6, 2022).

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] JOINT COMM'N INT'L, *Search for JCI-Accredited Organizations,* https://www.jointcommissioninternational.org/who-we-are/accredited-organizations/#sort=%40aoname%20ascending&f:@aocountry=[Mexico] (last visited Oct. 23, 2023).

[89] *See* Browne, *supra* note 3, at 349 (discussing how to determine if an advertisement is deceptive, as defined by the FTC; stating that the three elements include: (1) there was a representation; (2) the representation was likely to mislead customers acting reasonably under the circumstances; and (3) representation was material).

[90] Browne, *supra* note 3, at 348; Burkett, *supra* note 41.

A second example of "deceptive" advertising is *Healthtourism.com* – "medical tourism made simple."[91] Somewhat better, this website does mention that Mexico has nine JCI-accredited hospitals and clinics, yet this benefit is hidden from consumers.[92] The site allows consumers to filter healthcare facilities based on specialty or procedure, to which all hospitals and clinics appear, with no mention of the JCI-accredited facilities.

To combat deceptive advertising, the World Medical Association (WMA) recommended at the sixty-ninth WMA General Assembly that:

> Advertising for medical tourism services, whether via the internet or in any other manner, should comply with accepted principles of medical ethics and include detailed information regarding the services provided. Information should address the service provider's areas of specialty, the physicians to whom it refers the benefits of its services, and the risks that may accompany medical tourism. *Access to licensing/accreditation status of physicians and facilities and the facility's outcomes data should be made readily available.* Advertising material should note that all medical treatment carries risks and specific additional risks may apply in the context of medical tourism.[93]

Specifically, the WMA noted the importance of regulation and accreditation and the guidelines for how they should be advertised to consumers. The FTC has the legal authority to follow through on the WMA's recommendation and make it a requirement in the U.S.

More simply, the FTC has legal authority. Guidelines from the AMA and WMA already exist and emphasize the importance of consumer protection and the need for informed detailed information. The AMA and WMA do not have the authority to regulate based on these guidelines because, as is, they are simply guidelines and lack governmental authority. However, the FTC must work with the AMA and WMA to transform the guidelines into something more concrete; a regulation that provides consumer protection and allows for informed decisions to be made, all while noting the importance of the medical tourism industry.

Although the FTC does not have specific regulations in place targeting the medical tourism industry, the agency has regulated consumer safety and

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[91] Health-Tourism.com, *Medical Tourism to Mexico,* https://www.health-tourism.com/medical-tourism-mexico/ (last visited Nov. 6, 2022).

[92] *Id.* (emphasis added).

[93] WORLD MED. ASS'N [WMA] General Assembly, *WMA Statement on Medical Tourism*, ¶ 26 (Oct. 8, 2018), https://www.wma.net/policies-post/wma-statement-on-medical-tourism/#:~:text=Medical%20tourism%20must%20not%20promote,to%20treat%20the%20local%20population [hereinafter WMA Statement].

protection in analogous situations, including the tobacco industry, the prescription eyeglass industry, and, more recently, in issues surrounding COVID-19.

A. Tobacco

The FTC's regulation of the tobacco industry is a good example of how the FTC regulated advertising by expressly requiring that certain types of information be readily available and provided to consumers. Examining the FTC's regulation of other products and services may provide needed insight into whether regulation of medical tourism applies to modern legal norms and within the FTC's authority.[94] Arguably, the most important consumer protection regulation issued by the FTC is regulation in the tobacco industry. In 1964, the Surgeon General of the United States released *Smoking and Health: Report of the Advisory Committee of the Surgeon General of the Public Health Service*.[95] This report was the first of its kind, outlining the addictive, detrimental, and carcinogenic effects of tobacco.[96] The report was the topic of news headlines across the country, rated by USA Today as one of the top news stories of the twentieth century, and most importantly, it initiated the change in public perception and attitude towards smoking.[97]

In response, Congress began to impose strict regulations on the advertising of tobacco products. The Federal Cigarette Labeling and Advertising Act of 1965 made health warnings on cigarette packages mandatory.[98] In 1986, Congress passed the Comprehensive Smokeless Tobacco Health Education Act of 1986, which required a program to be established to "inform the public of any dangers to human health resulting from the use of smokeless tobacco products."[99] The FTC required manufacturers, packagers, and importers of smokeless tobacco products to place health-related warning labels on product packages and in

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[94] Browne, *supra* note 3, at 351.

[95] U.S. DEP'T OF HEALTH AND HUM. SERV., THE HEALTH CONSEQUENCES OF SMOKING- 50 YEARS OF PROGRESS. A REPORT OF THE SURGEON GENERAL 3 (2014), https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf.

[96] *Id.*

[97] *Id.*

[98] *Id.; see also* Browne, *supra* note 3, at 352.

[99] Comprehensive Smokeless Tobacco Health Education Act of 1986, S. 1574, 99th Cong. § 2(a) (1986).

advertisements.[100] Additionally, the act prohibited the advertising of smokeless tobacco products on radio, television, or other media.[101]

The Act did not eliminate tobacco products, but rather implemented regulations to protect public health better. Further, what began as a campaign to promote fair advertising by cigarette companies transformed into more transparent warnings, allowing consumers to make more informed choices regarding tobacco products.[102]

Medical tourism is similar in the sense that the industry should not be eliminated, but only better regulated to allow consumers to make more informed choices regarding their health, including when, where, and how they receive needed treatment. Medical tourism is essential since it allows people the opportunity to receive medical care and treatment that they otherwise would not be able to receive.[103] Before the Surgeon General's report, tobacco was historically regarded as medicinal and beneficial for health.[104] As more information about the risks of tobacco became known, the FTC began to regulate and control who had access to and what information must be available to the average consumer.

Similarly, medical tourism agencies hide adverse side effects and potential turn-offs from the consumer.[105] Medical tourism resources, such as Medical Tourism Corporation and Healthtourism.com, provide a one-sided view of the industry. By advertising sunny beaches and discounted low prices, the advertisements encourage consumers to overlook negative effects and lead to foreseeable injury.[106] The FTC must take a lesson from the regulation of the 1986 Act and limit medical tourism advertising to only JCI-accredited facilities to best protect consumer safety. Additionally, the FTC must regulate that *all pertinent* information is readily apparent to the average consumer before making an informed decision.

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[100] S. 1574 § 3(a)(1).

[101] S. 1574 § 3(a)(2).

[102] Browne, *supra* note 3, at 352-53.

[103] Parsiyar, *supra* note 1, at 386-387. ("It is a viable option for underinsured or noninsured Americans who do not have access to or simply do not want to use state, federal, or charitable programs or personal contributions. . . .the lower cost may mean the difference between life and death for those who are uninsured or underinsured.")

[104] Browne, *supra* note 3, at 353.

[105] *Id.*

[106] *Id.* at 353-54.

B. Contact Lens Rule

The FTC's regulation in the Contact Lens Rule is another example where the FTC has exercised its authority in the health field by requiring affirmative notice to consumers of contact lenses.[107] The Contact Lens Rule requires prescribers to give patients a copy of their contact lens prescriptions at the end of a contact lens fitting, *even if the patient doesn't ask for it.*[108] Further, the Rule places restrictions on "any person who engages in the manufacturing, processing, assembly, sale, offering for sale, or distribution of contact lenses" by not allowing representations "by advertisement, that contact lenses may be obtained without a prescription."[109]

Emphasized in the rule is the patient notice, which invariably heightens consumer safety and provides them with the information needed to make an informed decision. Similarly, the FTC must mandate and emphasize notice in medical tourism to allow prospective consumers to make informed decisions about their healthcare needs. Under the same approach, U.S.-based medical tourism agencies must provide readily accessible, not hidden, information about *all* benefits and risks, including JCI-accredited facilities, *even if the consumer doesn't ask for it.* In other words, the information must be made so readily apparent that the consumer would have no choice but to look at it. This would further the FTC's goal of consumer protection and curbing deceptive advertisements.

C. COVID-19

The COVID-19 pandemic is a strong example of how the FTC can rapidly respond to ongoing events by readily creating regulations that protect the public at large. Specifically, the FTC has worked to protect consumers from scams and frauds related to the pandemic. An April 2021 staff report noted that "one of the FTC's strengths is the ability to anticipate and respond to current events and the predatory behavior that capitalizes on those events."[110] As a result of the pandemic, the world shifted more digital,

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[107] *See generally* 16 C.F.R. § 315.3 (2023).

[108] Availability of Contact Lens Prescriptions to Patients, 16 C.F.R. § 315.3 (a)(1) (2023).

[109] Content of Advertisements and Other Representations, 16 C.F.R. § 315.7 (2023).

[110] STAFF REPORT, FED. TRADE COMM'N, PROTECTING CONSUMERS DURING THE COVID-19 PANDEMIC: A YEAR IN REVIEW 1 (2021),

enabling marketers to make deceptive COVID-19 claims, and schemes proliferated to exploit people's financial situations.[111] The emergence of the pandemic illustrated the ways in which the FTC worked to address consumer protection: "[t]he Commission developed systems to track and alert the public to shifts in reports from consumers, launched a public dashboard providing information on reports associated with COVID-19, and used COVID-related reports to identify law enforcement targets."[112]

The FTC's COVID-19 response is the most illustrative on how the FTC can work to regulate medical tourism. The FTC is a fluid agency with the ability to respond to current events. As such, the FTC has the legal authority to respond to medical tourism issues. More importantly, the pandemic illustrated the FTC's ability to educate the general public in real time. For example, "[t]he FTC. . .reached out to the business community, warning of COVID-related frauds even before the ramifications of the pandemic were widely recognized."[113] The FTC has the legal authority to reach out to U.S.-based medical tourism agencies to mandate that all pertinent benefits and harms are displayed to potential consumers, as well as to require that only JCI-accredited facilities are used.[114]

IV. INTERNATIONAL REGULATION

U.S. regulatory agencies will sometimes rely on international regulatory bodies to assist in regulating what the U.S. may not reach alone. The FTC should use the JCI in the same fashion—to assist in regulating international healthcare facilities for U.S. domestic marketing regulation. One example is from the Federal Aviation Administration's (FAA) International Aviation Safety Assessment Program (IASA).[115]

Under the IASA program, the FAA determines whether another country's oversight of its air carriers that operate or seek to operate, in the U.S. comply with safety standards established by the International Civil Aviation Organization (ICAO).[116] Countries are categorized as either

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https://www.ftc.gov/system/files/documents/reports/protecting-consumers-during-covid-19-pandemic-year-review/covid_staff_report_final_419_0.pdf.

[111] *Id.*

[112] *Id.* at 2.

[113] *Id.* at 11.

[114] *See generally* Browne, *supra* note 3, at 348-349.

[115] *International Aviation Safety Assessment Program*, FED. AVIATION ADMIN., https://www.faa.gov/sites/faa.gov/files/about/initiatives/iasa/FAA_Initiatives_IASA.pdf (Nov. 11, 2022).

[116] *Id.*

Category 1—the country meets ICAO standards and thus, permitted to operate in the U.S.; or Category 2—the country does not meet the ICAO standards and thus is prohibited from initiating commercial service into the U.S. [117] However, it may be allowed with certain restrictions.

In conducting the IASA assessments, the program administrators focus on compliance with eight critical elements of safety oversight, established by the ICAO.[118] An in-country assessment is conducted over the course of one week by a specially trained IASA team consisting of a team leader, at least one aviation safety inspector, and an FAA international aviation law attorney, after which a determination of a country's category is published.[119] Category 1 countries meet ICAO standards for each of the eight critical elements, while Category 2 countries are noncompliant with at least one critical element.[120]

Another example of the U.S.'s ability to regulate and monitor foreign conduct is through the Federal Drug Administration's (FDA) inspections of foreign drug manufacturing facilities. Drugs sold in the U.S. are manufactured throughout the world, with an estimated 60% of manufacturing occurring internationally.[121] As such, increased scrutiny and regulation are needed to ensure that drugs manufactured overseas meet the same statutory and regulatory requirements as in the U.S.[122] The FDA's Office of Regulatory Affairs (ORA) inspects both domestic and foreign establishments to "ensure that drugs are produced in conformance with applicable laws of the U.S."[123] The FDA generally conducts three main types of drug manufacturing establishment inspections: preapproval inspections, surveillance inspections, and for-cause inspections.[124]

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[117] *See id.*

[118] FED. AVIATION ADMIN., *supra* note 102 (stating that the eight critical elements include: primary aviation legislation; specific operating regulations; state civil aviation system and safety oversight functions; technical personnel qualification and training; technical guidance; licensing, certification, authorization, and approval obligations; surveillance obligations; and resolution of safety concerns).

[119] *Id.*

[120] *Id.*

[121] *Challenges for FDA with Foreign Inspections* (Feb. 2, 2020), https://www.pharmatutor.org/articles/challenges-for-food-and-drug-administration-with-foreign-inspections.

[122] *Id.*

[123] *Id.*

[124] *Id.* (stating that preapproval inspections are designed to verify the accuracy and authenticity of drug application data, in connection with a new brand name or generic drug to be marketed in the U.S.; surveillance inspections focus on drugs already marketed in the U.S., and

ORA investigators, who are assigned to and live in countries where the FDA has foreign offices, conduct the process to determine whether a foreign drug manufacturing facility complies with FDA requirements. During the investigation, "ORA investigators are responsible for identifying any significant objectionable conditions and practices and reporting these to the [foreign] establishment's management."[125] Additionally, the investigators suggest that management directly communicates with the FDA regarding any concerns stemming from the investigative process.

Based on their findings, ORA investigators categorize the establishments based on three classifications: no action indicated (NAI); voluntary action indicated (VAI); and official action indicated (OAI).[126] Foreign establishments that are classified as OAI are those where the ORA identified serious deficiencies. Such facilities may then be subject to regulatory action, such as issuing warning letters, which puts not only the establishment on notice, but also the U.S. supplier.[127]

In relation to medical tourism, the FTC has the authority and support to regulate and manage both domestic and foreign conduct. The JCI contains panel members who guide the development and revision process of the accreditation standards and includes members from the U.S., which invariably increases the likelihood of conformity with U.S. standards, such as in the FAA and FDA arenas.

V. JCI-ACCREDITED FACILITIES ARE MORE TRUSTED

The World Health Organization (WHO) has long recognized a need for accrediting foreign bodies to ensure healthcare safety, but has stopped short of advocating for a single, specific standard.[128] Rather, the WHO collaborates with the JCI to promote patient safety standards.[129] One such example of the collaboration between the WHO and JCI was the High 5s Project.

The High 5s Project was launched in 2007 as a global safety initiative to "facilitate the development, implementation, and evaluation of [standard operating protocols] that were developed to address known patient safety

inspection focuses on compliance with safety goals in manufacturing; for-cause inspections are conducted to investigate specific issues).

[125] *Id.*

[126] *Id.* (stating that NAI classification is analogous to Category 1 in the ICAO classification.)

[127] *Id.*

[128] Hill, *supra* note 15, at 281.

[129] *Id.* at 281-82.

problems."[130] More simply stated, the project sought to develop standardized interventions that could be applied in any hospital in any country.[131] In healthcare, standardization is key, as differences in care can result in worse clinical outcomes.[132] The project further noted that:

> [s]tandardization can be seen as enhancing the portability of expertise, irrespective of the country, the facility or the health care worker implementing the protocol. The standardization of hospital processes should enable trained health care workers to perform effectively in any facility in the world.[133]

The WHO has noted that a lack of unified standards is most likely reasonable, since accreditation is a holistic approach.[134] Yet, the WHO recognized the importance of promoting safety standards through standardization, and chose the JCI as a trusted partner through the project.

Given the importance of medical tourism, many countries and organizations provide advisory information or guidelines to best promote safe practices. Both the AMA and the WMA publish guidelines, which include provisions urging patients to consider the licensing or accreditation of the destination facilities. The AMA guidelines state: "[p]atients should only be referred for medical care to institutions that have been accredited by *recognized international accrediting bodies* (e.g., the Joint Commission International or the International Society for Quality in Health Care)."[135] The WMA takes a similar approach, stating that "[a]ccess to licensing/accreditation status of physicians and facilities and the facility's outcomes data should be made readily available."[136]

The guidelines illustrate the trustworthiness of the JCI. For one, they are mentioned, by name, by respected governing bodies in medicine and world health. Secondly, the guidelines may be interpreted less like guidelines, but rather more like "strong recommendations," as evidenced by the AMA and WMA guidelines including words like "should only" and "should be." More so, they direct prospective patients to facilities that are JCI approved.

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[130] Agnes Leotsakos et al., *Standardization in Patient Safety: the WHO High 5s Project,* 26 INT'L J. QUALITY HEALTH CARE 109, 110 (2014).

[131] *Id.*

[132] *Id.* at 111.

[133] *Id.*

[134] Hill, *supra* note 15, at 281.

[135] Am. Med. Assoc., *supra* note 29.

[136] WMA GEN. ASSEMBLY, *supra* note 93.

The JCI, as an organization, is also accredited by the International Society for Quality in Health Care (ISQua) for its role and development of standards that focus on the quality of healthcare.[137] The ISQua is a non-profit, non-governmental organization that aims to "provide services to guide health professionals, providers, researchers, agencies, policymakers, and consumers to achieve excellence in healthcare delivery to all people and to continuously improve the quality and safety of care."[138] In other words, ISQua "accredits the accreditors" and allows organizations, such as JCI, to demonstrate that their standards meet best international practices.[139] To qualify for a ISQua assessment, an organization must be an "external evaluation organization or a standards developing body within the health or social care sector," such as JCI.[140]

The framework for ISQua accreditation was developed focusing on patient safety and continuous quality improvement. ISQua bases its evaluation on the key principles: standards development; standards measurement; organizational role, planning, and performance; safety and risk; patient focus; and quality performance.[141]

ISQua accreditation is essentially an international umbrella organization under which the JCI and other foreign governing accreditation bodies lie.[142] As such, requiring international health care facilities to be accredited by both ISQua and JCI standards would not only be repetitive, but futile and costly, with no added benefit.[143]

While this note largely analyzed the effect and need of JCI-accreditation, other accrediting bodies, such as the ISQua, are equally as

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[137] *Accreditation of Overseas Hospitals - JCI or ISQua?*, Medical Tourism Magazine, https://www.magazine.medicaltourism.com/article/accreditation-of-overseas-hospitals-jci-or-isqua (last visited July 6, 2024).

[138] *Guidelines and Principles for the Development of Health and Social Care Standards*, ISQUA, 1, 2 (Sep. 2015), https://isqua.org/media/attachments/2018/03/20/guidelines_and_principles_for_the_development_of_health_and_social_care_standards__4th_edition_v1.2.pdf.

[139] *JCI is Pleased to Announce the Accreditation of the JCI Standards for Primary Care, 2nd Edition from the International Society for Quality in Healthcare*, JOINT COMM'N INT'L, (Sep. 2018), https://store.jointcommissioninternational.org/assets/3/7/September_JCInsight_Final.pdf.

[140] *Am I Eligible?*, INT'L SOC'Y FOR QUALITY HEALTH CARE EXTERNAL EVALUATION ASS'N https://ieea.ch/check-eligibility/am-i-elegible-accreditation.html (last visited Dec. 22, 2022).

[141] *See supra* note 137, at 14 (stating that these principles assess if the organization, such as JCI, has adequate standards development, consistent and transparent measurement of activity, risk management, and adequate monitoring systems in place).

[142] *Accreditation of Overseas Hospitals – JCI or Isqua?,* MEDICAL TOURISM MAG., https://www.magazine.medicaltourism.com/article/accreditation-of-overseas-hospitals-jci-or-isqua (last visited Dec. 22, 2022).

[143] *See id.*

beneficial for medical tourism. JCI focuses its accreditation on the hospitals, clinics, and similar facilities, while ISQua focuses on the bigger picture—the accreditation organizations. Therefore, JCI-accredited facilities may be more readily available and feasible to prospective consumers, based on the popularity of JCI and its closeness to U.S. standards.

CONCLUSION

The boom of medical tourism will only continue to rise.[144] With the increased cost of healthcare and inequality in accessibility, medical tourism provides prospective consumers with affordable, quality healthcare that they could not access otherwise. Yet, there remains a need for caution. Medical tourism is beneficial and necessary to level the playing field, but it is highly unregulated. Different organizations, such as the AMA and WMA, understand the value of the industry, but also understand the downside. Through published, nonbinding guidelines, both agencies advocate for patient safety and include provisions emphasizing the importance of accredited international facilities. The JCI is one of these accreditation standards.

While both the AMA and WMA guidelines are not binding laws, the FTC can offer binding regulations. Therefore, the FTC must regulate the way that medical tourism is conducted, mainly through its authority in the first step in the chain—marketing. When U.S. consumers at home first begin to consider medical tourism, they most likely begin by researching the industry, the commonly visited countries, and the cost. This is in the FTC's ballpark. The agency controls advertising and regulates what information is published and visible to prospective consumers. The FTC must, therefore, limit medical tourism to only accredited international facilities, such as those accredited by the JCI.

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[144] *See* Hill, *supra* note 15, at 280. ("The potential for industry growth, however, receives universal agreement.").

WORKING IN THE SHADOWS: HOW SOUTH KOREA'S BAN ON TATTOOING WITHOUT A MEDICAL LICENSE INFRINGES ON TATTOOISTS' HUMAN RIGHTS

Erica Park*

INTRODUCTION

In most developed countries, tattoos are widely accepted as a way of expressing one's interests, personality, and individuality, and are proudly shown off. Signs advertising tattoo shops can easily be seen on the streets. This form of art has become such an enormous part of social culture that even massive international tattoo conventions are held all over the world.[1] Many countries respect the individualism that tattoos represent, and acknowledge the craft and skill of the artists who bring, through communication with their clients, ideas, and designs to "life." Despite it being a modern, innovative, technology-forward, and developed country, South Korea stands with only a few other countries that have yet to accept this form of expression as art.

Tattoo artists, or "tattooists," deal with various struggles related to their occupation due to the current ban of tattooing performed by anyone without a medical license under Article 27, Paragraph 1 of the Medical Services Act.[2] The Supreme Court of Korea, in 1992, heard a case involving an eyebrow tattoo procedure performed by a non-medically licensed person.[3] In its decision, the Court ruled that a medical act was not limited to the prevention and treatment of diseases but included any act that is closely related to human life, body, or general public health and is likely to pose a serious risk unless performed by a doctor with highly professional knowledge and experience or medical personnel.[4] While the tattoo industry has been flourishing, legally nothing has changed since the Supreme Court's decision to mirror or make space for this growing industry.

In addition to Article 27, Paragraph 1 of the Medical Services Act, Article 5 of the Special Measures for the Control of Public Health Crimes Act (hereinafter referred to as the "Health Crimes Control Act)" enforces and penalizes unlawful actors practicing in medical acts with a statutory penalty of a fine, and sometimes imprisonment of anywhere between "more than two

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* J.D., Southwestern Law School, 2024.

[1] WORLD TATTOO EVENTS, https://www.worldtattooevents.com/2024-tattoo-conventions-calendar/ (last visited Feb. 10, 2024) (*World Tattoo Events* provides an online comprehensive tattoo convention calendar featuring over 1600 events worldwide, and is used as a tool for enthusiasts and tattoo professionals to keep track of upcoming shows, conventions, and other tattoo-related events).

[2] Euiryeobeob [Medical Services Act] art. 27 para. 1 (S.Kor.).

[3] Daebeobwon [S. Ct.], May 2, 1992, 91Da3219 (S. Kor.) (rejecting the defendant's claim that because the tattoo was injected into the epidermis, it was not subject to the same risks associated with injections into the dermis.).

[4] *Id*.

years" and life.[5] The Health Crimes Control Act encompasses any "act of practicing medical treatments by a profession by a person who is not a doctor."[6] It has been noted that since the Act of Controlling Public Health Crimes criminalizes the violation of Article 27 of the Medical Services Act and also requires a minimum fine in addition to a possibility of imprisonment, violation of these Acts are taken seriously. The legislative intent of these Acts is to criminalize fraudulent medical practices that could cause harm to the public.[7]

The Constitutional Court's decision in March 2022 in 2017 Hunma 1343, upholding the Supreme Court's 1992 ruling is flawed in several ways. The dissent in the opinion argue that the qualifications of the tattooist are limited to the scope necessary for safe tattooing.[8] Further, there are more efficient ways to safeguard the hygiene and health of the public such as requiring a clean tattooing environment, regulating the maintenance of hygienic tools, and providing guidelines of safe tattooing procedures and methods. Next, it fails to consider the level of artistic talent, skill, and technique that is required for tattooing, and demonstrated by tattooists. Tattooing is far more than a pure medical act. There is a continued increasing demand of artist-performed tattoos, and denying tattooists' a legitimate profession will not quell this demand. If the Court continues to uphold a law where only medical professionals are permitted to tattoo, the system will only fall behind on its ability to monitor and protect hygiene, health, and safety.

Further, the Court must reconsider its ruling because the current ban on non-medically licensed tattoo services violates the Korean Constitution; tattoos are a form of creative expression protected by international law; and there are no health or safety justifications that reasonably or sufficiently support the ban.

While there are various constitutional claims made by the petitioners and examined by the Constitutional Court, this note will focus mainly on the violation of tattooists' human rights including the constitutional right to work, freedom of occupation, freedom of speech and expression, and

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[5] Act on Special Measures for the Control of Public Health Crimes Act, Act No. 1252, art. 5, Dec. 19, 2017 (S.Kor.). (The article relating to punishment for illegal medical practitioners stating that a person who practices a medical act for the "purpose of commercial gain in violation of Article 27 of the Medical Service Act shall be sentenced to imprisonment for life or for not less than two years" and provides a minimum fine of one million won.)

[6] *Id*.

[7] Jin Kuk Lee, *The Interpretation of § 5 of the Act on Special Measures of the Control of Public Health Crimes with Regard to the Practice of Medicine Without License*, 30 KOREAN J. MED. & L., 7-24 (2022).

[8] Hunbeobjaepanso [Const. Ct.], Mar. 31, 2022, 2017Hunma1343(consol.)(Hungong 306, 531) (S. Kor.).

freedom to enjoy the arts.[9] Section II will provide background information about the history of tattoos, how it was introduced into South Korean society, how it was perceived, and how this perception has changed from one of social stigma to a form of art and self-expression. Section III will highlight the ways in which current classification of tattooing as a "medical act" violates the Constitution of the Republic of Korea and deprives tattooists of their constitutional rights to work, freedom of occupation, freedom of speech, and freedom to enjoy the arts. The section will also discuss the various serious negative consequences the law creates, and how it forces tattooists to live on the fringe of society. Section IV will discuss how international law and other countries including Japan, the United States, and European countries treat tattoos as art, and as a form of artistic expression that should be protected under freedom of expression. Section V will highlight why there are no real health or safety justifications as the Constitutional Court claims there to be, that supports the outright ban of tattooing by non-medical professionals. In addition, it will discuss the practices of other countries, which have a better balance of respecting tattooist's freedom of artistic expression while also taking measures that adequately consider hygiene, health, and safety issues that may arise in connection with tattooing. Lastly, Section VI will reiterate why the Constitutional Court must reconsider its ruling.

I. BACKGROUND

The practice of tattooing can be traced back thousands of years when people would permanently mark and pigment their bodies with designs that would often serve as amulets, "protect from evil, declare love, signify status or religious beliefs, as adornments and even forms of punishment.[10] There is evidence of tattoos being used as a way for one to express oneself and one's beliefs in ancient civilizations including the ancient Egyptians, the Scythian Pazyryk, and the ancient Britons.[11] In addition, evidence shows that tattoos were also fashioned during the Greco-Roman civilization,[12] and can even be traced to East Asia as early as 5,000 BCE.[13] However, at some later point in

[9] *Id.* (The Constitutional Court also addresses other claims brought by the claimants such as the violation of the principle of clarity and the constitutional violation by legislative omission and found there to be no such violations.).

[10] Cate Lineberry, *The World Wide History of Tattoos*, SMITHSONIAN MAGAZINE (Oct. 18, 2023).

[11] *Id*.

[12] *Id*.

[13] Morgan MacFarlane, *Tattoos in East Asia: Conforming to Individualism*, 1 THE COMMONS: PUGET SOUND J. OF POLITICS 1, 3 (Sept. 2020).

time, tattoos in East Asia were growingly used for punishing criminals and also symbolizing one's ties with organized crime.[14]

In Korea in particular, tattoos have a long history tied to crimes and other negative social stigmas. During the Goryeo dynasty, tattoos were given as punishments and were meant to mark and outcast people from society.[15] The social stigma surrounding tattoos may have been become more solidified during the Japanese occupation. Korea and Japan developed similar views toward people with tattoos: they were seen as someone with criminal ties, as tattoos inked into their skin were used to intimidate, as well as indicate membership in mobs or gangs.[16]

Within the past decade however, there has been an enormous shift in the way tattoos are viewed in Korea.[17] More delicate, creative, and intricate tattoo designs began replacing the fear that was previously associated with the bold, large, intimidating images often seen on the arms or backs of gangsters. And as more artistically talented and skilled tattoo artists, or tattooists, emerged in Korea, the more the industry and demand for tattoos continued to grow. Further, known for their delicate, fine-lined, and artistically advanced designs, Korean tattooists have also gained attention abroad, gaining the respect and admiration of other tattooists, and gaining fans and clientele internationally. The artists' skills and abilities bring in foreign tourists and contribute to the continued growth of the industry. Despite this, tattooists in South Korea are still not acknowledged by the legal system or legislature.

Tattoos are an internationally recognized form of body art requiring artistic talent and skill. Tattooists are no less an artist than the traditional artist. The process of tattooing requires just as much creativity, precision, and artistic knowledge. In fact, some Korean tattooists even have backgrounds or majored in Korean traditional art.[18] Instead of being treated as artists, Korean tattooists risk facing a minimum two-year prison or a fine up to $40,000 if caught practicing their craft without a proper medical license, which requires attending and completing medical school.[19]

In March 2022, the Constitutional Court of Korea upheld the Korean Supreme Court's 1992 ruling in 2017 Hunma 1343, considering tattooing a

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[14] *Id*.

[15] Chang W. Lee, *Tattoos, Still Illegal in South Korea Thrive Underground*, NEW YORK TIMES (May 13, 2022), https://www.nytimes.com/2022/05/13/world/asia/south-korea-tattoo-artists.html.

[16] MacFarlane, *supra* note 13.

[17] Lee, *supra* note 7.

[18] Eugene Lee & Joe Park, *In the Studio with Hongdam,* NEOCHA (July 2, 2018), https://neocha.com/magazine/in-the-studio-with-hongdam.

[19] *See* Na Young Park, *Illegal Tattoo Treatment During the Probation Period Imprisoned for 30 Years and Fined*, YONHAP NEWS, (Apr. 25, 2019), https://www.yna.co.kr/view/AKR20190425122200056; Lee, *supra* note 7.

"medical act" rather than artistic expression, and continuing to make it illegal for tattooists who are not licensed doctors to give tattoos.[20] The Constitutional Court of Korea's recent ruling upholds a law that infringes on tattooists' human rights, including tattooists' right to freedom of speech and expression, and the right to occupation. The decision fails to consider any actual remedies that may address its concern and instead perpetuates a law based in historical and cultural ideas of taboo.

In making its decision, the Constitutional Court considered several cases consolidated into one.[21] In each of these cases, the defendants who were tattooists challenged the constitutionality of Article 27 of the Medical Services Act and the Health Crimes Control Act.[22] In December 2017, the petitioners of 2017 Hunma 1343 filed a constitutional complaint, contending that the legislative omission to violate the freedom of choice of occupation and further, the legislative omission to establish the qualifications and requirements for the tattooing business so that the petitioners could conduct their tattoo businesses were unconstitutional.[23] In September 2019, the claimants in 2019 Hunma 993 contended that Article 27 Paragraph 1 of the Medical Act in the Health Crimes Control Act violated the principle of "clarity of criminal justice,"[24] and argued that the freedom of choice of profession was violated and that legislative omissions in relation to the tattoo industry was unconstitutional.[25] In July 2020, the claimants in 2020 Hunma 989 who were trying to operate a tattoo business filed a constitutional complaint also arguing that the provisions in Paragraph 1 of Article 27 violated the principle of clarity, violated their freedom to choose their occupation, and that the legislative omission in relation to tattooing and the tattoo business was unconstitutional.

In addition to the claims above, the claimants also argued that the consequences of considering tattooing a medical act, which is subject to criminal punishment, violated their freedom of art and freedom of occupation and that restricting the act of receiving tattoos from a person without a

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[20] Hunbeobjaepanso [Const. Ct.], Mar. 31, 2022, 2017Hunma1343(consol.)(Hungong 306, 531) (S. Kor.).

[21] *Id.*

[22] *Id*.

[23] *Id.*

[24] Compilation of Judicial Reports [Const. Ct.], Jan. 31, 2002, 14-1, 1, 8, 2000Hun-ga8 ("'The principle of clarity,' an expression of the principle of a constitutional state, is required for all legislation restricting basic rights. If a criminal cannot know what is prohibited and what is allowed in accordance with the meaning of norms, this will lead to weakened legal stability and predictability and enable arbitrary enforcement by law enforcement authorities.").

[25] Hunbeobjaepanso [Const. Ct.], Mar. 31, 2022, 2017Hunma1343(consol.)(Hungong 306, 531)(S. Kor.).

medical license violated the freedom of expression, the right to self-determination of the body, and the general right to freedom of action.[26]

While the claimants of each case had varying arguments and constitutional claims for each case, the Constitutional Court addressed all claims in its March 2022 ruling.[27] In its decision, the Court determined that the provision subject to adjudication was the provision which prohibits unlicensed persons from engaging in tattooing as a business by only permitting medically licensed doctors to perform medical activities.[28] The Court determined that the issue was whether the concept of "medical practice" or a medical act is unclear and thus violates the principle of clarity, and whether the provision subject to trial violated the principle of excessive prohibition, thus infringing on the freedom of the petitioners to choose their occupation.[29] In its ruling, the Court determined that in cases where multiple fundamental rights are simultaneously restricted by one regulation, the Court would look to the fundamental right most closely related to the case and the degree of infringement while balancing the intentions of the claimants and the objective with the legislative intent behind restricting such fundamental rights.[30]

In performing such a balancing test, the Constitutional Court decided that the primary intention of the provision subject to judgment and the subject matter of judgment was to regulate conduct that may harm public health and sanitation.[31] The Court ultimately decided that the fundamental right being examined was the freedom to choose an occupation, and that restrictions on freedom or art of freedom of expression was only indirectly restricted through the freedom of the profession of tattooing.[32] As a result, the Court determined that it would not decide claims of whether the freedom of art and freedom of expression were violated.[33] Furthermore, the Constitutional Court decided that the constitutional claims in 2020 Hunma 1486 regarding the right to receive tattoos (thus, that the provisions violated the freedom of expression, right to self-determination, and general freedom of action) was not subject to trial because the provision at issue did not directly restrict the

[26] *Id.*

[27] *Id.* (The Constitutional Court "merged" the cases mentioned when it made its ruling in 2017 Hunma 1343.).

