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# COLUMBIA UNDERGRADUATE LAW REVIEW

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## ARTICLES

“Disperse, You Rebels”: An Examination of the Evolution of Gun Rights in America  
*Hunter S. Rhoades*

Dissenting Opinion to *Oliphant v Suquamish Indian Tribe* (1978)  
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An Oliphant Fix: Delegalizing Rape in Indian Country  
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Comparative Studies of Indigenous Child Welfare Legislations in the United States, New Zealand, Australia, Canada, and China  
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The Precarious Right to Privacy  
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“Plagiarism” As Legal Language: The Influence of Amicus Curiae Briefs on Supreme Court Opinions in Parental Notification Abortion Laws  
*Emily Sadutto*

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## LETTER FROM THE EXECUTIVE EDITORS

Dear Reader,

On behalf of the Editorial Board and the Print Division, we are proud to present *Columbia Undergraduate Law Review*'s contributions to the Fall 2022 Journal. The contributing authors and our editors worked extremely hard this semester to cultivate a journal that fosters legal discourse. We are excited to share the following articles from the *Columbia Undergraduate Law Review*.

In “Disperse, You Rebels’: An Examination of the Evolution of Gun Rights in America,” Hunter Rhoades discusses American gun rights, both its history and evolution before the Supreme Court, and asks if the Court’s silence lended itself to a “tacit permission of restriction.”

In “Dissenting Opinion to *Oliphant v Suquamish Indian Tribe* (1978)” by Shera Bhala, Bhala presents an evidenced-based, contemporaneous dissenting opinion to *Oliphant v Suquamish Indian Tribe*.

“An Oliphant Fix: Delegalizing Rape in Indian Country” Gabrielle Levy, Levy also discusses *Oliphant v Suquamish Indian Tribe*, honing in on how the law and the federal government fails to protect Native women and proposes solutions moving forward.

In “Comparative Studies of Indigenous Child Welfare Legislations in the United States, New Zealand, Australia, Canada, and China” by Chaeun (Jenny) Song, Song explores the humanitarian crisis facing Indigenous children by analyzing the legal frameworks in the United States, New Zealand, Australia, Canada, and China.

In “The Precarious Right to Privacy” by Alexandra Velasco, Velasco examines several Supreme Court rulings on contraception, abortion, sexual conduct, and marriage, to discuss American privacy rights.

In “‘Plagiarism’ As Legal Language: The Influence of Amicus Curiae Briefs on Supreme Court Opinions in Parental Notification Abortion Laws” by Emily Sadutto, Sadutto researches the usage of language found in Amicus Curiae briefs in Supreme Court opinions, specifically pertaining to parental notification when minors seek an abortion.

We hope you enjoy reading the articles written by undergraduate students from all over the country and edited by Columbia and Barnard student editors. We are continually in awe of their talent, passion, and work.

Sincerely,  
Jeannie Ren and Anushka Thorat  
Executive Editors, Print

## **MISSION STATEMENT**

The goal of the *Columbia Undergraduate Law Review* is to provide Columbia University, and the public, with an opportunity for the discussion of law-related ideas and the publication of undergraduate legal scholarship. It is our mission to enrich the academic life of our undergraduate community by providing a forum where intellectual debate, augmented by scholarly research, can flourish. To accomplish this, it is essential that we:

- i) Provide the necessary resources by which all undergraduate students who are interested in scholarly debate can express their views in an outlet that reaches the Columbia community.
- ii) Be an organization that uplifts each of its individual members through communal support. Our editorial process is collaborative and encourages all members to explore the fullest extent of their ideas in writing.
- iii) Encourage submissions of articles, research papers, and essays that embrace a wide range of topics and viewpoints related to the field of law. When appropriate, interesting diversions into related fields such as sociology, economics, philosophy, history, and political science will also be considered.
- iv) Uphold the spirit of intellectual discourse, scholarly research, and academic integrity in the finest traditions of our alma mater, Columbia University.

## **SUBMISSIONS**

The submissions of articles must adhere to the following guidelines:

- i) All work must be original.
- ii) We will consider submissions of any length. Quantity is never a substitute for quality.
- iii) All work must include a title and author biography (including name, college, year of graduation, and major).
- iv) We accept articles on a continuing basis.

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***“Disperse, You Rebels”:  
An Examination of the Evolution of Gun Rights in America***

Hunter S. Rhoades | Columbia University

Edited by Adeline Larsen, Gabriella Chioffi, Ben Erdmann,  
Kendall Psaila, Avery Reed, Debby Shi

**Abstract**

The legal interpretation of the Second Amendment has significantly evolved over time. This paper outlines the legal and cultural background of the current gun debate in America, following how the legal interpretation of the Second Amendment has evolved over time. It begins with an examination of the origins of the Second Amendment in order to understand what the framers intended when drafting the Amendment. From there, a study in the shifts of cultural attitudes and judicial decisions show that gun rights were not initially as broad and strong as we imagine them today: in fact, courts remained largely uninterested in gun rights for several decades, instead offering a warmer reception of the various restrictions known as “gun control.” Contentious debate as we know it has materialized only recently.

Since conflict over the place of guns in our national experience is a defining feature of our contemporary political and cultural milieu, it is necessary to inspect the evolution of this right. With contemporary discourse in mind, a historical examination of jurisprudence alongside corresponding cultural attitudes has the distinct possibility of highlighting and further legitimating a positive and constitutionally valid path forward.

## I. Introduction

The Second Amendment of the United States Constitution has been the subject of much scrutiny and debate since the country's founding. However, this discourse has perhaps picked up its greatest momentum in the past twenty-three years since the 1999 massacre at Columbine High School. The right-to-bear-arms amendment contains much contested and unclear language referring to a "well-regulated militia," alongside one seemingly errant comma.<sup>1</sup> This intricacy in text has only complicated the legal debate further: specifically, courts have evolved from an interpretation of firearms in a militia context to a largely civilian one. In recent history, the prevailing legal interpretation of the Second Amendment has actually changed to become overall *more permissive* rather than more restrictive regarding the individual rights of citizens to own and carry firearms.

In early America, the right to bear arms was generally seen through a narrower lens—a responsibility rather than a privilege.<sup>2</sup> It is likely that the colonists and even our Founders would be surprised at the breadth of gun rights enjoyed by Americans today. Though interpretations of gun rights have fluctuated throughout our national evolution, the right to own and even carry a firearm has gradually become wider in scope. It is possible to own both a long gun and a pistol in all fifty states, but regulations vary as to whether one can carry those weapons in public. Indeed, even as some might paint gun rights as being under assault, the fact remains that Americans enjoy more gun-related freedoms today than at any other point in American history. In some cases, restrictions have actually been shed instead of strengthened, such as the federal assault weapons ban in 2004.

Yet the love story between America and guns is a tale that is rife with crime, violence, racism, and political intrigue. The advent of our right to bear arms arguably emerged as a reaction to British gun control. Even so, various states restricted the right to carry arms—and *who* could carry arms—for various purposes until the pivotal events of the 1930s under the Roosevelt administration, when Franklin Delano Roosevelt and his attorney general joined forces to establish gun control measures never seen before in an autonomous America. Since then, action both for and against gun control has led our nation's highest court to break its near silence on the matter for the first time in over 200 years.

Indeed, the Supreme Court has recently looked favorably on personal gun rights in several landmark cases, starting with *District of Columbia v Heller*<sup>3</sup> in 2008 and continuing with *McDonald v Chicago*<sup>4</sup> two years later. *Heller* held that the Second Amendment protects an individual's right to possess a firearm, militia service notwithstanding, as well as the use of that firearm for legal self-defense. *McDonald v Chicago*<sup>5</sup> was decided shortly after, specifying that the Second Amendment rights established in *Heller* apply to state and local governments as well as the federal. Perhaps more so than any other event, these cases cemented the personal right to keep and bear firearms for self-defense. With the recent Supreme Court decision in *New York State Rifle & Pistol Association Inc. v Bruen*<sup>6</sup> cementing a constitutional right to carry firearms in public, the debate on how best to regulate this right is currently underway. This public discussion makes the history of gun rights relevant and worthy of exploration, providing clues as

to how rights may change in the future.

By applying a historical lens to the debate of gun control, we can further understand the Court's ruling in *Bruen* and why many forms of gun control have historically faced obstacles to success in America. With a specific focus on events in the twentieth and twenty-first centuries, this paper examines the cultural forces behind primary interpretive legal philosophies in order to provide the foundation for our interpretation of the Second Amendment and our modern American love affair with firearms. Through this analysis, we can examine whether gun control is likely or even possible in today's America.

## II. Historical Foundation and Origin

Ever since mankind saw the first discharge of a gunpowder-powered spear through a long tube in tenth-century China, the firearm has come to change the meaning and power of human conflict. However, there remain only a few countries in which firearm regulation is still comparatively lax. Of these, the United States stands out as one in which gun ownership is nationally understood—if not universally respected—as part of the societal fabric, a near-unimpeachable right that defines what it means to be an American.

Our twenty-first century conception of the right to bear arms was not founded *ex nihilo*, but was shaped by the framing of historical events in England during the late seventeenth century. Arguably, the first of these events was the ascension of King James II to the English throne ninety years before the advent of the American Revolution.<sup>7</sup> James, a Catholic king to a majority-Protestant power base, feared deposal and thus enacted the Militia and Game Acts, laws that restricted gun ownership for the majority of the population on the basis of their “[danger] to the peace of the Kingdom.”<sup>8</sup>

The second event was also of royal origin and became known as the “Glorious Revolution,” wherein King William and Queen Mary replaced the toppled King James on the throne. These affairs resulted in a document known as the English Bill of Rights, designed to codify “respect [for] the individual rights of Englishmen.”<sup>9</sup> This newly defined right to bear arms was “recognized as an individual right—not a right belonging only to those serving in militias.”<sup>10</sup> Thus, the logical conclusion followed that this right was not so much to protect from errant wildlife or a petty crime—it was a fundamental insurance against the encroachment of an unjust, authoritarian government.

A new era for the English emerged, starting with the rejection of the unquestionable divine right of the sovereign in favor of the power of the citizen. Most importantly, the new English Bill of Rights paid strict attention to the *individual* right to arms, which was referred to “true, ancient, and indubitable” and encoded in a provision which read “[s]ubjects which are Protestants may have arms for their defense suitable to their Conditions and as allows by Law [sic].”<sup>11</sup> Thus, we observe our earliest example of individual rights serving as a safeguard and weapon against government tyranny.<sup>12</sup> Nevertheless, the individual right to bear arms was cemented over the following fifty years of legal progression in England, leading to the affirmation that gun ownership was a necessary precursor to securing other essential rights including “personal security, personal liberty, and private property.”<sup>13</sup>



### III. The First Gun Control in America

Since the colonists were indeed Englishmen by origin, legal scholar Joyce Lee Malcolm writes that “the key to [understanding the construction of the Second Amendment] is the English tradition the colonists inherited.”<sup>14</sup>

Fast-forwarding to the state of the American colonies just prior to the outbreak of war against Britain, we find the situation strikingly similar to that of the English under the rule of King James. In the *Charleston Law Review*, David B. Kopel outlines the “Coercive Acts” of 1774, known by the colonials as “The Intolerable Acts,” which enforced a series of exceedingly “harsh measures”<sup>15</sup> that receive direct responses in the later American Bill of Rights (such as the Third Amendment in response to the Quartering Act, which had forced property owners to house British soldiers without consent). Many of these acts dealt financial blows or enforced humiliating political subjugation upon the colonists, turning them into what could be seen as “second-class” Englishmen. While certainly undesirable, the content of the Acts themselves were not deemed as onerous as the British military’s response to the armed resistance that they received when enforcing the Acts. Similar to today’s calls for restriction of ammunition, the British forces came up with the solution of deprivation of gunpowder, rendering American arms useless. This hit home in more ways than one: not only were the British acting as an overwhelming authoritarian force, but they were now specifically targeting guns, the fundamental tool that the English Bill of Rights had enshrined as the method of protection *against* such force. Thus, a very similar situation emerged for the colonists as for the subjects of King James. While it is impossible to know whether this event served as a direct impetus for the later passage of the Second Amendment, it is one piece of evidence suggesting that the original purpose of the Amendment was indeed individual-level self-defense. This conclusion would mean that the Founders’ intent to establish an individual right was misconstrued by a later reading of the Amendment in a militia context, and that the contemporary interpretation in favor of an individual right to arms would constitute a realignment to that intent rather than the radical invention of a new right.

As soon as the British regulars began seizing powder from the town storehouse in Worcester County, Massachusetts, the immediate colonial response was to seize control of the militia force from the Royal Governor and move it to local control. Colonists then proceeded to engage in “group practice” with their firearms no less than “at least weekly.”<sup>16</sup> Indeed, the gun-related seizures were beyond the pale for the colonists. Things continued to ramp up as the American Provincial Congress declared that any inhabitants of the colonies who were not already armed should acquire arms and ammunition immediately.<sup>17</sup> The back-and-forth continued when the British Parliament enacted the Import Ban, which purported to merely require a government permit to import firearms and ammunition to America. However, no permits were granted.<sup>18</sup> This fact strikes a familiar chord in the modern-day United States—many jurisdictions have the same rule in place for the purchase of firearms, with varying degrees of permit issuance. The city of New York, for example, has functionally issued few permits and denied most applications outright—the issue in the core holding of *Bruen*.

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Overall, what we take away from this history is that the story of American gun rights actually began with gun control. In fact, the singular event to which the actual outbreak of the Revolutionary War is attributed was the famous order of a British soldier to a group of American militiamen on April 19, 1775, at Lexington, Massachusetts: “Disperse you Rebels—Damn you, throw down your Arms and disperse! [sic].”<sup>19</sup> Of course, this invitation was not accepted, resulting in a great deal of firearm-related bloodshed.

Ultimately, this brings us to the text at issue, which was inked onto paper and history in 1791 as the Second Amendment to the United States Constitution: “A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>20</sup> Much has been made of the so-called “militia clause,” with some debating that the original intent was to limit ownership only to those members of a well-regulated militia. Looking back to the original English right, we see that in contrast *this* right contained no such clause at all.<sup>21</sup> In other words, understanding why this particular clause was added helps us to understand the frame of mind and context in which the Second Amendment was composed, allowing us to better comprehend the various ways it has been argued and interpreted throughout history.

It is undeniable that the American colonists understood an essential right to arms. As legal scholar Malcolm points out, “the royal charters that created the new colonies assured potential emigrants that they and their children would ‘have and enjoye all Liberties and Immunities of free and naturall Subjects ... as if they and every of them were borne within the Realme of England [sic].’”<sup>22</sup> In addition, Malcolm reminds us that the colonies began to *require* new settlers to keep firearms early on. Surely, the colonists understood the firearm as a tool and a right. Yet along with mandating gun ownership, the colonies also required residents to establish militias.<sup>23</sup> Though it would seem simple to conclude from this fact that guns were to be limited to only this context, we must also consider the reasoning for militias themselves. In addition to possessing a strong sense of their imported English rights, we recall that colonists maintained a deep distrust of authoritarian government fomented by the “traumatic upheavals of the seventeenth century: the English Civil War of 1642, and the Glorious Revolution of 1688.”<sup>24</sup>

We can also find further evidence in the words of a Founding Father. In a chapter of *The Federalist Papers* entitled “Concerning the Militia,” Alexander Hamilton takes aim at authoritarian government, going so far as to state that even standing armies (controlled by the central government) “are dangerous to liberty.”<sup>25</sup> He offers support for militias, suggesting that they are “the most natural defense of a free country”<sup>26</sup> Taken all together, this early evidence suggests that the original intent for gun rights in America, both before and after the passage of the Second Amendment, was to serve as a check against government tyranny, perhaps best organized in the form of a state-controlled paramilitary alternative (militia), but nevertheless as an individual right. Still, we see the firearms debate in America at first cast almost entirely in a group context (primarily a military one). This understanding is a serious departure from the English Bill of Rights. In fact, based on Hamilton’s declaration, it is possible to discern an emphasis on a collective right to defend against internal tyranny, rather than the idea of singular

gun ownership unconnected with militia service as a prescription for the assurance of good government. In other words, our early history demonstrates that while gun rights were held in deep respect and viewed as an integral part of our national identity, the reasoning behind them was distinct from how some might articulate the right today.

#### **IV. Military or Civilian: A Question of Context**

While the original intent of the right to bear arms is the subject of some debate, the historical context that we have explored thus far would suggest that the best, or at least most familiar, understanding of the Second Amendment is that of a right to individual ownership related to militia service. Certainly, this argument may be countered with a suggestion that militia service was simply a standard expectation of the time for all qualified, able-bodied citizens. However, it is reasonable to surmise that in eighteenth-century America, the military context may have overridden guns themselves as the primary issue of importance, leaving firearms mainly as a tool which enabled the militia system to work. Indeed, American historian John K. Mahon wrote that it was the “existence and performance [of the militia system] that left an indelible impression on the future history of the United States.”<sup>27</sup> From the days of the citizen-soldier in the colonial militia to our post-9/11 national identity—when military-style camps for civilians and motivational talks for corporate audiences from veterans became popular and the purchasing of firearms, especially weapons with a military appearance like AR-15s, exploded—guns have been inextricably linked with a military identity.

However, such a simple conclusion obfuscates much of the nuance that has compounded the issue with regard to the increasing power, capability, and availability of firearms that would have astounded the Constitutional framers. There is ample evidence from legal history showing that even if one stipulates a common original meaning granting an individual right to possession, a singular understanding of the Second Amendment has never been universally accepted, even within the lower courts over time; and that restrictions related to this understanding have actually been upheld.

As early as the mid-nineteenth century, legal action at the state level began to deal with restrictions of the carriage of firearms by private citizens, with many cases even featuring a military nexus as an uncontroversial element. One such case came from Tennessee in 1840, which upheld the conviction of a man named William Aymette who had been caught carrying a concealed Bowie knife on his person in violation of state law. The court in that case, *Aymette v State*,<sup>28</sup> wrote that the words “bear arms” in the Second Amendment “have reference to their military use...so the arms, the right to keep which is secured, are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment.” The court even went so far as to reason that the right to keep and bear arms was meant solely for the purposes of the “defense of the public:” to “protect the public liberty, to keep in awe those who are in power, and to maintain the supremacy of the laws and the constitution.”<sup>29</sup> In upholding Aymette’s conviction, the court further opined:

“[citizens] need not, [for the ability to repel any encroachments upon their rights by those in authority], the use of those weapons which are usually employed in private broils, and

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which are efficient only in the hands of the robber and the assassin...[t]hey could not be employed advantageously in the common defense of the citizens. The right to keep and bear them, is not, therefore, secured by the constitution.”<sup>30</sup>

Aside from the fact that the court was unconcerned with the legislative restriction on “concealed carry,” which was at issue in this case, the court was equally interested in the fact that *Aymette*’s weapon was not deemed fit for military use and therefore was not constitutionally protected for ownership or use. This is a perspective that observers might find stunning today.

Nevertheless, the position remained consistent with historical background and the prevailing understanding of the Second Amendment as protecting those weapons which protected the collective public good—that is, only those weapons that met the standard of being qualified for military or militia use. *Aymette* also introduces us to the subject of carrying concealed weapons, a topic which is still debated today. Few jurisdictions agree on the degree to which citizens should be restricted in their ability to carry arms in public, if at all, precisely the subject that is being tackled in light of the outcome of *Bruen*. Now that permits *shall* be issued, instead of issued only at the discretion of the state, how many barriers can be put in place to qualify for one? What carriage restrictions can still pass constitutional muster? While *Aymette* ultimately serves as an example of a court that upheld the criminalization of carrying a concealed weapon on the state level, what is perhaps most instructive is the manner in which they viewed the particular weapon itself as being unqualified for protection under the Constitution.

Only a few decades later, an 1871 Tennessee law further dealt with the concealed carry of weapons, this time prohibiting the concealment of a large variety of handguns and other weapons— unless carried openly in the hands, and most notably, unless the weapon in question was an *army* pistol as is “commonly carried and used in the United States Army.”<sup>31</sup> While the specific delineation concerning an unconcealed weapon that qualifies as an army pistol seems odd, it suggests that lawmakers at the time were primarily concerned with weapons that were most qualified for legitimate protection—perhaps as an early attempt to preclude those weapons most likely to be used for crime.<sup>32</sup> In 1872, the Tennessee Supreme Court case heard a case stemming from this law. *State v Robert Wilburn*<sup>33</sup> examined the indictment of a man who had violated the 1871 law. What makes this case interesting is not the original indictment itself, which was affirmed by the court, but rather how little focus the court had on the text of the law related to the identity of the weapon as an army pistol. In fact, the court took time in their opinion to note that “we have no doubt [on the constitutionality of the state legislature’s prohibition of carrying an army pistol about the person] and hold the Act to be clearly constitutional.” While we see a hint in this case that lawmakers and courts might generally approve of citizen *possession* of firearms outside the confines of militia or military service, the military connotation held true for concealment, which was limited outside of r this context.

The Second Amendment expressly provides for two rights: the right to “keep” arms and the right to “bear” arms. We recall also that the purpose of the amendment is clearly expressed with the addition of the “well-regulated militia” language, which, in historical context, tells us that the partial reasoning for the amendment was to defend newly acquired collective freedom. It

is especially significant, then, that the Tennessee court, in this case, also took the time to write that the state law was “a legitimate exercise of [Constitutional] power to regulate the wearing of the weapon, and is authorized by the Constitution, and does not interfere with the right of keeping the arm, or of bearing it for the common defense.”<sup>34</sup> These early Tennessee decisions find at least some restriction pertaining to firearms to be constitutionally permissible, an important historical basis from which to theorize that modern forms of gun control may indeed pass muster. The increasingly vigorous and contentious discourse surrounding these restrictions, meanwhile, can be examined in the sociological context of what would come after the turn of the twentieth century.

One additional nineteenth-century case, *Presser v Illinois*<sup>35</sup>, serves as an example of a marked and unprecedented change in legal thinking regarding firearms rights. *Presser* came before the United States Supreme court in 1886 after a group of around 400 men, led by a man named Herman Presser, marched and paraded in armed formation down the streets of Chicago. Presser was charged by the state as the leader of an unauthorized militia. The Supreme Court sustained his conviction, ruling that “state legislatures may enact statutes to control and regulate all organizations, drilling, and parading of military bodies and associations except those which are authorized by the militia laws of the United States.”<sup>36</sup> Effectively, this meant that in tandem with the common understanding of gun rights being protected in a primarily military context, states were now permitted to restrict what exactly that context could be defined as, and whether or not a particular armed activity or group would be sanctioned. At that point, American gun rights, while not entirely quashed, were certainly a far cry from both the conception of the original English Bill of Rights, as well as our twenty-first-century holding.

Keeping in mind that state courts had largely taken the view that the Second Amendment protected firearms as a guard for collective liberty, it is reasonable to conclude that legislative actors would have had little hesitation in curbing gun rights as situations seemed to require. With the Supreme Court having taken the position that the Second Amendment was not a bridle to state authority, the stage was set for a serious evolution for gun rights in America.

### **Part V. Temperance and Temper: The New Crime Wave in Prohibition-Era America**

For the decades following *Presser*, the Supreme Court was largely silent on the gun issues in the United States, a choice which can perhaps be seen as having passively acquiesced to the series of increasingly strict legislation that would ultimately come. Yet, we cannot credit or blame *Presser* itself for this change. Instead, we examine a series of legal and cultural events which spurred the need for government action to protect its citizens.

The National Temperance League, which advocated against the consumption of alcoholic beverages, may sound innocuous, but it was indeed this particular group whose efforts led to what could be considered the most consequential act of the American government in the twentieth century: the Eighteenth Amendment. Along with the accompanying Volstead Act, the amendment effectively banned alcohol nationwide, with the near-immediate consequence of an incredible surge in organized crime, fueled by the illicit importation and sale of alcoholic

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beverages. At its zenith, the “Valentine’s Day Massacre” in 1992 had, as its star, a pair of Thompson submachine guns, weapons that were both unusually powerful and concealable. The deadly massacre sparked a terrible public outcry, leading President Franklin D. Roosevelt to launch his “New Deal for Crime,” with the National Firearms Act (NFA) as a centerpiece in 1934. Notably, this was a year after Prohibition was repealed, but the chain of events that had been set in motion was unstoppable. The NFA effectively hampered the sale and possession of certain weapons categories deemed to be used primarily by criminals for violent purposes: short barreled rifles and shotguns, and any gun with a suppressor. Interestingly, the NFA still functions today, albeit in a more symbolic fashion, to represent the American socio-political divide on gun issues. While the NFA still limits the purchase of such weapons and equipment, the tax that gives the act its teeth remains at only \$200, a small amount compared to the princely sum it was equivalent to in 1934. Gun-related legislation continued with the passage of the Federal Firearms Act (FFA) in 1938, which required licensure for gun sales, mandatory record-keeping and precluded the transfer of firearms to felons.

The NFA could be seen as a reasonable response to an event unpredicted by the Second Amendment. Significantly, it fed into the idea of a Constitution unprepared for the intricacies of a twenty-first century world, where technology challenges the meaning of the text. If the government is prohibited from searching an envelope without a warrant, what about a Facebook message? If citizens are entitled to possess muskets regardless of the reason, what about an AR-15? In 1939, two men were arrested and federally charged for possessing unregistered sawed-off shotguns, which were banned under the NFA. However, these charges were shortly overruled by the district court, which moved to strike the NFA as a violation of the Second Amendment. How far could the restriction of firearms go? How far was the reach of the Second Amendment, and what limitations did it allow on its subjects, if any?

