Global Civil Procedure Trends in the Twenty-First Century

Scott Dodson & James M. Klebba

Abstract: Recent scholarship in comparative civil procedure has identified “American exceptionalism” as a way to describe practices which set the United States apart from most of the world, particularly the civil law world. This Article focuses on two areas of “exceptionalism”: pleading standards and the role of judges. Specifically, pleading requirements are considerably less strict in the United States compared to other countries. Additionally, U.S. judges are less active in conducting litigation than their counterparts elsewhere, especially judges in the civil law tradition. This Article traces some modern trends toward convergence between the United States and the rest of the world. With regard to pleading standards, two recent Supreme Court cases, *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*, have moved U.S. pleading standards closer to the rest of the world. With regard to judicial roles, convergence has been bilateral, with U.S. judges becoming more “managerial” and European judges becoming less so. Additionally, civil law judges have begun to enjoy broader discretion, increasing their prestige and visibility in a manner similar to the U.S. judge. The final focus of the Article is whether these recent trends represent opportunities for improvement or an unwelcome disruption for the U.S. procedural system.
The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep’s Clothing?

Meredith Kolsky Lewis

[pages 27–52]

Abstract: The Office of the United States Trade Representative (USTR) is currently negotiating with seven other countries to form a new trade agreement called the Trans-Pacific Partnership (TPP). The TPP has the potential to expand into a Free Trade Agreement of the Asia-Pacific (FTAAP). At present there are several competing models for Asia-Pacific economic integration that exclude the United States entirely. In such an environment, the TPP presents the United States with a welcome opportunity, not only to participate, but also to take a leadership role in establishing the terms for a region-wide agreement. Nevertheless, the USTR must make the TPP sufficiently attractive to other Asia-Pacific economies, such that those countries will prefer the TPP over other integration models. This will require the USTR to partially diverge from its standard FTA template and liberalize in new areas. Although doing so may be politically challenging, it is the United States’ best strategy if it wishes to solidify a role for itself in an economically integrated Asia-Pacific.

Faith in the Law—The Role of Legal Arrangements in Religion-Based Conflicts Involving Minorities

Ofrit Liviatan

[pages 53–90]

Abstract: This Article examines the conflict-management role conferred upon the law within Western liberal democracies in the context of cultural tensions involving religious minorities. The Article finds that a threatened hegemonic Christian identity and secular illiberal sentiments disguised in liberal narratives often motivated legislative and judicial actions curtailing the freedom of religious minorities in leading liberal democracies. Based on these findings, this Article challenges the shortcomings of existing liberal scholarship to account for the potential bias presented in the liberal preference to facilitate cultural conflicts through legal means. Yet, the Article suggests that law’s limitations as a neutral vehicle in conflict resolution does not necessarily counteract its ability to manage conflicts. The continued attractiveness of law as the principal conflict-resolution device
in liberal democracies springs from its political nature, namely the recognition that shifts in political power could translate into legal change.

NOTES

CONTINENTAL DRIFT: CONTEXTUALIZING CITIZENS UNITED BY COMPARING THE DIVERGING BRITISH AND AMERICAN APPROACHES TO POLITICAL ADVERTISING

Alexander Boer

[pages 91–116]

Abstract: There is perhaps no more vital an issue to a healthy democracy than its attitude towards political speech. Because political speech—and particularly political advertising—has a profound influence on the outcomes of elections, most vibrant democracies recognize the need to avoid arbitrary distinctions among political advertisers that might sway elections for reasons other than the popularity of the candidates. The First Amendment avoids arbitrary distinctions by ensuring a free and open marketplace of ideas in the political speech realm, with almost no restrictions on political advertising. The United Kingdom, by contrast, addresses the problem by way of an outright ban on political advertising. This Note explores the recent, and controversial, Citizens United decision in the context of avoiding such groundless distinctions. In particular, this Note compares the American approach to the British approach, and argues that Citizens United is a correct reaction, within American constitutional law and case law, to the problem of arbitrary distinctions in the political advertising realm.

LIFTING THE VEIL: FRANCE’S NEW CRUSADE

Britton D. Davis

[pages 117–146]

Abstract: France is home to the largest Muslim population in Europe, comprising six percent of the French population, making Islam the second most practiced religion in France. With an influx of Muslim immigrants, France struggles with concerns over its national identity and culture. In 2009, the French government began to consider a ban on the face veil, or burqa, in public. Critics accused France of discrimination and Islamophobia, while officials calling for such a ban defended it on consti-
tutional grounds: secularism and a belief that the burqa represents gender discrimination. On September 14, 2010, the French Senate approved the bill to ban women from wearing the veil in public and with the approval of the Constitutional Council, the law will go into effect in the Spring of 2011. This Note calls on the European Court of Human Rights to depart from its history of deference to Member State governments regarding issues of religious expression; instead, the court should ensure that any decision to restrict religious expression in France through a burqa ban does not violate the European Convention on Human Rights.