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

act of receiving tattoos by the tattoo recipient and this was only an indirect effect of the provisions subject to judgment.[34]

Finally, in examining the violation of the principle of excessive prohibition claim, the Court examined the legitimacy of the legislative purpose and the suitability of the means. In its reasoning, the Court determined that the legislative intent to prevent harm to life, body, or public health of the people by limiting those who can perform medical practices to medical personnel and referred to the Supreme Court precedent which broadened the scope of "medical acts."[35] Further, the Court reasoned that even if one with special ability could "practice medicine" without any side effects, it would be "practically impossible to distinguish them" and deemed that because of the challenge of identifying such unlicensed medical practitioners there was no other alternative other than a "method of certification of a certain form in the country" – here, a medical license.[36]

While the Constitutional Court briefly considered the fact that there is a class of people that are not medically licensed but have "excellent medical skills in a certain field," the Court decided that it is the responsibility of legislators to provide certain qualifications in order to provide for a wider range of "medical services."[37] Further, the Court ultimately ruled that the provision at issue was within the legislature's scope since the "nature of medical practice that targets human life and body" always comes with risks that, if not confirmed and verified by the state, may cause harm to public health.[38]

II. THE CURRENT BAN ON UNLICENSED TATTOO SERVICES VIOLATES THE KOREAN CONSTITUTION

The Constitutional Court's ruling that tattooing is a medical act and requires a medical license violates the Constitution and denies tattooists their constitutionally guaranteed rights. The Constitution of the Republic of Korea, the supreme law of South Korea, protects certain rights including freedom of occupation, the right to work, freedom of speech, and freedom of

[34] *Id. See also* Constitutional Court Act art. 45 (S.Kor.) ("When the Constitutional Court decides on the constitutionality of a statute, the decision shall be made only for the statute or a provision of the statute for which a review is requested.").

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

the arts.[39] While these rights are not absolute, the act of tattooing and working as a professional tattoo artist do not fall under any of the exceptional categories.

The judicial interpretation and classification of tattooing as a type of medical act that is illegal when performed without a medical license denies tattooists their right to engage in an occupation. While South Korea's judicial and legislative bodies refuse to recognize the profession, the occupation is fast-growing, with even the Ministry of Employment and Labor, a government agency, including the profession in its "Selection of Promising New Jobs" in 2015.[40] However, despite the booming industry, tattooists are not guaranteed their constitutional rights as workers, and are given no protection by the State.[41]

The failure to give any legal recognition to the "tattooist" occupation forces thousands of tattooists to work secretly. This leave artists in a legally and societally vulnerable position. First, tattooists are at risk because there are no labor laws that apply to and set the standard for the profession. Thus, artists lack any legal protections that are constitutionally afforded to workers in other fields of officially recognized work.[42] There are no standards that protect tattooists' legal working hours, their right to certain medical benefits and regular health checkups, or regulations that ensure acceptable and fair working conditions. Further, because tattooing without a medical license is illegal, tattooists deal with the risk of running into trouble with the law. This includes the risk of punishment by a fine, being imprisoned, and ultimately losing their source of income.[43]

In addition to risk of losing their income, tattooists also face other difficulties that affect their livelihood and quality of life. Since their occupation is not recognized as a legitimate one, tattooists are prevented from

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[39] DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 15 (S.Kor.) ("All citizens shall enjoy freedom of occupation."); DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 32(1) (S.Kor.) ("All citizens shall have the right to work. The State shall endeavor to promote the employment of workers and to guarantee optimum wages through social and economic means and shall enforce a minimum wage system under the conditions as prescribed by Act."); DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 21(1) (S.Kor.) ("All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association.").

[40] Seung Hyun Baek, *Tattooist, Corporate Manager… Launching 17 New Jobs*, THE KOREAN ECONOMIC DAILY (Dec. 15, 2015, 5:51 PM), https://www.hankyung.com/politics/article/2015121523281.

[41] DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 32(2) (S.Kor.) ("The State shall prescribe by the Act the extent and conditions of the duty to work in conformity with democratic principles."); DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 32(3) (S.Kor.) ("Standards of working conditions shall be determined by Act in such a way as to guarantee human dignity."); DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 32(4) (S.Kor.) ("Special protection shall be accorded to working women and they shall not be subjected to unjust discrimination in terms of employment, wages and working conditions.").

[42] *Id*.

[43] Euiryeobeob [Medical Services Act] art. 27 para. 1 (S.Kor.).

reporting their income or paying their share of taxes.[44] As a result, artists are often forcibly prevented from securing loans or obtaining financial assistance from banking institutions.[45] Many, if not most, tattooists wish to pay their taxes through personal income taxes and through a long-desired state licensing system that would also help regulate and set standards for the profession.[46] While this proposal is feasible and highly beneficial in many aspects, South Korea's judicial branch continues to reject these ideas.

The serious negative consequences of the Constitutional Court's ruling are clear. The Court was swift in deciding that skills and medical knowledge limited to and involved in tattooing cannot guarantee the same level of safety that a medical professional can provide, for treatments that may be needed before or after a tattoo session.[47] While it is highly unlikely that a tattoo artist will have the equivalent medical knowledge and abilities of a medical professional, the Court does not identify or offer any data to show that medical treatments are so often needed before or after a tattoo procedure that only one who has extensive medical knowledge, skill, and a medical license should be able to perform the actual procedure.[48]

Even the Court recognized the possible alternatives to entirely banning non-medical tattooing by noting that there are different systems in place that allow non-medical professionals to practice tattooing in foreign cases.[49] Despite this, the Court reasoned that introducing alternatives, such as a tattoo procedure qualification system that regulates and manages tattoo artist qualifications and other possible regulations, was within the scope of legislative discretion.[50] Thus, the Court concluded that legislature's decision to restrict tattooing to medically-licensed professionals for the benefit of

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[44] Jessica Laura Holmes, *Yeomi*, YEOJA MAG. (Sept. 14, 2021), https://yeoja-mag.com/yeomi.

[45] *Id*.

[46] *Id*. *See also* TATTOO UNION, *Branch Introduction* (Feb. 27, 2020), https://m.koreatimes.co.kr/pages/article.amp.asp?newsIdx=165377.

[47] Hunbeobjaepanso [Const. Ct.], Mar. 31, 2022, 2017Hunma1343(consol.)(Hungong 306, 531)(S. Kor.).

[48] Iliana A. Rahimi, Igor Eberhard & Erich Kasten, *Tattoos: What Do People Really Know About the Medical Risks of Body Ink?,* JCAD (Mar. 1, 2018), https://jcadonline.com/tattoos-medical-risks-body-ink (there are two levels of medical complications: mild and advanced. Mild complications are "any unusual condition, sensation or visible reaction in the tattooed skin that differs from normal skin of the same person." Mild side effects are common and most often treated at home. Meanwhile, advanced complications are side effects that typically include "significant discomfort (i.e., events that would typically lead a patient to consult a physician)." Advanced complications can include aseptic inflammation, allergic reactions, and hypersensitivity to the in used on the skin. These complications are not as common and usually noninfectious).

[49] Hunbeobjaepanso [Const. Ct.], Mar. 31, 2022, 2017Hunma1343 (consol.) (Hungong 306, 531) (S. Kor.).

[50] *Id*.

public health and hygiene and the failure to select an alternative did not make the law unconstitutional.[51]

Along with the restrictions and difficulties that the law creates for all Korean tattooists, female tattooists are specially at risk. This is because the ban deprives female artists from their guaranteed constitutional protections under Article 32(4) which provides working women with special protections so that they are protected from employment discrimination, wages, and unfair working conditions.[52] Since tattooing and working as a tattoo artist is an illegal occupation because artists typically work out of discrete spaces and because artists meet with their clients secretly, they are at risk of improper conduct by potential clients, such as assault or harassment.[53] However, because tattooing is a source of income and affects a tattoo artist's livelihood, the fact that it is illegal would prevent a female artist from reporting any such incidents to the proper authorities. The failure to recognize the profession as a legitimate one unnecessarily places women at risk and offers a female artist no protection from dangerous or unfair working conditions.

Lastly, the law banning tattooists from tattooing without a medical license is a violation of artists' freedom of speech and freedom to enjoy the arts. The Oxford English dictionary defines art as "the expression or application of human creative skill and imagination, typically in a visual form…producing works to be appreciate primarily for their beauty or emotional power."[54] Tattoos require incorporation of an artist's ideas, creativity, and technique, and is performed and expressed in an artist's personal style. It is a part of one's right to free speech through artistic expression. Article 21(2) of the Constitution prevents the licensing or censorship of speech.[55] However, the law at issue does just that. Though the Constitution restricts speech in certain instances, tattooing in general does not meet this criterion because it is generally not thought to violate the honor or rights of others, or undermine public morals or social ethics.[56] The Court may view tattoos as undermining public morals due to the social stigma that sometimes still surrounds them, particularly with older generations. However, the law does not prevent certain types of tattoo designs, but instead bans all tattoo art without a medical license with one broad stroke, thus infringing on one's right to freedom of speech and freedom to enjoy the arts.

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[51] *Id*.

[52] DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 32(4) (S.Kor.).

[53] Lee, *supra* note 7.

[54] *Art*, OXFORD ENG. DICTIONARY.COM, https://www.oed.com/search/dictionary/?scope=Entries&q=art (last visited Dec. 6, 2024).

[55] DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 15 (S.Kor.); DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 21(2) (S.Kor.).

[56] DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 21(4) (S.Kor.).

The Court's concerns about health and hygiene may be partially justified. However, the Court offers no convincing information supporting the ban, and instead upholds an arbitrary law that violates the Constitution and the rights it guarantees its citizens including the freedom of occupation, the right to work, and the freedom of speech.

III. TATTOOS ARE A FORM OF CREATIVE EXPRESSION PROTECTED BY INTERNATIONAL LAW

Today, tattoos are widely considered its own form of art. In fact, most countries recognize tattoos as a form of creative expression, deserving protection under the freedom of expression. In addition, South Korea is a party to the International Covenant on Civil and Political Rights (ICCPR)[57] and the International Covenant on Economic, Social and Cultural Rights (ICESCR) treaties adopted by the U.N.,[58] which protect the individual's civil and political rights. This includes the freedom of expression and the right to work.[59] Further, Article 19 of the ICCPR guarantees the right to freedom of expression through the form of art or any other media of one's choice.[60] With this in mind, instead of the current legislation, South Korea should receive guidance from countries like Japan, the United States, and European states.

A. Japan

In terms of culture and social construct, South Korea shares many similarities with Japan. Japanese law considered tattooing a "medical act," making it illegal for anyone other than a doctor with a medical license to partake in the act of tattooing others.[61] Medical acts were those considered medical treatment that could cause harm if not performed by doctors.[62] This definition is almost identical to that given by the Korean Supreme Court in 1992. Japanese law, like South Korea's, was also concerned with the potential hygiene, health, and safety issues that could arise related to tattooing.

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[57] International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

[58] International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

[59] ICCPR art. 19(2), *supra* note 57; ICESCR art. 6, *supra* note 58.

[60] ICCPR art. 19(2), *supra* note 57.

[61] SaikōSaibansho[Sup.Ct.]Sept.16,2020, 2018 (A) 1790, 74Keishu (Japan).

[62] *Id*.

However, in 2020, the Japanese Supreme Court ruled that tattooing without a medical license did not constitute a violation of its "medical practitioners law."[63] In its ruling, the Japanese Supreme Court determined that the distinction between a medical act and tattooing is that the latter requires artistic skill, and it could not be assumed that tattooing was something practiced exclusively by doctors.[64] Unlike the Korean Constitutional Court, the Japanese Supreme Court acknowledges the level of artistic skill and craft that is more often than not necessary in the tattooing process.[65]

B. The United States

Next, courts throughout the United States have determined that tattoos, the process of tattooing, and business conducted relating to tattoos are "pure expressive activities" protected under the First Amendment.[66] In *Anderson v. City of Hermosa Beach*, the Ninth Circuit decided that tattoos of symbols, words, and abstract images, express an endless variety of messages and serve various functions, noting that people gets tattoos for various reasons including the "symbolization of interpersonal relationships, participation in a group, representation of key interests and activities, self-identification, and making a decorative or aesthetic statement."[67] Further, the Ninth Circuit took judicial notice of the "skill, artistry, and care that modern tattooists have demonstrated."[68]

In its decision, the Ninth Circuit first goes through an analysis of tattoos themselves, then examines whether the process of tattooing is a purely expressive activity.[69] The Court determined that the process of expression through a medium could never be thought of as distinct from the expression itself, and that because the purpose of tattooing is to produce the tattoo itself, the tattooing process itself is also entitled to protection under the First Amendment.[70] Furthermore, the Court determined that it was irrelevant

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[63] THE JIJI PRESS, *In First, Japan Top Court Finds Tattooing Not Medical Act,* Nippon.com, (Sept. 17, 2020), https://sp.m.jiji.com/english/show/7359.

[64] SaikōSaibansho[Sup.Ct.]Sept.16,2020, 2018 (A) 1790, 74Keishu (Japan).

[65] *Id*.

[66] Anderson v. City of Hermosa Beach, 621 F.3d 1051 (9th Cir. 2010); *See also* Coleman v. City of Mesa, 230 Ariz. 352, 284 P.3d 863 (2012) (ruling that tattooing and engaging in the business of tattooing were exercises of free speech entitled to protection as a fundamental right under the First Amendment of the U.S. Constitution).

[67] Anderson, 621 F.3d at 1061.

[68] *Id*. *See also* FED. CIV. TRIALS & EV. (Rutter Grp. Prac. Guide). ("Judicial notice is a court's recognition of the existence of a fact without the necessity of formal evidence and is limited to matters that are not subject to reasonable dispute.").

[69] *Id.*

[70] *Id*. at 1062.

whether the client has the ultimate control over the design which they desire, and the mere fact that the tattooist applied his "creative talents" during the process was sufficient to protect the process of tattooing under the First Amendment.[71]

Finally, in *Anderson*, the Ninth Circuit further extended First Amendment protections to the business of tattooing. The Court determined that a ban relating to the business rather than the tattooing process itself did not affect whether the activity regulated is guaranteed First Amendment protections.[72] The Ninth Circuit determined that because the business of tattooing is so closely connected or intertwined with the process of tattooing, the business is entitled to full constitutional protection.[73] Thus, the Court concluded that the business of tattooing qualifies as a purely expressive activity.[74]

In most countries around the world, tattooists are acknowledged as legitimate artists. In fact, when tattooists travel internationally for guest work, they are required to apply for "artist" visas.[75] In the United States, the artist visa is also called the "O-1 Visa" for "Individuals with Extraordinary Ability or Achievement, and includes individuals who possess extraordinary ability in the arts and "has been recognized nationally or internationally for those achievements."[76] Specifically, tattoo artists can apply for the O-1 visa or the EB-1 Green Card. The O-1 Visa requires demonstration of distinguishment in the field including "proof of prizes, press articles, work at prestigious studios, recommendation letters from fellow artists" and more.[77] The EB-1 Green Card holds a higher standard, requiring an artist to be able to show proof through "press articles in major publications, top prizes at the leading conventions and competitions . . . testimonials from fellow leadings artists . . . work displayed at exhibitions, sponsorships, judging tattoo conventions, high salary" and more.[78] This only strengthens the claim that

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[71] *Id*.

[72] *Id*. at 1062-63; *See also* White v. City of Sparks, 500 F.3d 953, 956 (9th Cir. 2007) (holding that "an artist's sale of his original work constitutes speech protected under the First Amendment.").

[73] *Id*.

[74] *Id*. at 1063.

[75] TATTOO UNION, *supra* note 46.

[76] *O-1 Visa: Individuals with Extraordinary Ability or Achievement*, U.S. CITIZENSHIP & IMMIGR. L. SERV. (West) (2024), https://www.uscis.gov/working-in-the-united-states/temporary-workers/o-1-visa-individuals-with-extraordinary-ability-or-achievement.

[77] *Services*, TATTOO VISA (Jan. 10, 2024, 10:14 AM), https://www.tattoovisa.com/how-we-can-help.

[78] *Id. See also Employment-Based Immigration: First Preference EB-1*, U.S. CITIZEN & IMMIGR. SERV., https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1 (last visited Dec. 6, 2024).

tattooists are internationally recognized, and the title is regarded as a legitimate artistic occupation.

C. The European Convention on Human Rights and the European Court of Human Rights Protects Tattooing Under Artistic Freedom

Further, most European states have also acknowledged tattoos fall under the freedom of artistic expression. Similarly, the European Convention on Human Rights has stated that Article 10 includes "[a]rtistic freedom, which affords the opportunity to take part in the public exchange of cultural . . . and social information and ideas of all kinds."[79]

The European Court of Human Rights has often stated that that "freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual's self-fulfillment."[80] Further, the Court views artistic creation, performance, and distribution as a crucial part of democratic society.[81] While there are certain restrictions permitted, these exceptions are very limited.[82] In fact, the European Court of Human rights in *Tatár and Fabar v. Hungary* even found that hanging dirty laundry near the Parliament as form of response to an ongoing political crisis is protected as expressive conduct, under Article 10.[83] Unless there are serious issues relating to societal wellbeing, national security, or there are moral or personal rights at risk, the Court has found that artistic speech falls within Article 10 and thus, is entitled to protection.

Japan, the United States, and Europeans states, and the European Court of Human Rights have all demonstrated the respect given to artistic speech. This artistic speech that is entitled to protection under freedom of speech or freedom of expression includes tattoo art, and the artists that create them. Though the Constitutional Court may try to disregard the level of creativity

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[79] European Convention on Human Rights, art. 10.

[80] Lingens v. Austria, Appl. No. 9815/82, Series A no. 116 (1986); Sener v. Turkey, *Appl. No. 26680/95, judgment of 18 July 2000 (unpublished)* (2000); Thoma v. Luxembourg, Appl. No. 38432/97, Reports of Judgments and Decisions 2001-III (2001); Maronek v. Slovakia, Appl. No. 32686/96, Reports of Judgments and Decisions 2001-III (2001); Dichand and Others v. Austria, Appl. No. 29271/95, judgment of 26 February 2002 (unpublished) (2002).

[81] Monica Macovei, *Freedom of expression: A guide to the implementation of Article 10 of the European Convention on Human Rights,* 2d. ed., Council of Europe (Jan. 2004), https://rm.coe.int/168007ff48.

[82] European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10, para. 2 ("The exercises of these freedoms….may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.").

[83] Tatár and Fáber v. Hungary, 26005/08 ECHR 984 (2012).

and artistic ability that is required for tattooing, most of the rest of the world does not.

Tattoos are a form of creative expression, specifically art, protected by international law. In addition, because South Korea is a party to the ICCPR and the ICESCR treaties that protect certain individual rights, such as freedom of expression through the form of art, its laws should be consistent with the protections the treaties afford.

IV. THERE ARE NO HEALTH OR SAFETY JUSTIFICATIONS THAT REASONABLY OR SUFFICIENTLY SUPPORT THE BAN

While the ICCPR places a longer list of restrictions on the right to freedom of expression, the Korean Constitution only permits restrictions on free speech when the speech violates the rights of others or undermines public moral or social ethics."[84] As a result, there are no health and safety justifications here, for more than modest regulation as is present in most countries.

Rather than aiming to effectively prevent or address the said risks it associates to the highly popular and growing tattoo industry, the Court's decision upholding the Supreme Court ruling may be detrimental to the public if it does not reconsider. Although the Court points to public health, hygiene, and safety as its one and only reason for its decision, the outright ban of tattooing without a medical license creates a bigger risk to tattooists, and especially to the country's citizens. Just as the Japanese Supreme Court had ruled in its decision, tattooing cannot be assumed to be exclusive to doctors. Restricting tattooing to doctors ignores the fact that the most demanded tattooists do not and will not ever go through medical school.

While the Korean Constitutional Court attributes the necessity of deeming tattoos a medical act to matters of health, hygiene, and safety, it is crucial to weigh how common and serious these risks may be. For instance, in New York City in 1961, the act of giving someone a tattoo was illegal.[85] There were several reasons as to why this ban was put in place. One of the reasons was that making tattooing illegal was meant to be a solution for the hepatitis B outbreak in the city.[86] Another was that the city wanted to "clean

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[84] DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 21(4) (S.Kor.).

[85] Jennifer Nalewicki, *Tattooing Was Illegal in New York City Until 1997*, SMITHSONIAN MAGAZINE (Feb. 28, 2017), https://www.smithsonianmag.com/travel/tattoos-were-illegal-new-york-city-exhibition-180962232.

[86] Lawrence O'Kane, *City Bans Tattoos as Hepatitis Peril; Board of Health Orders 8 Parlors Shut by Nov. 1 – Spread of Disease Cited City Board Votes Ban on Tattooing*, N.Y. TIMES, (Oct. 10, 1961, at 45.

up" for the prestigious upcoming World's Fair in 1964, and there was still a social stigma attached to tattoos.[87]

A. New York City

It was not until 1997 that the New York City Council passed a bill that legalized and regulated tattooing in the city since 1961, noting that tattooing ban remained even when the Health Department had not documented any cases of hepatitis B "transmitted by tattooing in the city since the ban was enacted." [88] Instead of outright banning tattooing, the bill required artists to be licensed and made tattooing anyone under the age of 18 illegal.[89] Further, artists were required to successfully pass an examination with the Health Department and pay $100 every two years.[90] It took New York City 31 years to lift what it realized to be a pointless ban. Thus, the South Korean Constitutional Court should take note of such cases, and like New York City, should aim to regulate rather than ban tattooing if it is truly only troubled by health and hygiene-related concerns.

B. The United States More Broadly

The regulation of the legally accepted practice of tattooing promotes public health and safety more reasonably and effectively than banning the conduct. In addition to the state of New York, all states in the United States have varying procedural requirements, including licensing and registration requirements for tattoo artists and tattoo shops, and most states place age limits on recipients.[91] Further, the Occupational Safety and Health Administration (OSHA), a federal regulatory agency of the U.S. Department of Labor, sets a standard to protect people with its Bloodborne Pathogens standard which by statute prescribes and regulates safeguards to protect workers who anticipate exposure to blood or other potentially infectious materials in their line of work, including tattooing.[92] Although there may be

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[87] *Id*.

[88] Randy Kennedy, *City Council Gives Tattooing Its Mark of Approval*, N.Y. TIMES, Feb. 26, 1997.

[89] *Id*.

[90] *Id*.

[91] *State Laws on Tattooing and Body Piercing*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Dec. 2012), http://web.archive.org/web/20121228011556/https://www.ncsl.org/issues-research/health/tattooing-and-body-piercing.aspx.

[92] *See* 29 C.F.R. § 1910.1030 (1991).

some risks involved with tattooing, the level of risk is not any higher than other body modifications such as piercings.[93]

C. Europe

A study conducted in Germany and Austria found that there are two levels of risks and complications due to tattooing.[94] The first, mild complaints, are "any unusual condition, sensation or visible reaction in the tattooed skin that differs from normal skin of the same person."[95] While these side effects are common, they are often treated at home and do not cause any serious problems. The second type, advanced complaints, are "more serious adverse reactions in tattoos, associated with object symptoms and significant discomfort (i.e., events that would typically lead the patient to consult a physician)."[96] These side effects are not as common and typically non-infectious.[97] Commonly, these side effects are reactions including "aseptic inflammation, allergic reactions, and hypersensitivity to the tattoo ink."[98] However, studies have found that more often than not, problems typically arise due to the lack of aftercare by tattoo recipients.[99]

In addition to advanced side effects being uncommon, studies have found that the risk for adverse effects on health "increases in individuals who obtain tattoo in an unauthorized facility.[100] Tattoos are becoming increasingly popular in South Korea. This means that more people will continue to look for tattoo shops where they can get them. Instead of turning a blind eye to the rising demand, it is in the best interest of public health for South Korea to acknowledge these businesses as legitimate, and in turn register tattooists and tattoo shops in order to better monitor and regulate them.[101]

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[93] *Tattoos and Piercings Go Mainstream, But Risks Continue*, NORTHWESTERN MEDICINE (Jun. 1, 2006), https://news.feinberg.northwestern.edu/2006/06/01/tattoos-2/.

[94] *ECTP 2013 European Congress on Tattoo and Pigment Research*, BfR, https://www.bfr.bund.de/cm/343/allergies-and-tattoing.pdf (last visited Jan. 23, 2024).

[95] *Id.*

[96] *Id*.

[97] Iliana A. Rahimi, Igor Eberhard & Erich Kasten, *Tattoos: What Do People Really Know About the Medical Risks of Body Ink?*, JCAD (Mar. 1, 2018), https://jcadonline.com/tattoos-medical-risks-body-ink.

[98] *Id*.

[99] *Id*.

[100] *Id*.

[101] *Id*. ("[A]mong 597 tattooed adolescents, 23.4 percent reported complications more frequently if their tattoos were obtained in unauthorized facilities compared to those who obtained their tattoos in professional, regulated studios (35.3% vs. 15.9%, respectively). Unsterile equipment and needles can transmit infectious diseases, such as hepatitis or human immunodeficiency virus.").

In Europe, although the European Union (EU) does not share common legislation regarding tattoos, most European states have their own regulations and restrictions to minimize the health and safety risks of tattoos. However, the practice itself is not banned.[102] Instead, European countries addressed risks by publishing a CEN standard, which specifies certain hygiene requirements before and after tattooing. In addition, it provides the guidelines for procedures to be used "to ensure optimum protection of the client, the tattooist and others in the tattoo work area."[103] The standard is not legally binding, but is open for countries to adopt to be made binding.

The EU, in addition to providing member states with procedural and health guidelines, is also able to regulate other risks that are associated with tattooing. At first in 2008, the EU released a revised resolution on permanent inks in 2008 which was suggestive but not legally binding that member states implement legislation regarding tattoo inks. In 2022 however, the EU under Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) prohibited some pigments because the chemicals commonly found in certain colored inks were found potentially hazardous to people.[104]

Although the EU has the ability to prohibit certain aspects of the tattooing process that is meant to protect public health and safety, it has not done so by taking such an extreme stance as banning tattooing by professionals without medical licenses.[105] Thus, most European states recognize artists' human rights, while still prioritizing health and safety.

Although the Constitutional Court's primary concern is the ability of tattooists to safely perform tattoos without the medical knowledge and skill of medical professionals, its concern is baseless. While there are certain risks and side effects associated with tattoos, as is normal with any other form of body modification, it is in the public interest to regulate rather than ban tattooing by non-medical professionals.

Most countries that allow tattooing allows it to be done by artists without medical licenses. First, the Court's medical license requirement is unrealistic in that it would require all tattooists to complete medical school and become a doctor before being able to practice his or her craft. Next, countries that have regulations are in a better position to create requirements and standards

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[102] *Landscape of legislation and safety efforts in the European Union*, EUROPEAN SOCIETY OF TATTOO AND PIGMENT RESEARCH https://estp-research.org/facts-science/tattoo-legislation/ (last visited Nov. 10, 2024).

[103] DIN EN 17169 (*Tattooing – Safe and hygenic practice*), https://www.en-standard.eu/din-en-17169-tattooing-safe-and-hygienic-practice/?srsltid=AfmBOoouHPfHL1cAt7Lb5WDLt7gm68GXM-Yg6QoIjRNlOyjgtVIg9N_R.

[104] *Substances Restricted Under REACH*, EUROPEAN CHEMICALS AGENCY, https://echa.europa.eu/substances-restricted-under-reach (last visited Nov. 10, 2024).

[105] *Europe's tattoo artists fear for future after EU ink ban*, BBC NEWS (Jan. 4, 2022), https://www.bbc.com/news/world-europe-59871779.

for hygiene that effectively target and address various health concerns. Whether or not the Constitutional Court accepts the changing times, tattoos are becoming more common, demand for them continue to grow, and banning non-medically licensed artists from giving them will not stop people from seeking them out. The best way to monitor and actually protect the health and safety of its citizens is for the Constitutional Court to consider the act an artistic expression rather than a medical act.

South Korea's ban on tattooing by non-medically licensed persons is unjustified by any legitimate health or safety concerns. There are no justifications that reasonably or sufficiently support the ban any more than they support regulations as practiced in other parts of the world.

CONCLUSION

In order to remedy the infringement on tattooists' rights in South Korea, the Constitutional Court's ruling must be reconsidered. The current law treating tattooing as a medical act is unjustified: it violates the Constitution while depriving tattooists of their human rights and leaves them in a vulnerable position, both economically and societally. Second, most countries including Japan, the United States and most European countries consider tattooing as a form of artistic expression more than just a mere procedure that can be performed by anyone, and that requires a certain degree of skill, technique, and creativity. As a result, tattooing and tattoos themselves are viewed as an exercise of the right to express oneself and is thus protected under freedom of speech or freedom of expression. Finally, in order to address the Constitutional Court's primary concern of public health, South Korea should adopt a practice similar to that of Japan, the United States, or the European states, which protects health and safety by setting standards and placing regulations and restrictions where they are needed without overstepping and infringing on the rights of tattooists.

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MOVING BEYOND ISOLATION – A RECONCEPTUALIZATION OF UNION RIGHTS FOR INCARERATED WORKERS

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INTRODUCTION

The collective organization of incarcerated workers is a critical issue, particularly in the context of labor law and workers' rights, but also as a field of action for social movements. It is also of international significance as incarcerated workers struggle for collective rights and better working conditions in many countries.[1] In Germany, incarcerated workers face significant legal challenges in organizing and exercising their rights to bargain collectively and engage in collective action such as strikes.[2] Yet there is a lack of a labor law perspective on this phenomenon, which has been viewed almost exclusively as one of penal law. My research aims to investigate these challenges with a particular emphasis on the right to collective organization and the right to strike.

Through a review of German case law denying labor rights to incarcerated workers, I identified a main strand of argument. Courts reject individual labor rights on the basis that incarcerated workers do not enter into free contractual employment relationships and because the purpose of prison work is not income generation but resocialization. Thus, the existence of an economic and contractual relation is seen as essential for the application of labor rights.

With the help of Noah Zatz's analysis of the "separate spheres reasoning,"[3] it is possible to uncover the fiction of separate economic and social spheres that underlie this argument. By equating the "employment relationship" and "economic relationship," two distinct and mutually exclusive social spheres are constructed: the economic sphere and the non-economic/prison sphere.[4] Zatz identifies three mechanisms of how law contributes to this construction: the codification of relational markers, the normativization of relational markers, and the normativization of distinct spheres.[5]

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[1] *See* Rachel Knaebel, *Prison workers in Germany are organizing*, Equal Times (March 2, 2015), https://www.equaltimes.org/prison-workers-in-germany-are; Hunter Southall, *From Behind Bars, Incarcerated Workers Are Unionizing, Striking*, onlabor (Dec. 28, 2022), https://onlabor.org/from-behind-bars-incarcerated-workers-are-unionizing-striking/.

[2] *See* Joe Watson, *German Prisoners Form Union, Seek Minimum Wage and Pension*, Prison Legal News (Aug. 2, 2016), https://www.prisonlegalnews.org/news/2016/aug/2/german-prisoners-form-union-seek-minimum-wage-and-pension/#:~:text=A%20group%20of%20prisoners%20in,successful%20reentry%20after%20their%20release.

[3] Noah D. Zatz, *Prison labor and the paradox of paid nonmarket work*, 8 Econ. Socio. of Work 369, 373 (2009).

[4] *Id.*

[5] Noah D. Zatz, *Working at the boundaries of markets: prison labor and the economic dimension of employment relationships*, 61 VANDERBILT L. REV. 857, 943 (2008).

This paper will translate these mechanisms into the context of prison union organizing. In the first step, I will show that the legal reasoning for denying the freedom of association and the right to strike for incarcerated workers is also predicated on the separate sphere logic. Accordingly, the arguments developed by Zatz against such a fragmentation of reality can be transferred to the collective level. This transfer from an abstract legal concept to the specific legal situation in Germany is at the core of this paper.

Using a substantive approach, I will show that the legal argument against union rights for incarcerated workers confines the role of unions in the economic sphere. Consequently, unions are perceived as mainly economic actors today and therefore denied to incarcerated and other 'non-economic' workers. However, this perception is not derived from an observation of reality but rather a construction heavily influenced by labor law itself. Hence, it can be shown that the exclusion of incarcerated workers from the scope of freedom of association is due to a formalistic understanding of the significance of labor unions. In the same way that individual labor relations cannot be clearly categorized as either within the economic sphere or within the prison sphere, the same is true for the collective organization of incarcerated workers. Unions are not exclusively economic actors, separate and distinguishable from other social actors, and therefore, should not be exclusive to individuals whose labor relations are categorized as economic. While this is not grounds to establish a positive right of incarcerated workers to associate and to strike, the merit of these findings is to dispel the dominant legal arguments against these freedoms.

These findings are not only crucial for the labor rights of incarcerated workers in Germany but also raise more far-reaching questions. Ultimately, they can pave the way to a deeper understanding of how labor law shapes the role that unions have in a society by granting access to union rights and the right to strike to some workers while denying it to others.

I. THE "RIGHT TO FORM ASSOCIATIONS TO SAFEGUARD AND IMPROVE WORKING AND ECONOMIC CONDITIONS"[6] AS AN EXPRESSION OF THE LIMITATION OF UNIONS TO THE ECONOMIC SPHERE

Zatz analyzes how labor law, among other things, contributes to its own restriction of economic relationships using relational markers, excluding all other relationships assigned to a different social sphere from its scope.[7] This mechanism can be transferred to the collective level, explaining how law categorizes unions based on which relational markers this categorization

[6] Grundgesetz [GG] [Basic Law] art. 9 § 3, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0051.

[7] Zatz, *supra* note 5, at 943.

takes place. The wording of Art. 9 III GG, which includes the terms "safeguard and improve working and economic conditions" in its definition, plays a crucial role.[8] The interpretation of this wording in the jurisprudence of the German Federal Constitutional Court (BVerfG) illustrates how the law, as interpreted by the jurisprudence, contributes to and maintains this delineation and reshapes unions' practices to appear more distinctly economic.

A. Transfer of Zatz's Analysis to the Scope of Freedom of Association

First, it is necessary to establish a connection between Zatz's considerations in individual labor law and the question of unions under examination here. This connection exists on two different levels.

On the one hand, the constitutional scope of protection under Art. 9 III GG is not limited to employees.[9] However, they still constitute the majority of members in most unions, so much so that unions are often referred to as "associations of employees or employers," making it appear as if other workers are excluded from the fundamental protection.[10] Those recognized as employees can join a union to represent their own work-related interests; this is not disputed for this group, unlike, for example, parasubordinate work[11] or incarcerated workers. Therefore, the question of who is legally recognized as an employee plays a significant role in the scope of the freedom of association.

Furthermore, there is a second connection of greater interest for this chapter. According to the wording of Art. 9 III GG, the qualifying feature distinguishing unions from general associations under Art. 9 I GG is that their purpose must be "to safeguard and improve *working and economic conditions*."[12]

In this paper, this requirement will be examined with the analytical tools that Zatz has developed regarding the employment relationship. At the center is the initial finding that, according to the prevailing view, there must be a

[8] Grundgesetz [GG] [Basic Law] art. 9 § 3, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0051.

[9] Grundgesetz [GG] [Basic Law] art. 9 § 1, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0051.

[10] *See generally Germany's Employers' Associations*, deutschland.de, https://www.deutschland.de/en/topic/business/globalization-world-trade/employers-associations.

[11] "Economically dependent work which represents a form of work falling within a grey zone between dependent work and self-employment." *See* Adalberto Perulli, Eur. Parliament, Study on economically dependent work/parasubordinate (quasi-subordinate) work 8 (2002).

[12] Grundgesetz [GG] [Basic Law] art. 9 § 3, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0051.

functional connection between working and economic conditions to such an extent that it encompasses "the totality of conditions under which dependent work is performed."[13] This is often understood as a distinction from associations dealing with purely economic conditions, such as lobby organizations or cartels.

The reverse question often remains unanswered: is it essential for the scope of freedom of association that the association deals with the working conditions *of economic work specifically*? And if so, what requirements are placed on this concept of economy? It is interesting to note that a tendency to equate economic work and employment can also be observed in the following passage, which is considered so self-evident that it receives no argumentative support:

> Unions in the constitutional sense are accordingly associations of working life that are called and able to resolve and overcome intra-societal, i.e., private law conflicts of interest between employees and employers in a collective, liberal, and socially just autonomy.[14]

Thus, Zatz's substantive criticism of this simplifying equation[15] can be transferred to the collective level. In the following, we will therefore take a closer look at the importance that case law attaches to economic relationships and the understanding of "the economic" on which it relies in determining the relational markers. This analysis will be based on the analytical tools developed by Zatz for the individual employment relationship[16]: determine the relational markers and provide a substantive evaluation of these findings.