It had seemed full steam ahead for gun laws, until the “peculiar case” of *United States v Miller*<sup>37</sup> in 1939, introduced by legal scholar Brian L. Frye as the result of the subsequent government appeal. Ultimately, the case became “the only Supreme Court opinion construing the Second Amendment” until the advent of *Heller* in 2008.<sup>38</sup> American gun rights, and their limitations, began to be more sharply defined. Perhaps the most important takeaway from *Miller* is the fact that the case “did not adopt a theory of the Second Amendment guarantee.”<sup>39</sup> Nevertheless, the court did make some interesting comments in its tightly-scoped ruling.<sup>40</sup>

In essence, the court’s ruling was unsurprising in that it focused yet again on the militia context, with Justice McReynolds pointedly writing for the court: “In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”<sup>41</sup> While this was not a revelatory statement, there is a clear focus on the categories of permitted weapons rather than a discussion of whether or not a firearm was connected with actual service in a militia. Presumably, any weapon not limited by the NFA would be found permissible by the court under the standard that it was not a “criminal”

weapon, and therefore, seemingly more suitable for military use. Frye suggests that *Miller* hardly addressed the meaning of the Second Amendment, but ultimately what we take away from the legal leniency is freedom to enact regulation on firearms and test the undefined limits.<sup>42</sup> Most astutely, Frye suggests that “the *Miller* Court’s reading of the Second Amendment simply reflected popular sentiment and conventional wisdom,”<sup>43</sup> indicative of the way we find the American gun debate evolving over the course of time: legal thinking tends to follow culture. Therefore, a study of Second Amendment interpretive history is more than just an examination of American jurisprudence on the issue, but also instructive in how cultural attitudes are often in symbiosis with the cultural attitudes of American citizens themselves. While it may be impossible to understand why the Court essentially gave the real Constitutional question a bunt, *Miller* suggests that it may be reasonable to identify public mood and opinion as a one-pronged standard for a prediction of future Court decisions, especially on a topic as well-sociologically documented as guns in America. While the Court may have taken a raincheck, the government and its newfound interest in firearms, fueled by the symbiotic relationship of the American people and their firearms, was only getting started.

## VI. The Rise of the GCA and the NRA

*“The battle outside ragin’/Will soon shake your windows/And rattle your walls/For the times they are a-changin’”*  
-Bob Dylan

The silent interpretive battle that had been brewing began to take form outside of academic and legal spaces, shaking the nation. As an adage suggests, an inch given may well translate into a mile taken, and this theory could well be applied to both legislators and firearms activists on both sides of the spectrum. Professor William J. Vizzard, a former federal agent and criminal justice professor at California State University, introduces us to the ensuing increase of political and cultural activity as the assassinations of figures such as the Kennedy brothers and Martin Luther King, Jr. spurred the passage of the Gun Control Act (GCA) of 1968, perhaps the most significant firearms-related legislation ever enacted. Vizzard remarks that Roosevelt administration’s efforts with gun control were “diluted” by opposition and called the NFA and FFA “minimalist statutes.”<sup>44</sup> Accordingly, the GCA essentially replaced the 1938 FFA, enacting restrictions on the interstate commerce of firearms, establishing categories of restricted buyers, mandating licenses for firearm dealers, and requiring those dealers to keep records of gun sales. Nevertheless, instead of offering a permanent improvement to the problems of increasing gun violence, such restriction only foreshadowed more factious debate. Vizzard points out that although the passage of the GCA “appeared to foretell a shift away a laissez-faire approach to policy on firearms” for many observers, the nation instead experienced “a sharp increase in the power of gun control opponents, a rollback of regulations, and the emergence of an individual rights interpretation of the Second Amendment.”<sup>45</sup> In truth, this era may well have marked the emergence of a national contemporary fascination with guns, or what we might call “gun-fever,” wherein firearms transformed from tools to objects representing patriotism, freedom, and identity.

Only a few years prior to the passage of the GCA, student and Marine Corps veteran Charles Whitman climbed into the bell tower at the University of Texas in 1966 and killed over a

dozen people in ninety minutes.<sup>46</sup> Even as this incident represents the worst historical mass shooting by one individual, some opponents of gun control have pointed to the fact that Whitman was armed with a sawed-off shotgun, which was precisely the sort of weapon that the NFA aimed to eliminate. This raised questions about the efficacy of gun control legislation. Was the problem that the legislation was weak, or was it simply that no gun-related legislation could address the root issue of violence? Regardless, these events launched the issue of gun control onto the national stage of public discourse and blew the Overton window wide open.

Enter the National Rifle Association (NRA). Or, rather, an extreme NRA membership that effectively intercepted any hope of compromise between the average American gun owner and Congress, opposing even the most commonly-proposed gun control legislation such as universal background checks. The NRA was founded in 1871 to “promote and encourage rifle shooting on a scientific basis.”<sup>47</sup> Although the NRA had initially warmed to cooperation on new legislative action, Vizzard points out that it was clear that “any hope of compromise between advocates of stricter gun control and the NRA ended after 1965.”<sup>48</sup> This does not mean that both sides were not quietly at work beforehand—other pieces of significant legislation were realized, including the most important Congressional action ever taken with support from the NRA: the 1986 Congress Firearms Owners Protection Act (FOPA). This modified the GCA, changing the way a licensed dealer had to maintain records, reducing the penalties for false or absent record-keeping, and completely redefined the meaning of being a federal firearms “dealer.”<sup>49</sup> This last change is famously known as the “gun show loophole,” a highly controversial exemption that still exempts private sellers and buyers engaging in non-commercial transactions from all provisions of the federal firearms licensing scheme. Thus, this legislative period marked the most intense period of opposition to gun control ever seen, which Vizzard notes as reflective of the swing of U.S. politics toward conservatism and the simultaneous growth in effectiveness and operational intensity of the pro-gun lobby.<sup>50</sup>

Of course, the gun control lobby had their turn as well with the passage of the “Brady Bill,” which ultimately added a provision to the GCA that all firearms sales be accompanied by an instant criminal background check. This was followed by a ban on assault weapons and high-capacity magazines—then defined as the ability to contain more than 10 rounds—although this ban expired in 2004 and was not renewed.<sup>51</sup> Other minor gun control laws have been passed as well, including a restriction on the manufacture of new automatic weapons for civilian purposes and a general ban on owning automatic weapons.<sup>52</sup> However, none of these laws have proven reliable in preventing mass shootings or addressing overwhelming gun violence, and Vizzard remarks that “it appears unlikely that legislation of any substance will emerge from Congress any time soon.”<sup>53</sup> All taken, it seems that former NRA President Charlton Heston’s famous declaration during the 2000 NRA convention that his gun would be taken only “from my cold, dead hands!” is emblematic of more than the gun lobby’s tenacity; it is representative of the power working against the call for gun reform.

### **VII. Alternative Efforts**



Our nation exists on coterminous systems of government, both federal and state. An examination of the gun debate on the level of the individual state reveals a much more energetic patchwork of advocacy and legislative action that would soon force the courts to weigh in more decisively than ever. As early as 1976, the federal enclave of Washington D.C. effectively banned handguns entirely and severely restricted the possession and storage of long guns.<sup>54</sup> Other states have enacted various provisions restricting the ability to carry one's firearm outside the home, both openly and concealed.<sup>55</sup> Indeed, seven states (including California, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey and New York) have accomplished what many members of Congress attempted, yet failed, to do in the wake of mass school shootings such as Sandy Hook: they passed laws banning high-capacity magazines (permanently), hollow-point bullets, and so-called "assault weapons" (usually referring to the AR-15 platform rifle).

While looking at the local or state level, we find a new strategy evolving, launched within a legal framework yet outside the traditional realm of criminal or administrative law. With tort law, new efforts are being made to choke off guns at their source by filing lawsuits against the manufacturers themselves. Timothy D. Litton writes that "whether by implication or by design, gun litigation has the power, and often the purpose, to regulate the firearms industry."<sup>56</sup> However, the NRA has historically successfully gone to war against this tactic by denouncing the suits as a second attempt to achieve the same reforms already rejected by legislatures through litigation instead.<sup>57</sup>

The push for national reform continues, arguing that the United States requires reexamination of the gun culture as a whole. Rhetoric spread fast as online media platforms allowed citizens to compare the United States to other countries, spurring an ongoing national conversation that challenged the status quo on guns. Critics point to gun control measures such as those in New Zealand and Australia, where tragic gun massacres transformed formerly gun-rich countries into places where guns are severely curtailed or banned entirely. However, neither of these countries had guns intertwined with their national identity from its beginning, nor anything analogous to the Second Amendment in their national constitutions. Ultimately, these arguments and tactics have done little to aid the overall efforts of those who advocate for stricter gun control or reform. Instead, it is the controls at the state level that have proven most successful. Naturally, these reforms have remained due to tacit agreement from the Supreme Court, whose silence was likely taken as permission for increasing restrictions on the individual right to possess firearms. Litton suggests that the courts in general are a space where "NRA lobbying power is not effective."<sup>58</sup> Yet, we can observe that the national efforts of the NRA did not cease after the coup of the FOPA, and instead shifted their battle to the courts just as the gun control lobby did.

### **VIII. Equal Justice Under Law: The Supreme Court Speaks**

Considering that the courts have largely been silent on the issue of guns since *Presser*, it seems that traditional legal holding would define the Second Amendment through the militia lens. Yet as we read from Vizzard, the NRA has long been engaged in defining those rights through a new individual lens.<sup>59</sup> Starting in 2008, we saw this effort come to fruition in the form

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of two cases from the Supreme Court: *District of Columbia v Heller*<sup>60</sup> and *McDonald v City of Chicago*.<sup>61</sup> Vizzard posits that these cases were not accidental, but rather the “result of a long, committed, and well-funded effort in pursuit of these goals by those who view gun rights as fundamental.”<sup>62</sup> Certainly, the Court’s decision to take a Second Amendment case after decades of silence on the issue marked the denouement of background gun-rights activism. We can understand these cases not as the decisions of a blind court fully removed from society, but rather as the product of the history, activism, and sociological conditions that preceded them. *Heller* and *McDonald*, marking the first time that pushback to sub-federal gun laws had actually been granted certiorari by the Court, can be understood as the culmination of cultural forces pushing and pulling at Second Amendment interpretation.

In short, *Heller* was viewed as the culmination of the NRA’s years of attempting to maneuver just such a case before just such a court, as Justice Antonin Scalia dealt a death blow to the Second Amendment’s dependence on a militia clause. Writing for the majority, Justice Scalia stated, “nowhere else in the Constitution does...’the people’ refer to anything other than an individual right.”<sup>63</sup> The Court also answered the question of which weapons were protected, writing that “the term [arms] was applied...to weapons that were not specifically designed for military use.”<sup>64</sup> For the first time, handguns were specifically outlined as protected weapons under the Second Amendment, with self-defense cited as the principal purpose. The Court was exceedingly clear that while the government may still opt to enact regulations for the aim of protecting public safety, not all laws would pass constitutional muster, stating that “the enshrinement of constitutional rights necessarily takes certain policy choices off the table.”<sup>65</sup> *McDonald* followed two years later, clarifying that although *Heller* occurred in the federal enclave of Washington D.C., the Second Amendment is enforceable against the states.

Our investigation ends in the current day, with the June 2022 holding in *New York State Rifle & Pistol Association Inc. v Bruen*<sup>66</sup> striking down New York’s effective ban on public carriage of handguns by ordering permits to be granted upon request (with a “shall-issue permit”) instead of at state discretion (“may issue”). Indeed, we see this as confirmation that the history of firearms regulation over the last century has maintained a clear pattern.<sup>67</sup> As the Court continues to expand the scope of the Second Amendment, *Bruen* marks the culmination of this progression, extending the Amendment into the public square for the first time. While many of the early twentieth century courts stuck to prevailing social norms in consistently viewing the Second Amendment as a limited collective right, today’s Supreme Court has aligned itself through *Heller*, *McDonald*, and now *Bruen* with a legal theory engineered by the powerful gun lobby.

However, we cannot assume that this spells the end of all restrictions on guns. In his dissent to the majority decision in *Heller*, Justice Stephen Breyer noted that “the adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible...the Court has deemed the interest of [government’s concern for the safety and the lives of its citizens] to be compelling.”<sup>68</sup> Scalia, writing for the majority, agreed with this sentiment, stating, “The Second Amendment right is not unlimited. It is not a right to keep and carry any weapons whatsoever in

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any manner whatsoever and for whatever purpose.”<sup>69</sup> Indeed, the Court even cited *Miller* as a valid justification for prohibiting “dangerous and unusual weapons.”<sup>70</sup>

So it is overwhelmingly clear that some forms of gun control are in fact legally tenable in the form of qualifying standards for “shall issue” permits. The exact shape of these forms is currently evolving in various legislatures across the country, including New York, which is currently testing the waters with a range of new restrictions declaring swaths of the city as gun-free zones. Nevertheless, it is plain that the confluence of American culture and politics has made a clear statement through the judicial branch, strengthening American gun rights perhaps even more than the founders themselves anticipated.

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<sup>1</sup> The prefatory clause of the Second Amendment reads “A well regulated Militia, being necessary to the security of a free State,” whereas the operative clause provides that “the right of the people to keep and bear Arms, shall not be infringed.” Of course, this is grammatically incorrect. The extra comma which separates what otherwise would be a cohesive sentence allows a lay reading of the militia language in the prefatory clause as unconnected to the right to keep and bear arms. This inclusion is believed to have been unintentional and not able to be corrected before ratification. Perhaps no other grammatical error has led to so much national confusion.

<sup>2</sup> At least, this applies for those persons who qualified to bear arms. It is important to note that not all Americans were afforded the right to bear arms equally at the time, nor for many decades after.

<sup>3</sup> *District of Columbia v Heller*, 554 U.S. 570 (2008).

<sup>4</sup> *McDonald v City of Chicago*, 561 U.S. 742 (2010).

<sup>5</sup> *Ibid.*

<sup>6</sup> *New York State Rifle & Pistol Association, Inc. v Bruen*, 597 U.S. \_\_\_ (2022).

<sup>7</sup> Adam Winkler, “Gunfight: The Battle Over the Right to Bear Arms in America,” 142 (2011).

<sup>8</sup> *Ibid.*, 142.

<sup>9</sup> *Ibid.*, 143.

<sup>10</sup> *Ibid.*, 144.

<sup>11</sup> *Ibid.*

<sup>12</sup> This practice of affording gun rights based on group status (here, Protestants only) has continued throughout our own history, as some have not been privileged with the same right to bear arms as others. Indeed, African-Americans have seen this right restricted on the basis of lacking equal citizenship throughout early American history, such as with the Black Codes during the Jim Crow Era.

<sup>13</sup> *Ibid.*

<sup>14</sup> Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 *Hastings Const. L.Q.* 285, 3 (1983).

<sup>15</sup> Kopel, David B., *How the British Gun Control Program Precipitated the American Revolution*, 6 *Charles. L. Rev.* 283, 288 (2012).

<sup>16</sup> *Ibid.*, 292-293.

<sup>17</sup> *Ibid.*, 295.

<sup>18</sup> *Ibid.*, 297.

<sup>19</sup> *Essex Gazette*, April 25, 1775, at 3, col. 3

<sup>20</sup> U.S. Const. Amend. II.

<sup>21</sup> Joye Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 *Hastings Const. L.Q.* 285, 44 (1983).

<sup>22</sup> *Ibid.* at 4.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> Alexander Hamilton, *The Federalist Papers*, No. 29, Concerning the Militia, 387 (1788).

<sup>26</sup> *Ibid.*

<sup>27</sup> John K. Mahon, *History of the Militia*, 34.

<sup>28</sup> *Aymette v State*, 21 *Tenn.* 152, page 156 (Tenn. 1840).

<sup>29</sup> *Ibid.*

<sup>30</sup> Ibid.

<sup>31</sup> *State v Wilburn*, 647 S.W.3d 893, page 1, (Tenn. Crim. App. 2021).

<sup>32</sup> Similar to the banning of the “Saturday Night Special” in the later 20<sup>th</sup> century. An inexpensive, cheaply produced revolver, the “special” was disproportionately used in crime due to its low cost and wide availability. Here again, we might also reasonably suspect that racial undertones may have been at play with this law in Tennessee, as presumably a pistol qualifying for military use could have higher quality and thus be more expensive, meaning harder to obtain for the poorest citizens (as opposed to other, more cheaply manufactured weapons). Indeed, the full text of the law makes mention of “dirks, sword-canes and revolvers,” all surely cheaper and easier to own than an army pistol.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> *Presser v Illinois*, 116 U.S. 252, page 1, (US Supreme Court 1886).

<sup>36</sup> Ibid.

<sup>37</sup> *United States v Miller*, 307 U.S. 174 (1939).

<sup>38</sup> Brian L Frye, “The Peculiar Story of United States v. Miller,” 3 *NYU Journal of Law & Liberty* 48, 49 (2008).

<sup>39</sup> Ibid, 50.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid, 75.

<sup>42</sup> Ibid, 82.

<sup>43</sup> Ibid, 81.

<sup>44</sup> William J. Vizzard, “The Current and Future State of Gun Policy in the United States,” 104 *Journal of Criminal Law and Criminology* 879, 879 (2015).

<sup>45</sup> Ibid, 880.

<sup>46</sup> This incident is significant in several ways. Also known as the “Texas Tower Shooting,” the event led to the development of police Special Weapons and Tactics (SWAT) teams after police nationwide began to realize they were largely unequipped and underprepared to deal with increasingly violent actors armed with increasingly powerful weapons. We can conclude that this incident led not only to further efforts to increase gun control, but also to a proliferation of specially designed and improved weapons for police departments, thereby eventually adding a new angle to what would become the overall gun debate in America.

<sup>47</sup> National Rifle Association, *A Brief History of the NRA*, online at <https://home.nra.org/about-the-nra/> (visited Apr 14, 2022).

<sup>48</sup> William J. Vizzard, “The Gun Control Act of 1968,” 18 *Saint Louis University Public Law Review* 79, 81 (1999).

<sup>49</sup> Vizzard, “The Current and Future State of Gun Policy,” 896.

<sup>50</sup> Ibid, 882

<sup>51</sup> Ibid, 883.

<sup>52</sup> Even these restrictions are not fully effective. Non-restricted persons under the GCA may still purchase select-fire weapons manufactured prior to the ban or may themselves become federal firearms dealers with simple paperwork and purchase newly manufactured ones under that license.

<sup>53</sup> Ibid, 883.

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<sup>54</sup> *Ibid*, 884.

<sup>55</sup> These laws vary from one extreme end of the ideological spectrum to the other. Several states, including Alaska and North Dakota, have legalized so-called “constitutional carry” which allows for permitless carry, concealed or unconcealed. Other states, such as Hawaii and New York, effectively hamper the ability of carriage entirely by refusing to issue permits in almost all cases. Hawaii even threatens to arrest visiting armed law enforcement officers, even though the right of sworn officers to carry their duty weapons is protected by federal law.

<sup>56</sup> Timothy D. Litton, *Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Advocacy*, 22 *Fordham Urb. L.J.* 417 (1994), 2.

<sup>57</sup> *Ibid*, 2.

<sup>58</sup> *Ibid*, 2.

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<sup>60</sup> *District of Columbia v Heller*, 554 U.S. 570 (2008).

<sup>61</sup> *McDonald v City of Chicago*, 561 U.S. 742 (2010).

<sup>62</sup> *Ibid*, 887.

<sup>63</sup> *District of Columbia v Heller*, 554 U.S. 570, 6 (2008).

<sup>64</sup> *Ibid*, 8.

<sup>65</sup> *Ibid*, 64 .

<sup>66</sup> *New York State Rifle & Pistol Association, Inc. v Bruen*, 597 U.S. \_\_\_ (2022).

<sup>67</sup> Vizzard, *The Current and Future State of Gun Policy*, *NW Un.*, 881.

<sup>68</sup> *Heller*, 554 U.S. 570, 9 (2008) Breyer Dissent.

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***Dissenting Opinion to Oliphant v Suquamish Indian Tribe  
(1978)***

Shera Bhala | Dartmouth College

Edited by Virginia Lo, Aurelia Tan, Kira Ratan, Laiba Syeda, Isabel Randall,  
Oliver Schneider, Martina Daniel

**Abstract**

*Oliphant v Suquamish Indian Tribe* (1978) is the most devastating Supreme Court decision for Native American tribes in the modern era (1970s – Present). The holding, which deprives tribes of the inherent power to prosecute non-Native Americans for crimes committed on reservations, continues to threaten tribal communities and erode indigenous sovereignty. In the dissenting opinion, Justice Thurgood Marshall (joined by Chief Justice Warren Burger) wrote, “[i]n the absence of affirmative withdrawal by treaty or statute, I am of the view that Indian tribes enjoy, as a necessary aspect of their retained sovereignty, the right to try and punish all persons who commit offenses against tribal law within the reservation.” Justice Marshall rightly noted both the inherent powers of tribes as sovereigns and the essentiality of criminal jurisdiction to tribal self-governance. Motivated by the implications of this decision, and the power of Justice Marshall’s pen, I present a dissenting opinion to *Oliphant*. This opinion is written as if it were contemporaneous with the Court’s *Oliphant* decision. The problematic term “Indian” is used only in this article in the context of external quotations or official legal phrases.



**JUSTICE BHALA**, dissenting.

The majority decision in *Oliphant v Suquamish Indian Tribe* (1978) is proof positive that at the end of the Trail of Tears there are more tears. Scarcely in the annals of its modern jurisprudence on Native American affairs has this Court issued a decision so parlous in legal reasoning, so ignorant of historical context and future implications, and so culturally insensitive in its undertones. For these reasons I dissent. I would uphold the decision of the United States Court of Appeals for the Ninth Circuit. That is, I would hold that indigenous tribes, by virtue of their inherent sovereignty, have jurisdiction to try non-Native Americans for criminal offenses committed in “Indian Country.”<sup>1</sup>

### **I. *OLIPHANT v SUQUAMISH INDIAN TRIBE***

For Native American tribes, *Oliphant* is now a name synonymous with loss. Specifically, the loss of territorial sovereignty. In any sovereign nation, a person who enters that territory is subject to its laws. For instance, a French person traveling in the United States is subject to American laws and, likewise, an American visiting France is accountable to French laws. Similarly, prior to *Oliphant*, a non-Native American visiting or living on a reservation was subject to tribal laws. *Oliphant* not only challenged the very essence of this territorial sovereignty, but eviscerated it. That is why this case is so devastating.

Since 1911, the Suquamish Tribe has reserved the third weekend of August for the annual Chief Seattle Days Celebration. It is a three-day festival honoring the Chief who established the tribe’s Port Madison Reservation and for whom the most populous city in Washington is named. In 1973, chaos disrupted the Chief Seattle Days Celebration.

Mark David Oliphant, a white resident of the Port Madison Reservation, was arrested by tribal authorities for assaulting a tribal police officer and resisting arrest. Similarly, Daniel B. Belgarde was arrested by tribal authorities after a high-speed car chase along reservation highways that resulted in a crash with tribal police vehicles. The two men filed writs of habeas corpus, claiming that the Suquamish Tribe had no right to detain and try them as non-Native Americans.

The Suquamish Tribe argued that, as a sovereign tribal nation, the tribe possesses inherent powers that grant it criminal jurisdiction over non-Native Americans. The invocation of inherent powers here is important. In the canon of Native American law, there are three sources from which tribes can derive their power: inherent (or retained) power, delegated power from Congress, and treaty-based power. The Suquamish Tribe argued that its power to prosecute non-Native Americans is not sourced from Congressional authorization or a treaty provision, but rather from the very nature of it being a sovereign entity that predates the founding of the United States. The United States Court of Appeals for the Ninth Circuit agreed, stating that criminal jurisdiction is a *sine qua non* of tribal sovereignty.

Notwithstanding this rationale, this Court reversed the appellate decision. This Court held that indigenous tribes do not have jurisdiction over non-Native Americans for crimes committed in “Indian Country.” The majority’s reasoning excessively focuses on Congressionally delegated

power, treaty-based power, outmoded precedent, and a paternalistic relationship between the United States and indigenous tribes. This rationale fails to understand inherent powers, the established canon of interpretation for treaties with tribes, and consequentialist reasoning. In the following sections, I challenge the majority's reasoning by examining treaty history, legislative records, legal precedent, the danger of eroding inherent tribal power, and a consequentialist argument.

## II. TREATY HISTORY

The treaty history reflects the long-standing right of the tribes to exercise full authority over Native Americans and non-Native Americans in "Indian Country." Yet, the majority finds otherwise, ignoring the canon of interpretation in Native American law to read treaties as the tribes would have understood them. *McClanahan v State Tax Commission of Arizona*<sup>2</sup> (1973) articulates this principle:

"It is circumstances such as these which have led this Court in interpreting Indian treaties, to adopt the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'"

So, as an interpretive rule, we should look first to the plain meaning of the relevant text—words as they are commonly understood as manifest in lexicographic sources. Per *McClanahan*, we construe vague or ambiguous terms in texts liberally in favor of the tribes. Concomitantly, we foist the burden of proof on the non-Native American party that argues for an outcome that would diminish tribal sovereignty. We do so because, as this Court has held since *Worcester v Georgia* (1832),<sup>3</sup> tribes are "distinct, independent political communities," and the federal government has committed itself to promoting tribal self-governance. That allocation of legal burden stands on sound moral grounds. The status of the tribes in this trust relationship necessitates what philosophers, such as John Rawls, call "distributive justice" (*i.e.*, consideration of what society owes to individuals and groups), and what theologians in the Christian tradition refer to as the "preferential option for the poor" (*i.e.*, putting the most vulnerable first).<sup>4</sup>

However, the majority appears to actively read the relevant treaties in disfavor of the tribes, thus placing a high burden of proof on the disadvantaged party. Rather than recognizing the credible treaty evidence benefitting the tribes, the majority turns a blind eye to such provisions, reading them to not recognize tribal power or to repeal tribal sovereignty *sub silentio*. This reading sets a dangerous precedent to ignore the canon of interpretation—a canon that justly acknowledges the inequalities at the time of treaty making (1770–1871). It is also morally untenable. In opposition to the majority, I read the treaties to support tribal power over non-Native Americans in "Indian Country."

First, some of the earliest agreements between the Native American and American sovereigns, such as the 1786 treaties with the Five Civilized Tribes, clearly demonstrate tribal jurisdiction over non-Native Americans within "Indian Country." For example, the 1786 Treaty with the Shawnees states that if any non-Native Americans attempt "to settle on any of the lands

hereby allotted to the Indians to live and hunt on, such person shall forfeit the protection of the United States of America, and the Indians may punish him or not as they please.”<sup>5</sup> This language clearly grants the tribes legal power over non-Native American criminal offenders. However, the majority nonsensically concludes that this statement does not recognize inherent tribal authority to exercise criminal jurisdiction over non-Native Americans. The majority, burying its shallow reasoning in its footnotes, states: “[f]ar from representing a recognition of any inherent Indian criminal jurisdiction over non-Indians settling on tribal lands, these provisions were instead intended as a means of discouraging non-Indian settlements on Indian territory in contravention of treaty provisions to the contrary.”<sup>6</sup> This conclusion is perplexing, seeing that the treaty provision expressly affirms tribal jurisdiction over trespassing—a criminal offense—by non-Native Americans. Further, there is a dearth of credible evidence to complement the majority’s focus on the “intent” of the treaty provisions.