THE CRIMINALIZATION OF SEXUAL ORIENTATION: WHY UGANDA’S ANTI-HOMOSEXUALITY ACT THREATENS ITS TRADE BENEFITS WITH THE UNITED STATES

Lucy Heenan Ewins

Abstract: In the fall of 2009, a Ugandan Minister of Parliament introduced legislation to further criminalize homosexual conduct in Uganda, which has been illegal since colonialism. This legislation would impose the death penalty on certain homosexual activity and would require citizens to report homosexual activity to the police or face jail time. Condemned by world leaders, some western governments threatened to withhold financial aid. In the United States, Senator Ron Wyden of Oregon has argued that, should the legislation become law, Uganda would be ineligible for trade benefits under the African Growth and Opportunity Act (AGOA). AGOA requires that beneficiary nations not engage in gross violations of internationally recognized human rights. This Note argues that sexual orientation is an internationally recognized human right and that the criminal penalties provided for in the Ugandan legislation constitute a gross violation of this right. It concludes that should the Ugandan legislation become law, Uganda would be ineligible for trade benefits under AGOA.

HASTA LA VISTA?: AN ASSESSMENT OF THE CALIFORNIA GOVERNOR’S PROPOSAL TO SEND UNDOCUMENTED INMATES TO MEXICO

Steven H. Joseph

Abstract: At a press conference in January 2010, California Governor Arnold Schwarzenegger proposed sending undocumented inmates from Cal-
California prisons to cheaper, privately run prisons in Mexico as a solution to the state’s budget crisis and prison overcrowding problems. Though seemingly far-fetched, the Governor’s proposal represents a creative solution to a nation-wide problem of growing illegal immigrant populations, overburdened penal systems, and increasing pressures to cut costs. National trends in privatization and the offshoring of government functions make exporting inmates to lower cost prisons abroad a tempting remedy, albeit one that is fraught with legal complications. This Note argues that the California Governor’s proposal is infeasible because it does not fit within the existing U.S.-Mexico treaty structure and California is constitutionally prohibited from entering into its own treaty with Mexico. Furthermore, the massive civil liability risk created by a private extra-territorial prison substantially reduces the cost savings incentives.

**LEVELING THE PLAYING FIELD: THE INTERNATIONAL LEGALITY OF CARBON TARIFFS IN THE EU**

*Steven Nathaniel Zane*

[pages 199–225]

**Abstract:** In the absence of any robust international agreements to combat climate change, some countries undertake climate change policy unilaterally. One such example is the European Union’s emissions trading system, a government program that sets the quantity of authorized carbon emissions in the EU. This system, however, places the EU’s energy-intensive industries at a competitive disadvantage compared to foreign firms without similar environmental restrictions. In order to level the playing field, some have proposed carbon border taxes or “carbon tariffs.” This Note assesses the legality of these proposed carbon tariffs under the General Agreement on Tariffs and Trade, part of the World Trade Organization. Because such tariffs will likely violate the main text of the GATT, this Note examines whether Article XX exceptions may apply to permit carbon tariffs. The Note concludes that despite the importance of climate change mitigation and the recent liberalization of WTO jurisprudence, Article XX should not be interpreted so broadly as to permit the introduction of carbon tariffs in the EU.
GLOBAL CIVIL PROCEDURE TRENDS IN
THE TWENTY-FIRST CENTURY

SCOTT DODSON*
JAMES M. KLEBBA**

Abstract: Recent scholarship in comparative civil procedure has identified “American exceptionalism” as a way to describe practices which set the United States apart from most of the world, particularly the civil law world. This Article focuses on two areas of “exceptionalism”: pleading standards and the role of judges. Specifically, pleading requirements are considerably less strict in the United States compared to other countries. Additionally, U.S. judges are less active in conducting litigation than their counterparts elsewhere, especially judges in the civil law tradition. This Article traces some modern trends toward convergence between the United States and the rest of the world. With regard to pleading standards, two recent Supreme Court cases, *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*, have moved U.S. pleading standards closer to the rest of the world. With regard to judicial roles, convergence has been bilateral, with U.S. judges becoming more “managerial” and European judges becoming less so. Additionally, civil law judges have begun to enjoy broader discretion, increasing their prestige and visibility in a manner similar to the U.S. judge. The final focus of the Article is whether these recent trends represent opportunities for improvement or an unwelcome disruption for the U.S. procedural system.