B. Illustration of the Delimitation to the Economic Sphere in Case Law and Legal Scholarship

The question of the significance of working and economic conditions for the scope of protection of Art. 9 III GG is most clearly expressed in a passage from a judgment of the LAG Stuttgart from the 1950s:

> Are there any associations on the part of employees at all for the preservation and promotion of working and economic conditions that are not trade unions? The most important characteristic of the term 'trade union' is collective bargaining capacity; on this, the entire literature agrees. But then the question arises: Is collective bargaining capacity not one of the

[13] Linsenmaier in: ErfK, 24th edition 2024, GG Art. 9 para. 23 (Ger.).

[14] Dürig/Herzog/Scholz in: Grundgesetz-Kommentar, 102nd edition 2024, GG Art. 9 para. 194 (Ger.).

[15] Zatz, *supra* note 3, at 386.

[16] Zatz, *supra* note 5, at 943.

> essential features of an 'associations to safeguard and improve working and economic conditions'? Can an organization that primarily wants to preserve and promote the working and economic conditions of its members achieve this main purpose other than by concluding collective agreements? [17]

The LAG Stuttgart did not address these questions subsequently because they were not relevant to the case to be decided. However, the questions already indicate a specific understanding of what the LAG considers the task and significance of an association protected by Art. 9 III GG: the conclusion of collective agreements. This conclusion presupposes two premises: first, that Art. 9 III GG only promotes the preservation and promotion of the conditions of economic work; second, that there is an economic and contractual work equation. This is because collective agreements are thought to be conceptually inseparable from the existence of an individual employment contract, their legitimation being the employees' deficiency in individual bargaining power.[18] Connected with Zatz's analysis, the following hypotheses result:

1. The presence of collective bargaining capacity or the intention to conclude collective agreements serves as a relational marker regarding the existence of an association protected by Art. 9 III GG.
2. The criterion of collective bargaining capacity hides a formalistic concept of the economy, which equates contractual to economic work.

These can be demonstrated by identifying two distinct relational markers for what is the relational package of "unions" in Art. 9 III GG according to the jurisprudence of the Federal Constitutional Court and by showing their relationality.

1. First Relational Marker: Working Conditions as Conditions of Contractual Employment

A marker that is easily recognizable based on the jurisprudence of the Federal Constitutional Court is the implicit equation of working conditions (in the sense of the wording of Art. 9 III 1 GG) and conditions of contractual work. This marker is also a good example that relational markers, unlike (legal) requirements, do not necessarily have to be present for a phenomenon

[17] Landesarbeitsgerichte (LAG) [Higher Labor Courts] June 5, 1953, Neue Juristische Wochenschrift [NJW] 1407, 1408 (1953) (Ger.).

[18] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 779/85, June 26, 1991, BVerfGE 84, 212, 229, https://www.servat.unibe.ch/dfr/bv084212.html.

to be qualified according to the "relational package": "The difficult part is that an element may regularly be present in a relationship and even contribute toward its recognition as a conventional package, without being essential to it."[19]

On the one hand, the Federal Constitutional Court repeatedly refers to the concept of the employee in its decisions. On the other hand, groundbreaking decisions such as on the freedom of association of domestic workers or on the right to strike for civil servants[20] also make it clear that the presence of an employment contract determining the working conditions is not a mandatory requirement for the scope of protection of Art. 9 III GG. In one of the first important decisions on freedom of association, the Federal Constitutional Court states as follows:

> The fundamental right to freedom of association concerns not only the association as such but the association for a specific overall purpose**, namely, for the active representation of employer (employee) interests**.
>
> From the totality of associations, only those were recognized as capable of collective bargaining whose statutory task was the representation of the interests of their members **precisely in their capacity as employers (employees)** {…}. In reality, however, these characteristics are nothing more than necessary prerequisites for the existence of genuine labor law associations.[21]

Here, the Federal Constitutional Court makes it clear that, in its opinion, the purpose of freedom of association is to represent the interests of employees (in their capacity as such). But even more interesting is that it sees this as a requirement "for the existence of genuine labor law associations" (meaning unions in the sense of Art. 9 III GG).[22] This is made even more explicit a few decades later with the following unequivocal statement: "The freedom of association (Art. 9 III GG) applies to employees and employers."[23]

This constriction is particularly evident in current legal commentary literature dealing with the interpretation of Art. 9 III GG:

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[19] Zatz, *supra* note 5, at 928.

[20] BVerfG, 2 BvR 1738/12, June 12, 2018, NVwZ 2018, 1121 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2018/06/rs20180612_2bvr173812.html.

[21] BVerfG, 1 BvR 629/52, Nov. 18, 1954, NJW 1954, 1881, 1882 https://openjur.de/u/348773.html.

[22] *Id.*

[23] BVerfG, 1 BvR 779/85, June 26, 1991, NZA 1991, 809 https://openjur.de/u/177422.html.

> "Working conditions" traditionally refer to the conclusion, content, and termination of an employment relationship.[24]
>
> Economic conditions are the economically and socio-politically significant general conditions *for employers and employees*.[25]
>
> On the trade union side, *all employees* are entitled to the fundamental right; on the employer side, *all legal entities that hold employer positions* are entitled to the fundamental right.[26]

Even if the reference to employees is not explicitly adopted, it serves as an important reference – as a default – which can be seen in the following excerpts from legal commentaries:

> These are professionals who want to preserve and promote their working and economic conditions together. These are *primarily employees and their social opponents, the employers,* as well as apprentices, but also civil servants, judges, and soldiers, home workers, retirees, and the unemployed.[27]
>
> The reference to dependent work means that *only associations of employees (or comparable persons) and employers* are covered by this provision.[28]

In this context, it is important to clarify that there is no imperative legal argument for this restriction in the constitutional text and that a less limiting interpretation of "working and economic conditions" would be equally valid.

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[24] Boecken/Duwell/Diller/Hanau in: Nomos Kommentar - Gesamtes Arbeitsrecht, 2nd edition 2023, GG Art. 9 para. 23 (Ger.).

[25] Cornils in: Beck'scher Online Kommentar Grundgesetz, 56th edition 2023, GG Art. 9 para. 46 (Ger.).

[26] Dürig/Herzog/Scholz in: Grundgesetz-Kommentar, 102nd edition 2024, GG Art. 9 para. 194 (Ger.).

[27] Linsenmaier in: ErfK, 24th edition 2024, GG Art. 9 para. 27 (Ger.).

[28] Däubler in: Nomos Kommentar - Tarifvertragsgesetz, 5th edition 2022, para. 105 (Ger.).

2. Second Relational Marker: Collective Bargaining Capacity[29] and Conclusion of Collective Agreements

In addition, another relational marker can easily be identified in the jurisprudence of the Federal Constitutional Court: the conclusion of collective agreements as the main practice of unions. This goes so far that the Federal Constitutional Court in an early leading decision on Art. 9 III GG, equates the capability of collective bargaining with the existence of fundamental rights protection under Art. 9 III GG. It stated that the conditions for the collective bargaining capacity are identical to the conditions for the existence of a union protected under the freedom of association (and not the other way around):

> From the totality of associations, only those were recognized as capable of collective bargaining {…}. In reality, however, these characteristics are nothing more than necessary prerequisites for the existence of genuine labor law associations.[30]

This equation becomes particularly clear in the following passage:

> So, if case law and legal doctrine have set special requirements for the recognition of the collective bargaining capacity with regard to associations whose members can be covered by collective wage setting, they have thus correctly delimited the concept of the association - also in the sense of Art. 9 (3) GG.[31]

Here, the Federal Constitutional Court appropriates the conditions for the collective bargaining capacity in such a way that it extends their meaning to the extent that they are already a requirement for the preceding question of fundamental rights protection under Art. 9 III GG.

Several decades later, the Federal Constitutional Court's wording on the relationship between collective bargaining capacity and freedom of association sounds more open, as becomes clear in the following passage. However, it should be noted that the case law to date and the judgment cited relate exclusively to the question of which other activities of a union with

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[29] This is a specific legal term in German labor law (*Tariffähigkeit*) with specific requirements and legal consequences. It is required for a union to have Collective Bargaining Capacity in order to conclude legally binding collective agreements. *See Tariffähigkeit*, dbb beamtenbund und tarifunion, https://www.dbb.de/lexikon/themenartikel/t/tariffaehigkeit.html#:~:text=Tariff%C3%A4higkeit%20beschreibt%20die%20Eigenschaft%2C%20rechtswirksam,Arbeitgeber%20verbindlich%20regeln%20zu%20d%C3%BCrfen.

[30] BVerfG, 1 BvR 629/52, Nov. 18, 1954, NJW 1954, 1881, 1882, https://openjur.de/u/348773.html.

[31] *Id*.

collective bargaining capacity and collective bargaining agreements are additionally covered by the scope of protection of Art. 9 III GG.

These decisions are concerned with determining whether individual activities serve to safeguard and promote working and economic conditions and not whether the association as such pursues this purpose. Although the Federal Constitutional Court affirms protected freedom of association for unions incapable of collective bargaining today, moving away from the restrictive jurisprudence of the 1950s, it is also evident in recent jurisprudence that the conclusion of collective agreements is still considered an important marker for the activities of unions. This is explicitly stated in the following passage from a Federal Constitutional Court judgment from 2001:

> The protection extends to all union-specific behaviors and includes in particular collective bargaining capability, which is at the center of the possibilities granted to unions for pursuing their purposes. Negotiating collective agreements is an essential purpose of unions.[32]

II. RECONCEPTUALIZING UNIONS AS A RELATIONAL PACKAGE

According to Zatz, a relational package is a "contingent collection of particular practices, actors, meanings, and institutional contexts" that is used to define a legal concept.[33] In other words, it is a contingent set of specific practices, actors, meanings, and institutional contexts. He identifies the individual practices, actors, meanings, and institutional contexts that comprise a relational package as "relational markers." The special feature of these relational packages is that there is no definitive and complete list of requirements that must be met for a certain phenomenon to be legally recognized as such. Instead, its existence or scope of application is evaluated based on different mutually influencing (relational) factors and thus resolved legally as opposed to the court merely recognizing and identifying a phenomenon that is present in real life.

A. Relationality of the Concept of Unions

The analysis of the Federal Constitutional Court's jurisprudence on Art. 9 III GG shows that the concept of unions is a relational package in this sense. While "association" and "safeguard and improve working and economic

[32] BVerfG, 1 BvL 32/97, April 3, 2001, NZA 2001, 777, 778.
[33] Zatz, *supra*, note 5, at 925.

conditions" initially appear to be clear legal prerequisites, the relationality is concealed behind the term “working and economic conditions.”

For an association to claim the extended protection of Art. 9 III GG, its purpose must be safeguarding and improving working and economic conditions. However, the German Constitution does not specify the meaning of “working and economic conditions.”[34] Consequently, it is the constitutional jurisdiction’s task to determine this meaning and to differentiate it from other possible fields of activity. Thus, the Federal Constitutional Court has taken on the task that Zatz assigned to employment law concerning the legal concept of work: “Employment law actively contributes distinctive elements to the package, shapes their interaction, and reinforces their coherence as a package.”[35]

The Federal Constitutional Court has not established a conclusive list of legal prerequisites. Still, it conducts an examination of various criteria to assess whether the interests pursued by the association qualify as working and economic conditions. The following section will demonstrate how the term "working and economic conditions" constitutes a relational package by the Federal Constitutional Court.

B. Relational Markers

Subsequently, the question arises regarding which markers the Federal Constitutional Court uses to determine whether the pursued interests qualify as working and economic conditions. An analysis of the Constitutional Court’s case law has revealed that the collective bargaining capacity of unions and the connection of their area of responsibility to contractual employment play a particularly important role. This illustrates the markers’ relationality on the individual and collective level. By referring to the regulation of the pursued interests through collective agreements, the criterion of contractual relationships is elevated to the collective level as the collective agreement is and can be, qualified as the collective equivalent to the individual employment contract.[36] This also transfers the formalistic limitation of the economic concept[37] contained in the contractual and economic work equation to the collective level.

Regarding working conditions, a strong connection to the concept of employment exists. Although, according to the Federal Constitutional Court, statutory and common law cannot determine or even influence a binding

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[34] This is the wording of the constitutional provision. *See* Grundgesetz, *supra* note 12.

[35] Zatz, *supra*, note 5, at 925.

[36] Both are based on a voluntary contractual relationship, regulate wages and other conditions of employment and are binding only to the parties.

[37] Zatz, *supra*, note 3.

interpretation of the Constitution, it nonetheless assumes that within the scope of Art. 9 III GG, working conditions refer to the conditions of contractual employment. This reflects a naturalization of employment as a social category as opposed to one that is already legally constructed because the wording of the Constitution could support other, more extensive definitions of "work."

This indicates that the relational package, constituting "working and economic conditions" according to the jurisprudence of the Federal Constitutional Court, operates within "separate spheres reasoning"[38] or "separate world rationale"[39] identified by Zatz regarding the individual employment relationship. In this perspective, unions are seen as representatives of employees in the economic sphere. They are distinguished from other (social) political associations whose interests are classified as political or social, even if they are concerned with working conditions, as long as they are not economic in a formalistic sense.

The wording of Art. 9 III GG, explicitly containing the term "economic conditions," favors this interpretation but does not necessarily presuppose it.[40] As shown by Zatz, the concept of economic action or the economy, as accessed by a substantive analysis, could easily encompass the conditions of work and the interests of people performing work beyond a contractual relationship.[41]

Moreover, the two markers also demonstrate the relationality of markers described by Zatz.[42] It is not coincidental that both markers establish a connection to the contractual sphere. The collective bargaining agreement is traditionally seen as a collective mechanism compensating for the individual negotiating weakness of employees. This negotiating weakness is, in turn, justified by the deficient market mechanisms of the labor market. Thus, the existence of an individual employment contract legitimizes the conclusion of collective bargaining agreements. Conversely, this means that the requirement of a collective bargaining agreement presupposes (at least according to the classical understanding) the presence of contractual work. In this way, the two markers reinforce each other.

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[38] *Id.* at 374.

[39] NOAH D. ZATZ, THE CARCERAL LABOR CONTINUUM: BEYOND THE PRISON LABOR/FREE LABOR DIVIDE, LABOR AND PUNISHMENT 145 (Erin Hatton ed., 2021).

[40] This is the wording of the constitutional provision. *See* Grundgesetz, *supra* note 12.

[41] Zatz, *supra*, note 3.

[42] Zatz, *supra*, note 5, at 928-29.

C. Mechanisms of Construction by Law

Zatz's analysis also encompasses the mechanisms by which law contributes to the construction of relational packages.

A *codification of markers*[43] occurs when the law codifies specific markers. Usually this involves "mandating practices that themselves serve as relational markers".[44] For unions, this happens specifically through the German Collective Agreements Act (TVG)[45], which regulates collective bargaining in Germany: concerning the subject of collective agreements, the law starts from employment relationships (§ 1 I TVG), explicitly extending the scope only to parasubordinate workers.[46] As shown, working in an employment relationship is a marker for the existence of working and economic conditions under Art. 9 III GG. The same applies to the regulation of these conditions through a collective agreement. If both conditions are linked by the TVG ("Only the conditions of employment relationships are the subject of collective agreements."), this means that collective agreements not related to employment conditions are not included in the TVG and, therefore, are less likely to be classified as a collective agreement in the sense of Art. 9 III GG. This, as a relational marker, influences whether the conditions of work regulated in these agreements are recognized as working and economic conditions.

The *normativization of markers*[47] is the process of markers mutually influencing each other in a way that reinforces their role as indicators for the whole package. If specific markers are present for an association, this can contribute to its members perceiving themselves more as union members and accordingly demanding the enactment of other markers or even collectively enforcing them. The markers influence each other, creating a domino effect.

This can also be observed in the union concept and its delimitation. The restriction to contractual employment relationships and the conclusion of collective agreements both function as relational markers. Thus, associations that do not represent employees or do not strive to conclude collective agreements are not only not legally recognized as unions but are also not regarded as such by society. Conversely, legally and socially recognized unions of employees consider concluding collective agreements for their members as their primary responsibility (and not, for example, enforcing economic policy demands against the legislature or establishing other forms of co-determination that do not yet exist). When we think of unions, we think

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[43] Zatz, *supra*, note 5, at 943-944.

[44] *Id.*

[45] Tarifvertragsgesetz [TVG] [Collective Agreements Act], May 20, 2020, Bundesgesetzblatt 1 [BStBl] at 1055 (Ger.), https://www.gesetze-im-internet.de/englisch_tvg/englisch_tvg.html.

[46] *Id.* at §12a.

[47] Zatz, *supra*, note 5, at 947.

of associations of employees; when we think of associations of employees, we think of collective agreements. In this way, the normativization of the markers takes place.

Finally, through these two mechanisms, the working and economic conditions category is *institutionalized*[48]. This is not about the term itself, as it results from the constitutional wording and therefore immutably serves as the delimitation of the constitutional protection. Rather, it concerns the meaning attributed to the term, in other words, the relational package that defines what the law understands by "working and economic conditions." This package constructs the union as an association that advocates for the interests of employees and primarily uses the means of collective bargaining and the conclusion of collective agreements. This is illustrated by the qualification of the freedom of association as a "fundamental right of employees and employers" and the subdivision of associations into "unions and employer associations." The legal debates about exceptions to this rule, such as those favoring civil servants or parasubordinate workers, only prove that this construction exists and is predominant, requiring an argumentative justification for exceptions. By limiting the constitutional protection to the working conditions of employees in contractual relationships, the demarcation of the different spheres is maintained, and overlaps are prevented.

D. Summary of Findings

The case law on the scope of union protection contains requirements that reshape associations to make them look more distinctly ‘economic’ to be protected under Art. 9 III GG. This case law, in turn, influences whether unions consider such topics within their institutional purview, thus affecting what unions do in a way that creates separation from other types of associations. Conversely, for other associations, some activities are considered markers for unions, which they cannot do or cannot do with legal protection. This further discourages them from trying to do so and thus makes them resemble unions less.

III. THE CONDITIONAL LEGITIMACY OF UNIONS

Accordingly, the Federal Constitutional Court’s interpretation reduces the historical and conceivable societal, economic, and social functions of unions, a limitation of their significance that does not necessarily follow from

[48] *Id.* at 949-950.

the wording of Article 9 III GG. Diane Reddy provides an analysis of the consequences of this restriction of unions to their economic function.

She employs the term *conditional legitimacy*,[49] to describe the outcome of the process accompanying the legalization and legal recognition of unions. On the one hand, unions gained the protection of the law and thus increased room to maneuver. On the other hand, legal recognition came with a condition: while the field of unions was previously determined primarily by their practical effectiveness and power, now the law limits the societal conflicts in which unions can act and those in which they cannot.[50] Reddy demonstrates that this limitation mainly occurred in a formalistic sense, in the economic sphere: that the purpose and justification of unions lie in the conclusion of collective agreements, serving as the collective counterpart to individual employment contracts regulating the conditions of dependent, contractual work.

Reddy distinguishes between two categories of actors: political and economic actors, with unions being classified as economic actors.[51] According to her analysis, the two spheres receive different attributes, as shown in the following table, influencing societal perceptions and expectations regarding the respective actors.[52]

Economic sphere	**Sociopolitical sphere**
Unions	Civil-rights-movements, parties
Only acceptable as a means to an end (end = regulate commerce to promote industrial peace) = ***conditional legitimacy***	Sociopolitical issues (end in itself, rights-oriented)
Technocratic decision-making	Normative argumentation
Matters of private/individual concern	Matters of public concern
Economic / rational	Normative / moral
Strike as an apolitical, economic weapon, an economic right, directed inwards (towards the employer)	Strike as a form of political protest, a civil right, directed outwards (towards the public)

[49] Diana S. Reddy, *After the law of apolitical economy: Reclaiming the normative stakes of labor unions*, 132(5) YALE L. J. 1391, 1455 (2023).

[50] *Id.* at 1460.

[51] *Id.* at 1396.

[52] *Id.* at 1455; Diana S. Reddy, *'There Is No Such Thing as an Illegal Strike': Reconceptualizing the Strike in Law and Political Economy*, 130 YALE L. J. 421, 421 (2020).

As a result, unions' jurisdiction is limited to areas of economic problems, while their recognition as primarily political actors is denied.[53] This has consequences for applying freedom of association to incarcerated workers, as their work, as demonstrated above, is not considered economic. Therefore, the regulation of their working conditions is not within the jurisdiction of unions. Reddy attributes the cause of this to the ***normative insufficiencies of labor law***.[54]

IV. BACK TO PRISON AND BEYOND

In the final section of this paper, the insights presented above will be applied to the question of the legal status of incarcerated workers' unions. Applying Zatz's methodology of relational packages and markers to the collective level and thus to the concept of "union," the mechanisms of demarcating the economic sphere can be identified. This involves equating economic and contractual work. In defining unions, especially through the interpretation of "working and economic conditions," the Federal Constitutional Court adopts a formalistic perspective, basing its definition on the conditions of contractual work.[55] Consequently, incarcerated workers are excluded from the fundamental protections because their working conditions are not contractually regulated. Thus, they are not understood as economic and, consequently, not as "working and economic conditions" within the scope of Article 9 III GG.

This demarcation is noy[56] inherent to reality but constructed by the law. The relational markers are codified and normativized by the law, reinforcing and perpetuating the hegemonic discourse of what is to be understood as working and economic conditions under Article 9 III GG, legally and socially. This explains why the courts dismiss the question of union protection for incarcerated workers so easily and without further substantiation.

Reddy's analysis of the two spheres concerning unions further illustrates this exclusion. By constructing unions as purely economic actors, they are not perceived by law and society as associations representing incarcerated workers' interests regarding their working conditions.

The exclusion of incarcerated workers' unions from the scope of freedom of association is justified because the work performed by incarcerated workers is not contractually regulated and, therefore, belongs to a

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[53] Reddy, *supra*, note 49, at 1396.
[54] *Id.* at 1400.
[55] Grundgesetz, *supra* note 12.
[56] Grundgesetz, *supra* note 12.

fundamentally different legal sphere. This chapter has demonstrated that this argumentation is based on a double fallacy. On the one hand, it relies on a formalistic equation of economic and contractual work, grounding the exclusion of incarcerated workers from the economic sphere in the presumed social specificity of this type of work. This equation is unconvincing; the work performed by the incarcerated can be equally assigned to the economic sphere, and social specificities can be identified in work understood as economic. On the other hand, the role of unions is limited to a supposedly clearly demarcated economic sphere, which is also understood in a formalistic way and thus closely linked to the conclusion of individual and collective contractual agreements. This understanding is neither mandatory nor does it do justice to the material and historical significance of unions.

CONCLUSION

In conclusion, it is important to emphasize that, regardless of the legal debate surrounding their protection, unions historically almost always had to fight for societal and legal recognition.

Unregulated collective organization and strikes often preceded their legal protection, which could very well be the case for incarcerated workers' unions.

> The lesson of history is that, with or without legal support, incarcerated workers, like workers on the outside, have persisted in organizing and acting through unions as a means of improving the conditions under which they labor and live.[57]

However, labor law plays a pivotal role in constructing and maintaining the barrier that separates the sphere of economic work from the sphere of prison work. German Constitutional Law then places labor unions firmly in the economic sphere, seemingly out of reach for incarcerated workers. Recognizing the artificiality of this divide challenges that exclusion and allows us to see labor unions as more than just economic actors.

[57] Eric M. Fink, *Union Organizing & Collective Bargaining for Incarcerated Workers*, 52 No. 3 IDA. L. REV. 953, 973 (2016).

GÖDEL'S LOOPHOLE: A PREQUEL

F. E. Guerra-Pujol[*]

INTRODUCTION

One of the great unsolved mysteries of constitutional law is "Gödel's loophole."[1] In brief, Kurt Gödel, "the foremost mathematical logician of the twentieth century,"[2] reportedly discovered a hidden flaw in the United States Constitution, a deep logical contradiction that could lead to a constitutional dictatorship.[3] In a previous work, I conjectured what the substance of this loophole might be.[4] Here, by contrast, I will address a different constitutional question: how plausible is Gödel's loophole as a practical matter? More to the point, how likely is it that a would-be dictator could exploit Gödel's constitutional loophole in these turbulent times? It turns out, very likely, if

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[1] *See generally*, F. E. Guerra-Pujol, *Godel's Loophole*, 41 CAP. U. L. REV. 637 (2013).

[2] Institute for Advanced Study, *Kurt Gödel, Past Faculty, School of Mathematics* (not dated), https://www.ias.edu/scholars/godel [https://perma.cc/YUY9-KDHA].

[3] Guerra-Pujol, *supra* note 1, at 638.

[4] *Id.*

the constitutional history of interwar Central Europe is any guide. By way of example, by the time Gödel was awarded the right to lecture at the University of Vienna in March 1933, democracy had died in at least nine or ten states in interbellum Europe, depending on whether Atatürk's Turkey is classified a dictatorship: Hungary under Admiral Horthy,[5] Italy under "Il Duce" Benito Mussolini,[6] Lithuania under President Smetona,[7] Poland under First Marshal Piłsudski,[8] Portugal under Prime Minister Salazar,[9] Spain under Captain General Primo de Rivera,[10] and Yugoslavia under King Aleksandar[11] had all become constitutional dictatorships.[12]

In summary, this work will survey three "self-coups" that occurred during the interwar period in Yugoslavia (1929), Austria (1933), and Romania (1938).[13] The first of these self-coups unfolded on January 6, 1929, when King Aleksandar I of Yugoslavia took advantage of the turmoil caused by a political murder to assume dictatorial powers.[14] The second self-coup happened in March of 1933, when Austrian Chancellor Engelbert Dollfuß used a legislative stalemate as a pretext to declare the "self-elimination" of Austria's parliament.[15] The third took place in February 1938, when King Carol II of Romania seized emergency powers to preserve his country's neutrality in foreign affairs.[16] In addition, this work will survey the demise

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[5] DENIS SINOR, HISTORY OF HUNGARY (1959).

[6] CHRISTOPHER DUGGAN, THE FORCE OF DESTINY: A HISTORY OF ITALY SINCE 1796 (2008). *See also* BENITO MUSSOLINI, *My Autobiography* (Dover 2006) (1928).

[7] Janis Rogainis, *The Emergence of an Authoritarian Regime in Latvia, 1932–1934*, 17 LITUANUS: LITHUANIAN Q. J. ARTS & SCI. 65 (1971).

[8] Joseph Rothschild, *The Ideological, Political, and Economic Background of Pilsudski's Coup d'Etat of 1926*, 78 POL. SCI. Q. 224 (1962).

[9] Antonio Costa Pinto, *The Radical Right and the Military Dictatorship in Portugal: The National May 28 League (1928-1933)*, 23 LUSO-BRAZILIAN R. 1 (1986).

[10] Ben-Ami Shlomo, *The Dictatorship of Primo de Rivera: A Political Reassessment*, 12 J. CONTEMP. HIST. 65 (1977).

[11] Brigit Farley, *King Aleksandar and the Royal Dictatorship in Yugoslavia*, *in* BALKAN STRONGMEN: DICTATORS AND AUTHORITARIAN RULERS OF SOUTHEASTERN EUROPE 51–86 (Bernd J. Fischer ed., 2007.)

[12] For geographical context, see *infra* the map of interbellum Central Europe.

[13] *See* Parts II, III, and IV *infra*.

[14] *See, e.g.,* MARIE-JANINE CALIC, A HISTORY OF YUGOSLAVIA 104-106 (trans. Dona Geyer, 2019).

[15] Ingeborg Bauer-Manhart, *4 March 1933: The Beginning of the End of Parliamentarian Democracy in Austria*, CITY OF VIENNA (STADT WIEN), https://www.wien.gv.at/english/history/commemoration/end-democracy.html, [https://perma.cc/23AH-EDDV].

[16] Stephen Fischer-Galati, *Romania: Crisis without Compromise*, in CONDITIONS OF DEMOCRACY IN EUROPE, 1919–1939: SYSTEMATIC CASE STUDIES 381-395 (Dirk Berg-Schlosser & Jeremy Mitchell eds., 2000). *See also* Library of Congress, Federal Research Division, ROMANIA: A CASE STUDY 40 (Ronald D. Bachman ed., 2nd ed. 1991).

of these Central European democracies through the eyes of Kurt Gödel,[17] for all three of these self-coups not only occurred in Central Europe while Gödel was at the University of Vienna; these anti-constitutional moments may also shed light on the recursive nature of Gödel's loophole.

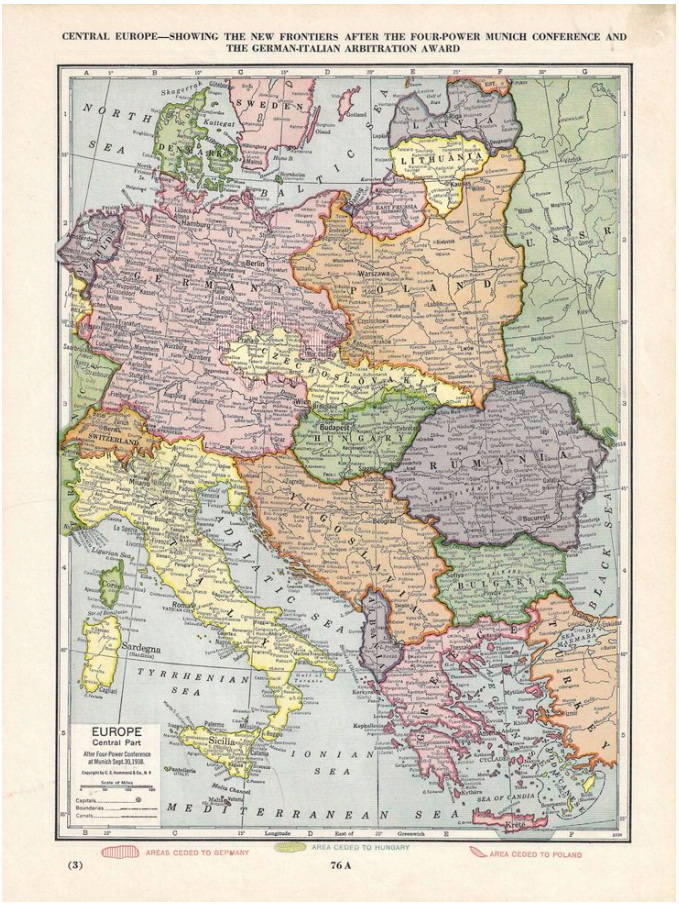

Figure 1: Map of Interwar Central Europe (c.1938)[18]

[17] I am therefore excluding military coups (e.g. Poland in May 1926 and Lithuania in December 1926) from my survey as well as constitutional dictatorships that occurred before Gödel's arrival in Vienna in the fall of 1924 (e.g. Hungary, Italy, and Turkey) or that did not occur in Central Europe (e.g. Portugal and Spain). I am excluding from my survey coups that took place while Gödel was overseas, including those that unfolded during Gödel's first visit at the Institute for Advance Study in Princeton, New Jersey: Estonia in March 1934 and Latvia and Bulgaria in May 1934. Gödel was at the IAS from September 1933 to June 1934. *See* Institute for Advanced Study, *supra* note 2.

[18] Figure 1: Map of Interwar Central Europe (c.1938), https://www.pinterest.com.

I. PROLOGUE: INTERWAR EUROPE THROUGH THE EYES OF KURT GÖDEL

Figure 2: Student I.D. Photo of Kurt Gödel (c.1926)[19]

Although the story of Gödel's discovery in late 1947 of a logical contradiction in the United States Constitution has been retold many times, the content of his discovery is often discounted as nonsense or as highly improbable.[20] This assessment, however, ignores Gödel's European background and the dramatic constitutional histories of several Central European states during the interbellum period, for during his formative years at the University Vienna, 1924-1940—first as a student and then as a lecturer—Gödel would have noticed that every constitutional democracy in Central Europe ended in dictatorship.[21]

Gödel lived only 15 years in Vienna, but in many ways those were the most formative and productive years of his life. Gödel had matriculated at

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[19] Figure 2: Student I.D. Photo of Kurt Gödel (c.1926), https://commons.wikimedia.org/wiki/File:Kurt_g%C3%B6del.jpg.

[20] *See, e.g.*, Draft Memorandum from Oskar Morgenstern (Sept. 13, 1971), https://robert.accettura.com/wp-content/uploads/2010/10/Morgenstern_onGoedelcitizenship.pdf [https://perma.cc/PF3F-FFFM].

[21] *Cf.* Joseph Rothschild, *The Military Background of Pilsudski's Coup d'Etat*, 21 SLAVIC REV. 241, 241 n.2 (1962) ("Eventually, all the states of this area [Central Europe], with the exception of Czeckoslovakia, succumbed to royal or military or political dictatorships").

the University of Vienna in the fall of 1924 (his university student identification photo is pictured above), and by the summer of 1929 he had completed his doctoral thesis logically proving the completeness of the first-order predicate calculus. (Gödel's dissertation was approved by his academic advisors on 6 July 1929,[22] and he was granted his Ph.D. on 6 February 1930.[23]) After proving his now-famous "incompleteness theorem" in 1931, he obtained his *Habilitation* as well as the right to lecture in 1933.[24] In the words of fellow Austrian scholar Karl Sigmund, "Kurt Gödel spent barely fifteen years in Vienna ... However, the years [in Vienna] ... constituted his formative period. He was deeply affected by the extraordinary cultural and intellectual following of what has been called 'Vienna's Golden Autumn,' and he may one day be seen as its most prestigious scion."[25]

Simply put, Vienna is where Gödel attended university and received his doctoral degree, where he attended the philosophical discussions of the Vienna Circle, where he met and wed his wife Adele, where he did his most important and original work, and where he made landmark contributions in the fields of logic and mathematics. In other words, Vienna was not only Gödel's primary residence from 1924 to 1940; it was also the grand capital city where Gödel came of age. But what many students of Gödel's life and work fail to mention is that Vienna—the imperial capital of the former-Austro-Hungarian Empire—must have also offered Gödel a perfect vantage point from which to observe, even casually, the degeneration of several constitutional democracies into constitutional dictatorships across Central Europe.

To sum up, when the young Gödel began his studies at the University of Vienna in the Fall of 1924, the vast majority of states in Europe were parliamentary democracies, but by the time Gödel and his wife Adele left their beloved Vienna fifteen years later in January 1940, every single constitutional democracy in Central Europe, Gödel's corner of the world, had become a constitutional dictatorship.[26] In the words of two eminent European historians, "Europe was strangled by various dictatorships: some fascist/Nazi dictatorships, some puppet, and a variety of semi-fascist or right-wing

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[22] JOHN W. DAWSON, JR., LOGICAL DILEMMAS: THE LIFE AND WORK OF KURT GÖDEL 93 (2005).

[23] *Id.* at 60.

[24] *Id.* at 86-89.

[25] Karl Sigmund, *Dozent Gödel will not lecture*, *in* KURT GÖDEL AND THE FOUNDATION OF MATHEMATICS 75–93 (Matthias Baaz et al. eds., 2011).