Second, the 1778 Treaty with the Delawares states that criminal acts by non-Native Americans in “Indian Country” and by Native Americans in American territory require “a fair and impartial trial [...] by judges or juries of both parties.”<sup>7</sup> This treaty acknowledges the agency of tribes in the adjudication of affairs regarding non-Native Americans on their lands. The majority perversely interprets this provision as well. The majority writes that, “[w]hile providing for Delaware participation in the trial of non-Indians, this treaty section established that non-Indians could only be tried under the auspices of the United States and in a manner fixed by the Continental Congress.”<sup>8</sup> This argument perverts the language of the treaty, which directly affirms that such trials would be “fixed by the wise men of the United States in Congress assembled, with the assistance of such deputies of the Delaware nation, as may be appointed to act in concert with them in adjusting this matter to their mutual liking.”<sup>9</sup> Despite the plain language of the treaty, the majority relies on a paternalistic argument centered on the supremacy of the American judicial system compared to the tribal courts. Moreover, the majority undermines its own case, introducing the treaty by stating that “[o]nly one treaty signed by the United States has ever provided for any form of criminal jurisdiction over non-Indians (other than the illegal-settler context noted above).”<sup>10</sup> Ultimately, the majority refuses to acknowledge the status of indigenous peoples as active participants and sovereigns in trials of non-Native Americans as provided by the Treaty with the Delawares.

Third, the majority, again obscuring its faulty reasoning in its footnotes, cites the lack of a specific clause regarding jurisdiction over non-Native Americans in the treaties signed by tribes in Washington in the 1850s to deny them of this jurisdiction *sub silentio*. Given the prior treaties, it is unfair to assume that agreements, by virtue of their silence on a subject, revoke inherent tribal powers over non-Native Americans. This reasoning by the majority also violates Felix Cohen’s theoretical guidelines for inherent tribal sovereignty, as recorded in *Cohen’s Handbook of Federal Indian Law*. This Handbook is regarded as a central text to understanding and interpreting Native American law and has been referred to as the “bible” of this field.<sup>11</sup> Cohen explains three central principles to understanding inherent powers: 1) consistent with the Marshall trilogy, prior to European contact, tribes possessed all the powers of a sovereign; 2)

conquest by the United States terminated the external powers of tribal sovereignty (for example, treaty-making with other nations), but did not impact the internal sovereignty of the tribes (for example, self-government); and 3) tribes retain all inherent sovereignty, which is only qualified by treaties and express legislation of Congress.<sup>12</sup> Considering these principles, these treaties cannot be read to extinguish the sovereign right to criminal jurisdiction, as there is no explicit repeal of such power.

Fourth, and by similar logic, the majority errs in reading the Treaty of Point Elliott (1855) to void tribal sovereign rights over non-Native Americans. The treaty makes no explicit remarks on such rights. Yet, the majority focuses on provisions in which the “tribes and bands acknowledge their dependence on the Government of the United States.”<sup>13</sup> The majority then speculatively concludes that “the Suquamish were in all probability recognizing that the United States would arrest and try non-Indian intruders who came within their Reservation.”<sup>14</sup> This argument is flawed in two significant ways. First, it again ignores the canon of interpretation and instead reads the treaty through a paternalistic viewpoint of the tribes as “dependents.” Second, it erroneously speculates on the “probability” of the Suquamish Tribe consensually relinquishing their rights to territorial sovereignty.

Finally, the majority cites the 1830 Treaty with the Choctaw Nation as evidence that tribes do not have inherent authority over non-Native Americans. However, there are two conflicting parts to this treaty: one in support of inherent tribal authority—the Choctaws are guaranteed “the jurisdiction and government of all persons and property that may be within their limits”—and one to “express a wish that Congress may grant to the Choctaws the right of punishing by their own laws any white man who shall come into their nation, and infringe any of their national regulations.”<sup>15</sup> Following the canon of interpretation and *Cohen’s Handbook*, the ambiguity in this 1830 Treaty ought to be read in favor of the tribes and their unequal level of understanding. The first provision, in stating “all persons,” establishes the right of tribes to prosecute any offending non-Native American. The second clause may also be interpreted to the tribe’s benefit, as perhaps a wish that the first provision explicitly states “any white man.” The 1830 Treaty should certainly not be read to dismiss the Native American case. Similarly, any value the majority finds in the Treaty with the Shawnees (1786) to support its ruling is outweighed by the preponderance of treaty evidence in favor of the tribes on which I have elaborated. Thus, the Suquamish Tribe never relinquished by treaty its authority to exercise criminal jurisdiction over non-Native Americans within the external boundaries of its reservation.

### III. LEGISLATIVE RECORD

Statutory analysis confirms this history as well. Section 16(h) of the Indian Reorganization Act of 1934<sup>16</sup> affirms inherent tribal sovereignty: “each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section.” Specifying the scope of this inherent power to criminal jurisdiction, the Indian Civil Rights Act (ICRA) of 1968 repeatedly applies its Bill of Rights-esque protections to

“any person.” For instance, Section 1302(a)(8) states that no tribe, in exercising powers of self-government, shall “deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.”<sup>17</sup> A plain reading of the text clearly suggests that “any person” within tribal jurisdiction includes Native Americans and non-Native Americans alike. This interpretation of the clause is especially evident given that Congress intentionally changed an earlier version of ICRA, which only applied its individual protections to “American Indians,” to the current version that applies to “any person.” Legislative history expressly states that this change was meant to extend the Act’s guarantees to “all persons who may be subject to the jurisdiction of tribal governments, whether Indians or non-Indians.”<sup>18</sup> Despite this, the majority concludes, without a viable rationale, that “this change was certainly not intended to give Indian tribes criminal jurisdiction over non-Indians.”<sup>19</sup> This Court generally takes expressions of Congressional intent at face value, and here the legislative actions regarding the modification in ICRA are unambiguous. Congress reasoned that non-Native Americans who commit offenses in “Indian Country” would logically be arrested and prosecuted by tribes—exercising their sovereign powers—and should be entitled to individual protections. But still, the majority refuses to acknowledge the strength of this legislative history to attest to the territorial sovereignty of the Suquamish Tribe. Instead, the majority stubbornly persists on denying the facts of the Congressional record.

The majority bases its argument concerning the legislative history on unconvincing inferences. Regarding the 1854 amendment to the Trade and Intercourse Act (1790), the majority focuses on the provision barring the retrial of a Native American in federal court who has already been tried in tribal court. There is not an equivalent provision that prohibits the retrial of a non-Native American in tribal court who has already been tried in federal court, and the majority interprets this to indicate an “unspoken assumption” that tribal courts lack jurisdiction over non-Native Americans.<sup>20</sup> Then, with the Major Crimes Act of 1885—itsself borne of prejudicial thought about the inferiority of indigenous peoples as “aliens and strangers” and their tribal court systems which do not know the “responsibilities of civil conduct [...] a standard made by others”—the majority assumes it implies the lack of tribal jurisdiction over non-Native Americans.<sup>21</sup>

Finally, concerning the never-enacted Western Territory bill (1834), the majority states that this legislation would have preserved jurisdiction of non-Native Americans for the United States, in order to keep its citizens within “competent tribunals of justice.”<sup>22</sup> This argument is not only offensive to the sophisticated tribal court systems that exist, but it is also flimsy in focusing on legislation that was never codified, as opposed to the evidentiary value of ICRA. The majority’s reliance on draft legislation only serves to underscore its inconsistent approach to *Oliphant*. Recognizing the weaknesses in its own argument, the majority concedes,

“[w]hile Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.”<sup>23</sup>

This holding should have concluded at the end of the first clause. As the majority admits, Congress has never explicitly prohibited the exercise of tribal sovereignty over non-Native Americans in “Indian Country.” Further, careful examination of the evidence the majority cites adduces no proof that Congress “consistently” believed tribes lack such criminal jurisdiction.<sup>24</sup> Coupled with its violation of the canon of interpretation for treaties, the majority flouts the prevailing understanding that tribes retain all aspects of sovereignty not explicitly eliminated by the federal government.

While the majority argues for the “unspoken assumption” of the 19<sup>th</sup> century that tribal courts lacked jurisdiction to try non-Native Americans, there is evidence to the contrary. Federal authorities generally left whatever jurisdiction was not expressly excised by treaties or legislation to the tribes. An 1834 House Report concerning a bill to regulate jurisdiction in “Indian Country” stated that, assuming the power has not been taken away by the government, a tribe has “jurisdiction over all persons and property within its limits.”<sup>25</sup> With any sovereign, any person who enters “Indian Country” “must be considered as voluntarily submitting themselves to laws of the tribes.”<sup>26</sup> *Ergo* the clear signage at the entrances to the Port Madison Reservation indicating the implied consent of entrants to tribal jurisdiction.

#### IV. LEGAL PRECEDENT

In addition to treaty and statutory support and inherent power (as defined by Cohen to mean those sovereign powers retained by the tribes, qualified only by express treaty language or Congressional mandate), past rulings from this Court reveal the errors and injustices of the majority decision in *Oliphant*. The majority urges that there must be clear authorization from Congress for tribes to have criminal jurisdiction over non-Native Americans on tribal lands. That is not the liberal reading, nor the burden of proof allocation, that this Court championed in *Williams v Lee* (1959), *United States v Mazurie* (1975), and *McClanahan*.

In *Williams*, albeit regarding a civil matter about debt collection, the Court upheld inherent tribal sovereignty over non-Native Americans on reservation lands. The Court ruled, “[i]t is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there [...] If this power is to be taken away from [the tribes], it is for Congress to do it.”<sup>27</sup> *Williams* maintains the proposition that, by nature of being a sovereign, the tribe has the authority to regulate affairs that occur within the bounds of its territory. Rightly, the emphasis for this important matter of inherent sovereignty is placed on whether Congress ever qualified this power, not whether Congress delegated the power. The Ninth Circuit correctly applied this line of thinking in its *Oliphant* decision.

In *Mazurie*, the Court upheld the extension of a tribe’s alcohol prohibition law to non-Native Americans on reservation lands. The Court was not persuaded by the white defendant’s argument that the tribes were merely private associations, whose laws do not extend to non-Native Americans within “Indian Country.” Specifically, the Court stated that “[g]iven the nature of the [bar’s] location and surrounding population, the statute was sufficient to advise the Mazuries that their bar was not excepted from tribal regulation by virtue of being located in a

non-Indian community.” Thus, the Court upheld the right of tribes to exercise legal power (in this case, delegated power from Congress) over non-Native Americans in “Indian Country.” While an imperfect parallel to *Oliphant*, in *Mazurie*, Justice William Rehnquist rightly recognized that Native American tribes are unique entities, exercising sovereignty over their territory.

Finally, *McClanahan* held that states cannot impose personal income taxes on Native Americans who live on reservations for income earned exclusively on the reservation. Promulgating the nature of tribal sovereignty, the *McClanahan* opinion applies to our interpretation of *Oliphant*:

“[t]he Indian sovereignty doctrine [...] provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.”<sup>28</sup>

The Court must think of tribal sovereignty as legitimate, historical, and important, qualified only by those express statements of Congress. Indeed, *McClanahan* affirms that “state courts have been allowed to try non-Indians who committed crimes against each other on a reservation. But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive.”<sup>29</sup> Therefore, *McClanahan* maintains that tribes have the power to prosecute non-Native American offenders. The Court has established precedent, which must not be overlooked, concerning the scope of inherent tribal powers to exert jurisdiction over non-Native American criminal offenders in “Indian Country.”

Despite this support for tribal power, the majority neglects any discussion of *Williams*, *Mazurie*, or *McClanahan*. Rather than citing these relevant cases and the interpretive principles, the majority looks to *Ex Parte Kenyon* (1878). The majority is sparse with details on *Kenyon*, claiming that “[a]t least one court has previously considered the power of Indian courts to try non-Indians, and it also held against jurisdiction.”<sup>30</sup> However, when the facts and rationale of the case are analyzed, one can clearly distinguish it from *Oliphant*.

In *Kenyon*, the white petitioner had lived on Cherokee Nation’s lands, but, following the death of his wife, left the reservation and took their horse to his new home in Kansas. The Cherokee Nation tribal court tried and convicted him for larceny of the horse. He petitioned the federal district court in Arkansas for a writ of habeas corpus, arguing the Cherokee Nation had no right to exercise jurisdiction over him as he was a resident of the State of Kansas, not a tribal member. The court granted habeas corpus, but based on critical facts that distinguish this case from *Oliphant*.

The *Kenyon* court found that the offense was not even committed within “Indian Country,” emphasizing that the larceny, if any, would have occurred “beyond the place over which the Indian court had jurisdiction.”<sup>31</sup> In contrast, *Oliphant* assaulted a tribal police officer within the Port Madison Reservation. While the *Kenyon* opinion fails to provide substantial credence to inherent tribal powers to exercise jurisdiction over any person committing an offense

on tribal territory, it also fails to support the majority's sweeping claim that tribes consistently lacked the power to prosecute non-Native Americans.<sup>32</sup>

In fact, even the state of Washington's amicus brief (on the side of petitioner *Oliphant*), conceded that *Kenyon* is not controlling.<sup>33</sup> Further, the judge in *Kenyon* stated, "this court has no disposition in the slightest degree to trench on the jurisdiction of the courts of the Indian Territory, but, on the contrary, will respect and uphold such jurisdiction."<sup>34</sup> Disregarding the critical facts of *Kenyon*, the majority nevertheless cites it in *Oliphant*. Worse yet, the majority reverts to obsolescent precedents grounded in the thought of indigenous peoples as racial inferiors to justify its holding.

## V. CRITIQUE OF IMPLICIT DIVESTITURE

Drawing from *Johnson v McIntosh* (1823), *Cherokee Nation v Georgia* (1831), and *United States v Kagama* (1886), the majority takes the liberty of establishing a new doctrine — implicit divestiture—lethal to the existence of inherent tribal sovereignty. The majority claims that tribal sovereignty can be, and has been, implicitly divested by nature of the status of tribes as "dependents" that submit to the "overriding sovereignty of the United States."<sup>35</sup>

In *Johnson*, tribes were dispossessed of their inherent powers to own and sell their homelands. The Court, through a rhetoric of moral superiority, deemed Native Americans as mere "occupants" of the lands. In the field of Native American law, *Johnson* is recognized as the case in which tribes first lost their power. In *Cherokee Nation*, the tribes lost their rights to be treated as foreign states, instead being established as "domestic dependent nations."<sup>36</sup> *Cherokee Nation* thus created the relationship between the United States and the tribes. And, per *Kagama*, the federal government exercises plenary power over tribal affairs, which itself is found in the extratextual attachment of "guardian powers" to an already bloated Article I, Section 8 Commerce Clause. The justifications for these rulings are problematically rooted in the colonizing mentality of Manifest Destiny.<sup>37</sup>

But still, the majority adopts the paternalistic reasoning in these three cases to reason that inherent tribal power need not be explicitly removed by treaty or act of Congress, but that it can be implicitly divested through the condition of the tribes as "wards" to the United States government. Extending early 19<sup>th</sup>-century reasoning to 1978, the majority adds a lack of criminal jurisdiction over non-Native Americans to the laundry list of other "inherent limitations on tribal powers that stem from their incorporation into the United States."<sup>38</sup> This dangerous application of antediluvian precedent gives the federal government, including the judiciary, the power to find, at any moment and upon any emergency, that tribal inherent powers are implicitly divested by being "inconsistent" with the status of tribes as "wards."<sup>39</sup>

With this conclusion, the majority also overlooks a historic precedent more relevant to our modern times. *Worcester* held that state laws are generally inapplicable in "Indian Country" and affirmed the status of tribes as political bodies with rights to self-governance. While acknowledging the trust relationship between the United States and tribes, *Worcester* still asserted that "[p]rotection does not imply the destruction of the protected."<sup>40</sup> Yet in *Oliphant*, the



majority allows for destruction of the protected by nature of protection. The application of this rationale flagrantly ignores the historical practice that a tribe might punish non-Native Americans within its jurisdiction and problematically thrusts us back into a shameful history. And, the dependence of the majority on implicit divestiture reveals its opinion to be an intransigent holding in search of any rationale. Ultimately, as Native American law scholar N. Bruce Duthu concludes in his study of the erosion of tribal sovereignty, this Court is fashioning “a legal rule out of the detritus of unequal colonial relations between Indian tribes and the federal government.”<sup>41</sup>

### VI. PAST CONTEXT AND FUTURE IMPLICATIONS

The *Oliphant* decision does not exist in a vacuum of the present, shielded from the past and future. As stated repeatedly, our interpretative methodology cannot be willfully blind to the cruel context in which these texts and precedents arose. Centuries of violence perpetrated against indigenous tribes by European colonial powers, and then by the United States, continue to frame the legal issues afflicting them. Acting as the “superior” sovereign, the United States forced indigenous peoples to abandon their ancestral homelands for lands west of the Mississippi (Removal Period, 1820 – 1850), crammed them onto Reservations (Reservation Period 1850 – 1890), confined them within allotted lands and actively dismantled tribal government systems (Allotment and Assimilation Period 1870 – 1930), and later terminated their unique status and the government-to-government relationship (Termination Period 1950 – 1960). As Justice Thurgood Marshall espoused in *McClanahan*, it must not be forgotten that the tribes were a peaceful, independent people prior to the covetous impulses of Western colonizers. In *Le Père Goriot*, Honoré de Balzac wrote that, “behind every great fortune lies a great crime.”<sup>42</sup> Behind the prosperity of America lies the genocide of Native Americans.

Further, we must not ignore common sense consequential reasoning. To try a person for crimes committed in a sovereign’s territory is a touchstone of sovereignty, and to deny this power will surely have catastrophic implications. The majority itself acknowledges this impending catastrophe: “we are not unaware of the prevalence of non-Indian crime on today’s reservations which the tribes forcefully argue requires the ability to try non-Indians.”<sup>43</sup> And yet, the majority blithely proceeds, ordering a sweeping limitation on the criminal jurisdiction of tribes.

Indeed, the judicial harm of this limitation will be great. The crime rate in tribal areas has long been higher—by over twice as much—than the national average. Indigenous women face disproportionate sexual violence and domestic violence rates, especially at the hands of non-Native American abusers. Thus, the consequences of this decision are treacherous. First, by its rationale, the majority signals a lack of confidence in the competence of tribal justice systems—so much so that non-Native Americans should not be subject to these systems. This belief only serves to undermine the legitimacy of tribal courts. Second, by prohibiting tribal criminal jurisdiction over non-Native American offenders, this Court permits “Indian Country” to become a lawless land, where crimes can go unaddressed by slipping through the cracks. The non-Native

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American offenders will now be subject to federal or state prosecution, but oftentimes these departments do not have sufficient time or resources to address these crimes in “Indian Country.” Studies show that non-Native American sexual assailants are rarely prosecuted by federal and state prosecutors.<sup>44</sup> With a lack of judicial enforcement, it is to be predicted that violent crime, particularly against women, will increase on reservations.

### VII. CONCLUSION

Two white residents of the Suquamish Tribe’s Port Madison Reservation in Washington harmed tribal police officers and their property during the annual Chief Seattle Days celebration. These criminal acts occurred on sovereign land. Yet, because of *Oliphant*’s holding, that sovereign—the Suquamish Tribe—is denied its right to hold the offenders legally accountable. Today, this Court has deprived tribes of crucial jurisdictional power and, by doing so, destroyed the very notion of territorial sovereignty. In neglecting the canon of interpretation in Native American law and creating the devastating doctrine of implicit divestiture, this Court prioritizes its obsession with “protecting” the individual rights of non-Native Americans living in “Indian Country” over the rights of long-oppressed indigenous peoples to self-govern. The majority has further stripped away what is left of tribal sovereignty, and it has done so on this most important of matters. That is to be mourned.

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<sup>1</sup> As defined in the Indian Country Statute (1948) in Title 18 of the United States Code, “Indian Country” includes 1) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights of way running through the reservation; 2) all dependent Indian communities; and 3) all Indian allotments.

<sup>2</sup> *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 174 (1973).

<sup>3</sup> *Worcester v. Georgia*, 31 U.S. 515, 519 (1832).

<sup>4</sup> John Rawls, *A Theory of Justice*, 35 (Harvard University Press 1971).

<sup>5</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197 (1978).

<sup>6</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197 (1978)

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> “Treaty with the Delawares,” (Washington Government Printing Office 1904), online at <https://americanindian.si.edu/static/nationtonation/pdf/Treaty-with-the-Delawares-1778.pdf> (visited November 1, 2022).

<sup>10</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197 (1978).

<sup>11</sup> Nell Jessup Newton, et al., *Cohen’s Handbook of Federal Indian Law*, (LexisNexis 2012), online at <https://hls.harvard.edu/bibliography/cohens-handbook-of-federal-indian-law/> (visited November 1, 2022).

<sup>12</sup> Robert Anderson, et al., *American Indian Law: Cases and Commentary* 4<sup>th</sup> ed (Saint Paul: West Academic Publishing, 2020), 545.

<sup>13</sup> Duwamish Tribe, “Treaty of Point Elliott,” online at <https://www.duwamishtribe.org/treaty-of-point-elliott> (visited June 6, 2022).

<sup>14</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 207 (1978).

<sup>15</sup> *Ibid.*, 197.

<sup>16</sup> 25 U.S.C. 461 (1934).

<sup>17</sup> Anderson, *American Indian Law: Cases and Commentary*, 342.

<sup>18</sup> *Federal Court Review of Tribal Courts Rulings in Actions Arising Under Indian Civil Rights Act, Before the Select Committee on Indian Affairs*, 102<sup>nd</sup> Congress, 97 (1991)

<sup>19</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

<sup>20</sup> *Ibid.*, 203.

<sup>21</sup> *Ex Parte Crow Dog*, 109 U.S. 556, 571 (1883).

<sup>22</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 202 (1978).

<sup>23</sup> *Ibid.*, 204.

<sup>24</sup> *Ibid.*

<sup>25</sup> Anderson, *American Indian Law: Cases and Commentary*, 541.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Williams v Lee*, 358 U.S. 217, 223 (1959).

<sup>28</sup> *McClanahan v Arizona Tax Commission*, 411 U.S. 164, 172 (1973).

<sup>29</sup> *McClanahan v Arizona Tax Commission*, 411 U.S. 164, 171 (1973).

<sup>30</sup> *Oliphant v Suquamish Indian Tribe*, 435 U.S. 191, 199 (1978).

<sup>31</sup> *Ex Parte Kenyon*, 5 Dill. 385, 389 (United States Circuit Court W.D. Arkansas 1878).

<sup>32</sup> The majority cites *Kenyon* for support that tribes only have jurisdiction over Native American offenders committing crimes against Native American victims. However, this statement has been

referred to as “pure dicta” by attorney Samuel Ennis, and is irrelevant given the prevailing facts and canon of interpretation.

<sup>33</sup> Samuel Ennis, “Implicit Divestiture and the Supreme Court’s (Re)Construction of the Indian Canons,” *Vermont Law Review* 35, no. 3 (2011): 623-687.

<sup>34</sup> *Ex Parte Kenyon*, 5 Dill. 385, 388 (United States Circuit Court W.D. Arkansas 1878).

<sup>35</sup> *Oliphant v Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978).

<sup>36</sup> *Cherokee Nation v Georgia*, 30 U.S. 1, 17 (1831).

<sup>37</sup> N. Bruce Duthu, “The New Indian Wars: Tribal Sovereignty, The Courts, and Judicial Violence,” *Revue Française d’Études Américaines* 144, no. 3 (2015): 78-94.

<sup>38</sup> *Oliphant v Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978).

<sup>39</sup> *Ibid*, 208.

<sup>40</sup> *Worcester v. Georgia*, 31 U.S. 515, 518 (1832).

<sup>41</sup> Duthu, “The New Indian Wars: Tribal Sovereignty, The Courts, and Judicial Violence,” 83.

<sup>42</sup> Honoré de Balzac, *Le Père Goriot*. (Paris: Alexandre Houssiaux, Éditeur, 1855), 210.

<sup>43</sup> *Oliphant v Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

<sup>44</sup> N. Bruce Duthu, “Broken Justice in Indian Country,” *The New York Times*, August 10, 2008. <https://www.nytimes.com/2008/08/11/opinion/11duthu.html> (visited June 6, 2022).

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***An Oliphant Fix: Delegalizing Rape in Indian Country***

Gabrielle Levy | Dartmouth College

Edited by Jino Kim, Isabelle Cherot, Jeffrey Stein, Gabriel Fernandez, Robin Hess, Clara Hu, David Cho, Avery Lambert

**Abstract**

In this paper, I examine the nature and scope of tribal criminal jurisdiction to redress crimes of violence against Native women. I begin by discussing the horrific problem of violence against Native women in Indian country. I explain how the law fails to protect Native women and how the federal government has failed to fulfill its duties under the trust doctrine and international human rights law. I then provide an overview of the current legal framework in place to address crimes of violence against Native women in Indian country, including an analysis of the limitations of current laws and Supreme Court precedents. Finally, I assert that, to protect Native women from violence, the decision in *Oliphant v Suquamish Indian Tribe* (1978) must be reversed. In this decision, the Supreme Court ruled that non-Indians were not subject to the jurisdiction of tribal courts even if they lived in Indian country and committed crimes on the reservation. This decision was devastating for tribes and is at the heart of the current epidemic of violence against Native women. With the understanding that overruling *Oliphant* will be a long and arduous process, I also argue that, in the short term, Congress must allocate more federal monies to fund tribal justice systems and must also increase the tribal sentencing limit of three years under the Tribal Law and Order Act.

*“The partial restoration of tribal jurisdiction in VAWA 2013 is just a sliver of the full moon we need to ensure all of our women are safe. Until all of our tribes’ jurisdiction is fully restored, no one is safe.”*

- Lisa Brunner, activist & survivor (White Earth Ojibwe)

Native women living in the United States today are subject to a horrifying epidemic of violence: Native women face rates of abuse, murder, and sexual assault higher than any other group.<sup>1</sup> In some areas of the country, Native women are murdered at rates ten times higher than the national average.<sup>2</sup> According to a 2016 study conducted by the National Institute of Justice (NIJ), more than four in five Native women (84.3 percent) report experiencing violence in their lifetime, and over half of Native women report experiencing sexual violence.<sup>3</sup> Though Native American women represent only 0.8 percent of the total population, they constitute 1.8 percent of the missing persons list.<sup>4</sup> Importantly, the majority of crimes against Native women are committed by non-Indian perpetrators – in other words, individuals over whom tribes have no jurisdiction. Thus, many of these crimes go unpunished and communities are left unprotected. Though progress has been made toward protecting and ensuring justice for Native women since the devastating ruling made in the Supreme Court case *Oliphant v Suquamish Indian Tribe* in 1978, in which the Supreme Court held that “Indian tribes lacked inherent sovereign power to prosecute non-Indian defendants for violations of tribal law,” the United States still has a long way to go.<sup>5</sup> To protect Native women from violence and achieve justice, the United States must restore territorial sovereignty to Native American tribes by overruling the decision made in *Oliphant*.