Introduction

In a number of areas, civil procedure practices in the United States differ significantly from the rest of the world, particularly the civil law world. Notable differences include the use of civil juries,1 the prevalence of partisan experts paid for directly by the litigants,2 the existence and extent of party-controlled pre-trial discovery,3 standards for second

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2 See id. at 300–01.

3 See id. at 292–96.
instance (or appellate) review,\(^4\) notions of finality in litigation (\textit{res judicata}),\(^5\) the use of class actions and other forms of aggregate litigation,\(^6\) pleading requirements,\(^7\) and the role and status of the judge.\(^8\) Together, these individual attributes have given rise to a holistic assessment that U.S. civil procedure is highly exceptionalist when compared to the civil law systems in the rest of the world.\(^9\)

This Article does not quarrel with that general assessment. Nevertheless, we are convinced that “American exceptionalism” is diminishing in some, if not most, areas of civil procedure. To be sure, the United States is still exceptionalist. But we see trends in both U.S. procedure norms and foreign norms that suggest convergence.

Convergence is not an unabashed good. There are both promises and perils of convergence. This Article does not take a position on whether convergence ought to happen. But this Article does stress that if convergence is occurring, it is important to be aware of what rewards it may hold and of what pitfalls to avoid.

This Article tackles these topics through the lens of two areas of traditional “American exceptionalism”: pleading standards and the role of the judge.\(^10\) In both areas, some convergence between the United States and foreign systems has occurred. With respect to pleading, whatever movement has occurred has only been in one direction, with the United States making a unilateral move toward stricter pleading requirements.\(^11\) With respect to the role of judges, there is movement in both directions, though there are still significant differences between civil law countries.\(^12\) Nevertheless, at least some U.S. judges are becoming more involved in the management of civil litigation, and some civil law countries have ceded more control over litigation to the opposing attorneys.\(^13\)


\(^{6}\) See Marcus, \textit{supra} note 4, at 735–37.

\(^{7}\) See \textit{id.} at 718–19.

\(^{8}\) See \textit{id.} at 723–24.

\(^{9}\) See \textit{id.} at 710.

\(^{10}\) See generally Chase, \textit{supra} note 1 (discussing American “procedural exceptionalism” and how it is informed by U.S. culture); Marcus, \textit{supra} note 4 (exploring American exceptionalism as it relates to pleading standards and the role of the judge).


\(^{12}\) See Marcus, \textit{supra} note 4, at 723–24.

\(^{13}\) See Chase, \textit{supra} note 1, at 292–96, 298.
Further, the European Union (EU) is beginning to recognize the broad discretion that civil law judges are exercising in reality. This recognition seems to be a factor increasing the prestige and public recognition of the civil law judge, making him or her more similar to a common law judge.

What promises and perils might these convergences hold? The promises, we think, are many. The recognition of convergence and the resulting comparative inquiry can enrich and enlighten the debate about the trends: where they are going and why, and what possibilities they may hold. The convergences may provide opportunities for meaningful reform. Moreover, they may provide the opportunity for more inclusive participation in the development of global procedural norms.

There are corresponding perils as well. As such, this Article recommends studying these convergences and their likely benefit while remaining watchful of the possible adverse impact on other features of civil procedure, as well as system stability and workability as a whole.

A final note is in order. Naturally, our points are generalized. As a result, this Article strives for breadth rather than depth. In making these generalizations, we do not mean to give the impression that individual countries’ procedural rules are not different—they are. Rather, we mean to focus on the broader similarities and convergences. And we do believe they exist and have important implications.

I. Pleadings

This Part discusses U.S. federal pleading standards in a global context, particularly in light of the Supreme Court’s 2009 pleadings decision of Ashcroft v. Iqbal. This Part begins with an overview of the state of the law on federal pleading in the United States and then compares it to pleading standards in other countries.

A. U.S. Federal Civil Pleading

In the past, federal pleading under Rule 8 was simple: provide notice of your claim and, as long as you did not plead a critical defect—such as the expiration of the statute of limitations—or ask for relief under a nonexistent statute, you would survive a motion to dismiss under Rule 12(b)(6).