[26] Nancy Bermeo, *Getting Mad or Going Mad? Citizens, Scarcity, and the Breakdown of Democracy in Interwar Europe*, CENTER FOR THE STUDY OF DEMOCRACY (1997), https://escholarship.org/uc/item/8xf4t3t0.

nationalist and royalist authoritarian regimes."[27]

Did Gödel have the time or inclination to take notice of these dramatic anti-constitutional moments occurring across Europe during his tenure at the University of Vienna? How could he not have? Although "Gödel devoted himself intently on his studies … he was not asocial,"[28] for "he spent a good deal of time in the coffeehouses that were then so central to Viennese intellectual and cultural life."[29] So it is certainly possible, perhaps even probable, that Gödel perused some reports about these extra-constitutional coups in one of the Vienna's many news periodicals or heard about them in one of his favorite coffeehouses.

II. THE JANUARY 6 DICTATORSHIP

Figure 3: Feb. 11, 1929, Cover of Time (King Alexander)[30]

I will begin this survey of Central European self-coups with King Aleksandar of Yugoslavia (pictured above), who unilaterally abrogated his

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[27] Antonio Costa Pinto & Stein Ugelvik Larsen, *Conclusion: Fascism, Dictators, and Charisma*, 7 TOTALITARIAN MOVEMENTS AND POLITICAL RELIGIONS 251 (2006).

[28] DAWSON, *supra* note 22, at 31.

[29] *Id.*

[30] Figure 3: Feb. 11, 1929, Cover of Time (King Alexander), https://content.time.com/time/covers/0,16641,19290211,00.html.

country's constitution and assumed full dictatorial powers on January 6, 1929. This self-coup provides an early interwar example of a "recursive" transfer of power in which a previous extraconstitutional act is declared to be constitutional by a future constitutional act. Also, aside from his native Austria, the other Central European country that Kurt Gödel may have been most familiar with was Yugoslavia: Austria not only shared a common border with Yugoslavia, during the summer of 1933 Gödel had visited there and vacationed in the resort town of Bled with his mother.[31]

Following World War I, Yugoslavia was officially called the Kingdom of Serbs, Croats, and Slovenes.[32] This motley federation consisted of the crown provinces of Bosnia and Herzegovina, the formerly independent kingdoms of Serbia and Montenegro, and an assorted collection of territories that were once part of the Austro-Hungarian Empire, including Carniola, a portion of Styria, and most of Dalmatia (all from Austrian part of the former Austro-Hungarian Empire) as well as Croatia, Slavonia, and Vojvodina (all from the Hungarian part of the former empire).[33] Yugoslavia's first parliamentary constitution was enacted in June of 1921 and was called the Vidovdan Constitution after the feast of St. Vitus, a Serbian Orthodox holiday that takes place every June.[34] The Vidovdan Constitution established a constitutional monarchy, led by King Aleksandar I, also known as King Aleksandar the Unifier,[35] who assumed the throne in August of 1921 and ruled Yugoslavia—first as king, then as dictator—until his assassination in October 1934.

Alas, Yugoslavia's transition from democracy to dictatorship began as early as June 20, 1928, when the Croatian Peasant Party leader Stjepan Radić was shot by a Montenegrin Serb leader and People's Radical Party politician Puniša Račić during a tense argument on the floor of Yugoslavia's parliament.[36] Radić's assassination not only embroiled Yugoslavia in political turmoil; it also allowed King Aleksandar to take full advantage of the crisis. He carried out a self-coup on January 6, 1929, proroguing the parliament,[37] abrogating the Vidovdan Constitution, and assuming full

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[31] *Id.* at 93 (Bled is just across the border from Austria in Slovenia).

[32] *See generally* CALIC, *supra* note 14, at 73-84.

[33] *See id.*; *see also* chapter 1 of DEJAN DJOKIC, ELUSIVE COMPROMISE: A HISTORY OF INTERWAR YUGOSLAVIA (2007).

[34] Robert J. Donia & John Van Antwerp Fine, BOSNIA AND HERCEGOVINA: A TRADITION BETRAYED (1995). The parliamentary vote on the constitution was held on St. Vitus Day or "Vidovdan" on June 28, 1921. *See* CALIC, *supra* note 14, at 74.

[35] *See* CALIC, *supra* note 14, at 74.

[36] John Paul Newman, *War Veterans, Fascism, and Para-Fascist Departures in the Kingdom of Yugoslavia, 1918–1941*, 6 FASCISM: J. OF COMPAR. FASCIST STUD. 42, 63 (2017).

[37] *Id.* As an aside, the last European monarch to prorogue a parliament (i.e. suspend parliament without dissolving it) was King James II in 1685.

dictatorial powers.[38] Two years later, Aleksandar formalized his dictatorship by promulgating a new constitution by decree on September 3, 1931.[39] Yugoslavia's new constitution, also known as the September Constitution or Octroic Constitution, remained in effect for another ten years until the invasion of Yugoslavia by the Axis powers in 1941.[40]

Did Gödel take notice of these events in neighboring Yugoslavia? Although Gödel did cross the Austro-Yugoslav border once when he vacationed in Bled in 1933, it is unclear whether he took notice of any of these events. At the time of King Aleksandar's 6 January proclamation, for example, Gödel was in Vienna, beginning his work on his doctoral dissertation,[41] and when Aleksandar later decreed a new constitution in September of 1931, Gödel was preparing to attend a meeting of the German Mathematical Union in the spa town of Bad Elster, located in the state of Saxony in Germany, to lecture on his incompleteness theorem.[42]

Whether Gödel was aware of the Yugoslavian self-coup, King Aleksandar's decree of September 3, 1931—when he promulgated a new constitutional charter to replace the old one he had abrogated in 1929—poses an intriguing constitutional conundrum: was this decree itself constitutional? One could argue that King Aleksandar abrogation of the Vidovdan Constitution was an extraconstitutional power transfer from parliament to the king, since Aleksandar acted outside his country's constitutional process when he abrogated his country's constitution. But at the same time, the king's subsequent decree poses a puzzle: was his September 3 decree also an unconstitutional act, or did it "legalize" his self-coup *ex post* by creating a new constitutional order?

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[38] *See* Malborne W. Graham, Jr., *The "Dictatorship" in Yugoslavia*, 23 AM. POL. SCI. REV. 449, 445-456 (1929).

[39] *See* DAVID SHEPHERD, THE ROYAL DICTATORSHIP IN YUGOSLAVIA, 1929-1934: AS SEEN FROM BRITISH SOURCES (Thesis, Durham University 1975).

[40] *Id.*

[41] DAWSON, *supra* note 22, at 53.

[42] *Id.* at 75. (Gödel's lecture was delivered on the afternoon of September 15, 1931.)

III. THE SELF-ELIMINATION OF AUSTRIA'S PARLIAMENT

Figure 4: Sept. 25, 1933, Cover of *Time* (Chancellor Dolfuss)[43]

Gödel's fate was inextricably intertwined in many ways with Austria's during the turbulent interwar period. Although Gödel became a "citizen by fiat"[44] of Czechoslovakia when the Czechs and the Slovaks declared their independence in 1918, Gödel was originally born in 1906 in the small town of Brünn (now Brno) in the Austrian part of the now-defunct Austro-Hungarian Empire, and one of his schoolmates once confirmed that "Gödel considered himself always Austrian …."[45] In addition, Vienna was his primary residence from 1924 until early 1940.[46] During this span of time, the year 1933 is especially significant, not only for Gödel, but also for Austria as a whole, for it was in March of 1933 that Gödel was officially appointed *Privatdozent* or "private lecturer" at the School of Philosophy of the University of Vienna. Gödel held this position until 1938. As it happens, it was also in March 1933 that Austria's chancellor Engelbert Dollfuß (pictured

[43] Figure 4: Sept. 25, 1933, Cover of *Time* (Chancellor Dolfuss): https://content.time.com/time/covers/0,16641,19330925,00.html.

[44] *Id.* at 21.

[45] *Id.* at 15 (quoting Letter of Harry Klepetaŕ to John Dawson, dated December 30, 1983. Gödel officially became a citizen of the Republic of Austria in 1929).

[46] *Id.* at 21.

above) orchestrated a cunning extra-constitutional self-coup when he declared the self-elimination of Austria's parliament.

Gödel's Austria began as a parliamentary democracy with the enactment of a new constitution in October 1920, a charter in which legal scholar Hans Kelsen played a large role.[47] In brief, the 1920 Austrian Constitution allocated legislative power in the *Bundesversammlung* or Federal Assembly, a body composed of two houses, the *Nationalrat* (National Council) and the *Bundesrat* (Federal Council). The Constitution also allocated executive power in a cabinet led by a chancellor, who in turn was appointed directly by the *Bundesrat*.[48] The president was elected by both houses of the Federal Assembly and served as head of state.[49] Austria's interbellum constitution was then amended on December 7, 1929, when the Federal Assembly approved a series of constitutional amendments creating a presidential system of democracy by providing for the direct or popular election of the president.[50]

In March 1933, however, a national railway strike precipitated a dramatic constitutional crisis when a procedural snafu in the lower house of Austria's parliament (the National Council) created an unexpected constitutional vacuum or what two historians have referred to as a "formal error."[51] In brief, Karl Renner, the president of the *Nationalrat* or National Council, strategically resigned from his presidency on March 4, 1933, in order to cast the deciding vote on a controversial proposal to deal with the railroad strike.[52] That same day, the lower house's two vice-presidents, who represented Austria's other major political parties, Rudolf Ramek of the Christian Social Party and Sepp Straffner of the Greater German People's Party, also resigned for the same reason.[53] The National Council was thus left without a presiding officer due to the strategic resignations of Renner, Ramek, and Straffner.

Without a presiding officer, however, the National Council could not

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[47] *See* Jenny Gesley, *100 Year Anniversary of the Austrian Constitution*, LIBR. CONG. OF BLOGS (Oct. 1, 2020), https://blogs.loc.gov/law/2020/10/100-year-anniversary-of-the-austrian-constitution/. *See also* Paolo Carrozza, *Kelsen and Contemporary Constitutionalism: The Continued Presence of Kelsenian Themes*, 67 ESTUDIOS DE DEUSTO: REVISTA DE DERECHO PÚBLICO 55, 56 (2019).

[48] *See* Gesley, *supra* note 47.

[49] *Id.*

[50] *See* OSKAR LEHNER, ÖSTERREICHISCHE VERFASSUNGS-UND VERWALTUNGSGESCHICHTE. MIT GRUNDZÜGEN DER WIRTSCHAFTS-UND SOZIALGESCHICHTE 393 (4th ed. 2007).

[51] Peter Gerlich & David F.J. Campbell, *Austria: From Compromise to Authoritarianism*, *in* CONDITIONS OF DEMOCRACY IN EUROPE (1919–1939) 40, 47 (Dirk Berg-Schlosser & Jeremy Mitchell eds., 2000).

[52] *See* Ingeborg Bauer-Manhart, *4 March 1933 - The Beginning of the End of Parliamentarian Democracy in Austria*, STADT WIEN CITY OF VIENNA (not dated), https://www.wien.gv.at/english/history/commemoration/end-democracy.html.

[53] *Id.*

meet or enact legislation.[54] As a result, three days later (March 7, 1933), Chancellor Dollfuß declared the "self-elimination of Parliament" (*Selbstausschaltung des Parlaments*) and assumed full legislative powers.[55] After Dollfuß's self-coup, the Austrian president Wilhelm Miklas adjourned the parliament indefinitely, and when members of Austria's main opposition parties, the Greater German People's Party and the Social Democrats, attempted to reconvene the National Council on March 15, they were physically prevented from entering the parliament building by the police on Dollfuß's direct orders. In a matter of days—from March 4 to March 15—parliamentary democracy in Austria was dead.

Thirteen months later, Dollfuß convened a special parliamentary session in April 1934 with only the members of his political party present. The rump parliament retrospectively ratified all the chancellor's decrees since the constitutional crisis of March 1933 and enacted a new constitution that swept away the last remnants of parliamentary democracy. Among other things, the new 1934 constitution abolished freedom of the press, established a one-party system, and created a state monopoly on employer-employee relations. It remained in force until Adolf Hitler's annexation of Austria in March 1938. After the defeat of Nazi Germany in World War II, the original 1920 Constitution or BV-G was reinstated on May 1, 1945, and it remains in force to this day.[56]

Was Dollfuß's self-coup "unconstitutional"? On the one hand, one could argue that Dollfuß lacked the legal authority to fill the constitutional vacuum that arose when the lower house of Austria's parliament was left without a presiding officer. On the other hand, one could argue that politics abhors a constitutional vacuum: in the absence of a functioning legislature, the executive branch must legislate by default. On this view, Austria's constitutional crisis of March 1933 offers an instructive lesson on the dangers of constitutional vacuums.

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[54] This scenario may sound familiar to some readers in light of what occurred in Washington, D.C. in October 2023, when the House of Representatives was unable to elect a speaker for several weeks. *See* Jacob Fischler & Jennifer Shutt, *How Does a 'Frozen' U.S. House Function without a Speaker? Everyone's Got an Opinion*, MO. INDEP. (Oct. 5, 2023), https://missouriindependent.com/2023/10/05/how-does-a-frozen-u-s-house-function-without-a-speaker-everyones-got-an-opinion/. *See also* Ed Kilgore, *What If There's No House Speaker for a Month? For a Year?!*, INTELLIGENCER (Oct. 21, 2023), https://nymag.com/intelligencer/2023/10/what-if-theres-no-house-speaker-for-a-month-for-a-year.html.

[55] At the time, Dollfuß invoked an emergency law enacted during World War I called the Economic War Powers Act (*Kriegswirtschaftliches Ermächtigungsgesetz*). *See* KRIEGSWIRTSCHAFTLICHES ERMÄCHTIGUNGSGESETZ [RGBL], No. 307/1917 (Austria).

[56] *See The Emergence of the Austrain Federal Constitutional Law of 1920*, AUSTRIAN ACAD. OF SCIENCES (not dated), https://www.oeaw.ac.at/acdh/projects/the-emergence-of-the-austrian-federal-constitutional-law-of-1920.

By way of comparison, on the same month as Dollfuß's self-coup in Austria, Adolf Hitler staged a self-coup in Germany when the Reichstag enacted a controversial constitutional amendment known as the Enabling Law of March 23, 1933.[57] From a purely legal or formal perspective, one could argue that Hitler's evil dictatorship was a constitutional one, since Germany's democratic Weimar Constitution was never formally suspended or abrogated during the Hitler years,[58] nor did the Austrian-born Führer stage a military coup or suspend his country's constitution when he assumed power in 1933. Instead, after being appointed chancellor in January of 1933, Hitler was able to subvert his country's constitutional system from within through his enabling-act self-coup.[59]

In retrospect, March 1933 represents a symbolic turning point in the constitutional history of Central Europe during the interwar period—an anti-constitutional moment. In Austria, a legislative stalemate produced a constitutional vacuum that was filled by the chief executive Dollfuß, while in Germany the legislature effectively voted itself out of existence once it to transferred its powers to Hitler. Other would-be dictators now had a new two-part playbook or legal model for taking power, the self-coup: first, play by the rules of the political game to win power; next, change the rules of the game to stay in power. It is the recursive nature of this model that Gödel may have had in mind years later when he reportedly discovered a logical contradiction in the U.S. Constitution.

[57] OTTO WELS, THE THIRD REICH SOURCEBOOK 52 (Anson Rabinbach et al. eds., 2013).

[58] *See* Karl Loewenstein, *Dictatorship and the German Constitution: 1933-1937*, 4 U. CHI. L. REV. 537, 542-43 (1937).

[59] Or in the words of historian Peter Pulzer, "Though despising the rule of law, Hitler appreciated, after the fiasco of the 1923 Munich *putsch*, that he could gained power only through, not against the existing institutions." PETER PULZER, GERMANY, 1870-1945: POLITICS, STATE FORMATION, AND WAR 128 (1997).

IV. KING CAROL'S COUP WITHIN A COUP

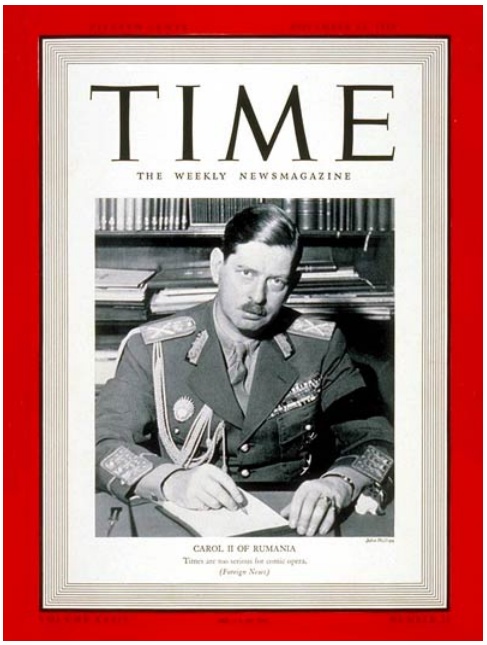

Figure 5: Nov. 13, 1939, Cover of Time (King Carol II)[60]

Romania went from a constitutional monarchy to a constitutional dictatorship on February 10, 1938, when King Carol II (pictured above) unilaterally suspended his country's interwar constitution (the Constitution of 1923), proclaimed martial law, and established a *de facto* royal dictatorship.[61] As it happens, King Carol carried out a coup within a coup, for he had first assumed the throne in June of 1930 via a parliamentary *coup d'etat*,[62] when Romania's parliament proclaimed him the king of Greater Romania--then, a country consisting of 295,000 square kilometers and a population of over 18 million people.[63] The coup in 1930 was carried out

[60] Figure 5: Nov. 13, 1939, Cover of Time (King Carol II): https://content.time.com/time/covers/0,16641,19391113,00.html.

[61] *See* Rebecca Ann Haynes, *Reluctant Allies? Iuliu Maniu and Corneliu Zelea Codreanu against King Carol II of Romania*, 85 THE SLAVONIC & E. EUR, REV. 105, 125 (2007). See also STEPHEN FISCHER-GALATI, ROMANIA: CRISIS WITHOUT COMPROMISE 390, Table 16.3 (Dirk Berg-Schlosser et al. eds., 2000).

[62] *See* Emil Lengyel, *The Situation that Made Carol King of Rumania* 32 CURRENT HIST. (1916-1940) 1085 (1930).

[63] *See* Aaron O'Neill, *Population of Romania, by Gender 1889-2020*, STATISTA (June 21, 2022), https://www.statista.com/statistics/1017626/population-romania-gender/#:~:text=With%20the%20collapse%20of%20the,to%2018.1%20million%20in%201930. Prior to 1918, Romania consisted of just 137,000 sq. km. and only 7.8 million persons. *Id.*

within the confines of the 1923 Constitution, since it was duly approved by the legislature.

King Carol's subsequent self-coup in 1938, however, poses a deep constitutional paradox: was his unilateral proclamation suspending the constitution itself constitutional? What about the new constitution that his government promulgated in the days after the self-coup? Was the new constitution unconstitutional? Does it matter that the new constitution was approved by the electorate in a constitutional referendum held on February 24, 1938,[64] just two weeks after King Carol's self-coup? One could argue that the king acted outside the constitutional order when he abrogated the 1923 constitution altogether on February 10, 1938, but one could also argue that the successor constitution—although drafted in secret and hastily approved two weeks later under dubious circumstances—created a new legal order that retroactively legitimized the king's previous actions.[65] The crux of this constitutional contradiction is thus this: does an action that occurs outside the constitutional process, such as King Carol's self-coup of February 10, 1938, become constitutional by a subsequent act, such as the popular plebiscite of February 24?

For his part, where was Kurt Gödel in February 1938, and was he aware of King Carol's self-coup in Romania? Although he would travel to the United States in the fall of 1938,[66] Gödel still lived in Vienna in February of 1938. According to his biographer John Dawson, "In mid-November 1937 Gödel [had] moved out of the building on Josefstädterstrasse and took up residence in a third-floor apartment at Himmelstrasse 43/5 in the Viennese suburb of Grinzing."[67] In addition, "Gödel managed over the next three months [i.e. starting in December 1937] to fill three notebooks on the Continuum Hypothesis."[68]

In the Fall of 1937, Edgar Zilsel, a philosopher of science and a former student of Heinrich Gomperz—who, in turn, was also one of Gödel's former professors—had re-established a philosophical discussion group and invited Gödel to join his circle.[69] "It was agreed the group would meet every other Saturday, and Zilsel suggested to Gödel that he report at an upcoming

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[64] STANLEY G. PAYNE, A HISTORY OF FASCISM, 1914-1945 288 (1st ed. 1996). The 1938 Constitution would prove to be a short-lived one, however, when King Carol signed a decree dated September 5, 1940 suspending the 1938 Constitution and transferring his powers to General Ion Antonescu.

[65] *See* Rom. Const. Referendum (Feb. 24, 1938), https://www.sudd.ch/event.php?lang=en&id=ro011938.

[66] *See* John W. Dawson, Jr., *Kurt Gödel at Notre Dame*, MATHEMATICS DEPT. AT U. OF NOTRE DAME (not dated), https://math.nd.edu/assets/13975/logicatndweb.pdf.

[67] DAWSON, *supra* note 22, at 126.

[68] *Id.*

[69] *Id.* at 124-25.

meeting on the status of consistency questions in logic …."[70] Gödel eventually accepted Zilsel's invitation and agreed to a lead a discussion on the question of consistency in logic. He presented a paper on this subject on 29 January 1938, and as fate would have it, "so far as is known his lecture to the Zilsel circle [on Jan. 29] was his last presentation to a Viennese audience."[71]

Was Gödel aware of the dramatic events unfolding in Romania in the winter of 1938? Perhaps, after his lecture on January 29, 1938, Gödel may have had extra time to reflect on the events unfolding in Central Europe. According to his biographer John Dawson, "Presumably, Gödel devoted the winter and spring of 1938 to the preparation of his manuscript and to making arrangement for his upcoming year abroad,"[72] since with Hans Hahn and Karl Menger gone, "there was little in the way of seminars or colloquia for Gödel to take part in."[73] Presumably, Gödel also read about the events unfolding in Greater Romania.

In any case, it was around this time that one of the most traumatic and unjust events in Kurt Gödel's professional life was about to occur: his authorization to teach would officially lapse, and his academic position at the University of Vienna would be abolished. This ugly experience, perhaps more than any other, may shed the most light on Gödel's loophole.

V. EPILOGUE: "DOZENT GÖDEL SHALL NOT LECTURE"

Following the *Anschluss*—Nazi Germany's wholesale annexation of the Republic of Austria in March 1938—German law displaced Austrian law, and the position of *Privatdozent*—Gödel's official position at the University of Vienna since March 1933—was officially abolished.[74] Former private lecturers like Gödel were now required to apply for the position of Lecturer of the New Order (*Dozent neuer Ordnung*) if they wished to maintain their academic careers under the new regime.[75] This new requirement was not

[70] *Id.* at 125.

[71] *Id.*

[72] *Id*. at 127. (Gödel spent the entire 1938-39 academic year at the Institute for Advanced Studies (IAS) in the United States, i.e. October 1938 to June 1939.)

[73] *Id*. at 124.

[74] *See id*. at 127-128; Sigmund, *supra* note 25, at 86. *See also* HAO WANG, REFLECTIONS ON KURT GÖDEL 94 (MIT Press 1987).

[75] Existing professors were required to take an oath of personal loyalty to Adolf Hitler. In the Philosophical Faculty where Gödel taught, 38 out of 99 professors (or 13 out of 32 emeritus professors, 14 out of 45 full professors, and 11 out of 22 associate professors) and 56 out of 159 paid lecturers voluntarily "retired" from academia rather than take the required loyalty oath. *See* Sigmund, *supra* note 25, at 85. Gödel himself, however, as a mere private lecturer, was not required to take the oath. *Id.*

directed at Gödel personally; instead, it was part of a general reorganization of educational institutions in the wake of Hitler's rise to power.

Additionally, it is worth mentioning, that the main reason why the Nazis abolished the position of *Privatdozent* was that, although the state had exercised administrative control of the universities in Germany and Austria even prior to Hitler's rise to power, it did not have any direct control over private lecturers.

Did the revocation of Gödel's lectureship inform his subsequent discovery of a loophole in the U.S. Constitution? In the case of the *Anschluss*, one country's laws and constitution swallowed up or displaced the laws and constitution of another country. For the mathematical logician, this meant the rules that applied to his lectureship were replaced wholesale with a new set of rules, and by all accounts, Gödel himself was "outraged" and "incensed" when university officials revoked his position in the spring of 1938.[76] Karl Menger, who knew Gödel personally from their days at the University of Vienna and who was co-teaching a course with Gödel at the University of Notre Dame during the spring of 1939 (one year after Gödel's position was abolished),[77] describes Gödel's reaction to the revocation of his lectureship thus:

> In the second half of the semester, Gödel also, who until then had been his usual dispassionate self, appeared to be restless. Remarks of his indicated longing for his family. For this and other reasons he wanted to return to Vienna at the end of the semester. Even earlier he had complained about the revocation of dozentship in the university by the Nazi regime and had spoken about *violated rights*.[78]

Menger had tried to reason with Gödel, asking him: "'How can one speak of rights in the present situation? … And what practical value can even *rights* at the University of Vienna have for you under such circumstances',"[79] but to no avail. Although Gödel had requested a leave of absence for the 1938-1939 academic year—he visited the IAS in the fall of 1938 and then co-taught a course with Menger at the University of Notre Dame in the spring of 1939—he had every intention of returning to the University of Vienna and resuming his academic career there.[80]

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[76] *See id.* at 86. *See also* REBECCA GOLDSTEIN, INCOMPLETENESS: THE PROOF AND PARADOX OF KURT GÖDEL 226 (2005); WANG, *supra* note 74, at 94.

[77] *See* DAWSON, *supra* note 22, at 134-136.

[78] *See* KARL MENGER, REMINISCENCES OF THE VIENNA CIRCLE AND THE MATHEMATICAL COLLOQUIA 224 (1994).

[79] *Id.*

[80] *See* Sigmund, *supra* note 25, at 86-87 (Recall that private lecturers were required to teach a course at least one semester every two years … Gödel had not taught a course at the University of Vienna since the summer semester of 1937.).

As an aside, the handling of Gödel's leave of absence request represents an almost comic case of bureaucratic bungling and ineptitude. To begin with, Gödel had submitted his request for leave to the University of Vienna in a letter dated October 31, 1938.[81] In response, the dean of the School of Philosophy forwarded Gödel's request to the Ministry of Instruction, which then forwarded the matter to the Ministry of Internal and Cultural Affairs.[82] According to John Dawson, "no further action was taken [on Gödel's request for a leave of absence] until 4 July [1939]."[83] On that date, an official at the Ministry of Internal and Cultural Affairs wrote back to the rector of the University of Vienna to inquire about Gödel's reasons for requesting a leave of absence. In turn, the rector forwarded this matter to the dean, who "proposed that Gödel's *Lehrbefugnis* (his official authorization to teach) be rescinded since Gödel had not requested a leave of absence for the summer semester."[84] The dean's harsh recommendation was sent back to the Ministry of Internal and Cultural Affairs, where yet another official advised the rector that the dean's recommendation was moot because "Gödel's *Lehrbefugnis* … was already in abeyance [since April 1938], and it would officially expire on 1 October unless Gödel submitted an application in the meantime to be named *Dozent neuer Ordnung*."[85]

Although it is unclear whether Gödel himself was aware of this bureaucratic back-and-forth,[86] the evidence suggests that, at a minimum, he must have known that his lectureship had now lapsed and that he would lose the right to lecture permanently unless he applied for the new position of *Dozent neuer Ordnung* before the October 1st deadline, for as it happens, Gödel not only returned to Austria in June 1939;[87] he apparently had every intention of remaining in his home country and continuing his scholarly work at the University of Vienna. In fact, according to his biographer John Dawson, Gödel still did not seriously expect to emigrate as late as November 1939![88] Among other things, Gödel closed out his bank account in Princeton, New Jersey,[89] moved into a new apartment in the center of Vienna,[90] and signed a new lease on his old apartment in the suburb of Grinzing.[91] In addition, Gödel finally applied for the new *Dozent neuer Ordnung* position

[81] DAWSON, *supra* note 22, at 134-136.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 139; *see also* WANG, *supra* note 74, at 101.
[88] DAWSON, *supra* note 22, at 147.
[89] *Id.* at 140.
[90] *Id.* at 146.
[91] GOLDSTEIN, *supra* note 76, at 228.

on September 25, 1939, less than one week before the October 1st deadline.[92]

Political reality, however, would derail Gödel's Viennese dreams. Germany invaded Poland on September 1, 1939, and Gödel was declared fit for military service in the German Army shortly thereafter.[93] All the while, Gödel's academic status at the University of Vienna remained uncertain. His position as a private lecturer had been suspended, and his application to become a *Dozent neuer Ordnung* was still under review by the university and ministry officials. Faced with this uncertainty, Godel and his wife Adele decided to leave their beloved Vienna in January 1940. They resettled in Princeton, New Jersey, where they would spend the remainder of their lives.[94]

Ironically, Gödel was finally awarded the title of *Dozent neuer Ordnung* in June 1940,[95] and the University continued to keep his name in its records until 1945, accompanied by a terse announcement that "Dozent Gödel shall not lecture."[96]

CONCLUSION

During his years at the University of Vienna, 1924 to 1940—first as a student and then as a lecturer—the logician Kurt Gödel would have noticed that every single constitutional democracy in Central Europe ended in dictatorship.[97] Did these anti-constitutional moments inform Gödel's discovery of a loophole in the U.S. Constitution that could lead to a constitutional dictatorship? If so, do the multiplicity of self-coups in interwar Central Europe, along with Gödel's own "troubled relationship"[98] with the University of Vienna—in particular, the revocation of his lectureship in 1938—provide clues about the nature of Gödel's constitutional loophole? As it happens, a common thread ties together Gödel's outrage at the revocation of his lectureship with the proliferation of self-coups and the general collapse of constitutional democracies across interbellum Europe. In both cases, Gödel may have noticed that the same person that is bound by certain rules often has the power to change those very same rules. Broadly speaking, this process of rule-change can occur in one of two ways:

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[92] DAWSON, *supra* note 22, at 147; WANG, *supra* note 74, at 102.

[93] *See* DAWSON, *supra* note 22, 101-102; GOLDSTEIN, *supra* note 76, at 229; Sigmund, *supra* note 25, at 88; WANG, *supra* note 74, at 29.

[94] *See* Sigmund, *supra* note 25, at 88. For reasons that are unclear, the rector of University, who had initially opposed Gödel's application, later had a change of heart and decided to support Gödel's appointment.

[95] *See id.* at 90. See also DAWSON, *supra* note 22, at 155.

[96] Sigmund, *supra* note 25.

[97] Rothschild, *supra* note 21, at 241 n.2.

[98] Sigmund, *supra* note 25, at 75.

1. **Inside the existing constitution**: the rule change giving X the power to make new rules occurs within a given system's existing constitutional framework; e.g. the German Enabling Act of March 1933.
2. **Outside the constitutional order**: the rule change occurs in an extraconstitutional manner but is then declared to be constitutional through some subsequent constitutional-level enactment, e.g. the self coups that occurred in Central Europe during the interwar period.

In conclusion, this article contributes to the literature on Gödel's loophole by exploring how the logical possibility of a self-coup may have informed Gödel's subsequent studies of the U.S. Constitution when he was preparing for his U.S. citizenship exam.

A CRITIQUE OF ADRIAN VERMEULE'S *COMMON GOOD CONSTITUTIONALISM*

Thomas Kleven*

Debates about the proper method of interpreting the Constitution are heated in today's polarized political and legal environment. Adrian Vermeule's *Common Good Constitutionalism*[1] contributes to this debate and, due to his prominence as a scholar, is likely to be a highly influential work. Vermeule argues for a method of interpreting and applying the Constitution (and of law-making in general) that he calls "common good constitutionalism." Common good constitutionalism is a natural rights theory which ties law to "general principles of jurisprudence and legal justice"[2] that transcend and undergird positive law, "principles of political morality that are themselves part of the law,"[3] and "general law common to all civilized legal systems."[4] These principles emanate from the classical law that stretches as far back at the Justinian Codes, and that in Vermeule's view have guided the development of the law (at least in the West) throughout its history.

In assessing a particular work, it is often helpful to situate it within the author's overall body of work. Vermeule, a devout Catholic, has made that easy for us in a non-academic piece entitled "A Christian Strategy."[5] In his view, "hostility to the Church was encoded within liberalism from its birth." The believer's response to the liberal onslaught must therefore be a "radical form of strategic flexibility" that entails a willingness "to enter into . . . alliances of convenience with any of the parties, institutions, and groups that jostle under the canopy of the liberal imperium" and to "emphasize, truthfully, one or another of his multiple political loyalties and identities as relevant and helpful to the audience and the occasion"—the "ultimate long-run goal" being "to bear witness to the Lord and to expand his one, holy, Catholic and apostolic Church to the ends of the earth."

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[1] ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).

[2] *Id*. at 4.

[3] *Id*. at 6.

[4] *Id*. at 8.

[5] Adrian Vermeule, *A Christian Strategy*, FIRST THINGS (Nov. 2017), https://www.firstthings.com/article/2017/11/a-christian-strategy.

From this vantage point, one take on *Common Good Constitutionalism*, while written as a traditional academic work and not directly supportive of religion, is that it aims to promote a version of natural law impacted by and supportive of orthodox Catholic ideology. Nonetheless, since the book is likely to influence the scholarly debate over the proper interpretation of the Constitution, it seems worthwhile to assess the strength of its argument as the traditional constitutional scholarship it purports to be—while bearing in mind its relationship to the ultimate goal.[6]

In *Common Good Constitutionalism* Vermeule argues against the currently dominant interpretive methodologies that he calls "originalism" and "progressive constitutionalism." Originalism, which is associated with modern-day conservatism and currently holds sway on the Supreme Court, posits that the Constitution should be interpreted in accordance with the intent of the framers, determined by the meaning that the words in the document had at that time or by how the framers would have applied the contested provision in their time. Progressive constitutionalism, which is associated with modern-day progressivism and influenced many of the Court's progressive decisions in the mid-twentieth century, is a living law approach which posits, because the precise intent of the framers is often unascertainable and because the framers could not possibly have anticipated the myriad of circumstances in which the Constitution would be called into play in the future, that the meaning and application of the Constitution's provisions must be allowed to evolve over time so as to remain relevant as guiding principles.

For Vermeule, anything worthy of being called law "is necessarily founded on some substantive conception of morality."[7] What particularly troubles Vermeule is that the conservative originalist and progressive living law approaches "deny the existence of the natural law,"[8] which is based on the common good of the community as a whole; and that the conception of morality underlying them is overly individualistic—with the originalist

[6] While some elements of Catholic dogma conflict with progressive ideals, in particular its opposition to a woman's right to choose to have an abortion and to same-sex marriage, there are progressive aspects of Catholic dogma, such as its current opposition to capital punishment and its critiques of the excesses of capitalism. Stephen Schneck, *What does the church teach about the death penalty*?, U.S. CATH. (Apr. 29, 2021), https://uscatholic.org/articles/202104/what-does-the-church-teach-about-the-death-penalty; Jonathan Warren, *Capitalism and Catholicism*, SCHOLASTIC (Oct. 9, 2014), https://scholastic.nd.edu/issues/capitalism-and-catholicism.. One should expect to find commonalities in the principles underpinning religious and secular moral philosophies. For example, something akin to the Golden Rule's precept to do unto others as you would have them do unto you can be found in most every religion, and the Golden Rule closely resembles Kant's moral imperative not to treat others solely as means to an end but as ends in themselves.

[7] VERMEULE, *supra* note 1, at 37.