In this paper, I will critically examine the nature and scope of tribal criminal jurisdiction to redress reservation-based crimes against Native women. I will begin by discussing the problem at hand – namely that the current legal framework operating in the US today fails to protect Native women from violence. Within this discussion, I will examine the role of settler colonialism in perpetuating violence. I will then review the existing legal doctrines and federal statutes governing tribal criminal jurisdiction. Lastly, I will propose changes that must be made to end the epidemic of violence against Native women in Indian country.

### **Section I: The Problem of Violence and its Colonial Roots**

*In 2005, two Native women were raped by three non-Native men in Oklahoma. In both cases, the perpetrators forced the women to wear blindfolds. Because the women were blindfolded, they were unable to say whether the rapes took place on federal, state, or tribal land. In turn, this uncertainty about the location of the crimes affected the ability of the women to obtain justice.<sup>6</sup>*

The case above makes clear that the current legal framework operating in the United States today fails to protect Native women. When justice is not served, perpetrators are free to continue enacting violence against Native women. Indeed, as discussed in the introduction, Native women living on reservations are subject to shocking rates of violence. Importantly, the incidence of violence increased dramatically after the *Oliphant* decision in 1978, in which the



Supreme court granted non-Indian perpetrators immunity from tribal jurisdiction by ruling that tribes lack inherent jurisdiction to prosecute crimes committed by non-Indians in Indian country. As a consequence of this decision, while tribal governments have criminal jurisdiction over tribal members in Indian country (*United States v Wheeler*, 1978), they do not have criminal jurisdiction over non-Indians.<sup>7</sup> Perpetrators wasted no time in exploiting this jurisdictional gap and continue to do so to this day. Native women are frequently abused by either their non-Native husbands, other non-Native men living on the reservation, or non-Native males who live off the reservation and come onto the reservation with the intention to harm. It is common knowledge that non-Natives in Indian country can literally get away with murder—internet forums with horrifying names such as “How to rape a woman and get away with it” are rife with suggestions that non-Indians go to reservations “because you can do whatever you want there.”<sup>8</sup>

Though violence against Native women was without a doubt enabled by the ruling in *Oliphant*, its root causes can be traced back much farther. Indeed, violence against Native women stems directly from the legacy of white settler colonialism. Historically, in sharp contrast to the “patrilineal communities of the first European colonizers,” Native women were “honored, held in great esteem, and mainly lived in egalitarian societies.”<sup>9</sup> Colonization dramatically altered gender roles and the status of women in Native societies. Specifically, colonizers diminished Native women’s importance within society by insisting on dealing solely with Native men. At the same time, perversely, Native women became important objects of the colonial project; violence against Native women was seen as “an integral part of conquest.”<sup>10</sup> Legal scholar Sarah Deer asserts that violence was used by colonizers as a tool “to conquer and control Indigenous women and disconnect them from their land and bodies.”<sup>11</sup> The Indigenous social work scholar Hilary Weaver has described how colonization continues to harm to this day as it “bred stereotypes regarding Indigenous people, insinuating that they are less than human savages” and that “Indigenous women specifically do not deserve protection from violence.”<sup>12</sup> Thus, as put by lawyer and advocate Jacqueline Agtuca: “Sexual assault rates and violence against Native women did not just drop from the sky. They are a process of history.”<sup>13</sup>

Historical structures of violence rooted in colonialism have been propagated through harmful legal frameworks and have had far-reaching consequences. Indeed, violence enacted against Native women not only harms Native women physically and mentally but has devastating ripple effects within the tribal community at large. When Native women are not protected, Native children often suffer great consequences. For example, violence against Native women has likely contributed to the sky-rocketing rates of post-traumatic distress disorder observed among Indian children and communities at large. Put simply, the endangerment of Native women affects entire tribal communities by undermining tribal health and welfare, which in turn can threaten other factors such as self-determination and economic security.

### **Section II: Laws and their Limitations**

In the United States, a “jurisdictional maze” prevents Native women from receiving protection and justice.<sup>14</sup> Indeed, a 2007 Amnesty International report states that the federal government “has created a complex interrelation between these three jurisdictions [i.e., tribal,

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state, and federal] that undermines equality before the law and often allows perpetrators to evade justice.”<sup>15</sup> In this section, I will review in chronological order the major statutes and court cases that have affected tribal criminal jurisdiction. Throughout, I will provide both critique and analysis.

Originally, crimes committed by Indians against other Indians were handled exclusively by tribal courts. This changed in 1885, when Congress passed the Major Crimes Act (MCA). The MCA marks the start of federal attempts to undermine tribal criminal jurisdiction; it gave the federal government exclusive jurisdiction over major crimes, such as rape and homicide, committed by Indians against Indians in Indian country. The next major law affecting criminal jurisdiction, Public Law 280 (PL-280), was passed in 1953. PL-280 stripped jurisdiction over crimes committed on reservations from the federal government, but returned this power to *states* instead of tribes. Additionally, PL-280 did not affect all states equally. The law delegated federal jurisdiction over crimes committed on reservations to state governments in just six states – Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. Notably, although the Bureau of Indian Affairs reduced funding to tribal governments because of the shift in jurisdiction, Congress failed to provide additional funds to PL-280 states to support their new law enforcement responsibilities.<sup>16</sup> In this way, Congress made it clear that criminal justice in Indian country was not a priority.

About a decade later, the Indian Civil Rights Act (ICRA) of 1968 undermined the remaining elements of tribal criminal jurisdiction and severely reduced the ability of tribes to protect their members. ICRA limited the penalty that could be imposed by tribal courts for any criminal offense to a maximum of one year imprisonment and a fine of \$5,000. The underlying attitude of the ICRA was that tribal courts were not “real” courts and thus not competent enough to serve serious sentences. As a result of ICRA, tribal courts have been hesitant to prosecute serious crimes for fear that justice will not be served, worsening the impact of the jurisdictional gap that exists in Indian country.

Although the MCA, PL-280, and ICRA all undermined tribal criminal jurisdiction, by far the most devastating decision for the safety and well-being of Native women was no doubt the Supreme Court’s 1978 ruling in *Oliphant v Suquamish Indian Tribe*. In 1973, Mark David Oliphant, a non-Indian living on the Port Madison Indian Reservation in Washington, was arrested and charged by tribal police with assaulting a tribal police officer and resisting arrest. Oliphant applied for a writ of habeas corpus in federal court and claimed he was not subject to tribal jurisdiction. Though the lower courts denied the appeal, the Supreme Court reversed and ruled that tribes lack inherent jurisdiction to prosecute crimes by non-Indians in Indian country as a consequence of “implicit divestiture.” In other words, the Court ruled that tribal territorial sovereignty had been eviscerated as a result of tribal submission to US sovereignty. This holding has been harshly criticized by legal scholars, especially given that the Court “didn’t (and couldn’t) say exactly *when* or *how* tribes’ inherent authority had been divested.”<sup>17</sup>

The *Oliphant* ruling has had devastating impacts. Most importantly, it eviscerated the notion of tribal territorial sovereignty. Unlike any other sovereign in the world, tribes no longer

have jurisdiction over all individuals who commit crimes in their territories. Indeed, the practical consequence of *Oliphant* is that “if a non-Indian rapes an Indian woman on Indian land, even if there is no question of guilt, the tribe must rely on either state or federal officials to carry out any punishment.”<sup>18</sup> Unfortunately, state and federal officials have not risen to the occasion. As a result, the likelihood that a non-Indian perpetrator will be prosecuted by the federal government for a crime against a Native woman is exceedingly low. In 2018, US attorneys prosecuted only 60 percent of crimes reported on reservations – 65 percent of the cases that were declined for prosecution related to either physical assaults or sexual violence.<sup>19</sup> Other studies indicate that the federal government has only prosecuted one in four sexual assaults that occur on tribal lands.<sup>20</sup> Thus, not only are tribal courts prevented from punishing crimes committed against tribal members by non-Indians, but the federal government, which purported to take over the role, has been failing to do its job. Legal scholar Matthew Fletcher has asserted that “crimes such as domestic violence and misdemeanors call for a swift local response, a response the federal government, despite the best efforts of the US Attorneys, can rarely offer.”<sup>21</sup>

The Court provided a similar blow to tribal jurisdiction in the 1990 decision in *Duro v Reina*.<sup>22</sup> Albert Duro resided on the Salter River Reservation, home of the Salt River Pima-Maricopa Indian community, but was an enrolled member of a different tribe (the Torres-Martinez Band of Cahuilla Mission Indians). While living on the reservation, Duro shot and killed an Indian youth on the reservation and was charged by the tribal court with the illegal firing of a weapon (ICRA limited criminal penalties at the time to misdemeanors). After the tribal court denied Duro’s motion for dismissal for lack of jurisdiction, Duro filed a petition for writ of habeas corpus in District Court. The court granted the writ, holding that tribal jurisdiction over a non-member Indian violated the Equal Protection clause of the Indian Civil Rights Act. Ultimately, the Supreme Court also held that tribes do not have criminal jurisdiction over a non-member Indian and left the looming jurisdictional void up to Congress to resolve. Using the theory of the “consent of the governed,” the court reasoned that if tribes had been divested of their inherent power to prosecute non-Indians, then they “had been implicitly divested of their inherent authority to prosecute *all* nonmembers, including nonmember American Indians.”<sup>23</sup> The court argued that tribal jurisdiction could not follow without the ability of individuals subject to the jurisdiction to partake in the political life of the tribal nation and affect the brand of justice meted out by that nation.

As with *Oliphant*, the court once again severely undermined the ability of tribes to protect and provide justice to their members. Additionally, *Duro* was especially devastating given that there is regular intermixing of various tribal communities within reservation territory and that non-member Indians regularly take part in reservation life. Legal scholar Matthew Fletcher asserts:

Nonmember American Indians play a significant role in the daily life of any American-Indian community – they participate in cultural ceremonies and powwows, they intermarry, they may be drawn to other American-Indian

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communities through the operation of the foster care and adoption provisions of the Indian Child Welfare Act and federal health, housing, and educational programs.<sup>24</sup>

Fortunately, after much protest from tribal leaders, Congress chose to exercise its plenary power to take action in this instance, recognizing that the “Court’s reliance upon the membership of an American Indian was completely out of tune with the reality on the ground.”<sup>25</sup> Thus, in 1990, Congress enacted the Duro Fix, which amended the Indian Civil Rights Act and affirmed that Indian tribes had inherent power to exercise criminal jurisdiction over all Indians, regardless of membership. The Duro Fix represents one of the few “wins” in tribal criminal jurisdiction.

The Duro Fix was challenged almost fourteen years later in 2004 in *United States v Lara*.<sup>26</sup> Billy Jo Lara was an enrolled member of the Turtle Mountain band of Chippewa Indians but lived on the Spirit Lake reservation with his wife and children. Lara had repeatedly disturbed the peace and engaged in acts of domestic violence. On one occasion, federal officials from the Bureau of Indian Affairs arrested Lara on the Spirit Lake Reservation for public intoxication, during which Lara attacked a federal officer. The Spirit Lake tribe prosecuted Lara in tribal court for assault – Lara pleaded guilty and served 90 days in jail. Subsequently, the federal government charged Lara with the federal crime of assaulting a federal officer. Lara moved to dismiss the indictment under the premise that the federal charges were a violation of the Double Jeopardy Clause of the Fifth Amendment, but the District Court denied the motion. While the appellate court reversed, the Supreme Court held that Congress was authorized to recognize the inherent jurisdiction of tribes to prosecute non-member Indians and thus that Lara’s federal prosecution was not a violation of the Double Jeopardy clause. *Lara* thus was another win for tribes, affirming not only that tribes had jurisdiction over non-member Indians, but also that this power was an inherent one and not a product of federal delegation.

Together the Duro Fix and *Lara* have gone a “long way toward ensuring the swift response required for most of the potentially deadly domestic violence situations in Indian country.”<sup>27</sup> Nonetheless, high levels of violence against Native women and significant red tape surrounding issues of justice remain. By only overturning *Duro* and not *Oliphant*, Congress has complicated the issue of jurisdiction in Indian country – before a crime can be punished, authorities must determine whether the crime occurred in Indian country, whether the perpetrator was an Indian, and if so, whether the perpetrator was a member of a federally-recognized Indian tribe. Indeed, tribes do not have jurisdiction over members of non-federally recognized Indian tribes, as this would constitute an impermissible racial classification under *Morton v Mancari*.<sup>28</sup>

Congress further expanded tribal criminal jurisdiction in 2013 in the form of the reauthorization of the Violence Against Women Act (VAWA). VAWA gave tribes special, limited jurisdiction to prosecute non-Indian perpetrators for certain offenses related to domestic violence. Essentially, VAWA partially overturned *Oliphant* for a limited set of crimes. And in 2022, an additional set of crimes were included in the latest VAWA reauthorization. Notably, special criminal jurisdiction of tribal courts was expanded to cover non-Indian perpetrators of sexual assault, child abuse, stalking, sex trafficking, and assaults on tribal law enforcement officers on tribal lands. Though both authorizations are significant improvements, they do not go

far enough to fully restore tribal jurisdiction over non-Native perpetrators. Additionally, perpetrators can still challenge tribal convictions by writ of habeas corpus in federal court under ICRA. Thus, ultimately, the “federal courts’ treatment of tribal convictions on habeas review...will determine the law’s success in stemming the violence against women occurring throughout Indian country.”<sup>29</sup>

As a final note, three years before the 2013 VAWA reauthorization, in 2010, Congress passed the Tribal Law and Order Act (TLOA), which increased the ability of tribes to redress violence against women by increasing the sentencing authority of tribal courts. Specifically, TLOA enabled tribal courts to sentence Indian offenders to a three-year prison term instead of just one year. Though TLOA was certainly a step in the right direction, it was a minimal one at best and failed to restore any jurisdiction over non-Indians. TLOA and VAWA also both mandated that tribes adapt their legal systems to better mirror that of Western systems (that is, federal and state governments). For instance, both TLOA and VAWA imposed requirements for providing legal counsel to defendants at the tribe’s expense. While this legal protection is not inherently objectionable, its imposition upon tribes “presumes that existing tribal justice systems are inadequate.”<sup>30</sup> Indeed, the Native American law scholar Bruce Duthu has described such conditions as a form of “judicial assimilation.”<sup>31</sup>

### **Section III: Changes**

The current framework of criminal jurisdiction in Indian country fails to protect Native women from violence and ensure that justice is served. This failure is a violation of the trust doctrine whereby the federal government of the United States made a promise to act in the best interest of Native tribes. It is also a violation of international human rights laws – indeed the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) contains provisions in its articles to protect Native individuals from violence. Article 7 states that Indigenous peoples have the “collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.”<sup>32</sup> Article 22 further mandates that states take measures “to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.”<sup>33</sup> Given that the failure to protect Native women constitutes a violation of the trust doctrine as well as international human rights principles, it is clear that the United States government must take accountability and take concrete steps toward reducing levels of violence.

Two major, and opposing, solutions have been proposed to address the epidemic of violence against Native women in Indian country. The first proposed solution suggests that the problem lies with the federal government failing to do its job – proponents of this solution assert that the federal government must step up and prosecute more crimes in Indian country. As for the other proposed solution, others assert that the federal government should be left out of the equation and that the only real solution is to restore proper jurisdiction to tribes. In the following paragraphs, I will argue for the second proposition. It is clear that the federal government is not properly set up to address violence against women in Indian country and that violence against

Native women will never be a priority – “federal prosecutors are also responsible for terrorism cases, white-collar crime, and drug racketeering. Rape cases are often shuffled aside.”<sup>34</sup> Thus, I will make the case that overruling *Oliphant*, and fully restoring tribal criminal jurisdiction, is the only solution that will protect Native women. I will also provide additional reforms that should be undertaken to address violence in the short-term.

### Long-Term Changes: Reversing *Oliphant*

While VAWA is a significant step in the right direction, it is not enough. Instead, *Oliphant* must be completely overruled—that is, ICRA must be amended to recognize tribal jurisdiction over all persons. Ultimately, the *Oliphant* decision has shaky legal foundations and also represents the most significant roadblock to ensuring justice for Native women.

*Oliphant* contradicts previous principles of federal Indian law and represents flawed legal analysis. Before *Oliphant*, tribes had assumed they had jurisdiction over non-Indians who committed misdemeanors and minor felonies in Indian country based on their status as sovereign nations. Criminal jurisdiction over non-Indians was seen as “an essential piece of that sovereignty, on the necessity to keep the peace within their borders.”<sup>35</sup> Thus the Court’s proclamation that the “the commonly shared presumption of Congress, the executive branch, and lower federal courts [is] that tribal courts do not have the power to try non-Indians” can be seen as a shocking deviation from agreed-upon principles. As stated, it also represents flawed legal analysis. Indeed, the Court’s basing of its opinion upon what the federal government presumed instead of what the tribe presumed was in contradiction with settled law, which “dictated that, under the canons of construction, treaties were to be interpreted in favor of the tribes.”<sup>36</sup> Along with failing to follow previous court decisions that favored tribal jurisdiction to preserve order in Indian country and departing from the favorable canons of construction, the *Oliphant* decision failed to either examine the Suquamish tribal court system, conduct an analysis of the tribe’s 1973 Law and Order code, or mention the current results of Suquamish tribal court justice.<sup>37</sup>

More important than its faulty legal reasoning, however, are the drastic, tangible consequences that have come from the *Oliphant* decision (that is., the propagation of violence against Native women and corresponding harm to Native families and communities). Overturning *Oliphant* would correct these consequences in two main ways. First, by restoring criminal jurisdiction to tribes, a correction of *Oliphant* would restore jurisdiction to the party best able to combat violence in Indian country. A 2011 report from the US Government Accountability Office asserts that “tribal justice systems are considered to be the most appropriate institutions for maintaining law and order in Indian country.”<sup>38</sup> Bruce Duthu has argued that tribal governments are better suited to handle reservation-based crime “given their familiarity with the community, cultural norms and, in many cases, understanding of distinct tribal languages.”<sup>39</sup> Put simply, tribal courts are both more adept at and concerned with handling crimes against Native women. Secondly, a correction of *Oliphant* would dramatically reduce crime in Indian country and against Native women by providing a deterrent with real teeth. Legal expert Troy Eid writes that “moving beyond *Oliphant* would create a practical deterrent to non-Indian and Indian offenders tempted to treat Indian lands as prosecution-free zones.”<sup>40</sup> Currently,

the federal government's failure to prosecute the large majority of crimes against Native women means that perpetrators are not only not deterred, but instead incentivized to enact violence in Indian country. If given the power to do so, tribal courts would actually prosecute perpetrators, thereby providing a real deterrent mechanism.

Of course, there are serious obstacles that would need to be surmounted for the overturning of *Oliphant* to take place. Indeed, overturning *Oliphant* is seen by some politicians and members of the judiciary system as a serious threat to the liberty of non-Indians. Thus, it is probable that any sort of "*Oliphant* fix" would, for instance, mandate tribes "to integrate federal constitutional substantive and procedural protections into their justice systems."<sup>41</sup> Indeed, though ICRA provides some protections, it differs from the Constitution's Bill of Rights. As an example, ICRA does not guarantee a criminal defendant the right to a lawyer if the defendant cannot afford one. A repeal of *Oliphant* might also require a modification of the decision in *Santa Clara Pueblo v Martinez* in order to provide a waiver of sovereign immunity in cases of non-Indian prosecution.<sup>42</sup> Currently the combined effect of ICRA and *Martinez* is to limit federal review of Supreme Court decisions to habeas corpus. Thus, a change to *Martinez* might be deemed necessary "to ensure greater government accountability and protection of defendants' civil liberties," as Eid has argued.<sup>43</sup> Ultimately, the decision in *Oliphant* can be traced back to the Court's conception of itself as the protector of those unfortunate non-Indian souls "trapped" in Indian country, helpless to defend their liberty. Therefore, given this entrenched view on liberty, an uphill battle lies ahead.

### Short-Term Changes

Given the serious obstacles to overturning *Oliphant*, it is likely that such action will take many more years of lobbying and advocacy work. Thus, while restoring tribal jurisdiction is the only real solution, in the near term, Congress should take other steps to work towards remedying the problem of violence against women in Indian country. In particular, Congress should provide more money to fund tribal justice systems and increase the sentencing limit of three years under TLOA. These two steps are important as the "US government has interfered with the ability of tribal justice systems to respond to crimes of sexual violence" not only by "prohibiting tribal courts from trying non-Indian suspects," but also by "underfunding tribal justice systems" and "limiting the custodial sentences which tribal courts can impose for any one offense."<sup>44</sup>

Increasing the sentencing limit under TLOA could pave the way toward a full return of tribal jurisdiction. Symbolically, it would indicate that tribal courts are "real" courts and are to be treated as such. Currently, the most privileged tribal courts are still limited to a maximum sentencing of three years for all crimes – this limit undoubtedly conveys the message that tribal courts are inferior bodies compared to federal and state courts. Indeed, in cases of rape, for instance, state court sentences usually exceed eight years while federal sentences exceed twelve.<sup>45</sup> Increasing the sentencing limit would also practically allow tribal convictions to play more of a deterrent role, potentially decreasing crime in Indian country while also recognizing the modern capabilities of tribal courts.

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It is also important that the federal government allot more funds to tribal courts. Though many tribal courts are modern and highly capable, others still suffer from a lack of funding. In 2018, the US Commission on Civil Rights found that Indian country continues to suffer from “systematic underfunding of tribal law enforcement and criminal justice systems, as well as structural barriers in the funding and operation of criminal justice systems in Indian country.” Based on 2020 appropriation levels, it was estimated that the Bureau of Indian Affairs is “generally funding tribal law enforcement at about 20 percent of estimated need, tribal detention at about 40 percent of estimated need, and tribal courts at a dismal 3 percent of estimated need.” Increasing funds allocated to tribal courts will be especially important in the event that *Oliphant* is overturned, in which case tribal courts would need to greatly increase their capacities and resources to keep up with the prosecutions of the largest group of offenders (at least in terms of violent crimes against Native women) – non-Indians. In sum, before *Oliphant* can be overturned, Congress should take immediate steps to mitigate the problem of violence against Native women in Indian country. By increasing funding to under-funded tribal justice systems and increasing the sentencing limit for tribal courts, the federal government could take concrete actions toward helping improve the legitimacy of tribal courts and thereby increasing their deterrent power.

### **Section IV: Conclusion**

Native women are not protected from violence under the current legal framework operating in Indian country today. While actions like increasing sentencing limits and federal funds allocated to tribal courts are important, they can only go so far. *Oliphant* was a devastating ruling that eviscerated tribal territorial sovereignty and ensured that Native women would be easy victims. To protect Native women and restore justice, *Oliphant* must be overruled. In the event that it is, jurisdiction will be restored to those who both understand crime against Native women on reservations the best and care enough about the community to prioritize seeking justice – that is, the tribes. Along with ending the epidemic of violence against Native women, reversing *Oliphant* will also get the United States one step closer to achieving true “deep pluralism” and correcting the wrongs of colonial America.



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- <sup>13</sup> Amnesty International USA, 2007.
- <sup>14</sup> Ibid.
- <sup>15</sup> Amnesty International USA, 2007.
- <sup>16</sup> Ibid.
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- <sup>22</sup> *Duro v Reina*, 495 US 676, (1989).
- <sup>23</sup> Fletcher 2004
- <sup>24</sup> Ibid.
- <sup>25</sup> Ibid.
- <sup>26</sup> *United States v Lara*, 541 US 193, (2004)
- <sup>27</sup> Ibid.
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*Comparative Studies of Indigenous Child Welfare Legislations in the United States, New Zealand, Australia, Canada, and China*

“Jenny” Chaeun Song | Dartmouth College

Edited by Jack Walker, Karun Parek, Sadia Safa, Nicole Wang, Yeibin Andrews, Simon Yang, Inica Kotasthane

**Abstract**

Many countries today face a humanitarian crisis regarding Indigenous children who are residing outside of their homes due to forced removal by colonial governments. Even though Indigenous peoples represent a distinct minority in the United States, Canada, New Zealand, and Australia, Indigenous children make up an inordinately large percentage of children in these nations’ respective child welfare systems. Recently, in China, custody of Indigenous children in state systems is also increasing at an alarming rate.

In this paper, I will first analyze the current legal framework in each country regarding Indigenous child welfare. Next, I will analyze the similarities and differences between each country’s approach. Countries’ different Indigenous child welfare systems stem from the different treatment of Indigenous peoples by the government. Absent sovereignty of the Indigenous peoples, having an effective child welfare system beneficial for Indigenous children presents a unique challenge.

## I. Introduction

Many countries today face a humanitarian crisis in the number of Indigenous children who are residing outside of their homes. In the Western countries, even though Indigenous peoples represent a distinct minority in the United States, Canada, New Zealand, and Australia, Indigenous children make up an inordinately large percentage of children in these nations' respective child welfare systems.<sup>1</sup> In China, custody of Indigenous children in state systems is also increasing at an alarming rate.<sup>2</sup>

Countries have made efforts to address this problem. Australia has recognized the problem of “Stolen Generations”—generations who were separated from their Indigenous families and taken into government foster care—and issued a national inquiry to understand the vast overrepresentation of Aboriginal children in Australia’s child welfare system.<sup>3</sup> Canada recently enacted “An Act respecting First Nations, Inuit and Métis children, youth, and families.”<sup>4</sup> New Zealand also vowed to stop the practice of removing Maori children from their families.<sup>5</sup>

The United States, however, is the only country among these that has a legal and policy model that relies on and builds upon the framework of Indigenous sovereignty and accords tribes exclusive jurisdiction to manage Indian child welfare decisions for children residing or domiciled on tribal lands.<sup>6</sup>

In this essay, I will first analyze the current legal framework in each country regarding Indigenous child rights. Next, I will analyze the similarities and differences between each country’s approach. My essay shows that countries’ different Indigenous child welfare systems stem from the different treatment of Indigenous peoples by the government and that absent Indigenous sovereignty, it is difficult to have an effective child welfare system for Indigenous children.