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14 See infra text accompanying notes 116–129.
15 See infra text accompanying notes 116–129.
That was a stark change from the Code pleading system that Rule 8 replaced. The Code required the complaint to contain “[a] statement of the facts constituting the cause of action.”\(^{18}\) In addition, the Code differentiated between conclusions of law, evidentiary facts, and ultimate facts, where pleading required ultimate facts.\(^{19}\) As the principal draftsman of Rule 8 forcefully argued, those distinctions were fuzzy at best and served the primary purpose of providing courts broad leeway to dismiss a complaint.\(^{20}\)

Rule 8 eliminated these distinctions.\(^{21}\) Rule 8 does not require any kind of statement of facts. It requires only a “short and plain statement of the claim showing that the pleader is entitled to relief.”\(^{22}\) Thus, Rule 8 reduces the importance of pleading as a courthouse gate and puts the weeding burden on discovery and summary judgment. The primary goal of Rule 8 shifted from isolation of issues, factual development, and merits determination, to simply notice. In this way, Rule 8 moved away from fact pleading and instituted something much closer to notice pleading.\(^{23}\)

Of course, it would be difficult to provide proper notice without any facts at all. But any necessary facts under Rule 8 are those needed to provide notice of a claim as opposed to those needed to support the claim on its merits.\(^{24}\) The upshot of Rule 8 is that notice—not factual support—is the focal point.

The Supreme Court confirmed this change in its 1957 decision in *Conley v. Gibson*. The Court held that Rule 8 does not require a claimant to set out in detail the facts upon which a claim is based.\(^{25}\) Instead, Rule 8 only requires simplified “notice pleading,” which means providing “fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”\(^{26}\)

\(^{18}\) 1848 N.Y. Laws 521, ch. 379 § 120(2).


\(^{22}\) *Fed. R. Civ. P.* 8(a).


\(^{25}\) *Conley*, 355 U.S. at 47.

\(^{26}\) *Id.* at 47–48.
Congress, of course, is free to modify general pleading standards, and, beginning in 1995, it did so in two isolated areas. The Private Securities Litigation Reform Act of 1995\textsuperscript{27} imposes heightened pleading for certain securities-related claims.\textsuperscript{28} The Act requires pleading with particularity for claims based on misleading statements or omission,\textsuperscript{29} and imposes heightened pleading for claims containing an element of scienter.\textsuperscript{30} Shortly thereafter, Congress passed a similarly heightened pleading requirement in the Y2K Act.\textsuperscript{31} The Y2K Act set forth several requirements: first, a claim must set out “a statement of the facts giving rise to a strong inference” of scienter;\textsuperscript{32} second, the complaint must be accompanied by “a statement of specific information” regarding “the nature and amount of each element of damages and the factual basis for the damages calculation”;\textsuperscript{33} and third, the claimant must disclose “the manifestations of the material defects and the facts supporting a conclusion that the defects are material.”\textsuperscript{34} These congressional experiments broke from the usual Conley notice pleading mold under Rule 8 and replaced it, in these limited instances, with fact pleading.\textsuperscript{35}

Despite these relatively unique and isolated congressional experiments with heightened pleading, Conley remained the paradigmatic pleadings case in all civil procedure books for fifty years, until the Court’s 2007 decision in \textit{Bell Atlantic Corp. v. Twombly}.\textsuperscript{36} \textit{Twombly} expressly jettisoned much of Conley.\textsuperscript{37} Notice, according to \textit{Twombly}, is not the critical component of pleading.\textsuperscript{38} Instead, “plausibility” is key.\textsuperscript{39} After \textit{Twombly}, a complaint fails to satisfy Rule 8 if the complaint does not allege facts that show a “plausible” entitlement to relief.\textsuperscript{40}

\begin{itemize}
\item \textsuperscript{29} \textit{Id.} (“[T]he complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.”).
\item \textsuperscript{30} \textit{Id.} § 78u-4(b)(2) (“[T]he complaint shall . . . state with particularity the facts giving rise to a strong inference that the defendant acted with the required state of mind.”).
\item \textsuperscript{32} \textit{Id.} § 6607(d).
\item \textsuperscript{33} \textit{Id.} § 6607(b).
\item \textsuperscript{34} \textit{Id.} § 6607(c).
\item \textsuperscript{35} \textit{See id.} § 6607(b)–(d); Conley, 355 U.S. at 47–48.
\item \textsuperscript{36} 550 U.S. 544, 549 (2007).
\item \textsuperscript{37} \textit{See} Dodson, \textit{supra} note 11, at 135.
\item \textsuperscript{38} \textit{See} Twombly, 550 U.S. at 556.
\item \textsuperscript{39} \textit{See id.}
\item \textsuperscript{40} \textit{Id.} at 556–57.
\end{itemize}
In practice, the plausibility standard forces plaintiffs to plead a level of factual detail that not only provides clearer notice—as Rule 9’s particularity requirement also might—but also demonstrates an increased likelihood of success on the merits.