[8] *Id*. at 4.

approach having a libertarian agenda that emphasizes the protection of property rights and opposes the modern welfare state (or as I would put it promotes the interests of the oligarchy); and with the living law approach having a liberationist agenda which promotes "the endless advance of human liberation"[9] and aims to free individuals from "the reactionary past"[10] and "the unchosen bonds of tradition, family, religion, economic circumstances, and even biology,"[11] and which Vermeule views as a "wildly implausible"[12] account of human flourishing. Rather, human flourishing from a common good perspective, while incorporating individual interests and well-being, is "the flourishing of a well-ordered political community"[13] as a whole. And the common good is "unitary and indivisible, and not an aggregation of individual utilities,"[14] and it represents "the highest felicity or happiness of the whole political community, which is also the highest good of the individuals comprising that community."[15]

But what, more specifically, does the concept of the common good mean; and how, so defined, does it contribute to the law-making process; and why, so defined, should we adopt it as our lodestar? Vermeule finds the meaning of the common good in "the precepts of legal justice in the classical law," which he identifies as "to live honorably, to harm no one, and to give each one what is due to him (sic) in justice," so as to promote "*peace, justice, and abundance . . . health, safety and common security . . .* [and] *solidarity and subsidiarity*."[16] These precepts are to guide the process of making, interpreting and applying positive law of all types (constitutions, legislation, administrative, as well as the common law), and to guide the design of the institutional structure for engaging in that process. This raises the question of whether the classical precepts are so general and abstract that in practice it would be possible to justify most any positive law. Assuming, as Vermeule believes and as I agree, that abstract principles can and do provide some guidance, the reasons he advances for following the classical law precepts are that they are "enduring, objective principles of just governance,"[17] fixed and unchanging, as shown by their persistence over such a long period of time and (as I think Vermeule implies) by their self-evident truth.

There is much to Vermeule's theory that has appeal to progressives such as us. However, I take issue with his characterization of modern

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[9] *Id*. at 18.
[10] *Id*. at 117.
[11] *Id*. at 22.
[12] *Id*. at 23.
[13] *Id*. at 7.
[14] *Id*.
[15] *Id*.
[16] *Id*. at 7.
[17] *Id*. at 118.

progressivism; and I think that some of the conclusions he reaches in applying classical law precepts to particular issues are either wrong, or if correct call into question the precepts' worthiness and self-evident truth.

First, I think it hard to quarrel with the profundity of the classical law precepts Vermeule identifies, just as it is hard to quarrel with precepts such as the Golden Rule, Kant's moral imperatives, and the Declaration of Independence's maxim that all people are created equal. The devil is in the details of interpreting and applying the precepts in practice.

Second, I think that Vermeule's critique of originalism, which is a major tool of the conservative effort to undermine progressivism, is devastating—much like the Critical Legal Studies movement exposed in the late 1900s the defects of the economic analysis of the law.[18] Originalism is an illusion because, in interpreting the meaning or intended meaning of any legal text judges must recur "to general background principles of law [that cannot be fully found within the text] and to the natural law;"[19] and because, at the high level of generality advocated by some self-proclaimed originalists, originalism becomes "practically indistinguishable from the progressive constitutionalism that originalism was created and designed to oppose."[20]

Third, I think that Vermeule's assertion that our law and culture have become overly individualistic has much merit, although I don't think it fair to say this is as true of the progressive movement as he asserts. Yes, progressives emphasize individual rights, and rightly so because individual rights have been neglected for much of history (including the classical era from which Vermeule derives his common good constitutionalism) and because there is much unfinished work to be done in liberating individuals and disfavored groups from exploitation and oppression. But progressives are also at the forefront of the battle against the oligarchs who dominate this society and who have promoted, in order to line their pockets, an ethos of rampant consumerism and self-gratification that threatens to destroy humanity through armed conflict and environmental catastrophe. We progressives recognize that a stable and flourishing society and world-order requires people to live honorably, meaning that we are to concern ourselves with everyone's well-being and not just our own. We recognize that abundance doesn't mean an endless supply of material things no matter how they are distributed, but a sustainable system that provides collective as well as individual goods, non-commodifiable as well as commodifiable goods, and that meets spiritual as well as material needs. And we recognize that a

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[18] *See* Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies,* 2 NEW PALGRAVE DICTIONARY ECON. & L. 1123-1132 (Peter Newman ed., 2002).

[19] VERMEULE, *supra* note 1, at 111.

[20] *Id*. at 99.

more egalitarian social order, where the goods of social life are fairly shared (which is akin to the classical precept of according each their due), is necessary for society to thrive and avoid conflict, even if that means less overall wealth and limits on what people are allowed to accumulate.[21] And so, we believe that the living law approach that progressives advocate is closer to the mark of what a just and good society entails than the originalist approach, which tends to support the interests of the well-to-do over those of the many and a return to the unjust hierarchies of the past.

Fourth, while Vermeule sees a legitimate role for the judiciary in making, interpreting and applying the law, he thinks that the judiciary currently plays an outsized role and that it should defer more to other public bodies and officials (legislatures, executives, administrative agencies) that are directly or more closely accountable to the electorate. The main role of the judiciary under common good constitutionalism is to police these other entities under a highly deferential standard of review, overturning their decisions only when they are arbitrary and not supported by "prudential judgment,"[22] a requirement that "public authorities act rationally and with a view to legitimate public purposes;"[23] or when their decisions serve illegitimate ends, consist of "intrinsic evils"[24] that no government has the right to impose, or reach absurd results that no reasonable lawmaker could be thought to have intended.

Progressives supported Supreme Court decisions advancing civil rights during the latter half of the 1900s. What we have learned since then is that we cannot rely on the Court for the protection of rights over the long run, that the same Court that upheld a woman's right to choose can undo that right and even (watch out for it) hold state laws permitting abortion invalid for violating the fetus' fundamental right to life,[25] and that it is debatable whether overall the Court has advanced more the rights of the disempowered or those

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[21] *See, e.g.*, DONELLA H. MEADOWS, JORGEN RANDERS & DENNIS L. MEADOWS, LIMITS TO GROWTH: THE 30-YEAR UPDATE (2004); JEFFREY D. SACHS, THE AGE OF SUSTAINABLE DEVELOPMENT (2015).

[22] VERMEULE, *supra* note 1, at 9.

[23] *Id*. at 15.

[24] *Id*. at 127.

[25] This is Vermeule's view. *Id.* at 199 n.103; *see also* Melissa Quinn, *Supreme Court declines to take up fetal personhood dispute*, CBS NEWS (Oct. 11, 2022, 7:52 AM), https://news.yahoo.com/supreme-court-declines-fetal-personhood-145214171.html?fr=sycsrp_catchall; Julie Rovner, *How an Abortion Fight in Supreme Court Could Threaten Birth Control, Too*, NPR (Nov. 3, 2020, 5:00 AM), https://www.npr.org/sections/health-shots/2020/11/03/930533103/how-an-abortion-fight-in-supreme-court-could-threaten-birth-control-too.

of the powerful.[26] We should expect the oligarchs to be able to dominate the judiciary through their ability to dominate the political process generally. We should expect that, ultimately, the protection of the rights of the less powerful demands a political movement that wrests power away from the oligarchs.

Fifth, when it is possible to pass progressive laws, Vermeule's common good approach and deferential standard of review could be helpful, if the Supreme Court could be convinced to adopt it, in upholding laws of the type that the Court has heretofore blocked and that living law progressivism supports. To illustrate, I'll discuss a few cases dealing with free speech, federalism, and administrative law.

One way of combatting the disproportionate political power of moneyed interests, given that money facilitates speech and enhances the voice of those with money, is to equalize the ability of those with less money to speak, either by limiting the expenditures of moneyed interests or subsidizing the speech of the less powerful. Both of those moves have been blocked by the Supreme Court on free speech grounds. In *Citizens United v. Federal Election Commission*,[27] the Court struck down, as a violation of corporations' free speech rights, a federal statute limiting how much money corporations could spend in support of or opposition to candidates in federal elections in the weeks preceding an election. And in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,[28] the Court struck down an Arizona public financing statute that increased the funding of publicly financed candidates to match the funds raised by or spent on their privately financed opponents, on the ground that the statute unduly impinged on the free speech rights of privately funded candidates and their supporters in that fund matching might discourage them from raising and spending money to speak. Underlying both decisions is the Court's refusal to accept, as a legitimate rationale for the statutes, the equalization of political power (or what it has called the "leveling of the playing field"[29]). The basis of the decisions was not that the statutes were irrational in that there was a lack of evidence that money buys disproportionate influence, of which there is ample empirical evidence,[30] but (at least implicitly) that protecting the individual right of free speech is a more important value than the collective interest in equalizing political

[26] *See. e.g.*, JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY (2022); Thomas Kleven, *Separate and Unequal: The Institutional Racism of the Supreme Court*, 12.2 ALA. C.R. & C.L. L. REV. 276 (2021).

[27] Citizens United v. Fed. Election Commission, 558 U.S. 310 (2010).

[28] Airzona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011).

[29] *Id*. at 749.

[30] *See* LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE (2008); MARTIN GILENS, AFFLUENCE AND INFLUENCE: INEQUALITY AND POLITICAL POWER IN AMERICA (2012).

power. This is the very kind of policy judgment that Vermeule would leave to the rational judgment of the legislature, balancing competing interests (fostering free speech and equalizing political power) that both derive from the classical law's precepts of legal justice.

As regards states' rights, in *Shelby County v. Holder,*[31] the Court struck down, as "a drastic departure from basic principles of federalism,"[32] the preclearance provision of the Voting Rights Act, which requires states with a history of voting discrimination on account of race or membership in a language minority group to obtain clearance from the Attorney General or a federal court for any changes in their voting practices. The purpose of the preclearance requirement was to place the burden on states to show, before implementing changes, that they would not abridge the right to vote of racial and ethnic minorities in violation of the Fifteenth Amendment. The rationale for the decision was that, while the criteria for determining the states whose past discriminatory practices warranted preclearance were valid when the Voting Rights Act was initially adopted, the criteria had not been updated to confine the preclearance requirement to states still practicing discrimination; coupled with the fact that there was insufficient evidence that voting discrimination was significantly more severe in covered jurisdictions than elsewhere to warrant singling them out for preclearance, that the discriminatory voting practices in place at the time of the Act's adoption (such as literacy tests and good moral character requirements) had long since been abolished, that minority registration and turnout in covered jurisdictions now compares favorably to non-covered jurisdictions as against the gross disparities that existed when the Act was adopted, and that substantial numbers of minorities are now being elected in covered jurisdictions. Yet, in so ruling, the Court failed to address or rebut the voluminous evidentiary record that supported the Court of Appeals' finding of substantially more severe and on-going discrimination in covered jurisdictions;[33] and the Court rejected Congress' rationales for retaining the preclearance criteria that the gains that have been achieved are due to the Act, and that the preclearance requirement is still needed to prevent retrogression in states with a history of discrimination through the adoption of newer discriminatory devices (such as racially motivated gerrymandering and at-large elections). Again, the Court is treating one constitutional value, states' rights, as a higher priority than another, the right to vote. And again this is the very kind of policy judgment to which the classical law's precepts of legal justice do not provide a definitive answer and which, absent a finding of irrationality or

[31] Shelby County v. Holder, 570 U.S. 529 (2013).
[32] *Id*. At 535.
[33] Shelby County v. Holder, 679 F.3rd 848, 865-71 (D.C. Cir.212).

arbitrariness that the record in *Shelby County* in no way supports, Vermeule would therefore leave to Congress.

One more states' rights case is *National Federation of Independent Business v. Sebelius*,[34] in which the Court struck down the Affordable Care Act's attempt to induce states to expand their Medicaid programs to include beneficiaries with incomes somewhat above the poverty line by withholding the existing Medicaid funding of states who declined. The impact of the ruling is to require the federal government to take over the declining states' Medicaid programs in order to expand their coverage. While the federal government is certainly free to attach strings to money it provides states who choose to implement federal programs, the Court's rationale was that states' reliance on existing Medicaid funding effectively compelled them to participate in its expansion. Even if so, and even if there should be some limits on the federal government's authority to mandate states to do things, *National Federation* elevates states' rights to a higher constitutional status than the federal government's authority to promote the general welfare. In light of the fact that millions of people would and did lose access to health care if states could opt out of Medicaid expansion,[35] and of the arguable merits of continued state participation in implementing Medicaid as against a federal take-over, the balance that Congress struck between states' rights and people's health needs was surely not arbitrary or irrational. So, again, Vermeule's common good constitutionalism would defer to Congress' determination.

Finally, as regards administrative law, in *West Virginia v. Environmental Protection Agency*,[36] the Court pronounced the major questions doctrine and struck down an EPA regulation designed to induce power plants to convert in producing electricity from coal to alternative energy sources such as natural gas, wind, and solar energy as a means of combatting global warming. The Court's rationale was that administrative agencies may not regulate with respect to questions of such magnitude without a clear delegation from Congress, which the Court found lacking in the Clean Air Act. The likely impact of the decision is to severely undermine the ability of Congress to delegate authority to administrative agencies to address matters it deems in need of regulation in furtherance of the general welfare. Vermeule himself

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[34] Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

[35] As of 2021, an estimated 3.5 million adults are uninsured due to the opt-out in the ten remaining states who have yet to adopt the Affordable Care Act's Medicaid expansion. Patrick Drake et al, *How Many Uninsured Are in the Coverage Gap and How Many Could be Eligible if All States Adopted the Medicaid Expansion*, KFF (Feb. 26, 2024), https://www.kff.org/medicaid/issue-brief/how-many-uninsured-are-in-the-coverage-gap-and-how-many-could-be-eligible-if-all-states-adopted-the-medicaid-expansion.

[36] West Virginia v. EPA, 142 S.Ct. 2587 (2022).

has roundly criticized the major questions doctrine and the improper delegation doctrine from which it derives.[37] And he vigorously supports the role of administrative agencies as comporting with common good constitutionalism: "[T[he administrative state is today the main locus and vehicle for the provision of the goods of peace, justice, and abundance central to the classical theory. . . [B]road deference to administrative determinations is itself a juridical principle, rooted in political morality, that can serve the common good."[38]

Sixth, like the living law approach, Vermeule's common good constitutionalism allows for positive law, including constitutions, to evolve over time as conditions change and unforeseen circumstances arise—a process he calls "developing constitutionalism."[39] He adamantly denies, though, that developing constitutionalism is a form of or akin to living law's progressive constitutionalism. Developing constitutionalism starts with the classical law precepts, "enduring, objective principles of just governance [that] inform positive law, the law of nations, and the natural law alike,"[40] principles that "remain constant over time"[41] and "do not themselves evolve."[42] These principles guide the positive law and allow its evolution over time so as to enable the principles "to unfold in accordance with their true natures"[43] and "to preserve the rational principles of the constitutional order as the circumstances of the political, social, and economic environment change."[44] Progressive constitutionalism, on the other hand, "treats legal principles themselves as changing over time in the service of an extrinsic agenda of radical liberation."[45]

Again, Vermeule grossly mischaracterizes the progressivist living-law approach. As I have shown above, the progressive agenda is not one of radical liberation over and above or at the cost of all other values. Of course, progressivism aims to liberate people from the enormous oppression that still exists in the world. But collective values and the public good are central to the progressive agenda as well, and progressives recognize the necessity of balancing individual and collective interests, as well as the debatability of the

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[37] *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002) (arguing that "a statutory grant of authority to the executive branch or other agents never effects a delegation of legislative power"); *see also* Adrian Vermeule, *There is no conservative political movement*, WASH. POST (July 6, 2022) (arguing that the major questions doctrine is not grounded in any "maxim or principle of our law").

[38] VERMEULE, *supra* note 1, at 135, 138

[39] *Id*. at 121.

[40] *Id*. at 118.

[41] *Id*. at 121.

[42] *Id*. at 118.

[43] *Id*.

[44] *Id*. at 122.

[45] *Id*. at 118.

proper balance and that the chosen balance may differ among societies and over time and still be consistent with progressive ideals.[46] Nor do progressives deny the importance of tradition to a flourishing society. But we do distinguish between good and bad traditions, between traditions that advance and those that undermine progressive values, between traditions that should be maintained and those that should be discarded.

Vermeule infers that, unlike common good constitutionalism, progressive living law has no abstract core values to which positive law must conform, which enable positive law to evolve over time, and which are (given our deconstructionist bent) at least relatively enduring. But that criticism, too, is wrong. Progressive living law is committed to core values—such as that all people are created equal, or that the benefits and detriments of social life should be fairly shared among everyone,[47] or that people have a duty to contribute to society in accordance with their abilities and are entitled to receive from society in accordance with their needs. These precepts are arguably grounded in versions of natural law and implicit even in Vermeule's classical law precepts.

To show that and how common good constitutionalism differs from progressive living law, Vermeule singles out for criticism, as an example of progressive overreach, *Obergefell v. Hodges*,[48] which invalidated state laws prohibiting same-sex marriage as violating people's constitutionally protected liberty to choose whom to marry. Here, I think, is where we see the influence (in my view the distorting influence) of conservative aspects of Catholic dogma on Vermeule's jurisprudence. Vermeule contends that *Obergefell* represents nothing more than an effort to disrupt "traditions and views that have constituted the very foundations of our law;"[49] and that it constitutes a "radical and public dismissal of a legal restriction that prevailed in Western law for millennia," namely that "marriage has for millennia been defined as the union of male and female for the purpose of procreation."[50] Thus, he asserts, the Court "tacked on arbitrary and artificial criteria that were

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[46] *See, e.g.,* Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758 (2020); Lucy A. Jewel, *The Biology of Inequality*, 95 DENV. L. REV. 609 (2018); Martha T. McCluskey, *Constitutional Economic Justice: Structural Power for 'We the People*' 35 YALE L. & POL. REV. 271 (2016); Athena D. Mutua, *ClassCrits Time? Building Institutions, Building Frameworks*, 1 J. LAW & POLIT. ECON. 333 (2021); MICHAEL J. SANDEL, THE TYRANNY OF MERIT: CAN WE FIND THE COMMON GOOD? (2020); Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEX. L. REV. 1609 (2013).

[47] *See* THOMAS KLEVEN, EQUITABLE SHARING, DISTRIBUTING THE BENEFITS AND DETRIMENTS OF DEMOCRATIC SOCIETY (2013).

[48] Obergefell v. Hodges, 576 U.S. 644 (2015).

[49] VERMEULE, *supra* note 1, at 119.

[50] *Id*. at 131.

extrinsic to marriage properly understood, and were thus unreasonable in just the way the classical law condemns."[51]

Even if Vermeule's reading of the classical law's view of marriage is accurate, this doesn't necessarily mean that the view is consistent with the classical law's moral precepts. The main argument advanced for laws prohibiting same-sex marriage and homosexual sex is that to allow those practices would somehow undermine traditional marriage and thereby damage children. But there is little to no empirical evidence to support that proposition, and in fact the evidence is to the contrary—as with studies showing that heterosexual marriage is still by far the dominant practice, that children raised in same-sex families fare as well as children raised in opposite sex families, and that children raised in two-parent families fare better than those raised in single parent families.[52] This raises the question of whether the state should be able to ban same-sex marriage and homosexual sex solely on the basis of tradition and the majority's disapproval of those practices. If so, then why shouldn't the majority be allowed to ban women from receiving a formal education or from working outside the home or even from voting, so as to promote the long-standing patriarchal tradition in the West of the woman as childrearer and the man as breadwinner and of the man as the head of the family and of society as a whole. But, as noted above, some long-standing traditions are inherently reprehensible and consequently inconsistent with classical law precepts, such as giving to each their due. Surely, it could strongly be argued that patriarchy fits into that inherently reprehensible category and is one of the intrinsic evils that Vermeule says no government has the right to impose.

Vermeule wanders even further from the classical law precepts he advocates in inferring in a footnote that states (and presumably the country as a whole) should not have the right to legalize same-sex marriage, meaning that the Supreme Court should strike down laws permitting same sex marriage as unconstitutional.[53] To do so under Vermeule's deferential approach to judicial review, the Court would have to find that it is irrational for the people's representatives or the people themselves to believe that allowing same-sex marriage would promote the common good and even that

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[51] *Id*. at 132. If so, this implies that Lawrence v. Texas, 539 U.S. 558 (2003), which invalidated sodomy laws criminalizing consensual sexual relations among same-sex adults as violating a constitutional right of privacy, was wrongly decided as well, and that legislatures should be free to ban homosexual sex even if behind closed doors and to imprison those who engage in such acts.

[52] *See* Jimi Adams & Ryan Light, *Scientific consensus, the law, and same sex parenting outcomes*, 53 SOC. SCI. RSCH. 300, 300-10 (2015); Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?*, 72 J. MARRIAGE & FAM. 3, 3-22 (2010); Yun Zhang, *Family outcome disparities between sexual minority and heterosexual families: a systemic review and meta-analysis*, 8 BMJ GLOB. HEALTH (2023), https://gh.bmj.com/content/8/3/e010556.

[53] Vermeule, supra note 1, at 218-19 n.346.

same-sex marriage is one of the intrinsic evils that government may not allow. Surely, this is incorrect. To so rule would make the exclusivity of heterosexual marriage a tradition that is written in stone and may not be allowed to change, even if the people reject that tradition and come to view marriage as having purposes beyond procreation that serve the common good, and even if there is empirical evidence that allowing same-sex marriage contributes to a more flourishing society—the very goal of the classical law's precepts.

So, if Vermeule has gotten it wrong simply because he has misinterpreted the classical law precepts he supports, then what we have is a disagreement over the proper application of those precepts, the type of disagreement that always arises in interpreting and applying abstract first principles. If so, he should acknowledge, which he doesn't, that the proper application of the classical law precepts is contestable and that there is a viable argument supportive of same-sex marriage within the classical law approach but with which he just disagrees. And he should acknowledge as well that there are alternative versions of natural law whose precepts support same-sex marriage as a fundamental right.

If the result in *Obergefell* could obtain under the classical law approach he supports, then Vermeule has not shown a fundamental difference between it and progressivism's living law approach. But if he is correct that *Obergefell* is inconsistent with the classical law approach and that the classical law approach may not even permit the legalization of same-sex marriage, then progressives have much to fear from Vermeule's common good constitutionalism despite its potential for helping to advance progressive values in some instances, and we should reject it as inconsistent with the more progressive natural law precepts we favor.

INDIGENOUS SOVEREIGNTY AND IDENTITY IN THE FACE OF COLONIAL LEGAL REGIMES: *(DE)HUMAN(IZING) RIGHTS*

Phoenix Johnson*
Julia Ricciardi**

"The most fundamental human right is the right to exist, both as an individual and in one's community."[1]

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It could be said that Christopher Columbus discovered America in 1492.[2] Of course, this statement fails on a number of levels. His fleet of ships landed on the shores of what is now commonly known as The Bahamas.[3] The Indigenous peoples called the land Guanahani.[4] The name America was not attached to any of the lands along the western edge of the Atlantic Ocean until August 1501, well after the arrival of Columbus.[5] In fact, Columbus was most likely not even the first European to spot land in the "New World," rather it was likely Rodrigo de Triana—who was a lookout on the *Pinta*.[6] The land and the Indigenous people existed well before Columbus or his crew took note of them, and well before outsiders attached the name America. *And what right did the outsiders have to name that land?*[7]

It could be said that Indigenous human rights were declared in 2007 by the United Nations.[8] Article One of the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") states, "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human

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writes this paper, on the lands of the Kalapuya people, she grieves the trauma enacted by people who look like her, and those from her lineage, and hopes to contribute to healing. She struggles alongside generations of visionaries, radicals, and caregivers who have fought for a truly liberated world for all. In particular, she wants to acknowledge and thank Phoenix Johnson, her primary teacher. She also extends gratitude to Judge Ortega, who shared OLDER THAN THE CROWN and who continues to deepen Julia's understanding of legal systems. All mistakes remain her own.

[1] Joyce Green, *Introduction: Honoured in Their Absence: Indigenous Human Rights, in* INDIVISIBLE: INDIGENOUS HUMAN RIGHTS 1 (Joyce Green ed., Fernwood Publishing, 2014).

[2] The Kiboomers – Kids Music Channel, *Columbus Day Lyric Video – The Kiboomers Preschool Songs & Nursery Rhymes for Holidays*, YOUTUBE (Oct. 13, 2015), https://youtu.be/-yzzCYJDPrQ?si=s3gsEsNwVrPxh_JH; Little Patriots, *Star Spangled Adventures Episode 01: Christopher Columbus*, YOUTUBE (Sept. 13, 2022), https://youtu.be/wKaRsJlcPvU?si=rccvQhB9MY38A2nx; Lakshmi Gandi, *How Columbus Sailed into History Thanks to Italians*, NPR: CODE SWITCH (Oct. 14, 2013, 10:15 AM), https://www.npr.org/sections/codeswitch/2013/10/14/232120128/how-columbus-sailed-into-u-s-history-thanks-to-italians.

[3] National Geographic Society, *October 12, 1492 CE: Columbus Makes Landfall in the Caribbean*, NATIONAL GEOGRAPHIC SOCIETY: EDUCATION (Oct. 31, 2023), https://education.nationalgeographic.org/resource/columbus-makes-landfall-caribbean/.

[4] *Id.*

[5] Erin Allen, *How Did America Get Its Name?*, LIBRARY OF CONGRESS BLOG (July 4, 2016), https://blogs.loc.gov/loc/2016/07/how-did-america-get-its-name/.

[6] Christopher Columbus, *Journal of the First Voyage of Columbus*, *in* JOURNAL OF CHRISTOPHER COLUMBUS (DURING HIS FIRST VOYAGE, 1492-93), AND DOCUMENTS RELATING TO THE VOYAGES OF JOHN CABOT AND GASPAR CORTE REAL 15, 35 (Clements R. Markham, ed. and trans., London: Hakluyt Society 1893).

[7] CHARLES W. MILLS, THE RACIAL CONTRACT 45 (1997) (elucidating the European ethos of colonization around the world noting that "there are rituals of naming which serve to seize the terrain of these 'New' Worlds . . ." and that European conceptions of "'discovery' and 'exploration' . . . "basically imply that if no white person has been there before, then cognition cannot really have taken place.").

[8] G.A. Res. 61/295, United Nations Declaration in the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP].

rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law."[9] The land and Indigenous peoples existed well before the United Nations and its member-states took note of them, and well before the UNDRIP was adopted. *Did the rights of those Indigenous peoples exist before outsiders named them? What right did the outsiders have in naming the rights of the world's Indigenous peoples?*[10]

We are not seeking to dismantle the foundations of human and Indigenous rights law. UNDRIP and other international legal mechanisms have value. However, we must interrogate the existing paradigm that distinguishes those who are entitled rights and those who entitle others to exercise those rights. On a philosophical level, we may acknowledge that all human beings are inherently and fundamentally imbued with human rights—rights that exist beyond any legal paradigm. Yet, with regard to recognition of and exercising those rights, there is a patchwork of legal systems with overlapping jurisdictions. For most Indigenous peoples around the world, that means on a practical level, they are forced to seek recognition and enforcement of their fundamental rights through colonial legal systems[11] (often the same legal systems that advanced legal "justification" to colonize those Indigenous peoples and their homelands in the first place).[12]

This does not mean that Indigenous peoples do not have their own complex ideologies of human rights. Many Indigenous communities have practiced and continue to practice complex legal structures, including

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[9] *Id.* art. 1.

[10] Many Indigenous people and groups led decades of activism and diplomacy, beginning at least as early as the 1970s, to engage international human rights bodies in the work of recognizing and protecting Indigenous communities. However, as Duane Champagne (Turtle Mountain Band of Chippewa) argues, "Indigenous nations may realize some advantages within the UNDRIP frame, but most likely they will not see full indigenous claims to self-government, territory, and cultural autonomy." The effectiveness of UNDRIP is limited, in part because the nation-states who have adopted UNDRIP often have claims of sovereignty which are in direct conflict with Indigenous sovereignty and rights. Duane Champagne, *UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples): Human, Civil, and Indigenous Rights,* 28 WICAZO SA REV. Spring 2013 at 9, 9-12.

[11] For example, U.S. common law courts (colonial in origin), court systems in commonwealths of the Crown, Norwegian courts that Indigenous Sámi are subjected to, and to some extent, international legal bodies heavily dominated or influenced by European colonial philosophy. *See generally id.*

[12] *See* Champagne, *supra* note 10 at 11-15 ("Collective human rights as outlined within UNDRIP suggests that all claims must be adjudicated before nation-state political, legislative, or judicial institutions. This plan of relying primarily on nation-state institutions negates the autonomy and powers of indigenous self-government."); *See also* TRUTH AND RECONCILIATION COMM'N OF CANADA, HONOURING THE TRUTH, RECONCILING FOR THE FUTURE: SUMMARY OF THE FINAL REP. OF THE TRUTH AND RECONCILIATION COMM'N OF CANADA, at 202-03 (2015) [hereinafter TRUTH & RECONCILIATION] ("[T]he view of many Aboriginal people is that the utilization of the Government of Canada's court is fraught with danger. Aboriginal leaders and communities turn to Canada's courts literally because there is no other legal mechanism.").

acknowledgment of human rights.[13] Due to historic and continual imposition of control by colonial legal forces (as well as material imbalance in power and access to resources), these Indigenous practices are often delegitimized by colonial forces.[14]

Colonialism, conquest, and genocide are evils too intense to be captured in writing. Imperial forces—aided by apathetic, indifferent, or inept witnesses—have ravaged and raped Indigenous peoples throughout this world and continue to do so. The Canadian government (which remains a commonwealth of the Crown), enacted the Gradual Civilization Act in 1857 and later the Indian Act of 1876, establishing federal policy which has "been highly invasive and paternalistic…regulat[ing] and administ[rating] in the affairs and day-to-day lives of registered Indians and reserve communities."[15] Similarly in the U.S., in 1823 the Supreme Court declared:

> According to every theory of property, the Indians had no individual rights to land; nor had they any collectively, or in their national capacity; for the lands occupied by each tribe were not used by them in such a manner as to prevent their being appropriated by a people of cultivators. All the proprietary rights of *civilized* nations on this continent are founded on this principle. The right derived from discovery and conquest.[16]

The *M'Intosh* court vindicated the "long and bloody war,"[17] which resulted in complete conquest over "the tribes of Indians inhabiting this

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[13] UVic, *Indigenous Law Today and Tomorrow with John Borrows and Val Napoleon*, YOUTUBE (Oct. 2, 2018), https://youtu.be/QhxVSYBDD98?si=OvGq0MD7mbWovYPb; Green, *supra* note 1; *Influence on Democracy*, HAUDENOSAUNEE CONFEDERACY, (last visited Jan. 30, 2024) https://www.haudenosauneeconfederacy.com/influence-on-democracy/ (Famously, legal practices, symbols and values practiced by the Haudenosaunee people for centuries were appropriated by drafters of the U.S. Constitution).

[14] "Sinixt sovereignty is inherent and does not rest on recognition from the state," as elucidated in a conversation between Sean Robertson (a Native studies faculty member at the University of Alberta-Edmonton) and Marilyn James (an official Sinixt spokesperson). Sean Robertson, *Extinction is the Dream of Modern Powers: Bearing Witness to the Return to Life of the Sinixt Peoples?*, 46 Antipode 773, 783 (2014). James shares, "the fact that we are limited in fulfilling our laws doesn't mean our laws aren't there: they are still there." *Id*.

[15] Erin Hanson, *The Indian Act*, Indigenous Foundations (last visited Jan. 31, 2024) https://indigenousfoundations.arts.ubc.ca/the_indian_act/ ("This authority has ranged from overarching political control, such as imposing governing structures on Aboriginal communities in the form of band councils, to control over the rights of Indians to practice their culture and traditions. The Indian Act has also enabled the government to determine the land base of these groups in the form of reserves, and even to define who qualifies as Indian in the form of Indian status.").

[16] *Johnson v. M'Intosh*, 21 U.S. 543, 570 (1823); *See generally* CHARLES C. MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS (2005) (noting that the *M'Intosh* court got the facts wrong—Native communities across what we now call North and South America engaged in highly specialized cultivation and care-taking practices of the land and other species).

[17] *Johnson v. M'Intosh*, 21 U.S. at 583.

country [who] were fierce sav[*]ges."[18] At so-called "residential schools" thousands of Native children, infants through teenagers, were tortured and killed, families and nations were torn apart.[19] Some say the last of these schools closed in 1996,[20] but Chemawa Indian School is still in operation by the Bureau of Indian Affairs on lands where hundreds of unmarked youth graves lay.[21] When colonizers arrived in Australia (another country that continues to be a commonwealth of the Crown), they declared *terra nulius*—that the people who had been stewarding the land since time immemorial—were *subhuman*, part of the flora and fauna.[22] This legal policy was not overturned until 1992.[23] Not only have colonizing forces declared legal policies specifically aimed at genocide of Indigenous peoples, colonial culture and legal practices have attempted to alter and eradicate Indigenous legal practices.[24] To this day, Indigenous people in colonized countries are disproportionately harmed by law enforcement[25] and incarceration;[26]

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[18] *Id.* at 590.

[19] Erin Hanson, Daniel P. Games & Alexa Manuel, *The Residential School System*, INDIGENOUS FOUNDATIONS, (2009, with updates in 2020), https://indigenousfoundations.arts.ubc.ca/the_residential_school_system/.

[20] *Id.*

[21] Rob Manning, *Federal Leaders Face Indigenous Schools' Tragic Past for First-of-Its-Kind Report*, OR. PUB. RADIO (Apr. 5, 2022), https://www.opb.org/article/2022/04/05/federal-leaders-face-indigenous-schools-tragic-past-for-first-of-its-kind-report/.

[22] *See generally* Rule of Law Education Centre, *European Settlement and Terra Nullius*, RULE OF LAW EDUCATION CENTRE (last visited Jan. 31, 2024), https://www.ruleoflaw.org.au/education/australian-colonies/terra-nullius/; National Library of Australia, *Challenging Terra Nullius*, NATIONAL LIBRARY OF AUSTRALIA: DIGITAL CLASSROOM (last visited Jan. 31, 2024), https://www.nla.gov.au/digital-classroom/senior-secondary/cook-and-pacific/cook-legend-and-legacy/challenging-terra.

[23] RULE OF LAW EDUCATION CENTRE, *supra* note 22.

[24] *See* K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 L. & Soc. Inquiry 1006 (2016) (describing the way early colonizers changed British mortgage common law in order to more easily dispossess Native people of their land); Sarah Deer (citizen of Muscogee Creek Nation), (*En)Gendering Indian Law: Indigenous Feminist Legal Theory in the United States*, 31 YALE J. L. & FEMINISM 1, 2, 9 (2019) (". . . some of the earliest formal legal relations between tribal nations and the federal government were marked with a significant absence and erasure of Native women's political power. One of the challenges faced by early Indian leaders was that European governments almost invariably declined to treat or even negotiate with Native women . . . As Native men were treated as more powerful in the eyes of Europeans, some internalized the Western concept of natural superiority of men and began to deny Native women their rightful role as equal participants in social and political spheres.").

[25] Elise Hansen, *The Forgotten Minority in Police Shootings*, CNN (Nov. 13, 2017), https://www.cnn.com/2017/11/10/us/native-lives-matter/index.html.

[26] Government of Canada, *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses,* JUSTICE RESEARCH AND DATA (Jan. 20, 2023), https://www.justice.gc.ca/eng/rp-pr/jr/oip-cjs/p3.html; Suzi Hutchings, *Aboriginal People in Australia: The Most Imprisoned People on Earth*, DEBATES INDIGENAS (Apr. 1, 2021),

disenfranchised from access to basic necessities like clean water,[27] electricity,[28] internet connectivity,[29] and affordable food;[30] endure

https://debatesindigenas.org/en/2021/04/01/aboriginal-people-in-australia-the-most-imprisoned-people-on-earth/; Off. of the Aboriginal and Torres Strait Islander Soc. Just. Comm'r for the Aboriginal and Torres Strait Islander Comm'n, *Indigenous Deaths in Custody 1989-1996*, 2 AUSTRALIAN INDIGENOUS LAW REPORTER 310 (July 1997); *Native Incarceration in the U.S.*, PRISON POLICY INITIATIVE (last visited Jan. 31, 2024), https://www.prisonpolicy.org/profiles/native.html.