## II. Context of Indigenous Peoples in Respective Countries

The scope and structure of various Indigenous child welfare legislations in each country are inevitably linked to the governmental models pertaining to treating their Indigenous peoples. I briefly discuss the policies concerning Indigenous peoples in respective countries and link them to discuss the specific legislatures for Indigenous children.

### A. Native Americans and Indian Child Welfare Act

The United States has recognized Indian tribes’ sovereignty since the early days of the federation.<sup>7</sup> The United States has a government-to-government relationship with Indian tribes, giving the federal government authority to handle affairs with Indian tribes. In the United States Constitution, Article 1, Section 8, Clause 3—also known as the Commerce clause—provides that Congress has plenary power “to regulate commerce with foreign nations, states, and Indian tribes.”<sup>8</sup> When enacting legislations related to Indian tribes, Congress must show that the federal law is rationally related to Congress’s unique obligation to the tribes.<sup>9</sup> Today, tribes have sovereign governments where they can enact tribal laws and establish law enforcement systems, like federal and state governments, to regulate their internal affairs. There are limits to the sovereignty, however, as tribes are considered “domestic dependent nations”<sup>10</sup> and to have

implicitly divested some sovereignty; their sovereignty is subject to “complete defeasance.”<sup>11</sup> Tribal powers come in three forms—treaty-based, inherent, and delegated—and their inherent authority generally does not extend to non-member activities on fee-land owned by non-members unless there is a consensual relation between the tribe and non-member, or the activity has a negative impact for tribes’ political integrity, economic security, or health or welfare.<sup>12</sup>

In 1978, House Report No. 95-1386 found that 25-35 percent of all Indian children are separated from their families and are disproportionately placed in foster homes, adoptive homes, and institutions primarily owned by non-Indians.<sup>13</sup> To remedy the issue, Congress passed the Indian Child Welfare Act of 1978 (ICWA). The act achieves three purposes: transfer jurisdiction of child custody cases to tribal courts, provide parents with procedural protections and raise standards for removal, and create preferences for the placement of children subject to removal. The ICWA notes that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest as a trustee in protecting Indian children,” referring to Congress’s plenary power over Indian affairs as established by the commerce clause of the Constitution.<sup>14</sup>

Delving into the specificities of the Act, I focus on three sections that state the purpose and specific provisions of the act. Section 1911 gives exclusive jurisdiction to Indian tribes over any child custody proceeding concerning a child who resides or is domiciled within the reservation of such tribes and allows the intervention of Indian tribes or Indian custodian of the child in State court proceedings.<sup>15</sup> Section 1912 provides protection for the parents by giving them the right to examine all reports involved in decision and providing requirements for removal, such as convincing evidence and active efforts to prevent the breakup of the Indian family.<sup>16</sup> Lastly, section 1915 designates preferences for the placement of children subject to removal with the following order: (1) a member of the child's extended family, (2) other members of the Indian child’s tribe, (3) other Indian families.<sup>17</sup>

The ICWA has recently been in the center of dispute with regards to their constitutionality, with *Brackeen v Bernhardt*<sup>18</sup> waiting for the Supreme Court review as of 2022. The major issue here is that the ICWA implicates the federal responsibility in child welfare legislation, which, according to the plaintiffs, violates the equal protection and the due process under the Fifth Amendment and the anti-commandeering doctrine under the Tenth Amendment. Justifying the federal government’s involvement in this legislation, the Congress stated that the federal government has direct interest as trustees of the Indian tribes, implicating the guardian–ward relationship established in *Cherokee v Georgia*<sup>19</sup>. In *Cherokee v Georgia*, Justice Marshall ruled that the Cherokee nation had sovereign power and that Georgia did not have the authority to enforce its state laws in the Cherokee land. Nonetheless, Justice Thomas voiced his concerns for child welfare legislation falling in the hands of the federal government rather than the general purview of states. In his concurring opinion to *Adoptive Couple v Baby Girl*<sup>20</sup>, where the Court ruled that a biological parent without legal custody cannot hinder an adoption under the ICWA.

### A. Indigenous Peoples in Canada

Among the countries represented in this paper, Canada has the most similar policy structure to the United States. According to the Canadian constitution, three distinct groups of Indigenous peoples with unique identities exist in Canada: First Nations (also known as Indians), Inuit, and Metis.<sup>21</sup> In this paper, I refer to all three groups as “Indigenous peoples” unless otherwise specified.

Since initial European contact, the Canadian Crown and the Indigenous peoples signed treaties, many of which are now incorporated into the Canadian Aboriginal law. The *Indian Act of 1876*, overruled local provincial laws; and assigned Indigenous peoples to be under federal legislation instead of provincial legislation.<sup>22</sup> The act explicitly intends for “enfranchisement,” which means the act handles Indian affairs so that Indians would want to renounce their Indian status and take Canadian citizenship.<sup>23</sup> In 1985, Bill C-35 made amendments to the Indian Act abandoning the enfranchisement process and stopping the process that had indirectly forced Indians to abandon sovereignty.<sup>24</sup>

In 1894, amendments were passed mandating compulsory attendance to schools for indigenous children between ages seven and sixteen, prompting the establishment of the Canadian Indian residential school system.<sup>25</sup> Moreover, Section 88 of the 1951 amendment of the Indian Act incorporated the general law of applicability, which allowed provincial governments to interfere with child welfare issues on reservations.<sup>26</sup> The Western approaches to child welfare fail to acknowledge what indigenous communities value for child welfare—their worldview and culture—with 11,000 indigenous children adopted during the period between 1960 and 1990.<sup>27</sup> Moreover, according to a 2016 report, Indigenous children make up 52.2 percent of the entire foster care population, while they represent less than 7.7 percent of the overall child population.<sup>28</sup>

Acknowledging the disproportionate representation of indigenous children in child protection systems, the Canadian government passed Bill C-92, also known as *An Act Respecting First Nations, Inuit and Metis Children, Youth and Families*, in 2019.<sup>29</sup> The act acknowledges the importance of cultural continuity as shown in Section 9 (2) and states that “primary consideration must be given to the child’s physical, emotional, and psychological safety, security, and well-being, as well as to the importance, for that child, of having an ongoing relationship with his or her family and with the Indigenous group, community, or people to which he or she belongs and of preserving the child’s connection to his or her culture.”<sup>30</sup> Section 13 provides that the child’s parents, care provider, and the tribe have the right to make representations.<sup>31</sup> Sections 14 and 15 designate strict standards for removal, including showing reasonable efforts made to allow the child to continue residing with their family.<sup>32</sup> Section 16 establishes the preferences for indigenous child placement: (1) one of child’s parents, (2) another adult member of the child’s family, (3) an adult in the same Indian tribe, (4) another Indian adult, and (5) any other adult. Section 18 affirms that Indian tribes have jurisdiction over Indian child affairs. The act came into effect on January 1, 2020.<sup>33</sup> This legislation resembles the ICWA of



the United States in many ways and was progressive in that it establishes the child's best interest is being with their indigenous parents and maintaining their cultural and traditional heritage.

In addition to the new act, in early 2022, Canadian officials reached a \$31.5 billion settlement to compensate indigenous children who were unnecessarily taken from their homes and put into the child welfare system. Half of the settlement will be used to directly compensate children and families for the past three decades, and the other half will be used to repair the child welfare system.<sup>34</sup>

### **B. Māori in New Zealand**

The Māori population in New Zealand is 17.1 percent of the national population, according to the 2021 government census<sup>35</sup>. This ratio is highest among the countries represented in this paper. In 1867 under *Māori Representation Act*, the New Zealand government established Māori electorates to reserve positions for Māori in New Zealand's parliament.<sup>36</sup> This model is fundamentally different from that of the United States and Canada since the New Zealand government does not recognize sovereignty of Māori and instead incorporates Māori into the colonial government.

While there has not been a specific legislation designed to combat the problem of Māori children removal in New Zealand, the government issued an apology for the survivors of such removals and vowed to stop removing "at-risk" Māori children from their families in September 2021, after nation-wide protests in 2019 that began after Ministry for Children tried to take a newborn Māori baby from their mother in a hospital.<sup>37</sup> The government accepted the recommendations from the advisory board to share resources and authorities with Māori to address their child welfare issues.<sup>38</sup>

### **C. Indigenous peoples in Australia**

Australia uses a similar approach for their aboriginal peoples, also known as First Australians or First Nations, as New Zealand. While the Australian government does not have a reserved proportion of seats for Aboriginal Australians, political parties have sought to increase the aboriginal representation; Aboriginal peoples have been elected to serve in the government at various levels, including as part of the House of Representatives and Governor.<sup>39</sup> Two indigenous groups—the Murrawarri Republic and the Sovereign Yidindji—declared independence from Australia in 2013 and 2014, but the claim was not legally recognized by the Australian Attorney General.<sup>40,41</sup>

Australia's indigenous child welfare issues are most well-characterized by the term "Stolen Generations." In 1905, the *Aborigines Act* deprived legal guardianship status from aboriginal parents in Western Australia.<sup>42</sup> In 1915, *Aborigines Protection Amending Act (NSW)* allowed the Aboriginal Protection Board to separate Indigenous children from their families without presenting evidence of child abuse or neglect in New South Wales.<sup>43</sup> While all states in Australia repealed Indigenous child removal by 1969, the issue of removing Aboriginal and mixed-race children from their Aboriginal families persisted into recent days.<sup>44</sup> Between the 1970s and 1980s, the Aboriginal Child Placement Principles was formulated, stating that the removal of any Aboriginal child must be a last resort after other conventional efforts for the

protection of any child, guided by Aboriginal welfare organization, and be given preference to the child's extended family or within the Aboriginal community in close proximity to the child's family to preserve the child's culture.<sup>45</sup> However, as the legislations in each state and territory are different, regulations towards the removal of Aboriginal children was challenging to maintain consistency for how the principle was enforced. As a result, children taken to such government facilities were neglected and suffered from violence and lack of resources.

The 1997 "National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families: Bringing Them Home" report revealed paradoxical deeds done to Aboriginal children, condemning the government to have committed genocide and gross human rights violations.<sup>46</sup> The report recommended the Australian Federal Parliament to fund Aboriginal communities, compensate those who were affected, and issue an apology to Aboriginal peoples.<sup>47</sup> However, even today, there is no one unifying Aboriginal child welfare legislation by the federal government, and instead, state governments individually deal with the issue. This issue is due to the fact that Aboriginal peoples of Australia are not recognized to have a government-to-government relationship with the colonial governments and thus remain under state jurisdiction.

#### **D. Ethnic Minorities Aboriginal to China**

China officially recognizes 56 ethnicities: the Han majority (92 percent) and 55 minority ethnic groups.<sup>48</sup> These ethnic groups—Uyghurs, Bai, Tibetans, Mongolian, Miao, Chinese Koreans, etc.—maintain their own native languages, customs, and traditions and are considered aborigines to China.<sup>49</sup> While the Chinese government signed the United Nations Declaration on the Rights of Indigenous peoples, it did not recognize the term "Indigenous" or "Aboriginal," as such a term could reinforce the idea that the Han majority is not Aboriginal to mainland China or Taiwan.<sup>50</sup> Therefore, the declaration is not implemented in China despite human rights activists' concerns about growing disparities between the Han majority and ethnic minority groups. The Chinese government portrays itself as the benefactor of ethnic minority groups and condemns those who refuse to assimilate—for instance, Tibetans, Uyghurs, and the Mongols—as uncivilized.<sup>51</sup>

The Chinese system is similar to a combination of those in the United States and New Zealand; 15 percent of the National People's Congress is made up of ethnic minorities.<sup>52</sup> While ethnic minorities are not generally considered sovereigns in China, there are five ethnic autonomous regions where select ethnic groups can form self-governments, enact ethnic laws in the local government, and practice relative economic independence.<sup>53</sup> The five regions are Guangxi, Inner Mongolia, Ningxia, Tibet, and Xinjiang. While other Chinese provinces and municipalities consist of the Han majority, those five regions are predominantly occupied by ethnic minorities. For instance, Xinjiang is primarily run by Uyghurs, a predominantly Muslim group, and Tibet is 90 percent Tibetan.<sup>54</sup> The governors of such autonomous regions are elected among the members of the ethnic groups, and the regions supposedly enjoy religious and language freedom.<sup>55</sup> In reality, however, religious and language freedom are far from guaranteed. 65 percent of the mosques in Xinjiang have been destroyed since 2017.<sup>56</sup> Tibetans can face

prison sentences if they post about the Dalai Lama, and most schools in Tibet use Mandarin due to the Han influence.<sup>57</sup>

While it is evident that Aboriginal peoples (ethnic minorities) of China are subject to oppression and discrimination by the government, child removal was not an initial problem. The extraordinarily rapid economic growth and urbanization from extreme poverty created discrepancies in government funding, which meant local governments could not finance social services.<sup>58</sup> Moreover, until 2016, China's one-child policy (a policy in which those having a second child were subject to extremely high fines or prison sentences) prompted many families to abandon their children and send them to orphanages.<sup>59</sup> Absent intrusive child protection services, China did not have the driving forces for Aboriginal child removals.<sup>60</sup> In addition, minority ethnic groups were exempted from the one-child policy, the principal reason for child abandonment.<sup>61</sup>

However, there has been a recent change in this trend; under Xi Jinping's ruling, which has been blamed for anti-democracy,<sup>62</sup> China has been condemned by the Western countries for the genocide against Uyghur with their concentration camps, mass sterilization, forced labor, and sexual abuse.<sup>63</sup> Children whose parents were detained are put into "centralized care system" or sent to ethnic Han families.<sup>64</sup> Some regions in Xinjiang even put a quota on the number of children that need to be institutionalized. More than a million Uyghur children have been forcibly put into boarding schools, where they are forbidden to practice their religion or speak their language; when children are removed from their Uyghur families, parents are threatened with detention if they resist.<sup>65</sup> While there is no legal justification in place, the Chinese government under Xi's ruling has quoted extremist separatist groups' terror threats for such measure.

### **III. Comparison of Indigenous Child Welfare Systems**

Canada passed Bill C-92 as an amendment to the *Indian Act* in 2019, and the bill came into effect in 2020.<sup>66</sup> Moreover, New Zealand did not recognize the problem of indigenous child removal until nationwide protests in 2019 against the removal of a newborn baby while the mother was in the hospital.<sup>67</sup> In comparison, Australia and the United States enacted policies to address indigenous child removals in the 1970s with Aboriginal Child Placement Principles, that started in New South Wales and spread nationwide, and the Indigenous Child Welfare Act (1978).<sup>68, 69</sup> It is difficult to involve China in the regular comparison of Indigenous child welfare policies since the objective for their policies differ drastically from those of Western countries. For example, Beijing has been officially pursuing assimilation policies for their ethnic minorities over sovereignty.<sup>70</sup> Thus, in subsections A, B, C, and D, we mainly delve into the United States, Canada, New Zealand, and Australia, and then in subsection D, we will discuss Chinese policies.

#### **A. Standards Set by the United Nations**

There are two United Nations conventions that provide an overarching framework on the rights of Indigenous children worldwide: the United Nations Convention on the Rights of the Child (UNCRC)<sup>71</sup> and the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP).<sup>72</sup> The UNCRC is the first global human rights treaty to refer to the rights of children.

It emphasizes the importance of guaranteeing children's rights to physical, emotional, and mental well-being. Articles 9 and 30 further support Indigenous children by [elaborate].<sup>73</sup> Article 9 stipulates that children are not to be separated from their family unless it is in their best interests.<sup>74</sup> Article 30 holds that children have a right to learn and use their familial language and practice their own cultural customs, even when they belong to a country's minority group.<sup>75</sup>

The UNDRIP outlines a series of indigenous rights that should be protected and nurtured by the United Nations' member countries. The UNDRIP touches upon indigenous rights in general, not specifically for child welfare policies; still, many of its articles are relevant, such as Article 7, which denounces "forcibly removing children of the group."<sup>76</sup> The right to self-determination (Article 3 and 4), right to religious and cultural freedom (Article 12), and protection of Indigenous women and children (Article 22) are relevant in the discussion of indigenous child welfare.<sup>77</sup> Article 3 and 4 outlines Indigenous peoples' self-determination and autonomy, which means Indigenous peoples should decide what's best for their self-interest. These are already reflected in the ICWA of the United States. The article on the right to religious and cultural freedom shows that, in deciding what the child's best interests are, their tradition and culture should be considered. Lastly, Article 22 outlines the importance of Indigenous children's welfare, along with women and elders. Initially, the United States, Canada, New Zealand, and Australia were the four non-signatories of the UNDRIP. Though all four of these countries have since declared support for the UNDRIP and the UNCRC, the United Nations' lack of enforcement power in this instance underscores how Indigenous children's rights remain at risk today.

One intriguing similarity between the aforementioned legislations, with the exception of China, is that they refer to children's "best interests." Whereas the UNCRC does not specifically explain what "best interests" means, Canada's Bill C-92 clearly outlines Indigenous peoples' "best interests" by citing culture, heritage, stability, identity, connections, relationship with care providers, community, safety, et cetera. In instances where other countries follow the UNCRC's vague approach to "best interests," their statutes on indigenous rights can be interpreted in varying ways.

### **B. Relationship Between Indigenous Peoples and the Government**

Indigenous child welfare legislation in every country is representative of the governments' general approach to Indigenous affairs. In the case of the United States, instead of having varying statutes in each state, it has a centralized federal legislation for Indigenous affairs, allowing the treatment of Indigenous peoples equal across all states complying to the government-to-government relationship between the Indigenous peoples and the federal government.<sup>78</sup> The government-to-government relationship stems from the Commerce clause, which states that the Congress, and not the state governments, has the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Moreover, the government-to-government relationship between the federal government and Indian tribes<sup>79</sup> allows for the transfer of child custody jurisdiction to the tribal governments. Canada first recognized tribal sovereignty during the colonial period, which set the stage for the

federal enactment of the *Indian Act* and the overruling of predated provincial regulations later on.<sup>80</sup> However, Bill C-92 does not provide a jurisdictional framework for how (or whether) states or tribal governments address and resolve Indian child welfare matters. The absence of such a jurisdictional framework is due in part to a lower level of recognition of Indian political entities compared to the United States since Canada has only recently begun reconciliations with their Indigenous people for their sovereignty.<sup>81</sup>

On the other hand, both New Zealand and Australia have incorporated their aboriginal population under their European settler-based federal governments, rather than recognizing aboriginal peoples' autonomy or sovereign governments. This structure poses limitations to the involvement of indigenous peoples in child welfare systems. While the governments may consult and involve Indigenous peoples when enacting laws pertaining to Indigenous child welfare, aboriginal peoples themselves do not have the legislative power to directly handle their issues due to the colonial government not having recognized the sovereignty of aboriginal peoples.<sup>82</sup> Australia differs from New Zealand in that it assigned aboriginal affairs to state governments, making it more challenging to have a unified structure for Indigenous child welfare rights.<sup>83</sup>

### **C. Effectiveness of the Legislation**

Granted, considering Bill C-92's recent enactment and the lack of defined policies concerning the welfare of Indigenous children in New Zealand, it is challenging to compare the effectiveness of the legislations across these countries. There are even less codified policies in place for Maori people in New Zealand: in response to 2019 protests against Indigenous child removals, the New Zealand government offered an apology in 2021 and vowed to cease such practices yet did so without any specific provisions to hold themselves accountable to change.<sup>84</sup>

As discussed above, Australia has multiple barriers for bringing their legislation into practice. For example, while the Aborigines Protection Board was the primary authority responsible for aboriginal child removals, the abolishment of the board did not effectively end the practice.<sup>85</sup> Multiple states in Australia enacted laws endorsing aboriginal child removal, ranging from 1905 to 1935.<sup>86</sup> While all states repealed such legislations by 1969, the Aboriginal Child Placement Principles were all adopted into each state in different years: the first being the Northern Territories in 1983, and the last being Western Australia in 2006.<sup>87</sup> Indeed, while the direction of the federal government can guide the states, there is no overarching or unified policy that can be enforced throughout the nation.

Moreover, while the Aboriginal Child Placement Principles are similar to the preferences indicated by the ICWA, the implications of state or provincial governments (as opposed to aboriginal governments) handling such cases should be examined critically. In Australia, without tribal governments' sovereign judicial systems, it is in the hands of the state and territorial governments to adopt the preferences, which is contradictory to the UNDRIP's self-determination principles; in order for Indigenous members to participate in the child placement process, they need to rely on state and provincial governments.<sup>88</sup> Between 2008 and 2018, the proportion of aboriginal children in foster care rose from 29.1 percent to 36.8 percent.<sup>89</sup> The redress schemes in each state and territory made various compensation packages for survivors,

but the state of Western Australia only offers compensation to those who experienced abuse while in government foster care.<sup>90</sup>

On the other hand, the Canadian Bill C-92 was passed in 2019 and came into effect in 2020. Bill C-92 essentially recognizes Indigenous people in their diversity and helps establish national principles for the best interests of the child and substantive equality.<sup>91</sup> In addition, the bill strives to implement many aspects of the UNDRIP to advance and codify Indigenous rights. In a recent class-action court case brought forward by the First Nations Child and Family Caring Society, the Canadian Government agreed to a \$30 billion settlement to compensate Indigenous children taken from families, the largest class-action settlement in history.<sup>92</sup> This case shows that even though Bill C-92 has only come into effect very recently, it is already starting to impact the way issues regarding Indigenous children are perceived.

Overall, the United States' system of legislation has proven to be the most effective. Among the countries represented in the paper, with the few exceptions of autonomous regions in China, the United States is the only country that adopted serious implementations of Indian tribal governments. Not only does the United States establish adoption principles like other commonwealth countries, but they also leave it for the tribes to put those principles into practice by giving them exclusive jurisdiction. For example, *Mississippi Band of Choctaw Indians v Holyfield*<sup>93</sup> was one of the first cases that established how the ICWA would come into practice. Even though the parents of the Indigenous child wished for the Holyfields to adopt the child, the exclusive jurisdiction of the tribal government allowed for the rights of the Band of Choctaw Indians to prevail through indigenous legislation. While the child was never physically on the reservation, they were considered to have been domiciled on the reservation as the Supreme Court held that minors do not have the capacity to have a separate domicile from their parents, demonstrating a stricter implication of the ICWA.<sup>94</sup>

However, as implicated by *Holyfield*, cases involving the statutory interpretations of the Indian Child Welfare Act have often been shown to exhibit the conflict between personal interest and communal or tribal interest.<sup>95</sup> When child custody cases are brought to tribal courts, it is challenging to maintain the child's privacy. U.S. Code Section 1902 stated that "it is the policy of this nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs."<sup>96</sup> While the statute refers to the "best interests" of Indian children just like other countries' legislations, the wording implies that "best interests" are defined primarily so that Indian children would not be removed from their families, with the overarching objective to "promote the stability and security of Indian tribes."<sup>97</sup>

### **D. The Future of Aboriginal Child Removal in China**

In contrast to the other countries we analyzed, aboriginal child removal has been increasing at a fast pace in China. The Chinese government is the primary driving factor behind

this and has fully embraced the policy of assimilation that Western governments now denounce. The bulk of the incidents occur in the Northwestern autonomous region of Xingjian, primarily populated by the Muslim Uyghur ethnic minority.<sup>98</sup> The Chinese government has refused to refer to the Uyghur as an indigenous people, as that would reduce claims of Chinese sovereignty in the region.<sup>99</sup> Estimates of Uyghur children taken from their family go upwards to over a million.<sup>100</sup> With this astounding number in mind, the question remains: why is China taking this backward step in Aboriginal children rights at a time when much of the world is improving?

One reason might be that the central government is better funded and more centralized nowadays. Under the leadership of Xi Jinping, the Chinese state is keener and has greater political resources than ever in suppressing dissent.<sup>101</sup> In a large, peripheral autonomous region like Xinjiang, peaceful protests and ethnically infused violence would flare up regularly. As such, in the past, much of the state's resources were spent trying to quell the violence in the region.<sup>102</sup> With a new direction of cultural assimilation, Xi is hoping to convert the population to ethnic Han so that better integration can be achieved. In addition, the Chinese government does not recognize the term "Indigenous peoples" and does not consider the Uyghurs to be indigenous in Xinjiang.<sup>103</sup> Therefore, the UNDRIP was not implemented in practice. Furthermore, when under attack by Western governments regarding the harsh treatment of Uyghurs, the Chinese government explicitly stated that they learned from "residential schools" in Canada and the US, effectively turning those examples into a shield to deflect criticism.<sup>104</sup>

#### IV. Conclusion

The differences between the indigenous child welfare legislations in the United States, Canada, New Zealand, Australia, and China stem from whether Indigenous sovereignty exists in respective countries. According to the UNDRIP Articles 3 and 4, Indigenous peoples have the right to self-determination as well as to autonomy or self-government for their internal affairs.<sup>105</sup> However, as the UNDRIP is a legally non-binding declaration, among the countries represented, only the United States has given the tribes a practical application of self-government for their internal affairs. For instance, Canada, while having a similar overall framework pertaining to Indigenous peoples to the United States', has not provided adequate financial or systematic resources for the indigenous peoples to practice self-government. In addition, the amendment to the Indian Act did not put emphasis on giving a jurisdictional framework for the Indigenous peoples to handle child custody.<sup>106</sup> However, the Canadian government states that they are committed to a new plan of reconciling with the indigenous peoples. Canada has officially adopted the UNDRIP and made efforts to allow Indigenous peoples self-determination, formulated a new reconciliation plan that involves improving fiscal relationship with the indigenous peoples, and drafted a considerable compensation package for the survivors of government-oriented foster care.<sup>107</sup>

Meanwhile, Australia and New Zealand have tried to represent their aboriginal peoples' interests by incorporating them into the colonial government. There are limits to this framework, however; without the autonomous jurisdictional framework, whatever is provided by Indigenous child welfare legislations will be subject to the supervision or approval by the European

government. On top of this limitation, Australia has outwardly rejected their Aboriginal peoples' efforts to form an autonomous government and let state and territorial governments handle aboriginal issues. Both Australia and New Zealand will have to come up with a way to ensure their Aboriginal peoples' self-determination.