During the 2009–2010 term, the Supreme Court added another bombshell twist. Ashcroft v. Iqbal held that a detainee’s constitutional discrimination claims did not meet the Twombly plausibility standard.41 By doing so, Iqbal confirmed that Twombly’s plausibility standard is meaningful and trans substantive.42 But it also added a new wrinkle. The Court declined to consider certain factual allegations in the complaint that the Court characterized as “conclusory.”43 For example, Iqbal alleged that the defendants “knew of, condoned, and willfully and maliciously agreed to subject him to harsh confinement . . . solely on account of his religion, race, and national origin.”44 He also alleged that Ashcroft was the “principal architect” and that Mueller was “instrumental” in adopting and executing this policy.45 The Court discarded these allegations as conclusory.46

Therefore, Iqbal represents a shift that is just as important as Twombly’s. After Iqbal, courts must consider whether a factual allegation is conclusory or nonconclusory for purposes of pleading requirements.47 If an allegation is nonconclusory, the court must accept it as true.48 If an allegation is conclusory, the court does not have to accept it as true.49 The court then examines all the nonconclusory allegations together to determine whether they show a plausible entitlement to relief.50

Note the important point here. If the goal is notice, the distinctions between conclusory and nonconclusory allegations, and between plausible and possible entitlement to relief, are largely meaningless. If, instead, the goal is greater factual detail for a preliminary merits assessment, then the distinctions from Twombly and Iqbal make a lot of

41 Iqbal, 129 S. Ct. at 1954.
42 Id. at 1953; Scott Dodson, Beyond Twombly, CIV. PROC. & FED. CTNS. BLOG (May 18, 2009), http://lawprofessors.typepad.com/civpro/2009/05/beyond-twombly-by-prof-scott-dodson.html.
43 Iqbal, 129 S. Ct. at 1951.
44 Id.
45 Id.
46 Id.
47 See id. at 1950, 1953–54; Dodson, supra note 42.
49 See id.
50 See id.
When recent congressional experimentations with heightened pleading are examined together with the Supreme Court’s reasoning in *Twombly* and *Iqbal*, it seems obvious that the United States is undergoing a momentous transformation in federal civil pleading standards. This transformation shifts U.S. pleading from its traditional notice-based regime to a fact-based system looking beyond notice and toward the merits of a claim.\(^{52}\)

### B. Foreign Pleading Models

The recent trend of U.S. federal pleading toward factual sufficiency is far more akin to the rest of the world than the notice pleading regime that existed before *Twombly*.

Germany requires “specific fact pleading and does not permit mere notice pleading.”\(^{53}\) The complaint is factually extensive and detailed, accompanied by available documentary evidence and explanations of any circumstantial evidence.\(^{54}\) It also includes a proposed means of proof that the plaintiff will use to establish the facts stated.\(^{55}\) For example, in a simple negligence case based on a car accident, the plaintiff’s complaint usually will include “specific allegations of precisely how and why the accident occurred, an identified source of proof for each allegation, the amounts of damage set forth with precision, [and] attached copies of bills, police and medical reports, and even photographs to support the allegations.”\(^{56}\) This gives the judge a complete picture of the claim as well as a sense of the strengths and weaknesses of the plaintiff’s case so that the judge can tailor the litigation process in an efficient manner.\(^{57}\)

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52 See Dodson, supra note 23, at 463. This Article does not equate the fact-based pleading of *Twombly* and *Iqbal* to the Code Pleading that dominated U.S. pleading before the Federal Rules: there are significant differences. See Kevin M. Clermont, *Three Myths About Twombly-Iqbal* (Cornell Law Faculty Working Papers, Paper No. 76, 2010), available at http://scholarship.law.cornell.edu/clspapers/76.


54 See id. at 197–98.


56 Murray & Stürner, supra note 53, at 198.

57 See id.
Japan also requires fact pleading. The complaint must “specif[y] and particulariz[e]” the claim, include the facts on which it is based, delineate “relevant . . . indirect facts” related to the claim, and itemize the evidence corresponding to each point the plaintiff will prove. It is not sufficient to allege ultimate facts. The underlying evidentiary facts that need to be established to support the claim must also be asserted.

Similarly, England requires a concise statement of the claim which must include “a concise statement of the facts on which the claimant relies,” and must specify the remedy that the claimant seeks. For certain claims, such as allegations of fraud, the claimant may also be required to provide additional details. The rules also permit claimants to include relevant documents in their statement of claim.