[27] Lanikque Howard, *Addressing Water and Wastewater Challenges in Tribal Nations*, ADMIN. FOR CHILD. & FAMS. (Aug. 25, 2022), https://www.acf.hhs.gov/blog/2022/08/addressing-water-and-wastewater-challenges-tribal-nations ("Native American households are 19 times more likely than white households to lack indoor plumbing. It is worse in some communities, as Navajo residents are 67 times more likely than other Americans to live without access to running water. It is also estimated that approximately 75 percent of people living on Hopi land are drinking contaminated water, which pose serious public health risks to the community."); *Make It Safe*: *Canada's Obligation to End the First Nations Water Crisis*, HUMAN RIGHTS WATCH, (June 7, 2016), https://www.hrw.org/report/2016/06/07/make-it-safe/canadas-obligation-end-first-nations-water-crisis (According to studies between 2015 to 2016, "[c]ontaminants in drinking water on First Nations reserves visited by Human Rights Watch included coliform, *Escherichia coli* (*E. coli*), cancer-causing Trihalomethanes, and uranium.").

[28] *The Future of Tribal Energy Development: Implementation of the Inflation Reduction Act and the Bipartisan Infrastructure Law: Before S. Comm. on Indian Affs.*, 118th Cong. (Mar. 29, 2023) (statement of Bryan Newland, Asst. Sec. for Indian Affairs, U.S. Dept. of the Interior), https://www.doi.gov/ocl/tribal-energy-development (stating that in 2022, more than 16,000 Native homes in the U.S. were not connected to the electric grid); Isabeau van Halm, *How Indigenous Communities Became Major Players in Canada's Energy Transition*, Energy Monitor (Oct. 24, 2022), https://www.energymonitor.ai/just-transition/how-indigenous-communities-became-major-players-in-canadas-energy-transition/ (noting that Indigenous communities are often on the forefront of transitions to new renewable energies); Logan Turner, *This Remote First Nation Pays Lofty Power Costs. Forced to use U.S. Source, they Want to be on Ontario Grid,* CBC NEWS (Nov. 28, 2022), https://www.cbc.ca/news/canada/thunder-bay/windigo-island-electricity-costs-1.6664244 (describing unjustly high utility rates and unreliable electricity service for a remote First Nation community on Windigo Island, as well as noting failures by governmental actors and electric companies to address the injustice. Further noting that the Indigenous residents "live on waters that generate cheap power for Ontario and Manitoba, but have to import electricity from the United States," paying some of the highest electricity costs in Canada. In February 2021, one household paid nearly $1000 USD for a single month of electricity.).

[29] *Exploring the Lack of Internet Access on Native American Reservations*, COMMUNITY TECH NETWORK (July 28, 2023), https://communitytechnetwork.org/blog/exploring-the-lack-of-internet-access-on-native-american-reservations/.

[30] Alessandra, Univ. Puget Sound, *Food Price Index in Native American Reservations, Explained*, SOUND ECONOMICS (Oct. 28, 2021), https://blogs.pugetsound.edu/econ/2021/10/28/food-price-index-in-native-american-reservations-explained/; Cecily Hilleary, *Native American Tribes Fighting High Prices, Poor Food Quality*, VOA NEWS (Mar. 24, 2017), https://www.voanews.com/a/tribes-fighting-high-prices-poor-food-quality-in-indian-country/3780303.html; Andria Moore, *These Indigenous People Have Gone Viral for Exposing the High Costs of Groceries on Native Reservations*, BUZZFEED (Sept. 27, 2021), https://www.buzzfeed.com/andriamoore/indigenous-people-on-tiktok-are-exposing-the-outrageously; Jordyn Beazley, *'Through the Roof' Food Prices in Remote NT are Forcing Aboriginal Families to Make Impossible Choices*, THE GUARDIAN: NORTHERN TERRITORY (May 20, 2022), https://www.theguardian.com/australia-news/2022/may/21/through-the-roof-food-prices-in-remote-nt-are-forcing-aboriginal-families-to-make-impossible-choices.

environmental harms from foreign corporations,[31] and are more likely to be harmed by violent crime perpetrated by non-Native people.[32]

Despite these many grave harms, Indigenous communities around the world have developed a variety of effective methods to exercise their human rights.[33] Law professors Kristen A. Carpenter and Angela R. Riley (citizen of the Potawatomi Nation) describe what they view as a "jurisgenerative moment in human rights," noting the increasing degree to which Indigenous legal norms receive recognition in international courts.[34] For example, a 2001 ruling by the Inter-American Court on Human Rights validated the customary land tenure law of the Awas Tingni people in Nicaragua.[35]

In Australia, there are instances in which Indigenous elders and respected persons can participate in the sentencing process of Indigenous people who have violated Australian criminal laws.[36] In places like Aotearoa, Boliva, and Ecuador, Indigenous communities have fought to protect both the planet and their own rights through the legal instrument of rights of nature.[37] In the U.S., many Indigenous communities operate tribal courts.[38] Indigenous communities sometimes seek to enforce their rights through the formation of

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[31] *See* Hannah Grover, *Navajo Nation Officials, Activists Feel Cut Out as Company Advances Uranium Mining Plans*, N.M. POL. REP. (May 1, 2023), https://nmpoliticalreport.com/news/navajo-nation-officials-activists-feel-cut-out-as-company-advances-uranium-mining-plans/; *see* Spoorthy Raman, *Canada Mining Push Puts Major Carbon Sink and Indigenous Lands in the Crosshairs*, MONGABAY (June 2, 2022), https://news.mongabay.com/2022/06/canada-mining-push-puts-major-carbon-sink-and-indigenous-lands-in-the-crosshairs/; *see* Becky Bohrer, *Judge in Alaska Upholds Biden Administration Approval of the Massive Willow Drilling Project*, PBS NEWS HOUR (Nov. 9, 2023), https://www.pbs.org/newshour/politics/judge-in-alaska-upholds-biden-administrations-approval-of-the-massive-willow-oil-drilling-project.

[32] National Institute of Justice, *Five Things About Violence Against American Indian and Alaska Native Women and Men*, U.S. DEPT. OF JUSTICE (May 2023), https://www.ojp.gov/pdffiles1/nij/249815.pdf.

[33] Kristen A. Carpenter & Angela R. Riley (citizen of the Potawatomi Nation), *Indigenous Peoples and the Jurisgenerative Movement in Human Rights*, 102 CALIF. L. REV. 173 (2014), https://scholar.law.colorado.edu/faculty-articles/65.

[34] *Id.* at 176.

[35] *Id.*

[36] Elena M. Marchetti & Kathleen Daly, *Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model*, 29 (3) SYDNEY L. REV. 415 (2007), https://ro.uow.edu.au/lawpapers/708/.

[37] Gwendolyn Gordon, *Environmental Personhood*, 43 COLUM. J. ENVTL. L. 49, 53-59 (2018); Tiffany Challe, *The Rights of Nature—Can an Ecosystem Bear Legal Rights?*, COLUM. CLIMATE SCH. STATE OF THE PLANET (Apr. 22, 2021), https://news.climate.columbia.edu/2021/04/22/rights-of-nature-lawsuits/#%3A%7E%3Atext%3DWhat%20are%20the%20%E2%80%9CRights%20of%2Cor%20even%20by%20climate%20change (This begs the question, what form of dehumanization is at play if Indigenous people must seek protection of their own rights through declaration of legal personhood for nature?).

[38] Indian Affairs, *Tribal Court Systems*, U.S. DEPT. OF INTERIOR, https://www.bia.gov/CFRCourts/tribal-justice-support-directorate.

nonprofits or other organizational structures.[39] Often, Indigenous people or communities appeal directly to colonial courts to assert their rights. In addition to legal victories for Indigenous communities, Carpenter and Riley also note that "indigenous peoples are influencing law around and outside of their communities, *all the way up* into state and international practice."[40] These scholars argue that "indigenous peoples are deeply and consciously involved in architecting a human rights system that bridges—or at least aspires to bridge—Western and indigenous ideals, mechanisms, and outcomes at every level."[41] Each method serves as an important tool to help Indigenous communities vindicate rights, however, in all of these instances, colonial powers still run the show.[42] And in the process, the colonial legal structure is bolstered or validated.

The sophisticated and nuanced engagements many Indigenous peoples have led within international human and Indigenous rights law deserve greater attention and acknowledgment. However, we remain skeptical as to whether a healthy "bridge" can ever be formed between colonial and non-colonial or anti-colonial communities. When Indigenous communities are required to assert their rights in legal systems where The Queen or King (of a country which has engaged in perhaps the most far-reaching colonialism) is an opposing party, or where the U.S. federal government maintains "plenary power" over tribal nations and is not required to follow treaty obligations, there is an inherent dehumanization at play.[43] Justice cannot be

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[39] *E.g. Native American Organizations Serving the Community*, NATIONAL INSTITUTES OF HEALTH, https://www.edi.nih.gov/people/sep/na/campaigns/native-american-heritage-month-2018/native-american-organizations.

[40] Kristen A. Carpenter & Angela R. Riley (citizen of the Potawatomi Nation), *Indigenous Peoples and the Jurisgenerative Movement in Human Rights*, 102 CALIF. L. REV. 173, 177 (2014), https://scholar.law.colorado.edu/faculty-articles/65.

[41] *Id.* at 197.

[42] Even when Indigenous communities engage international or regional human rights courts, colonial forces may have outsized power in that process. For example, "[t]he five permanent members of the UN Security Council wield great power in the [International Court of Justice] just as they do in the UN Security Council," and three out of five of the permanent Security Council members are France, the United Kingdom, and the United States. S. Gozie Ogbodo, *An Overview of the Challenges Facing the International Court of Justice in the 21st Century*, 18:1 ANN. SURV. OF INT'L & COMPAR. L. 93, 106 (2012); *see also* Paul Joffe, *Undermining Indigenous Peoples' Security and Human Rights*, in INDIVISIBLE: INDIGENOUS HUMAN RIGHTS 217, 223 (Joyce Green ed., 2014) ("[t]he Government of Canada repeatedly uses international processes and forums to undermine Indigenous peoples' rights and the UNDRIP, based on narrow self-interest.").

[43] *E.g.* American Constitution Society, *Founding Failures: Indian Country's Sovereignty and Subordination*, YOUTUBE (Sept. 17, 2021), https://www.acslaw.org/video/founding-failures-indian-countrys-sovereignty-and-subordination/ (statement of Ambassador Keith Harper) ("One of

achieved through fora that continue to subjugate Indigenous peoples, while the invasive party trying to assert dominance gets to dictate the legal and cultural procedures and policies that are used to adjudicate the claim.[44]

As Joyce Green (English, Ktunaxa and Cree-Scottish Métis), professor emerita of political science at the University of Regina, writes, "Indigenous peoples find that the settler states, the colonizers and their political, economic and legal apparatuses set the possibilities and parameters for Indigenous liberation so as to minimize the effect on the states."[45] Of course, from a colonial viewpoint, nation-states have a strong incentive to constrain recognition of Indigenous rights—"Indigenous human rights include a claim to land and against the sovereignty of settler states…none are willing to confront and remedy Indigenous rights violations as a consequence of state occupation and oppression."[46]

This truth is echoed in the Summary of the Final Report of the Truth and Reconciliation Commission of Canada: "[m]any Aboriginal people have a deep and abiding distrust of Canada's political and legal systems because of the damage they have caused. They often see Canada's legal system as being an arm of a Canadian governing structure that has been diametrically opposed to their interests."[47]

Regardless of whether the ruling of a colonial court produces a tangible remedy or meaningful benefit for an Indigenous person or community, we must grapple with what standing does a colonial court have to judge, impose penalties, or deliver remedies with regard to the fundamental rights of Indigenous peoples, in the first place? Either explicitly or *de facto* requiring Indigenous people to engage in the adversarial and idiosyncratic processes of colonial legal systems, in order for their personhood to be acknowledged, can cause Indigenous people psychological, financial, and other harms.[48]

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the things about the plenary power doctrine…on the one hand it gives Congress the power to break treaties, it gives Congress the power to terminate tribes…"); TRUTH & RECONCILIATION, *supra* note 12, at 202-03 ("Until Canadian law becomes an instrument supporting Aboriginal peoples' empowerment, many Aboriginal people will continue to regard it as a morally and politically malignant force."); Oral Argument at 3:03:50, Her Majesty the Queen v. Richard DeSautel, 2021 SCC 17 (2021), https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=38734&id=2020/2020-10-08--38734&date=2020-10-08, (statement from an attorney representing the Bar of Canada) ("Indigenous people across the country are regularly forced into court to defend their rights. Too often the Crown responds to their claim with arguments that would, if accepted, narrow and defeat [reconciliation].").

[44] Champagne, *supra* note 10, at 9-12 (discussing the non-consensual relationship between Indigenous people and nation-state forums).

[45] Green, *supra* note 1, at 5.

[46] *Id.* at 6.

[47] TRUTH & RECONCILIATION, *supra* note 12, at 202.

[48] *Id.*; Kate Gunn & Bruce McIvor, *Footing the Bill: The Supreme Court Weighs in on the Costs of Indigenous Rights Litigation*, FIRST PEOPLES L. (Apr. 15, 2021), https://www.firstpeopleslaw.com/public-education/blog/footing-the-bill.

Utilizing colonial legal mechanisms to rule on the very *humanity* of Indigenous people is dehumanizing and may perpetuate a false belief that rights are bestowed on sav*ge Natives by "civilized" outsiders.

In order for the rightful liberation of Indigenous peoples and to truly engage in reconciliation, the dominance of colonial legal structures needs to be lessened. The inherent sovereignty of Indigenous communities and their own legal practices need to be elevated to a level of understanding, power, respect, and authority, not lesser than colonial legal powers. To put it succinctly, decolonization can never be achieved through colonial legal structures.

I. COLONIAL LEGAL STRUCTURES INVADE THE SINIXT

The form, norms, procedure, jurisprudence, and structure of colonial courts continue to reinforce some of the original underpinnings of colonization (even if the effects have been softened to some degree in recent years). First and foremost, the authority of a colonial legal system arises from conquest over Indigenous peoples and the declaration—by the invasive force—of their sovereignty over the Indigenous peoples and their homelands.[49] This creates a paradigm in which the colonial legal regime is recognized as the "legitimate" one, while any existing Indigenous legal system is either entirely disregarded or subordinate to the colonial legal force. The experiences of the Sinixt people give us insight into the ways in which colonial legal frameworks can perpetuate longstanding, destructive colonial attitudes and power imbalances, even when rulings are made in favor of Indigenous peoples.

The Sinixt peoples "are the sovereign indigenous caretakers of Sinixt *tum-ula7xw* (mother-earth)," of the lands colonially known as the interior plateau of British Columbia, Canada and extending to Kettle Falls, Washington, and including the headwaters of the *shwan-etk-qwa* (Columbia

[49] *E.g.*, Article III of the U.S. constitution declares that, "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." In Canada, "[c]ourts of law flourished in the eighteenth-century in present-day Quebec and Ontario, as well as in what are now the Maritime provinces. . . . The *Quebec Act, 1774*, section 17, defined powers for creating British-style criminal, civil, and ecclesiastical courts in Quebec alongside that province's much more ancient courts dating back to the French [colonizing] regime." Supreme Court of Canada, *Creation and Beginnings of the Court*, (June 26, 2023), https://www.scc-csc.ca/court-cour/creation-eng.aspx. Eventually, the *Constitution Act, 1867*, was passed, enabling the new federal Parliament to create a federal court of appeal for Canada. *Id*.

River).[50] The name Sinixt roughly translates to spotted fish people, referencing a fish commonly found throughout the Arrow Lakes region.[51] The Canadian government did not recognize Sinixt peoples as their own nation and rather only provided legal recognition through the Arrow Lakes Band.[52] Until the mid-1800s, the Sinixt traditionally spent their summer in the southern part of their lands and wintered in the north near the Arrow Lakes.[53] The Sinixt often traverse their territory, including along the *shwan-etk-qwa* in their sturgeon-nose canoes made of white pine.[54]

In 1846 the ancestral land of the Sinixt people was divided, along the 49th parallel, by the U.S.-Canada border.[55] Euphemistically stated by the Supreme Court of Canada, "a constellation of factors made the Sinixt people move to the United States."[56] As one scholar writes, the imposed border "forced the reconfiguration of both [Sinixt] identities and the environments through which they moved…[and] allow[ed] each nation to impose its own criteria…[and] utilize the international boundary as a tool to terminate its obligations to [the Sinixt]."[57] Many Sinixt people continue to live all across their ancestral lands, but the Court was referring to the fact that officially the peoples were moved to the Colville reservation in Washington.[58]

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[50] SINIXT NATION, *About Us*, https://sinixtnation.org/content/about-us (last visited Jan. 31, 2024).

[51] R. v. DeSautel, 2017 BCPC 84, ¶ 22 (CanLII), [2018] 1 CNLR 97 (Can.); Oral Argument at 1:55:55, R. v. Richard DeSautel, 2021 SCC 17 (2021), https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=38734&id=2020/2020-10-08--38734&date=2020-10-08. *The authors would like to note that "R." in abbreviated case names from Canadian courts is short for* rex *or* regina*, the Latin terms for king and queen, respectively. In this particular case, the full party name appears on documents as* Her Majesty The Queen.

[52] Robertson, *supra* note 14, at 773.

[53] *Id.* at 777.

[54] R. v. DeSautel, 2017 BCPC 84, ¶ 24 (CanLII), [2018] 1 CNLR 97 (Can.); Sinixt Nation, *Sinixt Culture*, https://sinixtnation.org/content/sinixt-culture (last visited Jan. 31, 2024).

[55] Andrea Geiger, *"Crossed by the Border": The U.S.-Canada Border and Canada's "Extinction" of the Arrow Lakes Band, 1890-1956*, 23:2 WESTERN LEGAL HISTORY 121, 123 (2010), https://www.njchs.org/wp-content/uploads/23.2.pdf.

[56] Her Majesty the Queen v. Richard DeSautel, 2021 SCC 17 (2021), https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18836/index.do?q=sinixt.

[57] Geiger, *supra* note 55, at 121-22.

[58] The Colville Reservation was established by executive order in 1872 and originally extended both north and south of the international (U.S.-Canada) border. *Id.* at 124-27. However, settlers demanded access to the rich agricultural area and U.S. Congress acted almost immediately to shrink the reservation "limiting it to the far rockier and inhospitable terrain west of the Columbia River." *Id.* Then again in 1892, Congress severed the northern portion of the reservation in order to open up mining prospects for settlers. *Id.* Canada also engaged in a process of sequestering Native people on tiny and disconnected reserves. *Id.* Still, settlers believed Indigenous people sought too much access and mobility—across the land they stewarded since time immemorial. *Id.* One letter from settlers to representatives of the Canadian government written in 1915 states, "[t]he Indians appear to be laboring under the impression that all the land is theirs and we think it is high time they were disillusioned." *Id.*

II. IN 1956, CANADA DECLARED THE SINIXT PEOPLE EXTINCT

As Sean Robertson, faculty of the Native Studies at the University of Alberta-Edmonton, writes, this was an act of "conjuring extinction," using law and cartography to erase the Sinixt.[59] Robertson goes on to write, "[t]he formation of the *settler* state relies not only upon imaginative geographies of the precarious presence of the other, but also upon the discourse of emptying space of the inscriptions of daily life."[60] In 1936, an agent of the Canadian government "reported that Annie Joseph, an Arrow Lakes Indian residing in Vernon, 'has no knowledge of any survivor of the Reserve except herself.'"[61] Joseph passed away in the 1950s.[62] When she died, the Canadian government called her "an old Indian lady," and declared extinction of the Arrow Lakes Band (and therefore the Sinixt).[63] The title to Sinixt land—filled with lush timberlands—was transferred to British Columbia.[64] As Robertson asserts, "[w]ith this event, the cultural legitimation of colonialism, in the form of the imaginative geography of biological extinction materialized."[65]

Author Johnson (Tlingít and Haida) invites non-Native readers to engage in a visualization of erasure.

> *Erasure is something that isn't just a defined word we can understand…It is an existential chilling dread.*
>
> *Sit where you are and clear your mind. Look at your hands and stare at them for a moment, now imagine they're becoming see-through, and you can no longer see your fingers, and you can no longer see your hands, and this feeling creeps up inside of you.*
>
> *The erasure enacted against Native people is like being buried alive and watching the dirt heaped over you and the diggers and onlookers see right through you.*

One administrative function (carried out by a non-Native person) can lead to centuries of trauma playing through our mind at lightning speed. It is important for non-Native people to understand how colonizers enact erasure both through overt slaughter and through administrative and rhetorical acts; all forms of erasure compound the lived experience of generational trauma.

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[59] Robertson, *supra* note 14, at 778.
[60] *Id.* at 779.
[61] *Id.* at 778.
[62] *Id.*
[63] *Id.*
[64] Geiger, *supra* note 55, at 121.
[65] Robertson, *supra* note 14, at 778.

Marilyn James, an appointed spokesperson for the Sinixt Nation and director of the Sinixt Nation Society, reflects on the impact of being declared extinct:

> Someone would say to me… 'They say you are extinct, but you are not! You are still existing!' Yes, but I am also compromised; my actual ability to exist as who I am, what I am, be entitled to what everybody can be entitled to who hasn't been declared extinct: I am limited… Sure we can practice, I can still breathe and my heart still beating and I am not going to fall over by a declaration of extinction.[66]

III. THE SINIXT PEOPLE WERE NOT EXTINCT[67]

While none lived at the Oatscott Reserve, some still lived in Burton and Edgewood.[68] Research conducted by Dr. Andrea Laforet, retired director of ethnology and cultural studies at the Canadian Museum of Civilization, shows that Sinixt individuals continue to live throughout their ancestral lands in places now called British Columbia and Washington State, and that such individuals are direct descendants of Sinixt families who lived in British Columbia prior to 1930.[69]

The decision to declare the Arrow Lakes people extinct advanced geopolitical goals of the Canadian government.[70] The government was on the verge of negotiations with the U.S. "for the Columbia River Treaty that would dam the Columbia and create a…200 kilometre" reservoir, cutting through traditional Sinixt lands and washing away "nearly all archaeological traces of a culture that had endured for over five thousand years."[71]

Beginning in the 1930s, President Roosevelt—motivated to fulfill a campaign promise to put unemployed people to work—led the charge to build a dam in Washington at the Grand Coulee canyon.[72] The federal government followed no formal procedure for engaging Native people in

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[66] *Id.* at 782.

[67] Black Press Media, *The Sinixt: A People Without Recognition in Their Own Home,* ARROW LAKES NEWS (Oct. 23, 2013), https://www.arrowlakesnews.com/opinion/the-sinixt-a-people-without-recognition-in-their-own-home-4574931.

[68] *Id.*

[69] Factum of Resp't, R v. DeSautel, 2020 SCC 17 (2020), 1 S.C.R. 533, https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38734/FM020_Respondent_Richard-Lee-Desautel.pdf.

[70] Black Media Press, *supra* note 67.

[71] *Id.*

[72] LEONARD ORTOLANO ET AL., GRAND COULEE DAM AND THE COLUMBIA BASIN PROJECT USA i, v (2000), http://large.stanford.edu/courses/2010/ph240/harting2/docs/csusmain.pdf.

decisions concerning the taking or destruction of their reservation or ancestral lands.[73] The government forced thousands of Indigenous people in the region to relocate due to the construction of the dam.[74] After 1940, the federal government denied Native landowners even an opportunity to negotiate—they were notified of the forced removal via mail.[75] The dam blocked all runs of salmon to the Spokane, Coeur d'Alene, Kalispel, and Kootenai reservations as well as their traditional off-reservation fishing territories, and significantly diminished salmon runs to the Colville reservation.[76] In fact, the dam project completely swallowed Kettle Falls—a remarkably important fishing and gathering spot for the Sinixt and many other tribes for centuries.[77] Thousands of Indigenous people from across the Northwest, including the Sinixt, gathered for a three-day mourning Ceremony of Tears.[78] In the words of Marilyn James, "[t]he end of salmon runs had an enormous impact on the social, economic, spiritual and cultural lives of our people."[79] It has become more widely known that these destructive practices have a direct psychological, social, and spiritual impact. Further compounding this kind of trauma drives some to seek solace in self-medication using substances. It is believed that the harmful stereotype of the drunken Indian led to the further support of tribal status termination in the 1950s and 60s.[80]

> *Erasure is something that isn't just a defined word we can understand…It is an existential chilling dread.*

IV. RIGHTFUL CONNECTION WITH THE LAND

Many Sinixt members engage in a spiritual belief and practice that when there is a death in a family, that family does not hunt for a year, while another member of the tribe hunts to supply them with food and ceremonial meat.[81] Moreover, it is recognized that hunting and meat are central to the Sinixt way

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[73] *Id.* at xii.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 74.

[77] Tara Justine, *The Ceremony of Tears: The Rising Waters of Lake Roosevelt Ended a 10,000-year Native Tradition*, SPOKANEHISTORICAL.ORG (last visited Mar. 4, 2024), https://spokanehistorical.org/items/show/668.

[78] ORTOLANO, *supra* note 72, at 74.

[79] Marilyn James Aff. (Pet'r), Campbell v. British Columbia (Forest and Range), [2010] BCSC (2010), https://sinixtnation.org/files/Affidavit_James.pdf.

[80] Ortolano, *supra* note 72, at 74.

[81] OLDER THAN THE CROWN (War Pony Pictures 2022).

of life.[82] Richard Lee DeSautel, a direct descendant of the Ntsoxtiken family, is a ceremonial hunter of the Sinixt Nation and has worked as a game agent for tribal fish and wildlife.[83] He often hunts to supply meat for families who are observing the death of a loved one.[84] Due to the Canadian government's declaration that the Sinixt tribe had become extinct, Richard is regarded by U.S. and Canadian governments solely as a member of the Lakes Tribe of the Colville Confederated Tribes based in Washington state.[85]

In 2010, with the support of his community, Richard traveled to the northern area of his ancestral lands and hunted a cow-elk.[86] With a goal of affirming his nation's rights across their entire territory (including the lands now called British Columbia), he reported this hunt to authorities and was charged for hunting without a license and not being a resident of British Columbia.[87] This was not the Sinixt's first attempt to vindicate their rights in the eyes of Canada's legal system, but it has turned out to be the most successful thus far.[88]

Richard sought relief from the charges on a defense that he was exercising his Aboriginal hunting rights.[89] The adversarial nature of the colonial court in Canada placed a number of burdens on Richard (and his tribe, and by extension all Indigenous people who seek rights in Canada)—he "bears the onus of proving the existence of an aboriginal right to hunt in British Columbia," he must also illustrate a prima facie infringement of that right, and he must defend his position *against* an adversarial opponent—the Crown.[90]

It may seem like we are pointing out a banal and obvious point—that Richard must face and overcome opposing legal arguments to have his Indigenous rights (and by extension, his own personhood) vindicated by the courts in Canada. But it is important to acknowledge that not all dispute resolution or legal systems are predicated on an adversarial hostility—in fact,

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[82] R. v. DeSautel, 2017 CanLII 84, ¶ 28 (Can. BCPC).

[83] OLDER THAN THE CROWN, *supra* note 81; Factum of Resp't, R v. DeSautel, 2020 SCC 17 (2020), 1 S.C.R. 533, ¶ 16 https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38734/FM020_Respondent_Richard-Lee-Desautel.pdf.

[84] OLDER THAN THE CROWN, *supra* note 81.

[85] R. v. Richard DeSautel, 2021 SCC 17, ¶ 4 (Can.) https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18836/index.do?q=sinixt.

[86] *Id.* at ¶ 3.

[87] *Id.*

[88] *See* Sunshine Logging (2004) Ltd. V. Prior, 2011 BCSC 1044 (2011) (an example of representatives of the Sinixt tribe unsuccessfully attempting to prevent logging of Slhu7kin/Perry Ridge); *see* Robert Allen Watt v. R., T-1831-06, (Fed Ct. Can. filed Oct. 16, 2006) (a case regarding an attempt to seek free travel across the international border).

[89] R. v. Richard DeSautel, 2021 SCC 17, ¶ 3 (Can.) https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18836/index.do?q=sinixt.

[90] R. v. DeSautel, 2017 CanLII 84, ¶ 52 (Can. BCPC).

that is a *Western* or *English* tradition.[91] Many Indigenous dispute resolution systems are focused on horizontal power-sharing and collaborative peacemaking.[92] In contrast, the adversary system is based on "the sharp clash of proofs presented by adversaries,"[93] which reinforces a zero-sum ethos and encourages legal practitioners or representatives of the Crown to develop anti-Indigenous legal arguments, even when doing so offends our moral sensibilities or shared collective knowledge about Indigenous history.

More broadly, he must adhere to the court battle as defined by the colonial invader and follow the legal rules as well as unspoken norms of the colonial court. Even courtroom attire is tied to English practices from the 1300s; judges and lawyers continue to wear robes as a symbol of "privilege" and, to "remind people of the important role our courts play in a democratic society."[94] The so-called privilege denoted by robes functions entirely within the Euro-colonial tradition—certainly not recognizing any Indigenous customs of respect or privilege. Not only is Richard expected to conform to the Canadian legal customs and laws to defend his rights—doing so is his only option under the existing paradigm. Yet, there is no such expectation that officials of the colonial court system or representatives of the Crown—while adjudicating the very nature of Indigenous rights—conform with, or even attempt to validate, Indigenous legal norms or customs.

Richard's case was first heard in the Provincial Court of British Columbia before Judge Mrozinski in late 2016.[95] Several attorneys, representing the Crown, argued he "was not and could not have been exercising an aboriginal right to hunt…because no Sinixt aboriginal rights ever came into existence in Canada."[96] This argument requires an unspoken, yet underlying belief that the rights of Sinixt peoples did not exist before the "civilized" white people arrived. Or, that even if their rights existed before colonization, those rights were fully extinguished by the Crown's assertion of sovereignty. Alternatively, the Crown argues that the Sinixt people

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[91] *Compare* Stephan Landsman, *A Brief Survey on the Development of the Adversary System*, 44 OHIO STATE. L. J. 713, 717 (1983) (citing the adversary process as "a product of the slow evolution of English and American judicial procedure," dating back as early as the eleventh century), *with* JOHN HOSTETTLER, FIGHTING FOR JUSTICE: THE HISTORY AND ORIGINS OF ADVERSARY TRIAL 9 (2006) ("Roman-canon inquisitorial system . . . imposed on the judge a duty to inquire into the circumstances of the case with a view to uncovering the truth"), *and* Jessica Metoui*, Returning to the Circle: The Reemergence of Traditional Dispute Resolution in Native American Communities,* 2007 J. DISP. RESOL. 517, 528-38 (2007) (describing a number of Indigenous dispute practices from nations throughout North America).

[92] *See* Metoui, *supra* note 91, at 528-38.

[93] Landsman, *supra* note 91, at 714.

[94] Provincial Court of British Columbia, *Why do Canadian Judges Wear Robes?*, ENEWS (Sept. 18, 2018), https://www.provincialcourt.bc.ca/enews/enews-11-09-2018.

[95] R. v. DeSautel, 2017 CanLII 84 (Can. BCPC).

[96] *Id.* ¶ 5.

voluntarily left what is now called British Columbia, and thus their contemporary practices and territory lack any continuity upon which to base Aboriginal rights claims.[97] In other words, the Crown "assert[s] that no aboriginal collective capable of exercising such a right exists in British Columbia."[98]

"A Lumbee Indian legal scholar, Robert Williams, has traced the evolution of the Western legal position on the rights of native peoples…showing how it is consistently based on the assumption of 'the rightness and necessity of subjugating and assimilating other peoples to the European worldview.'"[99] The arguments put forward by the Crown, presented seriously and without hesitation by several attorneys, are essentially a repackaging of the arguments made to justify colonization in the first place.

The objective truth is that thousands of societies of Indigenous people existed across what we now call North America, since time immemorial, before the arrival of European colonizers.[100] And that these societies had, and continue to have, complex cultures, legal systems, economies, and recognition of rights.[101] These societies continue, despite the gruesome attempts to erase them over the past several centuries.[102] Yet, Mills describes that within the paradigm of European colonialism and dominance, "one has an agreement to misinterpret the world. One has to learn to see the world wrongly."[103] There must be a foundational belief that Europeans "were 'civilized,' … and [n]on-Europeans were 'sav[*]ges,'…the man whose being wildness, wilderness, has so deeply penetrated that the door to civilization, to the political, is barred."[104] Mills goes on to underscore that colonizers engaged in a process of declaring Indigenous people subhuman, nonexistent, part of the wilderness, and nonetheless killing them to reduce or eradicate their populations; "[s]o the basic sequence ran something like this: there are no people there in the first place, in the second place, they're not improving the land, and in the third place—oops!—they're already all dead anyway (and, honestly, there really weren't that many to begin with, so there are no people there, as we said in the first place.)"[105] Similarly, the legal position of the Crown and other provincial governments across Canada, in the 2010s, is that the Sinixt people never really had rights in Canada, and if they did, those

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[97] *Id.*
[98] *Id.*
[99] CHARLES W. MILLS, THE RACIAL CONTRACT 21 (1997).
[100] Roxanne Dunbar-Ortiz, An Indigenous Peoples' History of the United States, 1 (2014).
[101] *Id.* at 6.
[102] *Id.*
[103] Mills, *supra* note 99, at 28; *see also* Robertson, *supra* note 14, at 790.
[104] Mills, *supra* note 99, at 37.
[105] *Id.* at 40.

people died. And if those people didn't die, they left willingly. And either way, the sovereignty of the Crown supersedes.

The discord between the reality (that Indigenous peoples have always created robust civilization), and the European intentional misinterpretation (that Indigenous people either did not exist, or where they did they were wild and subhuman), sometimes surfaces in legal disputes and must be resolved by the colonial legal regime in a way that does not disturb the manufactured colonial superiority.[106] In 2001, in *Mitchell v. M.N.R.*, the Supreme Court of Canada wrote:

> Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures. The part of North America we now call Canada was first settled by the French and the British who, from the first days of exploration, claimed sovereignty over the land on behalf of their nations. English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation…At the same time, however, the Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown:...With this assertion arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as "fiduciary" in *Guerin v. The Queen*…
>
> Accordingly, European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them… Barring one of these exceptions, the practices, customs and traditions that defined the various

[106] Green, *supra* note 1, at 7 ("[S]ettler states deny Indigenous claims to land and sovereignty and have fought those claims in courts and in their political arenas…[w]here states have acknowledged the violence and consequences of historical policies of colonialism by past governments…[it] has been in such a compartmentalized fashion that it permits contemporary governments to conceive of colonial events as merely historical and to insulate their present practices that violate Indigenous rights").