On the other hand, in the United States, Indian Child Welfare Act has been subject to criticisms of the conflict of tribal and personal interests, with questions of what the "best interests" mean for the children. Nonetheless, the jurisdictional framework that the ICWA provided to tribal governments could allow the tribes to handle those issues on their own, rather than the federal government meddling to resolve the issues for tribal governments.

Lastly, for China, the indigenous child welfare issues are challenging to handle because of the government's different interest. China does not recognize ethnic minorities as their aboriginal peoples, and with an extraordinarily fast-growing economy, improving human rights for ethnic minorities is not a big concern for the government. Therefore, dealing with issues involving ethnic minorities and their children will have to be considered as part of the overarching effort of improving human rights practices in China.



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*The Precarious Right to Privacy*

Alexandra Velasco | University of New Mexico

Edited by Meghan Lannon, Kylie Gall, Michelle Lian, Janessa Vargas, Olya Sukonrat

**I. Introduction**

In a nation that is not only predicated upon the assertion that all men are created equal and possess natural, self-evident rights to life, liberty, and the pursuit of happiness, but is also governed by a supreme document—the Constitution—which explicitly guarantees various other rights to its citizens, it seems only rational that United States citizens ought to be equipped with the vital instruments that allow them to achieve these rights. Moreover, it is necessary to ensure citizens the ability to access these guaranteed rights, and thus the ability to enjoy these rights and make personal decisions concerning them, without unnecessary governmental intrusion. It is here that a right to privacy becomes apparent. It is categorically impossible for one to utilize the rights guaranteed to them if they are not afforded the privacy to do so. However, despite its significance, the right to privacy is not explicitly expressed in the Constitution of the United States. Rather, decades of decisions made by the Supreme Court of the United States demonstrate that the right to privacy is created and implied by various amendments—the First, Third, Fourth, Fifth, Ninth, and Fourteenth. These amendments are highlighted in cases such as *Griswold v Connecticut* (1965), *Eisenstadt v Baird* (1972), *Roe v Wade* (1972), *Planned Parenthood of Southeastern Pennsylvania v Casey* (1992), *Lawrence v Texas* (2003), *Loving v Virginia*, and *Obergefell v Hodges* (2015). Notwithstanding these decisions, the lack of detailed supporting constitutional text has proved to cause controversy concerning the right to privacy and thus the rights predicated upon it.

This controversy leads to the central question of this study: as it stands, with its current safeguards and challenges, how secure, if at all, is the right to privacy when concerning an individual’s capacity to make personal decisions? In considering this question, it is crucial to establish the following necessary factors: the definition of the “right to privacy,” its origin, its scope established by various United States Supreme Court decisions, several of the rights predicated upon it, and current challenges that oppose them. Moreover, it is important to note that, for all intents and purposes of this study, there will be a direct focus on the right to privacy in relation to personal liberty. Given the current direction American law is heading with regard to the ability of an individual to make personal decisions without unnecessary governmental intrusion, it is crucial to spark discourse concerning whether a right to privacy—in being an implied source used to permit and protect other rights not expressed in the Constitution—is moldering. It is apparent that the right to privacy regarding personal decisions has, in current America, become precarious and, if citizens are to preserve this essential tool, the people must take up efforts of security.

## II. The Right to Privacy

There is no explicit right to privacy in the Constitution of the United States. Instead, essentially everything known about this implied right has been based upon decades of decisions made by the Supreme Court of the United States. These holdings of the Court, as well as individual Justices, lead to the conclusion that, as encapsulated by Justice Louis Brandeis' in his famous dissent for *Olmstead v United States*, the right to privacy is "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." In furthering his claim, Justice Brandeis also goes on to allude that the right to privacy also protects individuals from unjust intrusions by the government. However, despite Justice Brandeis's assertion of the right in 1928, the Court did not explicitly recognize the right until 1965 in *Griswold v Connecticut*—in which the right to privacy was deemed as being an implied and fundamental right. Over the years, in cases such as *Roe v Wade* and *Lawrence v Texas*, this right was implicated by several amendments and expanded to include and protect a myriad of issues concerning personal decisions. Specifically, as seen in the expressed cases below, the Court has contended time and time again that the right to privacy is located in the substantive force of liberty that is explicitly protected by the Fourteenth Amendment's Due Process Clause—which asserts that "[no State shall] deprive any person of life, liberty, or property, without due process of the law." An example of this can be found in *Planned Parenthood of Southeastern Pennsylvania v Casey*, a case that will be explored later, when the Court asserts, "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." In the Court's continuous construal of this provision, it is evident that in the guarantee of liberty, there is a right to privacy; there is a realm of personal liberty—a realm of privacy—that the government cannot intrude upon, and the following elaboration of cases decided by the Supreme Court of the United States exhibit this recognition.

Moreover, the following cases also established and secured various additional rights belonging to citizens of the United States, leading them to become landmark decisions, on the basis of them falling within the right to privacy. These additional guarantees are pertinent in the consideration of this study's central question concerning the security of the right to privacy. Insofar as the right to privacy acts a source for additional rights like contraceptives, abortion, and so on, the issue of insecurity can arise in two ways: 1) if the Court were to erode the validity of the right to privacy by disregarding—whether explicitly or implicitly—its existence; and 2) if the states were to begin attacking the guarantees established by the right to privacy. However, before considering these two methods of onslaught upon the right to privacy, it is important to expound on several cases and their impact on the right to privacy and its scope.

## III. *Griswold* and *Eisenstadt*—Privacy and Contraceptives

When considering the United States Supreme Court cases that acknowledge and assert an implied right to privacy, we first look to *Griswold v Connecticut*. In this landmark case, the Court was dealing with a question of constitutionality concerning two Connecticut statutes: § 53-32 and § 54-196. As Justice William Douglas defines in the majority opinion of the Court, § 53-

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32 provides that: “Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.” He continued by quoting § 54-196, referred to as the “accessory statute,” as asserting that: “Any person who assists, abets, counsels, causes, hires, or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.” The appellants—the executive director, Estelle Griswold, and the medical director, Dr. C. Lee Buxton, of the Planned Parenthood League of Connecticut—in their sharing of medical information with married persons on methods of preventing conception and prescribing contraceptive materials, were found guilty as accessories and given individual fines on the basis of § 54-196. Griswold and Buxton appealed this conviction on the assertion that, as it was applied, the accessory statute was in violation of the Fourteenth Amendment. In responding to this claim, the Court engaged with a question of the association between married persons and their physicians; it considered a question of privacy.

In the majority opinion, Justice Douglas approaches the issue by providing examples and elucidations into various implied guarantees found within the Bill of Rights—which is done in an effort to establish the grounds on which he finds the right to privacy. He begins by elaborating on several penumbral rights located in the First Amendment. He explains that the “association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents’ choice—whether public or private or parochial—is not mentioned,” he asserts in reference to *Pierce v Society of Sisters*, “Nor is the right to study any particular subject or any foreign language,” as was established in *Meyer v Nebraska*, “Yet, the First Amendment has been construed to include certain of those rights.” Through this demonstration, Justice Douglas submits a powerful argument in favor of the notion that some rights are not explicitly mentioned in the Constitution but are nonetheless upheld—a concept that will prove to be influential for years to come.

He then goes on to explain that the absence of these “peripheral rights” endangers the security of the explicit ones, and this declaration concerning the significant status of penumbra guarantees will go on to be incredibly pertinent in the remainder of Justice Douglas’s advocacy for a right to privacy. Justice Douglas contends the “various guarantees create zones of privacy,” and delineates the sources of these zones:

Within the First Amendment, there is the right of association. In the Third, there is a privacy zone established with the prohibition of housing soldiers without consent of the owner during times of peace. Then, the Fourth Amendment explicitly protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” whereas the Fifth Amendment creates another zone with its Self-Incrimination Clause. Moreover, in *Boyd v United States*, 116 U.S. 616, 630, both of these amendments were described as protecting against all governmental invasion “of the sanctity of a man’s home and the privacies of life.” Finally, Justice Douglas makes note of the Ninth Amendment, which affirms the existence of rights not enumerated in the Constitution.

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In providing these explicit accounts of the numerous enforcements of a right to privacy, Justice Douglas demonstrates that the aforementioned amendments would have little life and meaning if the peripheral right to privacy was not implied and accepted. He concludes his expounding on the penumbra right by saying that “the right of privacy...is a legitimate one.”

Through this assertion, Justice Douglas is able to categorize the issue at hand—that of marital relationships and associations—as falling within the zone of privacy, as well as being a concept of privacy older than the Bill of Rights; thus, given the lack of a compelling governmental interest requiring the ban of contraceptives, the statutes being challenged are unconstitutional, and therefore void, as they impede upon a zone of privacy. The Court concluded by reversing the criminal convictions of Griswold and Buxton.

Additionally, as he provides a different location for the right to privacy, it is important to note the concurring opinion of Justice Arthur Goldberg. While Justice Douglas expresses that the penumbras created within the Bill of Rights are the source of a general right to privacy, Justice Goldberg argues that the right is located in the Ninth and Fourteenth Amendments. Specifically, Justice Goldberg emphasizes the importance of the Ninth Amendment, and thus the Fourteenth Amendment, in relation to the allowance and protection of additional essential rights. Moreover, in delineating his concurrence, he makes note of the fundamental nature of the right to privacy. He brings forth a quote from the opinion of the Court in *Snyder v Massachusetts*, 291 U.S. 97, 105, where Justice Benjamin Cardozo stresses that judges must look to the “traditions and collective conscience of our people” to determine whether a principle is “so rooted there...as to be ranked as fundamental.” Here, the standard that the Court is using to assess the nature of the right to privacy is established, and through its application, it is decided that the right is a cardinal one, given that “it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions’ ...,” a principle that was established in *Powell v Alabama*, 287 U.S. 45, 67. Justice Goldberg finds in his concurrence that both the Ninth and Fourteenth Amendments act as sources of the right to privacy, given that the Ninth Amendment indicates the existence of rights not expressed in the first eight amendments, and the Fourteenth Amendment works to prohibit the states “from abridging fundamental personal liberties,” insofar as the right to privacy is a fundamental right not mentioned explicitly in the first eight amendments.

About seven years later, the Court faced another question concerning privacy and contraceptives in *Eisenstadt v Baird*, 405 U.S. 438. Initially titled *Commonwealth v Baird*, 355 Mass. 746, 247 N.E. 2d 574, the defendant was convicted under Massachusetts state laws for, first, displaying contraceptive tools during a lecture at Boston University and, second, for giving a contraceptive item to a young woman. In this case, the Massachusetts Supreme Court dismissed the first conviction on the grounds of the First Amendment, but upheld the second. The law under which Baird was convicted, Massachusetts General Laws Ann., c. 272, § 21, expressed that “whoever...gives away...any drug, medicine, instrument or article whatever for the prevention of conception” can face a maximum of five years in prison, with exceptions for registered physicians and pharmacists. Upon this conviction, Baird filed a petition for a writ of

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habeas corpus—a request that requires the convicted’s presence before a court in an effort to be released on the grounds that their arrest was unlawful. The district court denied his request, so he appealed and the Court of Appeals for the First Circuit granted his release. This decision was then appealed by the Sheriff of Suffolk County, Massachusetts, to the Supreme Court of the United States, resulting in *Eisenstadt v Baird*, 405 U.S. 438.

Ostensibly, this case may not seem relevant in relation to the topic at hand, as the central issue here was whether Baird had the standing to seek a writ of habeas corpus upon being convicted under the aforementioned law—which specifically mentioned the rights of unmarried persons and authorized individuals—given that he was neither an unmarried person nor an authorized distributor. However the Court’s finding that Baird does have standing is incredibly pertinent in the discussion of the application of the right to privacy. In the opinion of the Court, Justice William Brennan begins with the assertion that “the legislative purposes that the statute [under which Baird has been convicted] is meant to serve are not altogether clear.” When impeding upon the rights of individuals (especially those considered fundamental, as the general right to privacy and its zones are, as can be seen in *Griswold*) the state is burdened with proving a necessary governmental interest. In this instance, the Massachusetts Supreme Court found the state’s interest is to protect its citizens’ health. However, the Court of Appeals disagreed and, citing *Griswold*, found that the statute barred contraceptives, and thus it interfered with fundamental guarantees. The United States Supreme Court affirms the Court of Appeals’s judgment, thereby leading them to the conclusion that “the statute, viewed as prohibition on contraception *per se*, violates the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment.”

In further delineating the opinion of the Court, Justice Brennan asserts that “whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike,” referring to the unequal application of the statute. Highlighting the ruling in *Griswold*, Justice Brennan explains:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affect a person as the decision whether to bear or beget a child.

This notion is important for the expansion of the right to privacy’s scope. In *Griswold*, the Court is primarily addressing marital privacy, which inadvertently permitted a disregard of privacy for single individuals concerning contraceptive accessibility. In this case, however, Justice Brennan is demonstrating how marital privacy consists of individual privacy in that marriage is the association of two individuals; thus, this allows for an expansion of the scope of the right to privacy in its application.

Overall, it is clear that both *Griswold* and *Eisenstadt* provide significant precedents on the right to privacy. Though said to have a few potential locations, the decisions of the Court

acknowledged a fundamental right to privacy—for both married and single individuals—that allowed for the legal system, especially the future Court, to expand upon the rights of individuals. As such is proven when considering the cases that followed.

#### **IV. *Roe and Casey*—Privacy and Abortion**

After *Griswold* and *Eisenstadt*, another landmark decision regarding the right to privacy is found in *Roe v Wade*, 410 U.S. 113. Widely referred to as the “abortion case,” *Roe v Wade* was brought to the United States Supreme Court as a challenge to several Texas statutes criminalizing abortions in all instances, excluding medically-advised termination as a life-saving measure for the mother. In seeking a declaratory judgment on the basis of the statutes being unconstitutional and an injunction barring Texas from effectuating them, Jane Roe, Dr. James Hubert Hallford, and John and Mary Doe. Roe, a pregnant woman, claimed that the criminal abortion statutes were “unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.” Dr. Hallford, a licensed physician who had two pending prosecutions against him for violating the Texas abortion statutes, intervened with Roe’s complaint and appealed to the same amendments. John and Mary Doe, a childless couple, in their companion complaint, also claimed that the Texas statutes were unconstitutional and sought declaratory and injunctive relief. The complaints were combined and presented together in front of a three-judge panel in Texas’ Northern District Court. Upon hearing the complaints, the court held that Roe and Dr. Hallford had “standing to sue and presented justiciable controversies.” The Does, on the other hand, “had failed to allege facts sufficient to state a present controversy and did not have standing.” The court would then go on to declare the abortion statutes void, insofar as they were unconstitutionally vague and infringed upon the plaintiffs’—Roe and Dr. Hallford—Ninth Amendment rights. However, the court did dismiss the application for injunctive relief. In response to the denial of injunction from the lower court, Roe, Dr. Hallford, and Doe, pursued 28 U. S. C. § 1253—which allows for any party to appeal to the Supreme Court “from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act Congress to be heard and determined by a district court of three judges.” In addition to this appeal, Henry Wade, the defendant, cross-appealed on the basis of the District Court’s declaratory relief granted to the plaintiffs—the nullification of the statutes. Thus, the Supreme Court is faced with another constitutional question concerning the right to privacy and its scope.

Jane Roe, the only appellant that the Supreme Court contends as having standing to sue, asserts that the Texas statutes “improperly invade a right.” This right, Roe claims, is discovered “in the concept of personal “liberty” embodied in the Fourteenth Amendment’s Due Process Clause.” In appealing to the precedents established in *Griswold* and *Eisenstadt*, Roe further argues that the right can further be found “in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras...or among those rights reserved to the people by the Ninth Amendment.” Before addressing this claim, the Court felt it appropriate to examine and establish the history and motivations behind abortion legislation. Before addressing this claim, the Court “approach[ed]... the subject from the viewpoint of history that clarifies the

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prospect [of abortion legislation]" as per Justice Cardozo's recommendation in *Snyder*. In doing so, the Court emphasizes various relevant historical notes: the common law's recognition of abortions performed before the first noticeable movement as being legal, the position of the American Public Health Association (which established various standards for abortion services), and the three commonly advanced state interests—health, medical standards, and prenatal life. Working in tandem with these historical and traditional references, Justice Blackmun goes on to consider a right to privacy and a right to an abortion.

In delivering the opinion of a 7-2 majority, Justice Blackmun asserts that the Constitution does not explicitly guarantee the right to privacy. However, he states, "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." Furthering this point, he notes:

In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment... the Fourth and Fifth Amendments... the penumbras of the Bill of Rights... the Ninth Amendment... or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment... These decisions [the various cases mentioned in reference to the aforementioned amendments] make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," ... are included in this guarantee of personal privacy. They [the cases] also make it clear that the right has some extension to activities relating to marriage...procreation...contraception...family relationships...and child rearing and education....

Here, Justice Blackmun is not only demonstrating the constitutional amendments from which the right to privacy has been construed, but he also notes the various fundamental personal rights that past Courts have ruled as falling within the scope of the right to privacy. Predicated upon this, Justice Blackmun expands the scope of the right to privacy, asserting that "The right to privacy...is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Thus, the Burger Court rules in favor of the existence of a constitutional right to an abortion derived from the right to privacy—a right grounded within the notion of liberty secured in the Due Process Clause of the Fourteenth Amendment.

Additionally, Justice Blackmun states that the privacy right to an abortion is not absolute but is subject to some limitations and regulations. Nevertheless, as is demonstrated by *Roe* and judicial precedent, in instances of historical context and construal, the Court deems this privacy right to an abortion as being fundamental. For a state to implement a statute limiting a fundamental right, the state must prove a "compelling state interest" and demonstrate that the statute was "narrowly drawn to express only the legitimate state interest at stake." Justice Blackmun acknowledges the existence of two legitimate but distinct interests states have in restricting abortion access: the preservation of the health of the pregnant individual and the preservation of the potentiality of life. Blackmun indicates the points at which the interests of the state become compelling—convincing enough to justify abridgment. With respect to the interest of the health of the pregnant individual, the compelling point is at the end of the first trimester;



for the potentiality of life, the compelling point is at viability of the fetus. The appellee, Henry Wade, could not prove a compelling state interest on behalf of Texas. Thus, the Court decided the Texas abortion statutes infringe upon the fundamental private right to an abortion, ruling them unconstitutional and, therefore, void.

Following *Roe*, the Court was confronted with another constitutional question regarding the private right to an abortion in *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 U.S. 833. In this case, the Court considers whether the Pennsylvania Abortion Control Act (PACA) of 1982, amended in 1988 and 1989, is constitutional. The PACA of 1982 contained five controversial requirements in relation to abortion, the first of which provided that doctors must provide certain information at least twenty-four hours before the abortion is performed. Second, a woman seeking an abortion must give her informed consent prior to the abortion procedure, as well as partake in a twenty-four waiting period. Third, a minor must obtain the informed consent of one of their parents, but there are allowances of judicial bypass for those who cannot or do not wish to obtain a parent's consent. The fourth provides that a married person seeking an abortion must sign a statement indicating that they informed their partner of the abortion. The fifth and final provision was the imposition of certain reporting requirements on facilities that provide abortion services. However, before these provisions were effectuated, five abortion clinics, a class of physicians providing abortion services, and one physician, in seeking declaratory and injunctive relief, brought forth a facial challenge that claimed each provision was unconstitutional. At the first stage of this challenge, the federal district court for the Eastern District of Pennsylvania authorized an injunction against the enforcement of any and all the provisions; however, upon an appeal made by then Governor of Pennsylvania, Robert Casey, this decision would go on to be reviewed by the Court of Appeals for the Third Circuit. The Court of Appeals upheld the district court's decision to dismiss the provision requiring the pregnant person to notify their partner and reversed the rest of the decision. The Supreme Court then granted certiorari—an order from a superior to review a decision made by a lower court—to assess the case themselves. The Court gave itself the opportunity to uphold or strike down the decision made in *Roe*.

The Court was unable to reach a majority opinion of five justices, resorting to a plurality opinion by Justice O'Connor, Justice Kennedy, and Justice Souter that upheld most of *Roe*. The plurality reaffirmed *Roe* in three parts. First, the plurality opinion states that the Court recognizes “the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the state.” This statement not only recognized the right to an abortion, but, insofar as it was deemed the source of a right to an abortion, it also reaffirmed the right to privacy. Additionally, the plurality affirms the “State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health.” Here, the plurality acknowledged a state's regulatory authority, as well as the limits on that power, when concerning abortion. Finally, working in tandem with the aforementioned premise, the plurality accepted the “principle that the State has legitimate interests from the

outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.”

However, the plurality opinion did overturn the trimester framework established in *Roe*. Instead of focusing on trimesters, the guideline was reworked with an emphasis on viability of the fetus. The Court replaced the “strict scrutiny test” with the “undue burden standard”—a test of whether the statute in question has placed a substantial obstacle in the way of the individual seeking an abortion—in the instances of challenges to abortion statutes. Due to this portion of the ruling, the standards for states became much more lax. Ultimately, Justice O’Connor found that all of the provisions of the PACA of 1982, apart from the notifying of the partner requirement, were permissible.

Though the right to privacy is implied, since being acknowledged, it has been used to construe, give meaning, and support various other rights, and the precedents set by these two cases are exemplars of this point. Through the decisions of *Roe* and *Casey*, the Court established the fundamental right to an abortion from the constitutional right to privacy, sourced from the Fourteenth Amendment. The expansion of this right to include abortion is not where the right to privacy ceases in its scope, given the subsequent cases where the right to privacy plays a central role in the Court’s decisions.

### **V. *Lawrence*—Privacy and Sexual Conduct**

Another important case in which the Court expanded its interpretation of the scope of the right to privacy is that of *Lawrence v Texas*, 539 U.S. 558. In deciding this case the Court overruled the infamous ruling of *Bowers v Hardwick*, 487 U.S. 186, the 1986 case that made it permissible for states to criminalize sodomy. However, it is important to note that the Court in *Bowers* did not contend that the right to privacy is nonexistent; rather, it ruled that the scope of the protection the right to privacy affords did not extend to the issue at hand. Here, the Court reasoned that:

No connection between family, marriage, or procreation on the one hand and homosexual activity on the other hand has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases [those that establish the right to privacy as protecting instances concerning family, marriage, and procreation] nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is supportable. Indeed, the Court’s opinion in *Carey* twice asserted that the privacy right, which the *Griswold* line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far.

Thus, it is clear that the Court, before considering *Lawrence*, was of the belief that the act of same-sex sexual conduct was far beyond the scope of the right to privacy, and the act of engaging in this conduct, specifically sodomy, was not a fundamental right.

About eight years later, the Court would revisit a similar issue, insofar as it involved homosexuality and the scope of the right to privacy in *Lawrence*. In this case, John Lawrence and Tyron Garner were arrested for “deviate sex” under Chapter 21, Section 21.06 of the then-

Texas Penal Code. Lawrence and Garner challenged the arrest in Harris County Criminal Court and brought forth the claim that the law was unconstitutional on the grounds of the Equal Protection Clause of the Fourteenth Amendment—which requires states to ensure equal protection of the laws—and the Texas Constitution. Their claims were rejected, and they were ordered to pay individual fines. Upon appeal, the Court of Appeals for the Texas Fourteenth District considered Lawrence and Garner’s arguments, but ultimately rejected them and reaffirmed the decision, referring to *Bowers* as their controlling principle. However, the Supreme Court of the United States granted certiorari and claimed to consider the case in tandem with three questions. First, the Court would consider whether the “petitioners’ criminal convictions under Texas ‘Homosexual Conduct’ law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of the laws.” Second, it would consider the question of “whether petitioners’ criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.” Finally, the Court also sought to address whether the decision made in *Bowers* should be overruled.

With regard to these questions, the opinion of the Court, as delivered by Justice Anthony Kennedy, struck down the Texas law, stating that:

The case... involves two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners [Lawrence and Garner] are entitled to respect for their private lives... Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

Here, the Court relied heavily on the precedents set in *Griswold*, *Eisenstadt*, *Roe*, and *Casey*. In doing so, it found that, despite what was said in *Bowers*, the issue at hand—same-sex sexual conduct—is similar to issues of family relationships, marriage, procreation, and abortion. Therefore, in its establishment of a fundamental right to engage in private sexual activity, regardless of whether the consenting individuals were of the same or different sex, on the basis of the Due Process Clause of the Fourteenth Amendment, the Court has once again broadened the scope of the right to privacy to allow for additional fundamental rights.

### **VI. *Loving* and *Obergefell*—Privacy and Marriage**

Having established the direct implication of the right to privacy found in the Fourteenth Amendment’s guarantee of liberty, it is important to discuss both *Loving v Virginia*, 388 U.S. 1, and *Obergefell v Hodges*, 135 S. Ct. 2584. In both of these cases, the Court established fundamental rights with reference to these guarantees and, in doing so, broadened the scope of the right to privacy. In *Loving*, there is a question of constitutionality regarding anti-miscegenation statutes in Virginia, found in the Racial Integrity Act (RIA) of 1924, which banned marriage between individuals of different races. In an attempt to avoid punishment, Richard and Mildred Loving, an interracial married couple, left Virginia; however, upon their return to the state, they were subjected to a police raid which led to their marriage certificate

being found. Thus, criminal charges under the anti-miscegenation law and a related statute were brought against the Lovings. On this charge, the Lovings pled guilty and left the state. However, they eventually wished to return to Virginia, so they contacted the American Civil Liberties Union (ACLU) and opposed the state's laws. Eventually, their appeals would reach the Supreme Court of the United States, where the Court, upon deliberation, concluded that the statutes are, indeed, unconstitutional on the grounds of the Fourteenth Amendment, thus reversing their convictions.

This holding was based on two premises. First, the Court found that Virginia's statutes were based solely upon distinctions drawn according to race and thus enforced racial classifications. Therefore, regardless of the state's attempt to argue that they had "equal application," the statutes were in clear violation of the Fourteenth Amendment's Equal Protection Clause. The second argument made by the Court relies on the notion of liberty found in the Due Process Clause of the Fourteenth Amendment—making this portion of the Court's holding important in reference to privacy rights. Upon this claim, the Court explained that the statutes "also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." This assertion that individuals have a recognized freedom to marry rooted in liberty is critical in how the scope of privacy is viewed. As the Court mentioned most notably in *Griswold*, marriage is a relationship that resides "within the zone of privacy." The Court construing the freedom to marry as being rooted in liberty, as it does in this case, given that it has also referred to marriage as being within the scope of privacy, provides further evidence of the connection between liberty and privacy. Thus, the Court here expanded upon the scope of privacy to protect decisions concerning who an individual marries, a facet of privacy it revisits in 2015 with *Obergefell v Hodges*, 135 S. Ct. 2584.