Thus, the United States appears to be shifting away from the notice-based exceptionalism toward a fact-based model more akin to the pleading standards in the rest of the world. Of course, the trend is not direct. The plausibility standard’s focus on facts is designed as a merits-screening tool; foreign fact-pleading models, on the other hand, are designed as issue-development tools. But the point here is more general; by moving away from pure notice and toward factual sufficiency, U.S. pleading is beginning to look a lot more like the global norm of fact-based pleading standards.

II. The Role and Status of Judges

This Part studies the role and status of judges in a comparative context. Like pleading standards, the relatively passive role and high prestige of U.S. judges have been viewed as examples of “American exceptionalism.” The unique status of the U.S. judge relates to procedural practices that set him or her apart from others. With regard to status, this Part explores why the “passive” U.S. judge occupies a more

59 See id.
60 See id.
62 Id.
63 Id. at 256.
64 See Dodson, supra note 23, at 463.
65 See Bone, supra note 51, at 853.
66 See, e.g., Kojima, supra note 58, at 697.
prestigious position in society and the legal profession compared with the more “active” Continental European judges. Further, there is an inquiry about convergence regarding the roles of U.S. judges and their counterparts in other countries.

A. Some Basic Differences

Significant differences in judicial roles begin with the training and selection of trial court judges, although these differences continue throughout the judge’s career. Shortly after law school, a Continental European graduate must generally choose a career either in private practice or as a member of the judicial corps. A lateral move from private practice to the judiciary is rare, though it is the norm in the United States and other countries sharing a common law tradition. Although some civil law judges have had practical experience, this experience is typically in the public sector: a prosecutor’s office or the ministry of justice. In short, the civil law method of selection and advancement follows a civil service model while the U.S. model is “political” at both the state and federal court levels. Great Britain, Canada, and Australia follow the U.S. model in that judges typically come to the bench after years of practice, though they are appointed rather than elected.

Probably the most widely noted and often praised distinction between the two systems is the more active role of the civil law judge in conducting litigation. In the civil law system, the judge is expected to

68 See infra text accompanying notes 93–99.
69 See discussion infra Part II.B.
73 See id. at 31–34.
74 See John H. Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823, 830–41(1985) [hereinafter Langbein, The German Advantage] (comparing U.S. civil procedure to German civil procedure and finding the former inferior in several respects, including an impaired fact-gathering system due to its adversarial nature and the less active role of the judge). The most frequently compared system in this regard has been that of Germany. See Benjamin Kaplan, Arthur T. von Mehren & Rudolf Schaefer, Phases of German Civil Procedure I, 71 HARY. L. REV. 1193, 1193–98 (1958) (seminal article describing Ger-
know the key facts in advance and guide the process.\textsuperscript{76} A number of U.S comparative law scholars see this civil law practice as both more efficient and more likely to achieve a just result than the Anglo-American tradition, where the passive trial judge leaves the entire process up to the lawyers.\textsuperscript{77} But others are skeptical about the ability of the active and involved civil law judge to retain objectivity and avoid arriving at premature conclusions regarding the merits of the case.\textsuperscript{78}

Another area where many U.S. and foreign observers find civil law procedure superior is the designation of expert witnesses. In European litigation, this designation is typically performed by the judge rather than the opposing parties.\textsuperscript{79} The U.S. practice of using highly paid “hired guns” has been criticized as completely inimical to the concept

\begin{footnotesize}
\bibitem{distinctive}
Ernst C. Stiefel & James R. Maxeiner, \textit{Civil Justice Reform in the United States—Opportunity for Learning from “Civilized” European Procedure Instead of Continued Isolation?}, 42 \textit{Am. J. Comp. L.} 147, 157 (1994). John Langbein argues that “by assigning judges rather than lawyers to investigate the facts, the Germans avoid the most troublesome aspects of our practice,” and that the judge “soon knows the case as well as the litigants do.” Langbein, \textit{The German Advantage}, supra note 75, at 824, 831–32.

\bibitem{scores}
See, e.g., Stiefel & Maxeiner, supra note 76, at 156–57.

\bibitem{unsure}
See Allen et al., \textit{A Plea}, supra note 75, at 728–29. One of the articles criticizing Langbein’s thesis cites as an example a German judge seemingly leading an unsure witness to the judge’s desired conclusion in an auto accident case. \textit{Id}.