> aboriginal societies as distinctive cultures continued as part of the law of Canada...[107]

The language and construction of these sentences shows the court grappling with having to admit the personhood and the existence of fundamental rights within Indigenous peoples and their societies pre-colonization, while continuing to reassert the validity of "the French and the British," and "the Crown's assertion of sovereignty."[108] The Court is telling Indigenous people that, even when the Crown recognizes your rights, *you must remember that the* legitimate (aka the European, civilized, victorious) *"government [can] extinguish[] them.*"[109]

Richard must assert his rights within the context of a colonial court system (rather than a sovereign Indigenous legal system),[110] and thus, he based his claim to aboriginal rights on common law and a Canadian constitutional amendment. Richard's argument before the Supreme Court of Canada notes, "[a]t common law, legislatures were able to extinguish or regulate aboriginal rights without justification."[111] Aboriginal rights received greater recognition and force of law with section 35 in the Constitution Act, 1982.[112] Section 35 declares that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[113] Section 35 recognizes existing and treaty rights, though it does not clarify what those rights encompass, and while section "35 jurisprudence has led to positive development for some Indigenous communities, the test for proving the Aboriginal rights has been criticized as being unduly narrow and freezing Indigenous rights" in relation to pre-contact culture—or what can be proved in a colonial court of law as "'integral and distinctive'" Indigenous practices pre-colonialism.[114] Naiomi Metallic and the Truth and Reconciliation Commission both underscore the inherent limitation of using a colonial legal system to affirm Indigenous rights—"s. 35 has not furthered meaningful

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[107] Mitchell v. M.N.R, [2001] 1 SCR 911 (Can.), https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1869/index.do.

[108] *Id.*

[109] *Id.*

[110] TRUTH & RECONCILIATION, *supra* note 12, at 203 ("When [Indigenous people turn to Canada's courts] they do so, []with the knowledge that the courts still are reluctant to recognize their own traditional means of dispute resolution and law.").

[111] Factum of Resp't, R. v. Richard DeSautel, 2021 SCC 17, ¶ 28 (CanLII), [2021] 1 SCR 533 (Can.), https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38734/FM020_Respondent_Richard-Lee-Desautel.pdf.

[112] Naiomi Metallic, *The Relationship Between Canada and Indigenous Peoples: Where Are We?, in* SPECIAL LECTURES 2017: CANADA AT 150: THE CHARTER AND THE CONSTITUTION 423 (The Law Society of Upper Canada, ed., Toronto: Irwin Law, 2018).

[113] The Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 (U.K.), 1982, c 11, s 35, (Can.).

[114] Metallic, *supra* note 112, at 423.

reconciliation because the case law is still anchored in the doctrine of discovery."[115]

Because of the wording of section 35 and related jurisprudence, the courts of Canada consider Sinixt behavior both before and after what they describe as "pre-contact," in order to decide the fate of Richard's criminal charges, as well as the rights of all Sinixt people. [116] For the purpose of resolving Richard's case, the parties agreed to use 1811 as the time of first contact, when a man who is believed to be the first European to enter Sinixt territory was on his way to the Pacific Ocean.[117] However, it should not be forgotten that at least indirect "contact" between colonizers and the Sinixt occurred "in the 1780s when smallpox pandemics swept through the area reducing the population though to what extent cannot be known."[118]

At the trial level, Judge Mrozinski notes that under Canadian law, "[a]boriginal rights are communal rights…and they may only be exercised by virtue of an individual's ancestrally based membership in [a historic and present community.]"[119] Canadian courts have developed common law tests for determining whether a present day community is a "rights-bearing" community—in other words, the colonial courts in Canada engage in a legal process of determining whether an individual or group of individuals are Indigenous to the land now called Canada.[120] Judge Mrozinski further notes that when evaluating a claim for an aboriginal right "a court must take into account the perspective of the aboriginal people claiming the right yet at the same time 'do so in terms that are cognizable to the non-aboriginal legal system.'"[121]

After reviewing extensive trial evidence, Judge Mrozinski ultimately concluded that Richard was a member of a modern-day community descended from the Sinixt, that "hunting in what is now British Columbia was a central and significant part of the Sinixt's distinctive culture in pre-contact times," and held that the Wildlife Act unjustifiably infringed Richard's rights.[122] The ability of Richard and the Sinixt people to enjoy

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[115] *Id.*

[116] R. v. DeSautel, 2017 BCPC 84, ¶ 14 (CanLII), [2018] 1 CNLR 97 (Can.). Even the language used to describe invasion by European colonizers is sanitized in the legal system. The phrase "pre-contact" defines the existence of Indigenous people solely in relation to invading forces, and further reduces the violent acts of colonization to "contact."

[117] *Id.* at ¶ 15.

[118] *Id.* at ¶ 16.

[119] *Id.* at ¶ 55.

[120] *Id.* at ¶ 56.

[121] *Id.* at ¶ 79.

[122] *Id.* at ¶ 84.

certain rights on their ancestral land was eventually affirmed by the Supreme Court of Canada, but not without further hardship and disrespect.[123]

The Truth and Reconciliation Commission suggests that the Canadian government should not "subjugate Aboriginal peoples to an absolutely sovereign Crown,"[124] yet, the Crown chose to appeal Judge Mrozinski's ruling.[125] Richard's case wound through an arduous appeals process[126] in the colonial legal system, including an appeal trial on September 6-8, 2017; a hearing about a request for leave to file appeal on March 27, 2018; a hearing before the Court of Appeal for British Columbia on September 12, 2018; an appeal heard by the Supreme Court of Canada on October 8, 2020; and a final judgment rendered on April 23, 2021, more than ten years after Richard's ceremonial act of hunting on his ancestral lands.[127]

By the time the case reached the Supreme Court of Canada, the Attorney General of Canada, and Attorneys General of six provincial or territory governments joined as intervenors.[128] Thirteen First Nation and tribal governments or associations also joined the case.[129]

Before the Supreme Court of Canada, attorneys for the Crown reiterated that aboriginal rights outlined in section 35 cannot apply to "US Indigenous groups," implying that the imposition of a colonial international border through Sinixt territory somehow invalidates who they are and where they come from.[130] The Crown further argues that "[c]onstitutionalizing the rights of US Indigenous groups has deleterious consequences," including that Canada may have to invite representatives of Indigenous groups living within the US to constitutional conferences under some circumstances, may have to recognize title rights of some Indigenous groups living in the US, and may be required to consult and accommodate Indigenous groups at times.[131]

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[123] OLDER THAN THE CROWN, *supra*, note 81.

[124] TRUTH & RECONCILIATION, *supra*, note 12, at 203.

[125] R. v. DeSautel, 2017 BCSC 2389, ¶ 7 (CanLII), [2018] 1 C.N.L.R. 135 (Can.), https://www.bccourts.ca/jdb-txt/sc/17/23/2017BCSC2389.htm.

[126] On appeal, the Okanagan Nation Alliance, a "First Nations government in the Okanagan which represents the 8 member communities including: Okanagan Indian Band, Upper Nicola Band, Westbank First Nation, Penticton Indian Band, Osoyoos Indian Band and Lower and Upper Similkameen Indian Bands and the Colville Confederated Tribes," joined as an intervenor. The Okanagan Nation Alliance reiterates that "[t]hrough colonization we were divided from one another and from our way of life. At the same time we were dispossessed from the resources we relied upon, and our self-sufficient economy collapsed." Okanagan Nation Alliance, *About Us*, SYILX OKANAGAN NATION ALLIANCE, https://www.syilx.org/about-us/ (last visited Jan. 31, 2024).

[127] DeSautel, *supra*, note 116; DeSautel, *supra*, note 125; R. v. DeSautel, 2018 BCCA 131 (CanLII); R. v. DeSautel, 2019 BCCA 151 (CanLII); R. v. Desautel, 2021 SCC 17 (CanLII), [2021] 1 SCR 533 (Can.).

[128] R. v. Desautel, 2021 SCC 17 (CanLII), [2021] 1 SCR 533 (Can.).

[129] *Id*.

[130] App. Factum at 17, (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).

[131] *Id.* at 29.

Astonishingly, the Crown advanced a scarcity-mindset argument providing that "US Indigenous groups" access to limited resources such as hunting "decreases the availability of these resources to Canadian Indigenous groups."[132]

The Attorney General of Alberta argued that recognizing Richard as having an Aboriginal right, while he is not a Canadian resident or citizen, "is incompatible with Crown Sovereignty," and further that "[c]ontrol of a country's borders, and who may enter and remain in that country, is a fundamental attribute of sovereignty."[133] Alberta further argued that descendants of the Sinixt people do not have an on-going presence in what is now British Columbia, and therefore hunting in that region cannot be considered integral to their culture.[134]

The Attorney General of New Brunswick presented several arguments that require a certain degree of mental gymnastics. First, New Brunswick argued that a distinctive feature of pre-contact Sinixt ceremonial hunting "requires a community with whom the hunt, game, and pre and post hunt rituals are shared," and that because the modern-day community with whom Richard engages in these rituals is located in the U.S. rather than British Columbia, "there can be no meaningful expression of his asserted right in Canada."[135] Second, New Brunswick then explains that the absence (in their eyes) of a modern-day Sinixt community in British Columbia means that international travel is necessary for the right to be expressed, and that this "international mobility aspect of the Aboriginal right" is incompatible with Crown sovereignty.[136]

The Attorney General of Canada argued that "a mobility right may not necessarily be incompatible with Canada's sovereignty," rather "the manner in which the right interacts with Canadian sovereignty should be determined on the specific facts of each case."[137] Additionally, the Attorney General of Canada suggested that the lower courts improperly applied an approach that "leads to an overly broad interpretation of the term 'aboriginal peoples of Canada,'" and proposed that the Supreme Court rely on a different line of case law and adopt a more narrow legal framework.[138]

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[132] *Id.* at 30.

[133] Factum for the Intervenor (Alta.) at 5, (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.). Perhaps the claim made by Alberta's Attorney General, that control of own's borders is a fundamental sovereignty attribute, is a powerful argument *in favor of* recognizing the Sinixt's existence and rights—after all it was colonizing forces from Europe, and eventually the colonial U.S./Canada border that encroached upon Sinixt territory in the first place.

[134] *Id.* at 16.

[135] Factum for the Intervenor (N.B.) at 9, 12 (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).

[136] Factum for the Intervenor, *supra* note 135, at 14.

[137] Factum for the Intervenor (Can.) at 2 (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).

[138] Factum for the Intervenor, *supra* note 135, at 10.

The Attorney General of Saskatchewan argued that Richard's "claim is not supported by s. 35's linguistic, philosophic and historic context, and should have been rejected in the courts below."[139] The Attorney General of Quebec echoed arguments presented by the Crown and other Attorneys General, that Indigenous groups "outside" of Canada cannot be afforded aboriginal rights under section 35.[140]

The Attorneys General of Ontario and the Yukon did not take positions on the outcome of the appeal but raise other legal questions and ideas.[141] Ontario cautioned that the lower court did not properly address two separate legal questions, and suggests that the Supreme Court adopt a procedure that involves first resolving "who may hold a right recognized and affirmed by s. 35," before turning to "whether the right is established on the facts."[142] Ontario presented a number of factors that the court could use to determine whether a community located outside of Canada could be entitled to rights under section 35.[143] The Yukon Attorney General submitted a factum to express how the Yukon territory has navigated prior land claims and international border agreements with Yukon First Nations, and further cautioned the Supreme Court against making a ruling that may inadvertently impact treaty rights.[144]

> *Erasure is something that isn't just a defined word we can understand…It is an existential chilling dread.*

The legal posturing and arguments that were put forward by the Crown and Attorneys General are in stark contrast to those that were presented by Indigenous nations and organizations. The Assembly of First Nations (AFN), which represents more than 634 First Nations, drew on UNDRIP and stated "that First Nations people have the right to self-determination and to freely determine their political status and the right to autonomy or self-government in matters relating to their international and local affairs."[145] AFN underscored the importance of recognizing the extensive "diversity among First Nation beliefs, laws and relationships," which existed before the arrival of colonizers and continues today. Moreover, AFN argued that the Canadian government's attempts to develop and utilize a one-size-fits-all test for evaluating Indigenous rights, perpetuates the "cultural homogenization of

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[139] Factum for the Intervenor (Sask.) at 16 (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).

[140] Factum for the Intervenor (Que.), (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).

[141] Factum for the Intervenor (Ont.) at 2, (2021); Factum for the Intervenor (Yukon) at 1, (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).

[142] Factum for the Intervenor (Ont.) at 3-4, (2021).

[143] *Id.* at 7-9.

[144] Factum for the Intervenor (Yukon) at 1, (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).

[145] Factum for the Intervenor, (AFN) at 8, (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).

Indigenous people, and the denial of their history [which] is a legacy of colonization."[146] Further, AFN asserted that "[t]he rights of a nation which existed since time immemorial and prior to contact with a settlor state cannot be subsequently defined or unilaterally infringed upon by another nation."[147] AFN emphatically asserted:

> First Nations laws have always been the foundation of our relationships with one and other and with other nations. These rights were practiced throughout history and are still practiced to the present day, regardless of the many ways the Crown has sought to minimize or restrict First Nations rights. First Nations rights are not subject to the discretion of the Crown, they are not granted or permitted by the Crown, they pre-existed the creation of the Canadian state and will not be defined, narrowed, or unilaterally infringed upon to suit the policy objectives of the Crown. The First Nations perspective is [the] only perspective, which is relevant to the determination of who holds First Nations rights.[148]

Further, AFN raises concerns regarding the prevailing jurisprudence which seeks "to limit as much as possible the interpretation of First Nations and treaty rights…[i]nstead of striving for genuine reconciliation."[149]

The Mohawk Council of Kahnawà:ke (MCK) asserted that many of the legal foundations advanced by the Crown "were based on the presumed inferiority of Indigenous peoples and their continued application perpetuates historical injustices."[150] Applying perspectives from constitutional, legal, and First Nations experts, MCK asserted that sovereign incompatibility arguments are connected to the Crown's act of "unilaterally claim[ing] authority to legislate over Indigenous peoples and Indigenous lands, in an era where Indigenous peoples were not even considered persons" by settlers, and that validation of sovereign incompatibility would be ahistorical as well as morally and legally wrong.[151] Separately, MCK refuted the Crown's natural resource scarcity argument, by citing studies that prove biodiversity and land management outcomes are improved on lands managed or co-managed by Indigenous communities.[152]

The Congress of Aboriginal Peoples (CAP) plainly asked the court to decide the case "in a manner that does not perpetuate or incorporate the

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[146] *Id.* at 7.
[147] *Id.* at 4.
[148] *Id.* at 5.
[149] *Id.* at 8.
[150] Factum for the Intervenor, (MCK) at 2, (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).
[151] *Id.* at 1.
[152] *Id.* at 9-10.

legacy of colonialism."[153] CAP underscored that "[b]orders are a colonial construct. Indigenous identity is not formed by national or provincial boundaries," and the U.S.-Canada border, which "bisects Indigenous groups, [cannot be taken] as a defining characteristic of Indigenous group identity."[154] The filing by CAP also traced a number of historical events and judicial decisions that either perpetuate colonialism or vindicate Indigenous rights.[155]

The Peskotomuhkati Nation provided clarity to the phrase "Aboriginal peoples of Canada," by noting that the proper interpretation of "of Canada" is "not possessive: Canada, the political entity, does not own people." Rather, the phrase "refers to the connection between the peoples and the land."[156] Further, the Peskotomuhkati Nation factum also pointed out that arguments advanced by the Attorney General of Quebec "echo[] a policy of assimilation that Canada has explicitly abandoned."[157]

The Métis Nation British Columbia wrote to express concern about the possibility of the Supreme Court drafting a ruling that inadvertently infringes Métis rights under section 35.[158]

Ultimately, the Supreme Court of Canada ruled in favor of Richard and the rights of Sinixt people—holding that section 35 protects the rights of "modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact," which may include groups that are now outside Canada.[159] The Court recognizes that Aboriginal rights existed before section 35 was created, and declared its broad interpretation aligns with the purpose of reconciliation.[160] However, two justices wrote dissenting opinions. Justice Côté wrote that Richard should be found guilty on both counts and that he should be denied section 35 protections, stating that "[t]he framers' intent was to protect the rights of Aboriginal groups that are members of, and participants in, Canadian society."[161] Justice Côté's opinion implies a belief that Canadian society is somehow superior to or encompassing over Indigenous societies and that such societies should not

[153] Factum for the Intervenor, (CAP) at 1, (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).
[154] *Id.* at 3.
[155] *Id.*
[156] Factum for the Intervenor, (Peskotomuhkati Nation) at 5, (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).
[157] *Id.* at 5.
[158] R. v. DeSautel, [2021] 1 SCR 533 (Can.).
[159] *Id.* at 535.
[160] *Id.* at 536.
[161] *Id.* at 538.

be entitled to full rights unless they assimilate to Canadian society.[162] Justice Côté advances many of the legal theories put forward by Attorneys General in the case, about how ruling in favor of Sinixt rights would cause deleterious impacts to Canadian democracy.[163] Another justice, Justice Moldaver, dissented by saying that Richard did not prove continuity between his hunt and an Indigenous practice that existed prior to European contact.[164] Moldaver's dissent is quite brief, but implies that when the Sinixt "left" Canada in the 1930s (which, of course, never happened),[165] their traditional practices on the land were severed.

V. INDIGENOUS SOVEREIGNTY NOW

While Richard and the Sinixt people won a victory at the Supreme Court, the very nature of its legal mechanisms infringes their dignity. It is perverse—for living beings who have existed with and stewarded the land since time immemorial—to have to endure years of legal contestation in order to have justices who serve at the leisure of the Crown to declare them into existence. Linda Desautel, Richard's wife, expresses grief and frustration about the process: "[u]ntil that Supreme Court tells you yay or nay, your voice means nothing."[166] Shelly Boyd, a member of the Sinixt nation who was intimately connected with Richard's legal case, remarked that over and over Canadian officials would say to her "well, once you win at the Supreme Court, that'll make a difference."[167] She said "I don't get that, I never got that…the truth is the truth."[168] The emotional toll that the protracted legal process takes on members of the Sinixt tribe can be seen and felt in the documentary *Older than the Crown*.[169]

One scene of the film that starkly contrasts the customs of the colonial legal system against Indigenous customs shows Shelly and Richard sitting on the exterior steps of the Supreme Court of Canada.[170] The height of the covid pandemic made it challenging for Richard and Shelly to even travel to the hearing, but still, they were not allowed into the court on the basis of covid

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[162] JOYCE GREEN, INDIVISIBLE: INDIGENOUS HUMAN RIGHTS 7 (2014) ("[T]he politico-economic and legislative history of the Canadian state indicates that Indigenous people are welcome only when they effectively assimilate—when they adopt the assumptions and practices of the state and turn away from any criticism of the state's legitimacy.").

[163] R. v. DeSautel, [2021] 1 SCR 533, 535 (Can.).

[164] *Id.* at 596.

[165] *See* § III of this paper.

[166] OLDER THAN THE CROWN, *supra* note 81.

[167] *Id.*, at 30:28.

[168] OLDER THAN THE CROWN, *supra* note 81

[169] *Id.*

[170] *Id.*

precautions.[171] At times, Shelly and Richard sit close to one another, sharing a woven blanket for warmth and watching the court proceedings on a phone.[172] At other times they engage in prayer and rituals.[173] Shelly is wearing a beautiful woven hat and traditional fur accessories.[174] Meanwhile, Richard's attorney and dozens of other lawyers are before the chief justice and judges inside the court house, wearing black robes and white tabs representative of the English tradition.[175] Proceedings are carried out in English and French, not Indigenous languages.[176] Attorneys for the Crown and provincial governments don't seem to flinch one bit as they make arguments in opposition to the rights of the Sinixt peoples. [177]

When Richard's attorney begins his remarks, he acknowledges that many Sinixt people wanted to be in attendance but could not travel due to the pandemic.[178] Richard's attorney continued by noting that Richard wanted to express his gratitude for a welcome he received from the Algonquin people when he arrived in what is now called Ottawa.[179] Paul Williams, lead counsel for the Peskotomuhkati Nation, began his remarks in his Native language.[180] Not only are the legal and ethical contrasts palpable, but so are the behavioral and emotional differences between the Indigenous representatives and those speaking on behalf of the Crown or colonial provinces.[181]

Dozens of Sinixt peoples gathered on a beach with Richard to engage in ceremony and await the decision of the Supreme Court of Canada.[182] Richard's attorney calls, and while holding back tears, he says, "On behalf of Canada, welcome home, we won."[183] Richard, his wife, and others gathered show visible joy and relief.[184] A few moments later, Richard says "I don't have to go back to the museum and stand by the dinosaur display no more?"[185] It is a moment of triumph for Indigenous peoples, and also a moment for the rest of us to reflect on the ways in which we perpetuate colonial harm. Amongst the hollering and cheers of celebration, Shelly Boyd shares that, in her view, the next step is reconciliation—and not just reconciliation with the Canadian government, with all relatives, she says,

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[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.* at 50:50.
[184] OLDER THAN THE CROWN, *supra* note 81.
[185] *Id.* at 51:10.

"I'm talking about reconciliation with the land. I think the land has missed us. And this water remembers us."[186]

Champagne calls our attention to the fact that "Indigenous nations often have tightly interrelated institutional relations between culture, government, economy and community," whereas "nation-states strive to separate culture and religion from politics, community, and economy, which is almost an inverse set of institutional imperatives than found in indigenous nations."[187] He continues, "Indigenous peoples have loyalties to their own forms of government, community, and territoriality, which do not conform to the views and positions of nation-states, whose policies usually explicitly deny such indigenous claims in favor of the nation-states' interests."[188] When colonial courts serve as the only forum to adjudicate Indigenous human and legal rights, progress towards true reconciliation is undermined.

Similarly, UNDRIP also fails to reconcile western notions of individual citizenship with cultural understandings held by many Indigenous communities (such as collective economic ownership and stewardship).[189] UNDRIP does not recognize political self-government from Indigenous nations, often incorporating Indigenous people as citizens of the nation-state without Indigenous consent, and UNDRIP explicitly "denies indigenous nations the right to secede from their surrounding nation-states."[190] Thus, even as UNDRIP may aspire to enshrine rights of Indigenous people and communities, it incorporates colonial frameworks.

Such legal endeavors, which are presented as fair and just, actually treat colonialism "as only historical rather than as a continuing process."[191]As Joyce Green writes "[t]he relationship [between Indigenous peoples and settler states] is adversarial and every right won is through struggle on *the hostile terrain of settler state courts and legislatures.*"[192] These types of legal judgments quietly reinforce the power, validity, and assumed stature of colonial legal systems—creating a false narrative that contemporary nation-state "governments and settler populations" are "temporally and legally separate" from perpetrators of colonialism.[193]

Attorneys continue to advance legal theories predicated on subjugation of Indigenous peoples—and those theories are taken seriously (legitimated),

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[186] *Id.* at 52:25.
[187] Champagne, *supra* note 10, at 13-14.
[188] *Id.* at 12.
[189] *Id.*
[190] *Id.* at 13.
[191] JOYCE GREEN, INDIVISIBLE: INDIGENOUS HUMAN RIGHTS 7 (2014).
[192] *Id.* at 4 (emphasis added).
[193] *Id.* at 7.

even when a court ruling does not adopt them in full.[194] When judges and justices announce rulings that are favorable to Indigenous people, they are able to portray themselves as saviors and bestowers of rights—the implication is that Indigenous peoples should be *grateful* for the recognition *granted to them* by the "civilized" society. In fact, many rulings are not favorable with regard to Indigenous rights, but it is the rare ruling in favor of Indigenous rights that sustains a perception that colonial court systems are "fair" and "just."[195] When a judge writes to constrain or deny an Indigenous right, whether in dissent or a majority opinion, that judge is not viewed as a pariah or a contemporary colonizer—their actions are interpreted as perfectly appropriate legal analyses and positions within the colonial legal paradigm.

To achieve reconciliation and liberation, Indigenous legal sovereignty must be recognized and elevated. The inherent authority of Indigenous people to name and exercise their own rights needs to be acknowledged, particularly by governments who have colonized those peoples. Until Indigenous governments can be fully freed from the constraints of colonial forces, every attempt should be made to eradicate legal doctrines and practices that are predicated on the imagined inferiority of Indigenous peoples. Court officials should work towards welcoming Indigenous customs and norms into courthouses, legal procedures, and proceedings. Courts who have the opportunity to review Indigenous rights claims should not rely on and continue to shape common law that is rooted in the doctrine of discovery/conquest—instead courts should explicitly reject and overturn such legal rulings. Judges within colonial legal structures should draft opinions that evince humility, and vindicate Indigenous wisdom, knowledge, and legal argument.

Creativity, compassion, and resources should be directed towards the development of legal processes that enable Indigenous peoples to assert their rights within colonial legal structures—without having to endure the dehumanizing and counterfactual adversarial dynamic. For example, could a new legal process be developed in partnership between the Canadian judiciary and Indigenous peoples to create a pathway for Aboriginal rights claims to be advanced to and vindicated by the Supreme Court of Canada—without requiring adversarial parties and appeals? The grave horrors of colonialism have worn scars across our planet for centuries—it will not be easy to dismantle the stronghold that colonialism has on our legal systems—

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[194] *See generally* R. v. DeSautel, [2021] 1 SCR 533 (Can.).

[195] *Cf.* interest-convergence theory: "[t]he interest of [B]lack [people] in achieving racial equality will be accommodated only when it converges with the interests of whites," Derrick Bell Brown v. Board of Education *and the Interest-Convergence Dilemma* 93.3 H. L. Rev. 518, 523 (1980).

but as we collaborate to do so, freedom will become more alive and palpable for all.

THE IMPACT OF ALEXANDER HAMILTON'S ECONOMIC THOUGHT ON THE MARSHALL COURT*

David Seaton**

INTRODUCTION

The Federal Government of the United States is, at least in theory, a government of specific powers enumerated in the Constitution of the United States.[1] The primary powers of the Federal Government are specifically enumerated in section eight of the first article of the Constitution;[2] although additional powers are also enumerated in other sections of the Constitution such as the Civil War Amendments.[3] The powers outlined in section eight of the first article include the power to: tax; spend; regulate international, interstate, and intertribal commerce (hereinafter the Commerce Clause);

* The research question that this paper seeks to answer is what if any connection exists between the jurisprudence of the Marshall Court and the prevailing economic consensus of the day. The thesis of this paper is that the best explanation for the jurisprudence of the Marshall Court is that, rather than relying on the text of the Constitution itself, the Marshall Court was simply implementing the economic consensus of Northern Capital; in particular the economic thought of Alexander Hamilton.

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[1] United States v. Lopez, 514 U.S. 549, 552 (1995).

[2] U.S. CONST. art. 1, § 8.

[3] *See* U.S. CONST. amends. XIII, XIV, XV.

borrow money; establish uniform laws of immigration and bankruptcy; mint money; punish counterfeiting; create a postal service; regulate patents; create courts subordinate to the Supreme Court of the United States; punish piracy; declare war; grant letters of mark; regulate the taking of prizes; forming a professional military; regulating the military and the militia; governing Washington D.C. and any federal facilities; and all things necessary and proper to accomplish the forgoing powers (herein after the Expandable Clause).[4]

One might be inclined to conclude that the evolving consensus of economic thought should not and cannot have much influence on the meaning of the Constitution during the Marshall Court (or any other court for that matter). The words are what they are, and they mean what they mean.[5]

Unfortunately, this rationale breaks down, because the Constitution (and any other legal document for that matter) means whatever judges say it means. This can be trivially demonstrated by the fact that—although the wording of the Commerce Clause has not been amended, changed, or altered in any way—the Supreme Court's interpretation of the Commerce Clause has changed over time. From the late Nineteenth to the early Twentieth Century for example, the Commerce Clause was interpreted to permit the federal regulation of interstate transportation, but not manufacturing (to include working conditions, length of the workday, or minimum wage).[6] Fast forward to the mid-Twentieth Century, the Commerce Clause serves as the rationale—not only for economic legislation—but also for a variety of other ostensibly non-economic federal policies by virtue of their impact on interstate commerce including: civil rights legislation,[7] narcotics criminalization,[8] and, for a time at least, gun control laws.[9] Indeed at the conclusion of the period of time when the Commerce Clause was interpreted most broadly, the Supreme Court noted "if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."[10]

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[4] U.S. CONST. art. 1, § 8.

[5] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 22 (Amy Gutmann, ed., 1997).

[6] *See* Kidd v. Pearson, 128 U.S. 1 (1888); United States v. E. C. Knight Co., 156 U.S. 1 (1895); Oliver Iron Mining Co. v. Lord, 262 US 172 (1923); Adair v. United States, 208 U.S. 161 (1908); Hammer v. Dagenhart, 247 U.S. 251 (1918); Adkins v. Children's Hospital, 261 U.S. 525 (1923).

[7] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[8] Gonzales v. Raich, 545 U.S. 1 (2005).

[9] United States v. Lopez, 514 U.S. 549 (1995).

[10] *Id.* at 564.

Having observed that constitutional interpretation requires looking beyond the four corners of the Constitution, the question that must then be answered is what exactly is driving the interpretation of the Commerce Clause. This is where we must turn to the question of legal philosophy.[11] Namely, what is the law? Generally, there are three answers: Natural Law Theory, Positivism, and Legal Realism.[12] Natural Law Theory—which by its very nature is a theory of both moral and legal philosophy—is a system of right or justice held to be common to all humans and derived from nature rather than from the rules of society.[13] The state will issue commands backed by force which it claims are law, but Augustine says "an unjust law is no law at all."[14] Positivism[15] on the other hand is the legal philosophy that laws are simply commands issued by a sovereign to a more or less obedient populace backed by force.[16] As H.L.A. Heart observes there is an is/ought dichotomy between the way things are and the way things ought to be, and the law is simply the way things are.[17] Both Natural Law Theory and Positivism anticipate that the state will issue commands that it calls laws and expects the populace to obey. Unfortunately, neither philosophy explains how the state determines which commands to issue.

This leaves us with Legal Realism which is the theory that the law is simply an arbitrary series of commands (certainly backed by force) which are rationalized *post hoc* with little or no interest in the words (be they constitutions, statutes, or regulations) that they are intended to interpret.[18] This theory actually gives a framework to look beyond the four corners of the Constitution in order to find its influences. More importantly, one of the founding fathers of realism is Justice Oliver Wendell Holmes Jr. who served

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[11] *Jurisprudence*, ENCYC. BRITANNICA (Jeannette L. Nolen ed.), https://www.britannica.com/science/jurisprudence (last visited Dec. 6, 2024).

[12] See *Natural Law*, ENCYC. BRITANNICA, https://www.britannica.com/topic/natural-law (last visited Dec. 6, 2024); *Legal Positivism*, INTERNET ENCYCL. OF PHILOSOPHY, https://iep.utm.edu/legalpos/#:~:text=Legal%20positivism%20is%20a%20philosophy,common%20law%20or%20case%20law (last visited Dec. 6, 2024); *Legal Realism*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/law/encyclopedias-almanacs-transcripts-and-maps/legal-realism#:~:text=The%20school%20of%20legal%20philosophy,determinate%20and%20apolitical%20judicial%20decision (last visited Dec. 6, 2024).

[13] *Natural Law Theory*, *supra* note 12.

[14] Lawrence W. Reed, *Augustine: Searching for Truth and Wisdom*, FOUNDATION FOR ECONOMIC EDUCATION (March 4, 2016), https://fee.org/articles/an-unjust-law-is-no-law-at-all/.

[15] The legal philosophy of Positivism should of course not be confused with the epistemological philosophy of the same name that indicates the only things we can know are things that can be verified by empirical observations. *Positivism*, ENCYC. BRITANNICA, https://www.britannica.com/topic/positivism (last visited Dec. 6, 2024).

[16] *Legal Positivism*, *supra* note 12.

[17] H.L.A. HART, THE CONCEPT OF LAW (3rd ed. 2012).

[18] *Legal Realism*, *supra* note 12.

on the Supreme Court.[19] Okay, but why is the whole field of human knowledge focus on economic thought in particular?

This leads us to the dichotomy between the original founders of Legal Realism, like Supreme Court Justice Oliver Wendell Holmes Jr., who were happy with the implications of Legal Realism ("Realists"),[20] and those who—though convinced of the internal logic of Legal Realism—were horrified by Legal Realism (proponents of the following disciplines: Critical Legal Studies; Feminist Legal Theory; and Critical Race Theory).[21] Legal Realists tend to be members of the ruling class (or have pretentions of being members of the ruling class) and tend to believe that the law is simply rationalizations *post hoc* designed to implement ideal policy; whatever that may be. Critical Legal Studies is the legal philosophy that the law is simply rationalizations *post hoc* designed to ensure maintenance of class divides (such as Capital dominating Labor which is a theme in many, but not all economic thought).[22] Feminist Legal Theory is the legal philosophy that the law is simply rationalizations *post hoc* designed ensure the maintenance of gender divides.[23] Critical Race Theory is the legal philosophy that that the law is simply rationalizations *post hoc* designed to ensure the maintenance of racial divides.[24]

Ok, so we've narrowed down the possible fields of human endeavor as a lens with which to view constitutional interpretation to: class (and therefore economics); gender; race; and good policy (and therefore potentially all forms of human endeavor). It doesn't seem as if we have narrowed it down much. Taking these possibilities in reverse order however, what rulers consider "good policy" to be is ultimately overdetermined by the economic consensus of the time. As John Maynard Keynes indicated in *The General Theory of Employment, Interest, and Money*, "[p]ractical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist."[25] Moreover as Silvia Federici notes in *Caliban and the Witch*, modern gender roles were created in the middle

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[19] *Legal Realism: Power and Economics In Society, The Persuasion And Characteristics Of Individual Judges, Society's Welfare*, JRANK, https://law.jrank.org/pages/8165/Legal-Realism.html (last visited Dec. 6, 2024).

[20] *Id.*

[21] *See Critical Legal Studies*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Critical-Legal-Studies (last visited Dec. 6, 2024); Martha Albertson Fineman, *Feminist Legal Theory*, 13 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW 13, (2005); *Critical Race Theory*, ENCYC. BRITANNICA, https://www.britannica.com/topic/critical-race-theory (last visited Dec. 6, 2024).

[22] *Critical Legal Studies*, *supra* note 21.

[23] *See generally* Fineman, *supra* note 21.

[24] *Critical Race Theory*, *supra* note 21.

[25] JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 241 (1936).

ages to facilitate the destruction of the feudal economy and the establishment of modern capitalist economy.[26] Finally as Theodore Allen, Kenneth Stamp, and Howard Zinn describe in *They Would Have Destroyed Me": Slavery and the Origins of Racism*, *Peculiar Institution*, and *A Peoples History of the United States* respectively that the modern concept of race was created by the white ruling class of the British colonies which would eventually become the United States, in the wake of Bacon's Rebellion, in order to prevent cross-racial class solidarity; thus preventing a disruption of the economic *status quo*.[27] Taken together, Critical Legal Studies explicitly endorses the reliance of economic thought in order to understand legal decisions, and Legal Realism, Feminist Legal Theory, and Critical Race Theory—whether they are willing to admit or not—are ultimately dependent on economic thought.

Thus, prevailing economic thought is the best explanation for the changing interpretations of the Constitution (or any law for that matter). Although a much longer treatise could focus changing interpretations of constitutional law throughout the entire history of the United States, this paper will focus on the constitutional jurisprudence of the Supreme Court of the United States during the period of time when John Marshall presided over it as Chief Justice of the United States (hereinafter Marshall Court). The thesis of this paper is that the best explanation for the jurisprudence of the Marshall Court is that, rather than relying on the text of the Constitution itself, the Marshall Court was simply implementing the economic consensus of Northern Capital; in particular the economic thought of Alexander Hamilton.

I. METHOD

The Method of this paper shall be to outline the jurisprudence of the Marshall Court, and then to outline the economic thought of Alexander Hamilton while explaining why his economic thought was illustrative of the prevailing economic thought of the day; as well as demonstrating his influence on the Marshall Court.

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[26] SILVIA FEDERICI, CALIBAN AND THE WITCH: WOMEN, THE BODY AND PRIMITIVE ACCUMULATION (2004).

[27] Theodore Allen, '. . . *They Would Have Destroyed Me': Slavery and the Origins of Racism, Understanding and Fighting White Supremacy*, SOJOURNER TRUTH (1976), http://www.sojournertruth.net/destroyedme.html (last visited Dec. 6, 2024); HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 31 (2003 ed.).