In Michigan, Kentucky, Ohio, and Tennessee, there were laws that defined marriage as being between one man and one woman. These laws would go on to be challenged by various plaintiffs in their respective district courts as violating the Fourteenth Amendment—which resulted in the district courts ruling in favor of the plaintiffs. However, the Court of Appeals for the Sixth Circuit would go on to combine multiple challenges into one case, known as *Obergefell v Hodges*, and reverse the decision, thus permitting the aforementioned states to enforce their definitions of marriage. In reversing this decision, the Supreme Court of the United States granted certiorari to the Sixth Circuit and addressed the question of whether, under the Fourteenth Amendment, states must allow and acknowledge same-sex marriage.

In their reversal, the Court established that the "Fourteenth Amendment requires a States to license a marriage between two people of the same sex," as it protects fundamental liberties that "extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs," in reference to cases such as *Griswold* and *Eisenstadt*. Through this assertion, the Court, as it did in *Loving*, expanded the scope of

protection afforded by the right to privacy and, in doing so, it furthered the fundamental rights of homosexual individuals to match those of heterosexual individuals.

## VII. Current Challenges

Despite the fundamental nature, as the Court construes it, of the right to privacy, its stability continues to be challenged by those who seek to erode it and the guarantees therein. These challenges come largely in response to the passive implication of the right to privacy. The Court, as well as Justices in their additional opinions (both concurring and dissenting), has delivered various opinions explicitly acknowledging the right to privacy and its scope: namely, the creation of additional fundamental rights through constitutional amendments. The recent decisions of the Roberts Court, however, demonstrate significant challenges by various states to the right to privacy. The strategy employed by actors opposed to the right to privacy's constitutional protection is comprised of two methods of attack: 1) the Court eroding the validity of the right to privacy by disregarding—explicitly or implicitly—its existence, and 2) the states bringing cases to the Court that threaten the personal protections the right to privacy guarantees to citizens.

Today, the American judicial system faces an onslaught of related cases challenging the right to privacy and a Court readily disposed to overturning precedent. The incredibly recent contentious case, *Dobbs v Jackson Women's Health Organization*, best demonstrates the Court's two-pronged attack on the right to privacy. The challenge to the private, fundamental right to an abortion in *Dobbs v Jackson* is interpreted as a direct challenge to *Roe* and *Casey*, both of which established the right to privacy. *Dobbs* asked the Supreme Court to determine the constitutionality of a Mississippi law passed in 2018—the Gestational Age Act (GAA)—prohibiting all abortions, with few exceptions, after fifteen weeks' gestational age. Upon the passage of the GAA, Jackson Women's Health Organization—an abortion clinic—with one of its doctors, Dr. Sacheen Carr-Ellis, challenged the law in a federal district court. The ruling of the district court barred the state of Mississippi from enforcing the GAA, citing the state's failure to provide evidence of fetal viability at fifteen weeks and the precedents established by the Court in *Roe* and *Casey*—which prohibit states from banning abortions before viability. The State Health Officer of the Mississippi Department of Health, Dr. Thomas E. Dobbs, appealed the decision to the Court of Appeals for the Fifth Circuit. However, the Fifth Circuit affirmed the district court's decision, leading Dobbs to appeal to the Supreme Court. Dobbs' appeal of the lower courts' decision gave the Supreme Court the opportunity to overrule *Roe* and *Casey*, thereby stripping individuals of the fundamental right to an abortion. Furthermore, a ruling in favor of *Dobbs* makes way for challenges to various other fundamental rights recognized by the Court, thus putting the cases, and the rights established through them, at risk of being overturned.

Until early May 2022, the Court left the general public to speculate on the decision of *Dobbs*. Speculation included the Court upholding the right to an abortion, or a ruling that chipped away at some (but not all) of the precedent established in *Roe* and *Casey*. The most severe conjecture was that the Court would overturn the decisions in *Roe* and *Casey* *entirely*. On

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On June 24, 2022, the Roberts Court overturned *Roe* and *Casey*, nullifying a federally protected right to abortion and eroding the validity of a claim to a constitutionally protected right to privacy.

The majority opinion, written by Justice Samuel Alito, asserts:

We [the Court] hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’ . . . The right to an abortion does not fall within this category.

This excerpt is incredibly dangerous for the stability of the right to privacy, as it refers to neither *Roe* nor *Casey* as having a claim to constitutional support. As established in the earlier expounding of *Roe*, the Court previously relied on the provision of a right to privacy implied by the Due Process Clause of the Fourteenth Amendment. However, by asserting that no such provision exists within the Due Process Clause of the Fourteenth Amendment, the Court not only creates a precedent casting doubt on the right to privacy as being the source of the right to an abortion, but also suggests that the right to privacy may not exist at all.

Justice Alito further addresses the right to privacy by referring to *Roe* as “remarkably loose in its treatment of the constitutional text.” Alito writes that *Roe* “held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned.” Justice Alito is correct in stating that the right to privacy is not expressly stated in the Constitution, but implied in accordance with the Court’s previous rulings. However, the threat to the right to privacy is derived from the fact that he references *Roe*—which is being overruled for its lack of constitutional support—and the right to privacy in the same manner. Granted, Alito does proceed to elaborate on the amendments that privacy is said to come from; however, insofar as there is no mention of the current Court supporting any specific provision as implying the right to privacy, this does little to diminish the damage done in the grouping together of *Roe*—having just been overruled—and the right to privacy seen in this opinion. Thus, the Court opens the door for the argument that neither the right to privacy nor the rights therein have adequate constitutional support, thereby threatening their existence.

The precedent set by the Court’s ruling in *Dobbs v Jackson Women’s Health Organization* endangers other rights established on the same basis as *Roe* and *Casey*, including the right to contraceptives, same-sex sexual conduct, and same-sex marriage. While Justice Alito refers to the issue of abortion as “fundamentally different” from matters such as contraception, sexual relations, and marriage, one must recall that the cases ruling on these matters establish fundamental rights for individuals that our nation has not always been so accepting of. In his concurring opinion in *Dobbs*, Justice Clarence Thomas explicitly provides a basis for challenging the precedents established in *Griswold*, *Lawrence*, and *Obergefell*. In advocating for

their overruling, Justice Thomas writes that these decisions should be overruled because their precedents are considered under “substantive due process,” a principle derived from the Fifth and Fourteenth Amendments protecting rights (enumerated and implied) from governmental interference through an analysis of sufficient reasoning. These decisions, argues Justice Thomas, are thus “demonstrably erroneous.” Justice Thomas further writes that the Court has “a duty to ‘correct the error’ established in those precedents.” The consequences of these opinions are likely to be disastrous. When an organization inevitably brings forth a complaint on an issue such as the legalization of same-sex marriage, the precedent established here provides them with a supporting principle. They will be able to make an appeal to both Justice Alito’s assertion concerning issues that are not “deeply rooted in the Nation’s history and tradition,” and Justice Thomas’ claim regarding decisions made on the basis of substantive due process as being “demonstrably erroneous.”

Although the Supreme Court of the United States has a record of upholding the right of privacy, and has built upon precedent to establish additional rights, the Roberts Court demonstrates no qualms with overruling the decisions that secured them in the first place. Moreover, in recent years, various states including Texas, Florida, Tennessee, and Oklahoma have passed and enforced laws undermining these rights. Thus, in consideration of the actions by the states and the Court, the state of the right to privacy in America is alarmingly precarious.

### **VIII. Solution**

As demonstrated by the information above, the right to privacy has evidently begun to be undermined and ignored by the very institution that established it, as well as numerous states. Considering the fundamental nature of the right, this is an issue that ought to be addressed. While backed by precedent, the right to privacy is an implied right that is relatively nebulous because the Constitution does not expressly enumerate it. The hope of those who wish to maintain the guarantee to privacy, and rights therein, is that the Supreme Court of the United States remains on the side of privacy. However, this is unlikely given the recent majority opinion in *Dobbs*.

With this in mind, rights explicitly stated in the Constitution are afforded a privileged and protected status, facing little opposition concerning their validity because there is little room for interpretation. Consequently, the most infallible way to ensure that the right to privacy is protected would be to propose an amendment to the Constitution. An explicit recognition of a constitutional right to privacy would grant citizens a direct source of authority to be used in instances of grievances. Further, the provision would serve as a direct source for the additional fundamental rights the Court established in *Griswold*, *Eisenstadt*, *Roe*, *Casey*, *Lawrence*, *Loving*, and *Obergefell*.

However, successfully amending the Constitution—a document revered for its rigidity—is no easy feat. Several requirements must be met. First, the amendment must be proposed by two-thirds of both sectors of Congress; or, if two-thirds of the states requested the amendment, it must be proposed through the process of a convention. Then, the amendment must be ratified by three-fourths of the states or three-fourths of conventions called in each state for ratification.

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However, this is rarely done and unfeasible in today's political climate. Thus, amending the Constitution, while not impossible, is too impractical of a solution.

The only other direct way to constitutionally protect the fundamental right to privacy belongs to the United States Supreme Court. The Court is the only government body in possession of the authority to construe the Constitution in this explicit way. Thus, the people only have one avenue in trying to ensure security: voting. The decision being made in *Dobbs* regarding *Roe* is an indirect result of voting, insofar as three of the Justices that voted to overrule *Roe*—Justice Neil Gorsuch, Justice Brett Kavanaugh, and Justice Amy Coney Barrett—were nominated by President Donald J. Trump and confirmed by the Senate. Considering how politicized judicial appointments are today, American citizens must be selective with who is allowed to hold executive office, and by carefully voting, the people will be giving their best effort in securing a right to privacy, given that the President of the United States is the only individual with the authority to appoint Supreme Court Justices—with whom the responsibility of constitutional protection ultimately belongs to. In times like these, when fundamental rights are at stake, the impact and importance of voting are wholly apparent.

However, in reference to the rights established on the basis of the right to privacy, there is an additional method of protection: codification. As mentioned in the several cases above, the right to privacy is the source of the rights to contraceptives, an abortion, engagement in consensual sexual activity with those of the same sex, and, among many other rights, the right to marry those of the same sex. In acting upon the authority granted to it in the Fourteenth Amendment to protect the liberty asserted in said Amendment, Congress may codify these rights, thus affording them federal protection—which, given that they are sourced from it, would grant the right to privacy to more security. Specifically, in considering the undue burden and strict scrutiny standards, codification of these rights in federal law would not explicitly state the legality of an act. Rather, the law would prevent states from imposing unfair, unwarranted, and uncompelling restrictions on these actions; thus, in considering where Congress would procure the authority to enact such legislation, the fifth section of Fourteenth Amendment enables them to effectuate “appropriate legislation” in order to protect the provisions established in the amendment.

Understandably, one may question the need for codification, given that the Court has already construed the Constitution as covering these issues. Up until the momentous decision of *Dobbs*, this would have been a sound argument. However, *Dobbs* demonstrated that the Court has no issue with nullifying rights that were once deemed to be constitutionally protected. Moreover, the Constitution's protection of these issues is almost entirely contingent upon the existence of a right to privacy, as it is found within the Due Process Clause of the Fourteenth Amendment or the penumbras of the Bill of Rights. In this infamous opinion, Justice Alito is intentional in his mentioning of the right to privacy as not being found within the Constitution, as well as his not mentioning of the Court affirming any right to privacy.

Nonetheless, it could also be argued that there are hints of anti-federalism within this solution. Some may say codification would take too much power away from the states.



Regarding matters such as abortion, marriage, and contraception, some argue that they should be left up to the discretion of the states, not the federal government, given that they possess the policing power—the authority to make laws for the betterment of public health and safety.

However, these arguments disregard the fact the states would still have the capacity to impede upon and regulate these rights. As is the case with a state's infringement of any right, curtailment of these guarantees is permitted so long as it is—of varying degrees depending upon the right—rationally related, necessary, and narrowly tailored in achieving a governmental objective. Thus, the states would still be able to regulate these matters, so long as it is proved to be necessary.

## **IX. Conclusion**

As is established in this study, the right to privacy is, despite being implied, a fundamental right. In the construal of various of various constitutional amendments, such as the penumbras within the Bill of Rights, the Ninth Amendment, and the Due Process Clause of the Fourteenth Amendment, the Supreme Court of the United States has recognized that citizens are afforded the right to be left alone and free from unjust governmental intrusion. In this establishment, it becomes clear that the right to privacy guarantees individuals the capacity—the liberty—to make fundamental personal decisions, as such can be seen in the reviewing of cases such as *Griswold* and *Eisenstadt* with contraception, *Roe* and *Casey* with abortion, *Lawrence* with sexual conduct, and *Loving* and *Obergefell* with marriage. However, due to current challenges, most notably the recent decision in *Dobbs*, and the nebulousness of the implied right—regardless of whether the past Courts deemed it fundamental—the right to privacy, and thus the rights it provides for, has become precarious. In resolving this issue, apart from the ideal recourse of amending the Constitution to explicitly guarantee a right to privacy, there are two things to be done. First, the people must mobilize and vote to ensure that the power of appointment resides in the hands of a person who will nominate Justices that will uphold this fundamental right, insofar as the power to re-secure this right is in the hands of the Supreme Court of the United States. Second, the legislature must federally codify the rights that the past Courts have deemed as falling within the scope of the right to privacy. Though these solutions are contentious to some, particularly those who believe the solutions are promoting anti-federalism, for those who wish to protect this fundamental right and the rights therein, they remain the best, most practical options, insofar as they are the most accessible.

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3. US Const, Amend XIV, § 1.
4. *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 581 (1992).
5. *Griswold v Connecticut*, 381 US 479, 480 (1965).
6. *Ibid.*
7. *Ibid.*
8. *Id.*, at 482.
9. *Ibid.*
10. *Ibid.*
11. *Id.*, at 483.
12. *Id.*, at 484.
13. *Ibid.*
14. *Id.*, at 485.
15. *Id.*, at 482-485.
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18. *Ibid.*
19. *Ibid.*
20. *Id.*, at 486-488.
21. *Ibid.*
22. *Id.*, at 494.
23. *Eisenstadt v Baird*, 405 U.S. 438, 440-441 (1972).
24. *Id.*, at 442.
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26. *Eisenstadt v Baird*, 405 U.S. 438, 443 (1972).
27. *Id.*, at 453.
28. *Ibid.*
29. *Roe v Wade*, 410 U.S. 113, 120 (1973).
30. *Id.*, at 122.
31. *Ibid.*
32. 28 U. S. C. § 1253.
33. *Roe v Wade*, 410 U.S. 129 (1973).
34. *Ibid.*
35. *Ibid.*
36. *Snyder v Massachusetts*, 291 U.S. 97, 113 (1934).
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41. *Id.*, at 162.
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48. *Ibid.*
49. *Id.*, at 846.
50. *Ibid.*
51. *Ibid.*
52. *Bowers v Hardwick*, 478 U.S. 186, 191 (1986).
53. *Lawrence v Texas*, 539 U.S. 558, 564 (2003).
54. *Ibid.*
55. *Id.*, at 578.
56. *Loving v Virginia*, 388 U.S. 1, 8 (1976).
57. *Id.*, at 12.
58. *Griswold v Connecticut*, 381 U.S. 479, 485 (1965).
59. *Obergefell v Hodges*, 13 S. Ct. 2584 (2015), p. 2.
60. *Ibid.*
61. *Jackson Women’s Health Organization v Dobbs*, 142 S. Ct. 2228, 2242 (2022).
62. *Id.*, at 2245.
63. *Ibid.*
64. *Id.*, at 2243.
65. *Jackson Women’s Health Organization v Dobbs*, 142 S. Ct. 2228, 2301 (2022) (THOMAS, J., concurring).
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U.S. Const., amend. XIV, § 5.

***“Plagiarism” As Legal Language:***  
***The Influence of Amicus Curiae Briefs on Supreme Court Opinions in***  
***Parental Notification Abortion Laws***

Emily Sadutto | Binghamton University

Edited by Daisy Lawrence, Jay Bowling, Hannah Puelle, Matthew Ruppert,  
Gabriella Frants, Jeannette Kim, Dongjae Min, Elizabeth Hasapis

**Abstract**

Amicus Curiae play an active role in the Supreme Court by filing Amicus briefs. These briefs advocate for the Court to uphold the Amici’s interests. This paper explores the role these briefs have had on four Supreme Court opinions for parental notification cases: *Bellotti v Baird* established this precedent for *Ayotte v Planned Parenthood of Northern New England*, *Hodgson v Minnesota*, and *Ohio v Akron Center for Reproductive Health*. The paper first provides an overview of the relevant cases and a detailed profile of the Amici. Additionally, this paper compares the language and arguments within the amici briefs to the language in the majority opinion of the Court to determine whether the justices’ borrowed legal language from the Amicus Curiae. This comparison is done through the use of plagiarism detection software. The results of this research highlight that Amicus Curiae may not significantly influence the opinions of the Court, specifically within parental notification cases.

In the American political system, the Supreme Court and its interpretations have played a significant role in defining the boundaries of reproductive rights, given that explicit language about abortions does not exist in the Constitution. In 2019, the Centers for Disease Control and Prevention (CDC) reported that there were 629,898 legal abortions performed.<sup>i</sup> It is the Court's interpretations that have allowed people with uteruses to access abortions, making it imperative to evaluate the factors that influence the Court's decisions. One particular type of influence is Amicus Curiae. This article argues that the Amicus Curiae briefs, or briefs submitted by third parties with a vested interest in the matter of the case, influence the Supreme Court's opinions. This research compares the language and arguments within the Amicus Curiae briefs and the justices' opinions in Supreme Court cases involving parental notification laws for minors seeking an abortion to see whether the justices borrowed legal language or arguments from Amicus Curiae briefs.

Since there is little literature regarding Amicus Curiae's influence on Supreme Court opinions in parental notification cases, this research will help fill that gap. Analyzing such cases will highlight whether these Amicus Curiae have any democratic influence on the Supreme Court. A democratic influence is a non-legal factor representing public opinion on a particular issue. As a democratic influence, Amici represent public interests within the Supreme Court. This deviates from the traditional legal model of courts' decision-making in which the Court is non-democratic and only considers legal factors and influences when making a judicial decision or ruling. In this case, the measure of democratic influences, Amicus Curiae, will assess the level of influence these factors have on Supreme Court opinions on parental notification abortion laws. Previous research has shown that studying the effect of Amici on the Supreme Court's opinions reveals how the Amicus uses language to shape public policy and achieve their policy goals.<sup>ii</sup> Dr. Paul Collins, a professor and legal scholar, gives scholars insight into the different factors justices consider when drafting their opinions. This research analyzes Amicus Curiae and their briefs filed at the merits stage. The certiorari stage is when the Supreme Court justices decide which cases to pick up for review, while the merit stage is when the Supreme Court has already picked up a case and adjudicates it.

### **Background**

Amicus Curiae translates to "a friend of the court" in Latin. Amici are third parties, meaning they are not direct parties or litigants to a case. They file briefs urging a court to rule in favor of a party. Amicus Curiae briefs are more common at the merits stage. However, if an Amicus files a brief during the cert stage, the justices are more likely to pick up a case for review because of the additional legal grounds articulated by the Amicus.<sup>iii</sup> Amici must also receive permission from both parties before submitting a brief. If one side does not grant permission, the Amici can petition the Court to grant permission for their participation. It is uncommon for the Supreme Court not to grant that request. Among the historically relevant cases for this research, the Court did this only once in *Ayotte v Planned Parenthood of Northern New England*.<sup>iv</sup> Legal Defense for Unborn Children filed a brief, but the petitioner filed a motion to block the brief for

two reasons. First, the Amicus brief was not filed in support of either party. Second, the brief focused on the life of the unborn, which was not at issue in this case.

Additionally, state and federal government representatives do not need permission to file an Amicus brief. When the Supreme Court wants to hear the government's perspective in a hearing, they will sometimes specifically invite the Solicitor General to participate in oral arguments or submit a brief. The Solicitor General is an attorney who oversees and handles litigation matters for the United States government at the Supreme Court. As such, the Solicitor General only participates in cases that affect the interests of the US Government, especially those of the Executive Branch. As a federal institution and central part of the American political system, the Supreme Court cannot ignore the government's interests.<sup>v</sup>

The Supreme Court also has strict deadlines for when an Amicus Curiae brief can be filed at the cert and merit stage. At the cert stage, an Amicus must ensure that both parties are aware of the Amicus's intent to file a brief at least ten days before the deadline unless the brief is filed ten days before the final deadline. Amicus Curiae briefs in support of the petitioner must be filed within 30 days of the Supreme Court placing the case on its docket or calling for a response, whichever occurs later. Amicus Curiae briefs filed in support of a respondent are due 60 days after the case is put on the docket. The Supreme Court can also grant extensions for Amicus briefs supporting the respondent if the deadline for filing a motion to dismiss or affirm is changed. At the merits stage, the Supreme Court requires Amici to submit their briefs within seven days of the brief of the party they are supporting. If an Amicus brief is in support of multiple parties, the Court will allow the Amicus to submit it within seven days of the last brief of the last party an Amicus is supporting.<sup>vi</sup>

Amicus Curiae briefs can also urge the Supreme Court to consider previous court rulings in their decision. This constitutional method of interpretation is known as *stare decisis* and involves the Court looking at previous decisions on these matters. The Supreme Court may use *stare decisis* when maintaining an application of the law from an earlier case. This constitutional method of interpretation has been used for continuity in critical Supreme Court decisions. The Court first recognized the right to abortion in *Roe v Wade*,<sup>vii</sup> then reaffirmed *Roe* through its holding in *Planned Parenthood of Southern Pennsylvania v Casey*,<sup>viii</sup> and other similar abortion cases. However, the Court did hold that states had the right to impose limitations. In Supreme Court cases concerning parental notification abortion laws, states have created statutes or regulations that attempt to regulate minors' access to abortion by forcing them to receive parental notification before the abortion procedure.

Under the precedent set by *Planned Parenthood of Southern Pennsylvania v Casey*, the Court ruled that statutes cannot pose a significant obstacle to a person seeking an abortion as it would fail the undue burden test established by the Court, which did not allow states to maintain unreasonable statutes requiring both parents' consent or lacking the possibility of a judicial bypass. Judicial bypass allows a pregnant minor to receive an abortion without parental notification and consent by petitioning the court. A judge may grant a judicial bypass if they deem the minor competent and mature enough to make their own decisions. Individual states

have different requirements for minors to meet that standard. The Court's ruling on judicial bypass was upheld through stare decisis in all of the parental notification cases it heard. *Bellotti v Baird*<sup>ix</sup> established this precedent for *Ayotte v Planned Parenthood of Northern New England*, *Hodgson v Minnesota*,<sup>x</sup> and *Ohio v Akron Center for Reproductive Health*<sup>xi</sup> by creating a framework that would allow lower courts to constitutionally implement judicial bypass. Consequently, the maturity and competency of a teenager to make their own medical decision could be evaluated without their parents being notified that they were seeking judicial bypass.

This paper's research is an extension of the research Collins, Corley, and Hamner (2015) conducted on the influence of Amicus Curiae briefs on Supreme Court majority opinion content. Collins and his co-authors preeminently argue that the Supreme Court justices incorporate language from Amicus briefs into their opinions, suggesting that Amicus Curiae influence the Supreme Court's decisions. Justices consider briefs from the litigants and Amici when issuing a decision. As such, the Court's opinions highlight which arguments, evidence, and positions the justices found most worthy of mentioning, whether by refuting or agreeing with them. The more mentions of Amicus Curiae briefs, the higher the influence that the Amici had on that particular opinion. Collins et al. collected evidence that supports the notion that Amicus Curiae briefs influence the Court's decisions by using plagiarism detection software, WCopyFind, and comparing 2,016 Amicus briefs from 2002, 2003, and 2004 Supreme Court terms to the majority opinions of the cases for which the Amici filed their briefs. Using this plagiarism detection site, the researchers found that only 7 percent of references to an Amicus were negative, meaning that the justices criticized or rejected the arguments presented in Amicus briefs.<sup>xii</sup>

Collins, Corley, and Hamner's research support the notion that justices tend to incorporate arguments presented by Amici and the precedent the Amici cites within the majority opinion. More specifically, they found that the justices adopted language from Amicus briefs based on four factors: higher quality arguments, lots of repetition within the brief, the alignment of the position advocated in the brief with the justice's position, and the identity of the Amicus. If an Amicus brief contained most or all of these factors, there was an increased likelihood that the justices utilized language from that brief. Additionally, the study found that justices primarily mentioned Amicus Curiae briefs and their arguments to advance their own arguments and interpretations. It was not as common for justices to cite briefs for the purpose of criticizing the Amici's arguments. This article attempts to replicate the findings of Collins, Corley, and Hamner within a narrower issue area. Unlike the expansive set of briefs that Collins and his colleagues consider, this article solely examines the Amicus briefs filed in cases surrounding parental notification abortion laws to assess how influential Amici are within abortion right Supreme Court cases.

## **Methodology**

To determine Amicus Curiae briefs' impact on the Supreme Court's opinions in cases involving parental notification laws for minors seeking abortions, I compared the language between Amicus Curiae briefs and Supreme Court opinions by narrowing the scope of the included data set to include only Supreme Court cases involving minors and state abortion



regulations following 1973. Five cases met this standard: *Ayotte v Planned Parenthood of Northern New England*, *Bellotti v Baird*, *Hodgson v Minnesota*, *Lambert v Wicklund*,<sup>xiii</sup> and *Ohio v Akron Center for Reproductive Health*. *Lambert v Wicklund* was excluded since no Amicus filed briefs.