\bibitem{inimical}
\end{footnotesize}
that a trial involves the search for “truth.” 80 In contrast, in Continental litigation, the judge is responsible for both the selection and instruction of the expert, though an attempt is made to secure the agreement of the parties. 81 The goal is to choose a neutral expert who will assist the judge and not either of the parties. 82 Although Federal Rule of Evidence 706 gives U.S. judges the authority to appoint their own experts, 83 this authority is seldom exercised. 84 One possible reason for this is that the judge is not familiar enough with the facts of the case to choose an expert. 85 Another explanation for why U.S. judges do not exercise their authority under Rule 706 to call experts, 86 or Rule 614 to call ordinary fact witnesses, 87 has to do with deep-seated cultural attitudes about the judge’s proper role in conducting a trial. 88

Other scholars contend that the use of court-appointed experts in Germany has not been an unmitigated success. 89 For example, well-qualified experts are difficult to find. 90 Consequently, judges seldom use their authority to appoint experts, such that the choice is not between court-appointed experts and partisan experts, but between court-appointed experts and no experts at all. 91 Additionally, scholars worry that judges may be simply delegating to experts rather than overseeing them. 92

There is irony in the fact that, whereas the U.S. judges have a less active role in conducting the trial, acting more like “umpires” than “managers,” they are nevertheless seen as more of an authority figure in the courtroom, or as some have suggested, “culture heroes, even parental figures.” 93 Why should this be so?

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80 See id. at 835–36. Professor Langbein argues that “[t]he battle of experts tends to baffle the trier, especially in jury courts. If the experts do not cancel each other out, the advantage is likely to be with the expert whose forensic skills are the more enticing.” Id. at 836.

81 Id. at 836–37.

82 Id. at 837.

83 See Fed. R. Evid. 706.

84 See Langbein, The German Advantage, supra note 75, at 841.


86 Fed. R. Evid. 706.

87 Fed. R. Evid. 614.

88 See Reitz, supra note 75, at 992–95.

89 See Allen et al., A Plea, supra note 75, at 737–38.

90 See id. at 739.

91 See id. at 738–40.

92 See id.

93 See John Henry Merryman & Rogelio Pérez-Perdomo, The Civil Law Tradition 34 (3d ed. 2007); Kevin J. Mitchell, Neither Purse Nor Sword: Lessons Europe Can Learn from...
There may be several factors, not the least of which is the previously mentioned political selection of U.S. judges, as well as the pattern of U.S. judges embarking on a judicial career only after achieving some degree of success in law practice. The relatively low social standing of the typical European judge may also be a factor.\textsuperscript{94} The role’s passive character may give the U.S judge an aura of being “above the fray” in contrast to the “hands-on” civil law judge.\textsuperscript{95} Additionally, the power to issue contempt orders adds to the clout of the U.S. judge.\textsuperscript{96} Moreover, the managerial authority of the civil law judges, while extensive, is exercised within a narrower band than that of U.S. judges who have a larger range of discretion and opportunities for creativity, thereby “making

\textit{American Courts’ Struggle for Democratic Legitimacy}, 38 Case W. Res. J. Int’l L. 653, 659 (2007). Public opinion polls support these anecdotal observations about the prestige rankings of U.S. judges. \textit{E.g.}, CYNTHIA L. CATES & WAYNE V. McINTOSH, \textit{Law and the Web of Society} 75 (2001). In addressing this issue, two scholars have noted:

Clearly, the judicial office carries with it tremendous prestige. Generally speaking, public opinion ranks judges near the top of the occupational heap in terms of status. Thus, for example, one study of occupational prestige ranked judges generally at about the high position of doctors, with college professors, “regular” lawyers, airline pilots, and nurses trailing behind. Supreme Court justices out-ranked even doctors.

\textit{Id.} In a Harris poll dated August 8, 2006, seventy percent of those polled “would trust” judges, compared to twenty-seven percent for lawyers. \textit{Doctors and Teachers Most Trusted Among 22 Occupations and Professions: Fewer Adults Trust President to Tell the Truth}, The Free Library (Aug. 8, 2006), http://www.thefreelibrary.com (navigate to “Date”; select “August 8, 2006”; navigate to “PR Newswire” under the “Business” section; scroll down to hyperlink with the article title and follow hyperlink) (last visited Oct. 20, 2010). Comparative statistics regarding the relative prestige of Continental lawyers and judges are not readily available. Nevertheless, the self-image of the two groups is relevant. In a 1972 poll, only twenty percent of the German judges thought that they enjoyed the prestige due to them by virtue of their profession, whereas forty-three percent of the attorneys thought they enjoyed such prestige. \textit{See} Allen et al., \textit{A Plea}, supra note 75, at 747–48.

\textit{94} \textit{See} MERRYMAN & PÉREZ-PERDOMO, \textit{supra} note 93, at 110 (“The upper classes, who get the best education and who have influential friends, tend to have privileged access to, and to dominate, practice and academic life. Judicial posts are frequently filled by those who are rising to the middle class from humbler social origins.”).