II. JURISPRUDENCE OF THE MARSHALL COURT

During the Marshall Era, the Marshall Court assumed the power of judicial review and—having done so—determined that the Federal Government had the authority to create a national bank and regulate interstate transportation. The Marshall Court assumed these powers in a trilogy of cases: *Marbury v. Madison*,[28] *McCulloch v. Maryland*,[29] and *Gibbons v. Ogden*.[30] Together these three cases established that the Federal Government could implement the economic consensus of Northern Capital using the Commerce Clause as a cudgel.

We first turn our attention to *Marbury v. Madison*.[31] In *Marbury*, the Marshall Court—a collection of unelected hacks chosen for their political connection as often if not more so than by their skill—declared that it had the authority to override the authority of the elected legislature and executive.[32] Ultimately, this assumption of power became a key cornerstone in implementing the economic consensus of Northern Capital over any pesky objections that could be raised by a democracy.[33]

In President George Washington's farewell address, he warned against the establishment of competing political factions or what we would now call political parties.[34] Ultimately, these remarks were too little too late, because political factions had already developed among Washington's cabinet.[35] Alexander Hamilton was on the Federalist side opting for institutions capable of managing the economy and creating infrastructure in order to foster an industrial economy.[36] Thomas Jefferson[37] was on the side of the Jeffersonian Democrat-Republicans opting instead for an agricultural economy

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[28] Marbury v. Madison, 5 U.S. 137 (1803).

[29] McCulloch v. Maryland, 17 U.S. 316 (1819)

[30] Gibbons v. Ogden, 22 U.S. 1 (1824).

[31] Marbury v. Madison, 5 U.S. 137 (1803).

[32] *Id*.

[33] It of course should be noted that at its founding, the United States was in no sense a true democracy, because a true democracy must respect the notion of one person one vote. Reynolds v. Sims, 377 U.S. 533 (1964). Additionally, at the time, suffrage was only guaranteed to wealthy white men. "The Founders and the Vote," *Library of Congress* available at https://www.loc.gov/classroom-materials/elections/right-to-vote/the-founders-and-the-vote/#:~:text=Unfortunately%2C%20leaving%20election%20control%20to,who%20did%20not%20own%20property. (last visited May 21, 2022). Regardless, the results of *Marbury* reveals that even the constraints of such a limited democracy was too much for Capital to bother with.

[34] George Washington, *The Address of Gen. Washington to the People of America on His Declining the Presidency of the United States*, September 19, 1796 *available at* https://www.mountvernon.org/education/primary-sources-2/article/washington-s-farewell-address-1796/ (last visited May 21, 2022).

[35] ZINN, *supra* note 27, at 97.

[36] JACOB ERNST COOKE, ALEXANDER HAMILTON 109-20 (1982).

[37] *Id.*

dominated by yeoman farmers sustaining themselves on a small parcel of land.[38] Regardless, Washington was succeeded by the Federalist John Adams; thus giving the Federalists, at least for the moment, the upper hand.[39] This success, however, was short lived, because Thomas Jefferson would defeat Adams in the next election.[40] The Federalists under Adams—not content to allow the result of an election interfere with their economic vision[41]—hatched a court packing plan to ensconce Federalist influence into the government irrespective of the results of a democratic election.[42]

Congress created a number of new judicial positions before Jefferson could take office.[43] Adams immediately appointed individuals sympathetic to the Federalist cause to these newly created judicial vacancies.[44] Additionally, Adams appointed his Secretary of State John Marshall as Chief Justice of the United States;[45] the official responsible for presiding over the Supreme Court.[46] The appointees were quickly confirmed by the Senate, and commissions memorializing the appointments were sent to the Secretary of State—still Marshall—who was responsible for delivering the commissions to the appointees.[47] Unfortunately, Marshal—even after enlisting the help of his brother—did not have time to deliver all of the commissions to their recipients prior to Jefferson taking office.[48] Upon taking office, Jefferson declined to deliver the remaining commissions; thus preventing an already stacked judiciary from being further stacked against him.[49] James Madison

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[38] This of course rings hollow given that the Constitution was only written after Shay's Rebellion, a populist rebellion demanding economic relief, gave rise to the fear that the then current government established under the Articles of Confederation would not be able to maintain order; one the key events of George Washington's administration was crushing the Whiskey Rebellion, a populist rebellion of yeoman farmers demanding economic relief,; and the fact that Thomas Jefferson was a slave owner and a plantation owner. ZINN, *supra* note 27, at 97-98, 101.

[39] *Id.* at 184.

[40] *Id.* at 215-30.

[41] *Judiciary Act of 1801*, ENCYC. BRITANNICA, https://www.britannica.com/ topic/Judiciary-Act-of-1801 (last visited May 22, 2022).

[42] The legitimacy of such a "democratic election" can easily be called into question. This should not cloud the fact that even this degree of "democracy" was too democratic for the outgoing Federalists to honor.

[43] The Judiciary Act of 1801, 2 Stat. 89 (1801).

[44] *Judiciary Act of 1801*, ENCYCL. BRITANNICA, https://www.britannica.com/topic/Judiciary-Act-of-1801 (last visited Dec. 6, 2024).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

replaced Marshall as Secretary of State [50] but Marshall retained his newly appointed position as Chief Justice.[51]

William Marbury—an intended recipient of one of the undelivered commissions—was displeased that he had been politicked out of a job, and he filed suit against Madison in the Marshall Court insisting that he was entitled to the commission.[52] This put the Marshall Court in a bit of a pickle.[53] On the one hand, Marbury had been appointed and confirmed to a judicial vacancy. On the other hand, there was the risk that Jefferson would refuse to obey the Court's opinion, and—without the power of the purse or the sword—the Marshall Court would have little if any means of coercing Jefferson to comply with their instructions.[54] Ultimately, in a unanimous opinion—authored by Marshall—the Marshall Court found the Constitution did not grant the Marshall Court original jurisdiction to hear the case, and the federal statute that granted the Marshall Court jurisdiction to hear the case was unconstitutional.[55] In doing so, the Marshall Court assumed the authority to strike down democratically enacted legislation as unconstitutional without any explicit authority given to it in the Constitution.[56] Instead, the Court reasoned that in order for the Constitution to limit the powers of Congress some institution had to be able to strike down legislation, and the best institution to have that power was the Judiciary; because it is the Judiciary's job to interpret laws up to and including the Constitution.[57]

> The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited

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[50] *Id.*

[51] Interestingly enough, Jefferson asked Marshall to stay on until his replacement could be appointed and confirmed. *John Marshall*, ENCYCL. BRITANNICA, *available at* https://www.britannica.com/biography/John-Marshall (last visited Dec. 6, 2024). This of course raises a question. Why on Earth didn't Marshall just deliver the remaining commissions? Did he feel honor bound to respect Jefferson's authority? Was he content that the appointments that had been delivered were already sufficient to thwart Jefferson's agenda and thus did not believe it mattered one way or another? Whatever the reason, Marbury's commission was not delivered despite a clear opportunity to do so, and thus a constitutional crisis could have been avoided persisted. This represents a potential hinge point in which American history *could* have progressed in a very different way depending on its outcome.

[52] Marbury v. Madison, 5 U.S. 137 (1803).

[53] *Marbury v. Madison*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/event/Marbury-v-Madison (last visited Dec. 6, 2024).

[54] *Id.*

[55] *Madison*, 5 U.S. at 171-73.

[56] *Id.*

[57] *Id.*

> powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it, or that the Legislature may alter the Constitution by an ordinary act.
>
> Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it . . . if . . . true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. . . . It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.[58]

Thus, Marshall retreated from direct confrontation with executive authority (caving to Jefferson's demands) while inventing from whole cloth the entirely new doctrine of Judicial Review (the authority to unilaterally countermand democratically enacted legislation) that appears nowhere in the Constitution to justify appeasing to the executive's demands. Clearly at its inception, this newly created doctrine of Judicial Review was anemic. Indeed, the Marshall Court could countermand Congress, but the Marshall Court would need the President to implement the decision; without the President's seal of approval this doctrine was useless. Regardless, it set a precedent for using judicial authority to override the popular will; a key ingredient to implementing the economic consensus of Capital over the will of the people.

Next, we turn our attention to *McCulloch v. Maryland*.[59] In *McCulloch*, the State of Maryland levied a tax against the Second Bank of the United States; the then national bank of the United States.[60] The head of the Maryland branch refused to authorize the payment of the tax. Litigation ensued, and the matter was eventually appealed to the Marshall Court.[61] At issue before the Marshall Court was: firstly, whether it was even permissible for the Federal Government to create a national bank; and secondly, whether or not the State of Maryland could tax it.[62]

When we survey the Constitution (in particular section eight of the first article) we do not see anything explicitly indicating that Federal Government

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[58] *Id.* at 176-77.
[59] McCulloch v. Maryland, 17 U.S. 316 (1819).
[60] *Id.*
[61] *Id.*
[62] *Id.*

has the power to create a national bank.[63] Regardless, the Marshall Court, upon surveying the Federal Government's powers, concluded that the Federal Government has the power of "[t]he sword of the purse."[64] It then looked to the final clause of section eight of the first article which indicated that the Federal Government had the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution [*sic*]"[65] (which is also known as the Expandable Clause).

> Although, among the enumerated powers of Government, we do not find the word "bank" or "incorporation," we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation are entrusted to its Government. It can never be pretended that these vast powers draw after them others of inferior importance merely because they are inferior. . . [A] Government entrusted with such ample powers, on the due execution of which the happiness and prosperity of the Nation so vitally depends, must also be entrusted with ample means for their execution.[66]

The Court concluded that a national bank was necessary and proper to exercising its powers over the sword and the purse, and—as such once one applies the Expandable Clause to the other federal powers—the Federal Government does have the authority to create a national bank.[67] Namely, a national bank could aid the Federal Government in raising money in one region of the country in order to fund the government operations (up to an including an army) in another region of the country.[68] As a national bank was an institution that the Marshall Court considered useful in executing this function, the Marshall Court concluded that the Federal Government had the power to create it.[69]

> It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic . . . revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the Nation may

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[63] U.S. CONST. art. 1, § 8.
[64] *McCulloch*, 17 U.S. at 407.
[65] U.S. CONST. art. 1, § 8, cl. 18.
[66] *McCulloch*, 17 U.S. at 407-08.
[67] *Id*. at 316.
[68] *Id.*
[69] *Id.*

> require that the treasure raised in the north should be transported to the south that raised in the east, conveyed to the west, or that this order should be reversed. . .[T]he Constitution . . . does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential, to the beneficial exercise of those powers.[70]

The Court then reasoned that "the power to tax involves the power to destroy" concluded that as the State of Maryland did not have the authority to destroy the Federal Government it did not have the authority to tax the Federal Government, and that this inability to tax the Federal Government also applied to institutions lawfully created by the Federal Government; like the Second Bank of the United States.[71] Thus we have another key ingredient to implementing elite economic consensus. Not only can the Marshall Court strike down any popularly enacted legislation that is unfavorable to elites on the grounds that it is not explicitly addressed in the Constitution, but the Marshall Court can also certify and protect any federal entity that elites approve of even when it is not explicitly authorized by the Constitution.[72]

Finally, we turn to *Gibbons v. Ogden*.[73] Aaron Ogden and Thomas Gibbons had purchased rival licenses to operate steamboats between New York and New Jersey. Ogden's license was issued by the State of New York, and Gibbon's license was issued by the Federal Government.[74] The Marshall Court ultimately ruled that transportation equaled commerce, and, as a result, the Federal Government had the authority under the Commerce Clause to regulate the traffic on major interstate waterways.[75]

> The subject to be regulated is commerce, and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word . . . Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a

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[70] *Id.* at 408-09.

[71] *Id.* at 431.

[72] It is important to note that a good deal of the discussion in the Court's reasoning deals with the doctrine that the Constitution was created by and for the People rather than by State governments. Despite this ostensible appeal to populism however, *McCulloch* extends the doctrine outlined in *Marbury* that the Marshall Court can strike down popularly enacted federal legislation to the state level; thus eliminating every lever of power that a popular movement in opposition to an elite consensus might have.

[73] Gibbons v. Ogden, 22 U.S. 1 (1824).

[74] *Id.*

[75] *Id.*

> system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling or of barter.
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> If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense, and the attempt to restrict it comes too late.[76]

Moreover, the Court discussed the notion of what has become known as the Dormant Commerce Clause that due to the Federal Government's authority to regulate interstate commerce (in this case transportation) the governments of the several states did not have any authority to regulate interstate commerce (in this case transportation).[77] Consequently, the Marshall Court concluded that the federal license was not only valid, but that it clearly trumped the license issued by the State of New York.[78]

The legacy of the Marshall Court is best characterized by three cases: *Marbury v. Madison*,[79] *McCulloch v. Maryland*,[80] and *Gibbons v. Ogden*.[81] In these three cases, the Marshall Court assumed the power of judicial review (and in effect became the final arbiter of the Constitution) and used the assumed power to conclude the Federal Government had both the authority to create a national bank (as well as potentially any other institution it needed to create) and to regulate interstate transportation. As we shall see, these three cases taken together were shaped by and facilitated the ability to enact the

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[76] *Id.* at 89-90.
[77] *See* Gibbons, 22 U.S. 1.
[78] *Id.*
[79] Marbury v. Madison, 5 U.S. 137 (1803).
[80] McCulloch v. Maryland, 17 U.S. 316 (1819).
[81] *Gibbons*, 22 U.S. at 1.

economic consensus of Northern Capital; in particular the economic consensus outlined by Alexander Hamilton.

III. THE ECONOMIC THOUGHT OF ALEXANDER HAMILTON AS THE KEY TO UNDERSTANDING THE MARSHALL COURT.

The single individual who best illustrates the economic consensus of the prevailing thought in the fledgling United States is Alexander Hamilton. Although arguably not an economist *per se*, Hamilton advocated for and by virtue of his position was able to implement a vision of the American economy. Moreover, we see his influence in the Marshall Court including: allying with the interests of Northern Capital, creating a national bank, and regulating interstate transportation.

The two political parties that developed shortly after the adoption of the Constitution were the Federalists and the Jeffersonian Democrat-Republicans.[82] The Federalists like Alexander Hamilton aligned with the interests of Northern Capital.[83] Hamilton's economic ideas are best encapsulated by the trilogy of government reports: the *First Report on the Public Credit*,[84] the *Report on a National Bank* (also known as the *Second Report on the Public Credit*),[85] and the *Report on Manufactures*.[86] On the other hand, the Jeffersonian Democrat-Republicans—led by (you guessed it) Thomas Jefferson—broadly speaking represented the interest of the Southern Planter class; while admittedly making rhetorical overtures to the masses.[87]

In the *First Report on the Public Credit* Hamilton outlined his plan to address outstanding American debts.[88] Hamilton begins that by outlining how public credit is essential for a government to be able to respond to national emergencies.[89] "That exigencies are to be expected to occur, in the affairs of nations in which there will be a necessity for borrowing. That loans in times of public danger, especially from foreign war are found to be an indispensable resource, even to the wealthiest of them."[90] Thus given the inevitable need for government borrowing, Hamilton argues that "it is

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[82] ZINN, *supra* note 27, at 97.

[83] JOHN C. MILLER, ALEXANDER HAMILTON AND THE GROWTH OF THE NEW NATION 323 (Harper Torchbooks 1959).

[84] Alexander Hamilton, *First Report on Public Credit, reprinted in* THE REPORTS OF ALEXANDER HAMILTON (Jacob E. Cooke ed., 1964).

[85] Alexander Hamilton, *Report on a National Bank, reprinted in* THE REPORTS OF ALEXANDER HAMILTON (Jacob E. Cooke ed., 1964).

[86] Alexander Hamilton, *Report on Maufactures*, *reprinted in* THE REPORTS OF ALEXANDER HAMILTON (Jacob E. Cooke ed., 1964).

[87] *Id.* at 115.

[88] Hamilton, *supra* note 84.

[89] *Id.*

[90] *Id.* at 2.

equally evident, that to be able to borrow upon *good terms*, it is essential that the credit of a nation should be well established."[91] While conceding that "[t]he advantage to the public creditors from the increased value of that part of their property which constitutes the public debt needs no explanation…"[92] Hamilton argues that public credit benefits everyone. Public credit "will procure to every class of the community some important advantages, and remove some no less important advantages."[93] Specifically, Hamilton argues that the establishment of good credit will give the public debt of the United States a similar value to currency backed by specie, and that this in turn will benefit trade, manufacturing, agriculture, manufacturing, and cheaper commercial credit.[94]

> It is a well known fact that in countries in which the national debt is . . . an object of established confidence, it answers most of the purposes of money. Transfers of . . . public debt are there equivalent to payments in specie[.] . . . The same thing would, in all probability happen here, under the like circumstances.

The benefits of this are various and obvious.

> First. Trade is extended by it, because there is a larger capital to carry I on, and the merchant can at the same time, afford to trade for smaller profits; as his stock, which when unemployed, brings him in an interest from the government, serves him also as money when he has a call for it in his commercial operations.
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> Secondly. Agriculture and manufactures are also promoted by it: For the like reason, that more capital can be commanded to be employed in both: and because the merchant, whose enterprize[*sic*.] in foreign trade, gives to them activity and extension has greater means for enterprize[*sic*.].
>
> Thirdly. The interest of money will be lowered by it; for this is always in a ratio, to the quantity of money, and to the quickness of circulation. This circumstances will enable both the public and individuals to borrow on easier and cheaper terms.[95]

Turning to Hamilton's actual policy prescription, the debts at issue could be broadly broken down into three categories: foreign debt, domestic debt, and state debt. Hamilton recommended the full payment of foreign debts plus interest, the assumption of state debt, and the establishment of a sinking fund

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[91] Hamilton, *supra* note 84.
[92] *Id.* at 5.
[93] *Id.*
[94] *See* Hamilton, *supra* note 84.
[95] *Id.* at 5-6.

in order to maintain the price of public securities.[96] Ultimately, this plan worked to the benefit of Northern Capital, because as Alfred Jay Nock in his biography of Thomas Jefferson notes "[m]any of these, probably a majority, were speculators who had bought the government's war bonds at a low price from the original investors who were too poor to keep their holdings."[97] Indeed, many of the original holder of government debt were Revolutionary War veterans who were paid in securities rather than cash for their service in liberating the United States from the British Empire.[98]

Hamilton might very well have been influenced by a genuine admiration for the speculators. As John C. Miller in his biography of Hamilton indicates "[m]en willing to risk their wealth on long chances he deemed indispensable to a flourishing capitalism; he liked his capitalism spiced with audacity and he found this particular ingredient abundantly among the purchasers of government securities."[99]

From perspective of Hamilton's contemporaneous critics however, Hamilton's effort to enrich Northern Capital had a more sinister side to it; namely an outward contempt for the common man. As Zinn notes "Hamilton . . . believe[ed] that government must ally itself with the richest elements of society to make itself strong[.]"[100] As Jacob Cooke in his biography of Hamilton indicates

> To Hamilton's critics . . . perquisites of the states [was] more essential than the enhancement of the power of the unition, the maintenance of a predominantly agrarian society and the well-being of farmers and planters preferable to a balanced economy that would pander to the interests of the mercantile and capitalistic classes. . . . [T]he gravamen of his critics' indictment, was well founded. That Hamilton's plan was heavily weighted in favor of precisely those classes is . . . beyond dispute.[101]

Hamilton's critics seem to have a salient point as Hamilton's own remarks seem to confirm his critics worst criticism that he was an elitist who strove to curry favor with the upper class.

> All communities divide themselves into the few and the many. The first are the rich and well-born, the other the mass of the people. The void of the people as been said to be the voice of God; and however generally the maxim has been quoted and believed it is not true in fact. The people are turbulent and changing; they

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[96] COOKE, *supra* note 36, at 76-77.
[97] ALBERT JAY NOCK, JEFFERSON 112 (Univ. Press America, 1985) (1926).
[98] RON CHERNOW, ALEXANDER HAMILTON 298 (2004).
[99] MILLER, *supra* note 83, at 233.
[100] ZINN, *supra* note 27, at 101.
[101] COOKE, *supra* note 36, at 77.

> seldom judge or determine right. Give therefore to the first class a distinct permanent share in the government . . . Can a democratic assembly who annually revolve in the mass of the people be supposed steadily to pursue the public good? Nothing but a permanent body can check the impudence of democracy[.][102]

Then again, looking at Hamilton's perspective more sympathetically it is possible that Hamilton didn't have any choice. Hamilton himself explained that getting the support of Northern Capital was necessary in order for the government to survive. "[I]f all the public creditors receives their dues from one source, distributed by an equal hand, their interest will be the same. And, having the same interests, they will unite in support of the fiscal arrangements of the Government."[103] As Cooke notes the direction "toward which Hamilton pointed was a monolithic nationalism – a unified, centralized, strong federal government that would both reflect and serve the interests of every section and all classes, while singling out those whose support was most indispensable."[104] Margaret G. Myers in *A Financial History of the United States* concurs by indicating that "Hamilton had advocated it as part of his plan to attach the 'monied interest' to the new government and thus strengthen it, and this he undoubtedly accomplished."[105] W.R. Brock also agrees observing "[i]njustice is often done to Hamilton in supposing that he intended to use national authority simply to" help the rich; "[r]ather, he intended to make their power, which might otherwise be against the public interest, serve a useful purpose[.]"[106] Perhaps Miller puts it best. "Hamilton saw that if capitalism were to prosper, capitalists were indispensable . . . [and] he knew of no effective substitute for capitalism[.]. . .To an eighteenth-century statesman bent upon . . . capitalism . . .flourish[ing], the "improvident majority" was of little importance."[107]

But even bending over backwards to see things from Hamilton's point of view seems to provide little solace for the tactic that Hamilton would employ to silence his critics. Namely, tried and true capitalist tactic of blaming the poor for suboptimal outcomes in a system stacked against them. Knock observed that Hamilton "declared that the impoverished original holders should have had more confidence in their government than to sell out their holdings and that the subsidizing of speculators would broadcast this salutary

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[102] ZINN, *supra* note 27, at 96.

[103] MILLER, *supra* note 83, at 235.

[104] COOKE, *supra* note 36, at 77.

[105] MARGARET G. MYERS, A FINANCIAL HISTORY OF THE UNITED STATES 62 (1970).

[106] COOKE, *supra* note 36, at 78; W.R. Brock, *The Ideas and Influence of Alexander Hamilton, in* BRITISH ESSAYS IN AMERICAN HISTORY 140 (H.C. Allen & C.P. Hill, eds. 1957).

[107] MILLER, *supra* note 83, at 233.

lesson."[108] Even proponents of Hamilton admit to this odious tactic. As Ron Chernow notes (in a creepily enthusiastic way) in his biography of Hamilton, Hamilton argued that the "original investors had gotten cash when they wanted it and had shown little faith in the country's future. . . In this matter, Hamilton stole the moral high ground from opponents[.]"[109] Not content to simply attack the poor, Hamilton and his supporters, as Richard Brookhiser and Forest McDonald note, also alleged that any attempt to treat people who sold their securities out of desperation differently then rich rentier speculators was discrimination against the rich rentier speculators.[110]

In his *Report on a National Bank*, Hamilton outlined his plan for (you guessed it) a national bank. Hamilton requested that Congress charter a national bank capitalized by a combination of private and public investment.[111] The Federal Government would deposit funds in the national bank, and the national bank would issue legal tender redeemable in specie.[112] Although technically a private institution, the government would appoint one fifth of the bank's directors and audit the bank's records.[113] Hamilton argued that that there were three principal advantages of a national bank: augmenting the capital of the nation; facilitating pecuniary aids particularly during emergencies; and facilitating the payment of taxes.[114] National banks augment capital, according to Hamilton, in three ways.

> First. A great proportion of the notes which are issued and pass as Cash are indefinitely suspended in circulation, from the confidence which each holder has, that he can at any moment turn them into gold and silver. Secondly, Every loan, which a Bank makes is, in its first shape, a credit given to the borrower on its books, the amount of which it stands ready to pay, either in its own notes, or in gold or silver at his portion. . . . The Borrower frequently, by a check or order, transfers his credit to some other person, to whom he has a payment to make; who, in his turn, is as often content with a similar credit[.] . . . And in this manner the credit keeps circulating . . . till it is extinguished by a discount with some person who has a payment to make to a Bank, to an equal or greater amount. . . . Thirdly, there is always a large quantity of gold and silver in repositories of the Bank . . . which is placed therewith a view partly to its safe keeping and partly to the accommodation

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[108] NOCK, *supra* note 97, at 112.

[109] CHERNOW, *supra* note 98, at 298.

[110] Richard Brookhiser, *Alexander Hamilton, American*, (New York, NY: The Free Press, 1999), 84-87; Forrest McDonald, *Alexander Hamilton: A Biography*, (New York, NY: W. W. Norton & Company, 1979), 165-67.

[111] Hamilton, *supra* note 85.

[112] *Id.*

[113] COOKE, *supra* note 36, at 89.

[114] Hamilton, *supra* note 85.

> of an institution, which is itself a source of general accommodation. . . . though liable to be redrawn at any moment, experience proves, that the money so much oftener changes proprietors than place, and that what is drawn out is generally so speedily replaced as to authorize the counting upon the sums deposited, as an *effective fund*; which . . . enables [the Bank] to extend loans, and to answer all demands . . . arising form the occasional return of its notes.[115]

Hamilton also observes that national banks facilitate pecuniary aids including during times of emergency, because "[t]he capitals of a great number of individuals are . . . collected to a point[.] . . . The mass, formed by this union, is in a certain sense magnified by the credit attached to it[.] . . . the interest of the bank to afford that aid . . . is a sure pledge of its disposition."[116] Finally, Hamilton argued that a national bank facilitates the collection of taxes for two reasons. First, "[t]hose who are in a situation to have access to the Bank can have the assistance of loans to answer with punctuality the public calls upon them[,]"[117] and second, a national bank could create a general currency that would allow anyone and everyone to pay any debt that they incurred. "The other way, . . . is the increasing of the quantity of circulating medium and the quickening of circulation. . . . [W]hatever enhances the quantity of circulating money adds to the ease, which every [man] . . . to better pay his taxes as well as supply his other wants."[118]

Once again, Hamilton's critics saw the creation of a national bank as a giveaway to Northern Capital. As Cooke has noted Hamilton's critics "though that he was strengthening the government's servitude to business interests of the Northeast. . . Both sectional and class interests were responsible for Congress' opposition to Hamilton's bank report."[119] This time however, Hamilton's efforts appear to be a good faith—albeit most likely naïve—believe that such a private institution would act in the best interests of the people as a whole rather than in the interests of an elite few. Miller indicates "[n]otwithstanding Hamilton's insistence upon private control of the Bank of the United States, he was resolved that the Bank should be run mainly for the benefit of the public." More specifically, Miller suggest that the reason Hamilton thought this was possible was "Hamilton believed that it was sufficient for government to keep businessmen on the right track by a system of rewards and penalties, always bearing in mind that their initiative

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[115] *Id.* at 49.
[116] *Id.* at 50-51.
[117] *Id.* at 51.
[118] *Id.*
[119] COOKE, *supra* note 36, at 90.

must not be paralyzed by too many directives and too much officiousness." As Hamilton himself put it "[t]o attach full confidence to an institution of this nature it appears to be an essential ingredient in its structure, that it shall be under a *private* not a public direction – under the guidance of *individual interest*, not of *public policy*."[120]

In his *Report on Manufactures*, Hamilton outlined what is now known as the Infant Industry Argument.[121] Namely, that the United States should protect infant industries until they had the ability to compete with foreign competitors by implementing tariffs, creating patent laws to encourage innovation,[122] and building a transportation network including "[g]ood roads, canals[,] and navigable rives to connect the nation together.[123] Speaking on the topic of transportation networks specifically, Hamilton indicated that a comprehensive national plan to establish and regulate interstate transportation networks is one of the best strategies of promoting industry, and that it should naturally be the pride of the people of any nation.[124]

> Improvements favoring this object intimately concern all the domestic interests of a community; but they may without impropriety be mentioned as having an important relation to manufactures. There is perhaps scarcely anything which has been better calculated to assist the manufacturers of Great Britain, than the amelioration of the public roads of that Kingdom, and the great progress which has been of late made in opening canals. Of the former, the United States stand much in need; for the latter they present uncommon facilities.
>
> The symptoms of attention to the improvement of inland Navigation, which have lately appeared in some quarters must fill with pleasure every breast warmed with a true zeal for the prosperity of the Country. These examples, it is to be hoped, will stimulate the exertions of the Government and citizens of every state. There can certainly be no object more worthy of the cares of the local doubt of the power of the national Government to lend its direct aid on a comprehensive plan. This is one of those improvements, by any part or parts of the Union.[125]

Lest you think that perhaps Hamilton is turning over a new leaf and learning to root his economic policies in grassroots populism, he immediately makes clear that creating an interstate transportation network will, of course, require crushing local opposition.

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[120] MILLER, *supra* note 83, at 261
[121] Hamilton, *supra* note 86.
[122] HA-JOON CHANG, ECONOMICS: THE USER'S GUIDE, 47 (2015).
[123] Hamilton, *supra* note 86, at 178.
[124] *See* Hamilton, *supra* note 86.
[125] Hamilton, *supra* note 86, at 177-78.

There are cases in which the general interest will be in danger to be sacrificed to the collisions of some supposed local interests. Jealousies, in matters of this kind, are as apt to exist as they are apt to be erroneous.[126]

Jefferson served as a foil for Hamilton's economic vision. "The quarrel between Hamilton and Jefferson is the best known and historically the most important in American political history."[127] Generally, Jefferson opposed the conversion of the American economy from a largely agricultural economy to an industrial one. Although personally disturbed by the institution of slavery (an institution he was personally a beneficiary of), Jefferson rationalized his beliefs under the idealized vision of a nation of independent farmers subsisting off individual plots of land.

> Wishing to hold fast to an idealized past, [Jefferson] saw a nation of planters and farmers, the latter tilling their own soil, turning out local manufactures, and employing only their own families, and the planters overseeing the labor of their slaves. Appalled by the prospect of ubiquitous factories, impoverish industrial workers, and urban blight, he recoiled from the budding Industrial Revolution abroad and its possible transplantation to America. The way of life he wished to preserve was that which he had known in Virginia (although about slavery his conscience was troubled).[128]

Both the Federalists and the Jeffersonian Democrat-Republicans were represented in the administration of George Washington; the first presidential administration.[129] Hamilton, however, as the first Treasury Secretary had far more influence on developing the economy than Jefferson did (or even could) as the first Secretary of State; both by virtue of the subject matter of the departments that they presided over and the size of those Departments.[130] Hamilton, for example, had 30 clerks to assist him in his duties while Jefferson had only four.[131] On a personal level, Hamilton also had a deeper relationship with President Washington being both a former *protégé* and close confidant.[132] Thus, Hamilton was able to garner more influence in the Washington administration then Jefferson was.

Hamilton left the Treasury department towards the end of the Washington administration,[133] and Washington was replaced as President by

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[126] *Id*.
[127] *Id.* at 109.
[128] *Id.* at 115.
[129] ZINN, *supra* note 27, at 97.
[130] COOKE, *supra* note 36, at 74.
[131] *Id.*
[132] *Id*. at 9-20.
[133] *Id.* at 157.

John Adams; a federalist.[134] More importantly, Hamilton was replaced at Treasury by Oliver Wolcott, Jr. who was a committed federalist and saw eye to eye with Hamilton on economic policy.[135] As a result, Hamilton's economic vision endured beyond his tenure at the Treasury Department.

John Adams would lose his bid for reelection to Thomas Jefferson,[136] and the Federalists became a minority party (never holding power again) until their dissolution after the War of 1812.[137] Jefferson appointed Albert Gallatin to the Treasury Department and served until 1814.[138] Gallatin was a loyal Jeffersonian Democrat-Republican who clashed with Hamilton's economic thought and the economic policies of the Federalists as a whole.[139] By this point in time however, the institutions and policies created by Hamilton had been in place for over a decade and had cemented themselves into the government.[140] Thanks to the Court packing scheme at the end of the Adam's administration moreover, the Federal Bench was filled with federalist judges to protect these Federalist institutions.[141]

Having reviewed Hamilton's economic thought, we now turn to its relation to the key cases of the Marshall Court (*Marbury v. Madison*,[142] *McCulloch v. Maryland*,[143] and *Gibbons v. Ogden*).[144] As we have discussed, Hamilton saw a need to transform the American economy from an agricultural economy to a to an industrial one. In pursuit of this endeavor, Hamilton has little if any concern for the opinions of the People; insistent on pushing his vision through at all costs. More importantly, the Federalists found Hamilton's vision convincing. Unfortunately, the Federalists were voted out of power in 1801. As previously noted, the outgoing Adams administration packed the judiciary to ensure Federalist influence after being voted out of office. In *Marbury*,[145] the Marshall Court assumed the power to determine – even over the objects of Congress – what the Constitution means. In this capacity, the Marshall Court determined that the Constitution said about Hamilton's vision. In *McCulloch*,[146] the Marshall Court found the Federal Government could create a national bank thus fulfilling Hamilton's

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[134] *Id.* at 184.

[135] *Id.* at 74, 105, 117, 154, 160, 187-88, 195, 218, 219, 241, 268.

[136] *Id.* at 229-30.

[137] CLEMENT EATON, HENRY CLAY AND THE ART OF AMERICAN POLITICS 34-35 (1957).

[138] *Albert Gallatin*, ENCYC. BRITANNICA, https://www.britannica.com/biography/Albert-Gallatin (last visited Dec. 6, 2024).

[139] *Id.*

[140] COOKE, *supra* note 36.

[141] *Judiciary Act of 1801*, *supra* note 41.

[142] Marbury v. Madison, 5 U.S. 137 (1803).

[143] McCulloch v. Maryland, 17 U.S. 316 (1819).

[144] Gibbons v. Ogden, 22 U.S. 1 (1824).

[145] Madison, 5 U.S. at 137.

[146] McCulloch v. Maryland, 17 U.S. 316 (1819).

recommendations in the *Report on a National Bank*, and, in *Gibbons*,[147] the Marshall Court found that transportation equals commerce; thus ensuring the Federal Government had the ability to build and regulate the transportation such as canals as outlined in Hamilton's *Report on the Manufactures*.[148]

Alexander Hamilton is perhaps the single individual who best represents the prevailing economic thought of Northern Capital during the early years of the United States. We can see Hamilton's influence in the Marshall Court during the Marshall Court including: allying with the interests of Northern Capital, creating a national bank, and regulating interstate transportation.

CONCLUSION

The best explanation for the jurisprudence of the Marshall Court is that, rather than relying on the text of the Constitution itself, it was manipulated in order to implement the economic consensus of Northern Capital; in particular the economic thought of Alexander Hamilton. In order to adequately understand constitutional interpretation, one must look beyond the four corners of the Constitution itself. The best field of discipline to observe in order to properly understand the Constitution is economic thought. Alexander Hamilton's economic thoughts provide the best explanation for the jurisprudence of the Marshall Court. Without understanding Hamilton's economic beliefs, it is difficult, if not impossible, to determine how the Marshall Court determined, without any explicit authorization from the Constitution itself, that it: had the authority to overrule a democratically elected legislature; could authorize a national bank; or could authorize the Federal Government to assume control of interstate transportation networks; without referencing the economic thought of Alexander Hamilton who advocated: ignoring the will of the people; establishing a national bank; and regulating interstate transportation networks. This explanation provides clarity where others provide confusion and is the best explanation for our observations.

[147] Gibbons, 22 U.S. at 1.
[148] Hamilton, *supra* note 86.