I downloaded the briefs and opinions from Westlaw and Nexis. There were 53 Amicus Curiae briefs and 14 opinions of the court. Eight of those 53 Amicus Curiae briefs were filed for *Hodgson v Minnesota* and *Ohio v Akron Center for Reproductive Health*. Of the 14 opinions, three were majority opinions, one was a plurality opinion, five were concurring opinions, three were concurring in part and dissenting in the other, and two were dissenting opinions. Each opinion is primarily written by one justice. The most senior member within the majority delegates the writing of the opinion to whichever justice they choose. If the Chief Justice is in the majority, they will assign the opinion-writing, even if they are not the most senior justice.<sup>xiv</sup> A plurality opinion is when no majority agrees for the same reason. This does not set a very durable or binding legal precedent. Within plurality opinions, there are two types of concurrences. If a justice does not agree with the outcome or reasoning, they will write a dissenting opinion.<sup>xv</sup>

After downloading the briefs and opinions, I utilized Turnitin, a plagiarism detection software site that allows users to compare two documents for similarities in language, to evaluate whether there was an overlap in language between the briefs and Supreme Court opinions. Dr. Wendy Martinek, a professor in the Political Science Department at Binghamton University, assisted with the data collection portion of this research. Dr. Martinek first created a Turnitin assignment for each of the four cases. I then created edited versions of each brief and opinion, which involved removing all of the citations and other extraneous material except for the text of the actual opinion and submitting them under the relevant assignment. Dr. Martinek then generated each brief's Turnitin report to view the similarities between the brief and the opinion.

### **Overview of Cases**

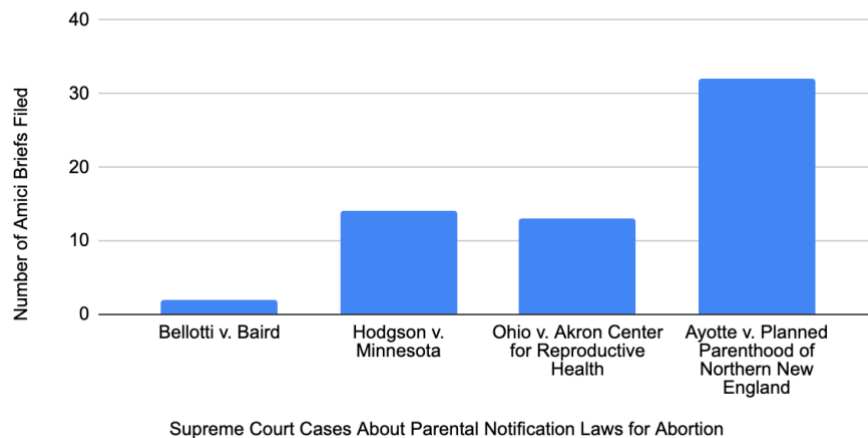
Each of the four cases included in the dataset was heard in the Supreme Court after 1973 and involved parental notification laws for minors seeking abortions. In 1979, *Bellotti v Baird* was the first case of this nature to be heard at the Supreme Court. This case challenged a Massachusetts state law requiring minors to obtain parental permission before seeking an abortion. Under this same statute, if a minor did not receive approval from one or both parents, a Massachusetts judge could overrule the needed consent as long as “good cause” was demonstrated. The Supreme Court found this statute unconstitutional because it required parental notification in all cases, even if a minor was filing for a judicial bypass—when a minor can petition the court to receive an abortion without their parent’s consent. Judicial bypass procedural hearings occur quickly since the situation is time-dependent. In *Bellotti v Baird*, the statute allowed judges to decline judicial bypass even if the minor was deemed competent. Figure 1 notes that two Amicus Curiae briefs were filed in this case.

In 1990, the Supreme Court issued decisions for *Hodgson v Minnesota* and *Ohio v Akron Center for Reproductive Health*. *Hodgson* involved a Minnesota law regulating minors’ access to abortion by requiring parents to be notified of the procedure. Minors were not allowed to receive

the procedure until 48 hours after the abortion clinic notified their parents. While this Minnesota law did have exceptions, such as medical emergencies and victims of abuse from parents, it also strictly enforced its Parental Notification law.<sup>xvi</sup> The Supreme Court held that requiring both parents to provide consent was unconstitutional. Instead, as the Court recommended, legislators should modify the statute to one-parent notification and a 48-hour waiting period.<sup>xvii</sup> There were 14 Amicus Curiae briefs filed. At that time, the Supreme Court also heard a case about an Ohio bill requiring parental notification for unmarried minors seeking an abortion. Like Minnesota, there were several exceptions, including a written letter of consent from both parents, parental 24-48 hours before the procedure, and a judicial bypass. The Supreme Court ruled that the statute was constitutional because judicial bypass was a constitutional mechanism to avoid parental notification.<sup>xviii</sup> There were 13 Amicus briefs filed. *Hodgson* and *Ohio* had eight joint Amicus briefs, as represented in Figure 1.

The most recent Supreme Court case involving parental notification laws was *Ayotte v Planned Parenthood of Northern New England*. Planned Parenthood of Northern New England attempted to preemptively block a New Hampshire law regulating abortions for minors through mechanisms of parental notification. The Supreme Court unanimously ruled that the statute could be harmful in emergencies in which a minor would need an abortion immediately. The Court remanded the case to the lower court to determine legislative intent and issue injunctions as required.<sup>xix</sup> There were 32 Amicus briefs filed in *Ayotte*, as seen below in Figure 1.

**Figure 1. Number of Amici Participating in Each Supreme Court Parental Notification Case**

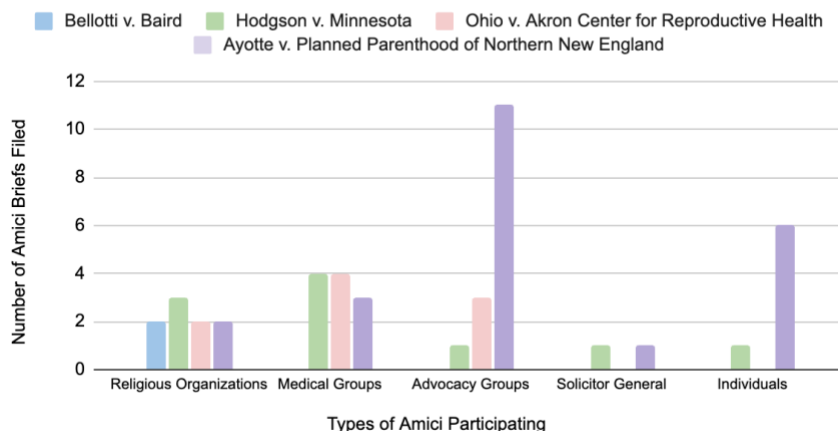


### Profile of Amici

Prior research on the participation of Amicus Curiae, or organized interest, has shown that many Amicus Curiae participate in the Supreme Court either through filing briefs or through presenting oral arguments, each with their own goals and agendas.<sup>xx</sup> For this data set, interest groups are either for or against regulations on abortion access in reproductive rights cases. In each Amicus brief, the Amici provides background on the organization they represent and why the Amicus is filing a brief. This background offers immediate context for possible bias. There are five main groups of Amicus Curiae, as seen in Figure 2: religious organizations, medical

groups, advocacy groups, the Solicitor General, and individuals. Figure 2 includes a breakdown of all five main groups of Amicus Curiae in the data set, including how many briefs each group filed for each case.

**Figure 2. Types of Amici Participating in Parental Notification Law Challenges in the U.S. Supreme Court**



### ***Religious Organizations***

Most of these Amici take a pro-life position in their briefs, arguing in favor of more restrictions and regulations for access to abortion. In the context of my research, there were seven briefs in this data set filed by religious organizations. Six Amicus briefs were filed in favor of parental notification laws, and one was filed in opposition to having such laws.

The Religious Coalition for Reproductive Choice (RCRC) is a notable Amicus because the Coalition was the only religious organization that filed a brief opposing parental notification laws. They filed a brief supporting Planned Parenthood of Northern New England in *Ayotte*. Their brief recognized that individuals seeking abortion might have different religions. They also highlighted that because every pregnancy is different, women should be able to seek abortions if they and their doctor believe that is the right choice for them.<sup>xxi</sup> The RCRC emphasizes the importance of personal liberties and making medical decisions for oneself without interference from the government or parental interference.

### ***Medical Groups***

This dataset contained eight medical groups, organizations, and individual professionals. Four briefs were filed against the parental notification law, and four briefs were filed in favor of the law. These briefs provided medical explanations for abortion, including the procedures, side effects, and conditions caused by pregnancy. Depending on the group’s positions, the medical organizations use their expertise within their medical specialty to justify their position on parental notification laws and rebut competing arguments by highlighting studies and statistics that favor their argument.

The American College of Obstetricians and Gynecologists (ACOG) filed individual briefs in *Ayotte* and a joint brief in *Hodgson* and *Ohio*. The mission of ACOG is to “advance women’s health care and our members’ professional and socioeconomic interests through

continuing medical education, practice, research, and advocacy.”<sup>xxii</sup> ACOG’s brief, which was cosigned by numerous other medical professional associations, detailed their concern about parental notification laws violating doctor-patient confidentiality (HIPPA), which they argue can negatively impact minors’ healthcare. This brief supports the right of each patient to make their own informed decisions.<sup>xxiii</sup> Thus, imposing parental notification laws could violate patient-doctor confidentiality and negatively impact a patient’s relationship and trust with their medical provider.

The Amicus Curiae brief of the American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG) is particularly notable because it is a self-proclaimed pro-life medical organization. AAPLOG’s stated mission is to “encourage and equip its members and other concerned medical practitioners to provide an evidence-based rationale for defending the lives of both the pregnant mother and her unborn child.”<sup>xxiv</sup> Within this study’s data set, AAPLOG only filed a brief in *Ayotte*. Notably, they used medical and religious reasoning to support parental notification laws. Their brief discusses the need for parental notification laws that support family interests, such as protecting a pregnant teenager’s health. AAPLOG advocates for other treatments in place of abortions. The brief contends that pregnant teenagers should not receive an abortion, instead offering different support systems, such as parents, social services, or doctors. However, receiving non-abortifacient treatments (which can be more medically complex than an abortion procedure) would also require parental notification and consent. Lastly, while the brief contains medical and religious explanations, AAPLOG’s discussion of alternative medical treatments to abortion supports the religious arguments they make against terminating pregnancies. The brief suggests that abortion is a life-altering procedure. Thus, the AAPLOG argues that parents should likewise be involved in teenagers’ decisions to get an abortion, ideologically upholding New Hampshire’s parental notification laws.

### ***Advocacy Groups***

Advocacy groups, such as nonprofits and foundations, are known for their positions or stances on specific social issues. Smaller advocacy groups will sometimes collaborate or file a joint brief with other groups that share their position. These joint briefs combine similar perspectives and ideas to develop a strong argument for the Amicus’ position. Advocacy groups generally have experience in filing Amicus Curiae briefs and often have a dedicated subsection of their legal department to work on these briefs since this is one of the group’s primary focuses. Amicus, with experience writing briefs, tend to know how to tailor their briefs most effectively, as well as the rules and regulations surrounding the process of submitting a brief. There were 14 briefs in this dataset filed by an advocacy group. Six briefs were filed by a party not in favor of the parental notification law, while the other eight briefs were in favor of the law. NARAL Pro-Choice Foundation and the American Center for Law and Justice (ACLJ) are two notable advocacy groups within the data set.

The NARAL Pro-Choice Foundation is known for its strong defense of protecting abortion rights. As an advocacy group, NARAL engages in lobbying and advocacy supporting comprehensive sexual education with the aim of decreasing unwanted pregnancy and bolstering

the right to make decisions about one's own body. Their brief approaches the legal questions in *Ayotte* with this focus by advocating for minors to have the right to seek an abortion without parental notification. They address constitutional flaws within the New Hampshire statute, including a failure to include a provision for emergency abortions. NARAL highlights the unconstitutionality of this given that in *Roe* and other abortion rights cases, the Court upheld that there should be protections for women's health.<sup>xxv</sup>

The American Center for Law and Justice is a nonprofit law firm that works on social justice issues involving the First Amendment, families, and human life. Like NARAL, the ALCJ has been very public about its position on abortion. The ALCJ advocates for more regulations to restrict access to abortion. In their brief in *Ayotte*, the ALCJ focuses on abortion's harm to minors and their families by discussing the negative impact of "secret" abortions. The brief goes on to cite personal stories from women who had secret abortions as minors and suffered mentally or physically following that abortion. This culminates in the ALCJ arguing that secret abortions cause significant harm to the minor, as well as the destruction of unborn life, and should be deterred by parental notification laws.<sup>xxvi</sup>

### ***Solicitor General***

The Solicitor General serves as an attorney for the President of the United States and the Executive Branch in the Supreme Court and represents the United States Government's interests in cases before the Supreme Court. Since they oversee Supreme Court cases, they generally have a friendly relationship with the justices,<sup>xxvii</sup> and the Court often views them as a reliable source of legal information. As such, the Solicitor General may sometimes have certain advantages over other Amicus Curiae, meaning their briefs or arguments may be more highly regarded by the justices. However, these advantages critically only occur if the Supreme Court justice(s) have similar ideological positions to the Solicitor General and the President of the United States. If the two parties have different political and ideological beliefs, a justice may treat the Solicitor General like any other Amicus Curiae and offer them no advantages.<sup>xxviii</sup> In this data set, a Solicitor General filed only two briefs: one in *Hodgson* and another in *Ayotte*, in which both briefs favor parental notification laws.

Kenneth Starr, former Solicitor General under President George H.W. Bush, filed an Amicus brief in *Hodgson*. Starr mentions another case involving state regulations on abortion procedures, *Webster v Reproductive Health Services*. Although *Webster* did not involve parental notification laws, the United States had filed an Amicus brief in which they asked the Court to deviate from the judicial framework the justices implemented in *Roe v Wade* and instead adopt a test to evaluate legitimate governmental objectives.<sup>xxix</sup> In *Hodgson*, Starr also asked the Court to stray from the precedent to further the federal government's legislative interests and policies. Starr mentions that federal regulations for Title X of the Public Health Services Act of 1970 were being challenged in the lower courts for their inconsistency with the Court's ruling in *Roe v Wade*.<sup>xxx</sup> The federal government has a vested interest in ensuring that the Court's ruling in *Hodgson* will not create or enforce a precedent that conflicts with their lower court proceedings. If the Court did not rule in favor of the parental notification law, there would be less precedent to

support those lower court proceedings, thus, interfering with President George H.W. Bush's proposed federal policies for family planning clinics.

In the second brief, Paul Clement served as Solicitor General under President George W. Bush. Solicitor General Clement filed an Amicus brief in *Ayotte* in favor of the petitioner, Attorney General of New Hampshire Kelly Ayotte. Within this brief, Clement explains that the federal government's interest in *Ayotte* is to protect President Bush's Partial-Birth Abortion Ban Act (2003). This Act "prohibits a physician from knowingly performing a partial-birth abortion in or affecting interstate commerce."<sup>xxxix</sup> Clement explains that the Partial-Birth Abortion Ban Act was being challenged in the lower courts, and therefore, the Court's decision in *Ayotte* could play a central role in the lower courts' decisions regarding the Act. Similar to Starr's involvement in *Hodgson*, both *Ayotte* and the case involving the Partial-Birth Abortion Ban Act involve direct challenges to state statutes regulating abortion and conflict with the federal government's interests. As such, it remains unsurprising that the Solicitor Generals in both cases filed briefs to use their power to support the federal government's agenda.

### **Individuals**

This data set also contains Amicus Curiae who filed briefs as individuals or non-affiliated groups of individuals. There were 11 Amicus Curiae briefs filed by individuals across *Ayotte*, *Hodgson*, and *Ohio*. Of these 11 Amici, only five were non-governmental actors. Additionally, of the five briefs, four were filed in favor of the state imposing the parental notification law.

One notable individual in this data set is Harlon Reeves, who filed a brief in *Ayotte* on behalf of himself and his unnamed underage daughter. Reeves' daughter, who suffers from several intellectual disabilities, was sexually assaulted and raped by her mother's then-boyfriend multiple times. She became pregnant twice, and her rapist took her to get an abortion each time. Reeves shared his daughter's story to advocate for parental notification laws, saying that if that law had been in place when his daughter was forced to get an abortion by her rapist, he and his ex-wife would have learned about the sexual assault sooner.<sup>xxxix</sup> His argument and the legal precedent he cites center on protecting children from sexual abuse and sexual predators. Reeves believes that parental notification laws could help protect minors in similar situations to his daughter.

The Amicus brief of Dr. Thomas Sharpe is the only one filed by an individual against parental notification laws. Dr. Sharpe is the former Director of Adolescent Obstetrics and has experience with pregnant minors delivering babies. In his brief for *Ayotte*, he held that New Hampshire had no informed consent laws, no abortion regulations restricting physicians from performing abortions, and no position on fetal viability, which leaves physicians and doctors with many questions.<sup>xxxix</sup> Dr. Sharpe does not explicitly outline his position on abortion but instead asks the Supreme Court to affirm the First Circuit's decision that New Hampshire has to begin participating in federal abortion surveillance measures to determine the impact of such laws. This decision would require New Hampshire to explicitly outline its position on the issues Dr. Sharpe mentioned before there can be judicial deliberation on parental notification laws in the lower courts.

## Results & Discussion

The results from Turnitin were evaluated to compare the language between the Amicus Curiae briefs and the Supreme Court opinions. This evaluation found no instances in which the Court's opinion matched the Amicus Curiae briefs to an extent greater than 1%. It is important to note that Turnitin's plagiarism detector does not account for paraphrasing unless the wording is similar between the documents. Based on this research, there does not appear to be evidence of Amicus Curiae briefs directly influencing legal language in the Supreme Court opinions in *Ayotte v Planned Parenthood of Northern New England*, *Bellotti v Baird*, *Hodgson v Minnesota*, and *Ohio v Akron Center for Reproductive Health*.

While this research cannot definitively prove that Supreme Court justices directly borrow legal language from Amicus Curiae briefs in their opinions in parental notification cases, there are still several reasonable conclusions that can be drawn from the findings. Before exploring these conclusions, however, this paper must note the differences in the results between Collins, Corley, and Hamner's research and this research.

Collins and his colleagues did find that Supreme Court justices borrowed legal language from Amicus Curiae briefs. However, their sample consisted of 2,016 Amicus Curiae briefs from 2002 to 2004—significantly, 1,963 briefs more than this research. Additionally, none of the cases this article examined overlapped with the time period of Collins, Corley, and Hamner's research. This is significant because their cases and my cases have different Supreme Court justices. Within the cases I reviewed, only *Hodgson* and *Ohio* had the same justices since the cases were decided in the same year, which could influence the transmissibility of Amicus Curiae within a Court opinion. As such, differing justices could affect the ability to generalize research results.

Furthermore, it is likely that the specific briefs within this data set did not meet any of the four qualifications Collins, Corley, and Hammer found to be significant in influencing majority opinions. Many of these Amicus briefs may not have been of sufficiently high quality, meaning there was a lack of clarity and plain language. The briefs from medical organizations, especially, utilize more complex language, making it more difficult for non-experts to understand their argument fully. Without a simplified explanation or an audience with the appropriate knowledge and understanding, these briefs' efficiency decreases. The Amicus briefs in this sample also repeat points already discussed within the litigants' briefs. Additionally, the positions in the briefs may not correspond to the justices' ideological beliefs. For example, more conservative justices that do support parental notification laws may disregard Amicus Curiae briefs arguing against them. Lastly, there were fewer “elite” Amici filing briefs. Elite Amici, also known as private Amici, have a higher status within the Supreme Court. One notable exception is the brief of the Solicitor General within this sample. While this research did not necessarily reflect the findings of Collins, Corley, and Hamner's research, it did interpret the null findings to highlight new insights into the Supreme Court's decision-making process.

From the findings, it appears that Amici could have a more subtle influence on the opinions of the Court, even if their influence is not measurable in terms of “borrowed” legal

language or arguments. The Amicus Curiae briefs may reinforce Supreme Court justices' individual opinions and interpretations but may not have been significant enough to be explicitly cited within a Court opinion. The briefs may also raise legal arguments about relevant case law that then lead the Supreme Court to use precedent from that case. It is important to assess each potential variable that may influence the Supreme Court to understand how the Court adjudicates cases about abortion access. The Constitution does not explicitly mention abortion or the right to have an abortion. *Roe v Wade* was built off a constitutional interpretation of the Due Process Clause of the 14th Amendment in which the Court held that people had a right to privacy, and access to an abortion fell within that right.<sup>xxxiv</sup> The Supreme Court continues to hear many cases about abortion regulations, much like parental notification laws. In June 2022, the Supreme Court deviated from *stare decisis* and overruled *Roe*. Following this decision, many states began placing bans or limitations on access to abortion. As such, it is increasingly imperative to understand whether Amicus Curiae, one critical factor amongst many in the court process, play a role in the Court's adjudication of abortion cases.

Furthermore, the type of influence that an Amicus could have on an opinion's language would suggest the permeability of the Supreme Court to democratic influences. There are a variety of potential democratic influences on the Supreme Court, such as the media, Amicus Curiae, and public opinion. Still, the extent of each of these forces remains somewhat critically under-researched or up to interpretation by scholars, interested parties, and justices themselves. Each actor seeks the Court to adjudicate the decision in their favor. Ingrained in their fundamental utility, Amicus Curiae democratically influence the judicial system because of the language and arguments contained in briefs and oral arguments that introduce additional insight into a case. The null findings of this paper support the traditional legal model of decision-making by the Supreme Court. In this model, justices are more influenced by precedent and their interpretation of the Constitution rather than third parties or outside democratic influences. Simultaneously, the justices also rely on their personal and political views to craft opinions of the Court, making them non-neutral adjudicators. In Supreme Court parental notification cases, the justices appear to be influenced by both their own interpretation of the Constitution and relevant precedent.

## **Conclusion**

This research explored whether the briefs in this data set directly influenced certain majority opinions and hypothesized that the language contained in the Amicus Curiae's briefs would affect the "thoughts" or opinions of the Supreme Court in abortion parental notification cases. While the research did not prove this to be true necessarily, it did highlight the potential for the opposite argument; that Amicus briefs do not influence Supreme Court opinions. Evaluating all variable influences on Supreme Court reproductive rights cases is critical. Because the right to an abortion is not explicitly cited within the Constitution, factors like Amicus briefs may have a more significant effect on Supreme Court decisions in this context than others. These Court decisions go on to become the precedent that is used to strengthen future legal cases. What influences the Supreme Court's rulings in abortion rights cases demands collective, careful



attention, as these forces drive monumental Court decisions that touch the lives of many. Scholars should continue to evaluate the various factors that drove the Court to reverse *Roe* to provide critical transparency and understanding of the decision-making process of the highest court in the land.

- <sup>1</sup> Katherine Kortzmit, et. al., “Abortion Surveillance - United States, 2019,” in *MMWR Surveillance Summaries*, 70(No. SS-9 (2021), 1–29, <https://www.cdc.gov/mmwr/volumes/70/ss/ss7009a1.htm#suggestedcitation>.
- <sup>2</sup> Paul Collins, Pamela Corley, and Jesse Hamner, “Influence of Amicus Curiae Briefs,” 49 *Law & Society Review* 917, 49, no. 4 (2015).
- <sup>3</sup> Gregory Caldeira and John Wright, “Organized Interests and Agenda Setting,” 82 *American Political Science Review* 1109, 82 (1988), 1109–27.
- <sup>4</sup> 546 US 320 (2006).
- <sup>5</sup> Paul Collins, “Amicus Curiae Participation in Supreme Court,” in *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (PUBLISHER EDITION 2008).
- <sup>6</sup> Scott Harris, “MEMORANDUM TO THOSE INTENDING TO FILE AN AMICUS CURIAE BRIEF IN THE SUPREME COURT OF THE UNITED STATES,” The Supreme Court of the United States (2019), <https://www.supremecourt.gov/casehand/AmicusGuide2019.pdf>.
- <sup>7</sup> 410 US 113 (1973).
- <sup>8</sup> 505 US 833 (1992).
- <sup>9</sup> 443 US 622 (1979).
- <sup>10</sup> 497 US 417 (1990).
- <sup>11</sup> 497 US 502 (1990).
- <sup>12</sup> Collins, Corley, and Hamner, “Influence of Amicus Curiae Briefs.” (2008).
- <sup>13</sup> 520 U.S. 292 (1997).
- <sup>14</sup> Lee Epstein and Thomas Walker, “The Conference,” in *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, 10th ed. (2019), 64.
- <sup>15</sup> Epstein and Walker, “The Conference,” (2019), 66.
- <sup>16</sup> Subdivision 2 of Minn.Stat. § 144.343
- <sup>17</sup> 497 U.S. 417 (1990).
- <sup>18</sup> *Ibid* 502.
- <sup>19</sup> 546 U.S. 320 (2006).
- <sup>20</sup> Paul Collins and Lisa Solowiej, “Interest Group Participation in Supreme Court,” 32 *Law and Social Inquiry* 955, (2007) 32 , 955-984.
- <sup>21</sup> Brief of Religious Coalition, *Ayotte v Planned Parenthood of Northern New England* (2005).
- <sup>22</sup> American College of Obstetricians and Gynecologists, “About ACCOG,” online at <https://www.acog.org/about#:~:text=Our%20Mission,practice%2C%20research%2C%20and%20advocacy>.
- <sup>23</sup> Brief of American College of Obstetricians and Gynecologists, *Hodgson v Minnesota and Ohio v Akron Center for Reproductive Health* (1989).
- <sup>24</sup> American Association of Pro-Life Obstetricians and Gynecologists, “Our Mission Statement – Pro-life OBGYNS – AAPLOG.” online at <https://aaplog.org/about-us/our-mission-statement/>.
- <sup>25</sup> Brief for American Association of Pro-Life Obstetricians and Gynecologists, *Ayotte v Planned Parenthood of Northern New England* (2005).
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- <sup>28</sup> Peter Ubertaccio, “The Solicitor General,” in *Learned In the Law and Politics: The Office of the Solicitor General and Executive Power* “The Solicitor General” (2009), 140–51. 140–51. New York: LFB Scholarly Publishing 2009).
- <sup>29</sup> Scott Bodderly, “Solicitor General as Direct Litigant,” *Constitutional Political Economy* 30 (2019), 194. “Signals From a Politicized Bar: The Solicitor General as a Direct Litigant Before the U.S. Supreme Court,” 30 *Constitutional Political Economy* 194, 194 (2019).
- <sup>30</sup> 494 US 490 (1989).
- <sup>31</sup> Brief for United States, *Hodgson v Minnesota* (1989).
- <sup>32</sup> Brief for United States, *Ayotte v Planned Parenthood of Northern New England* (2005).

<sup>33</sup> Brief of Harlon Reeves, *Ayotte v Planned Parenthood of Northern New England* (2005).

<sup>34</sup> Brief of Thomas Sharpe, *Ayotte v Planned Parenthood of Northern New England* (2005).

<sup>35</sup> *Ibid* 113.

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