\textit{95} \textit{See} Gross, \textit{supra} note 67, at 746. One of the many articles joining in the academic debate over \textit{The German Advantage} cites the more passive role of the U.S. judge as contributing to the “prestige and autonomy” of U.S. judges as well as making them “more effective as guarantors of individual rights.” \textit{See id.; see also} STEPHAN LANDSMAN, \textit{The Adversary System: A Description and Defense} 50 (1984). Whether the trend in the U.S. toward a more involved role for judges would bring about a reduction in this level of prestige is uncertain. Perhaps there are enough other attributes of U.S. judges, noted in this Article, which would prevent any reduction of prestige.

\textit{96} \textit{See} MERRYMAN & PÉREZ-PERDOMO, \textit{supra} note 93, at 123–24.
law” as well as interpreting it.97 The role of *stare decisis* in the common law system is seen as central to the judge’s more creative role.98 Although the hierarchical structure of courts in Germany, for example, results in strong adherence to higher court decisions, there is less room for creativity when interpreting the law.99

This greater range for creativity in the United States is particularly striking in the context of judicial review of legislative and executive action, a power that can be exercised by state as well as federal judges. Although judicial review in the United States dates back to the 1803 Supreme Court decision in *Marbury v. Madison*,100 across the Atlantic it has only been the norm since World War II in Western Europe, and the fall of communism in Eastern Europe.101 Nevertheless, in Europe there is a strict separation between the new constitutional courts and the ordinary courts.102 In Europe, only constitutional courts have the authority to strike down acts of the legislature, whereas even trial court judges can do this in the United States.103 Nevertheless, in Germany and Italy,

97 Id. at 37 (“Civil law judges are not culture heroes or parental figures, as [in the common law system]. Their image is that of a civil servant who performs important but essentially uncreative functions.”).

98 Mitchell, supra note 93, at 659. One commentator compares the recognized role of such reputable judges as Coke, Mansfield, Marshall, and Cardozo as lawgivers in the common law tradition to legislators and politicians, such as Justinian or Napoleon, in civil law history. *Id.* at 660.

99 See Mirjan R. Damaška, The Faces of Justice and State Authority 33–34 (1986); Allen et al., *A Plea*, supra note 75, at 755 (quoting Damaška, *supra*, at 42 n.37) (“[T]he result is a system of precedent that lacks the crucial element that maintains the vibrancy of the Anglo-American common law system: A ‘Continental judge does not weigh the symmetry of factual situations which, under the aegis of stare decisis, permits fine distinctions and thus assures the flexible growth of the law. Instead, he seeks ever more concrete rules in prior decisions, disregarding the enveloping factual context.’”).


102 Mitchell, *supra* note 93, at 675.

103 See id. at 675, 680. At least one comparative scholar sees virtue in the Continental division of labor between various court systems:

We must remember that the decision to isolate important components of constitutional and administrative-law jurisdiction outside the ordinary courts in Germany lowers the political stakes in judicial office, by comparison with our system, in which every federal district judge (and for that matter, every
members of the ordinary judiciary have the ability to refer any constitutional issues that arise in a civil or criminal case to the constitutional court.\textsuperscript{104} This limited degree of constitutional “involvement” arguably constitutes some measure of “convergence.”\textsuperscript{105}

Also significant is the difference between ordinary courts and constitutional courts regarding methods of judge selection. In contrast to the civil service career judiciary model, constitutional court judges often have a background in politics or as law school faculty members.\textsuperscript{106} Their career paths are closer to those of a common law judge. The appointment process is political, typically by a majority or super-majority vote of the Parliament.\textsuperscript{107}

Common law judges have a greater identity as individuals, strikingly illustrated by the fact that they typically issue concurring and dissenting opinions. This may be a factor that enhances their prestige with the practicing bar and the general public. Civil law judges tend to be “invisible.” Their opinions are typically unanimous and anonymous.\textsuperscript{108} This is true of both the ordinary courts and the constitutional courts, although less so for constitutional court judges.\textsuperscript{109}

B. Convergence of Judicial Roles

The most widely noted trend toward convergence is the increased managerial responsibilities of the U.S. judge, primarily in the “big case.”\textsuperscript{110} The complexity of class action certification and settlement


\textsuperscript{105} See Cappelletti, supra note 104, at 84.

\textsuperscript{106} See Ferejohn & Pasquino, supra note 104, at 1681–82.

\textsuperscript{107} See id. The exception is France, “where the President of the Republic and the presidents of the two houses of Parliament each appoint three members of the Conseil Constitutionnel.” Id. at 1681.

\textsuperscript{108} See id. at 1681–82; Merryman & Pérez-Perdomo, supra note 93, at 37. The German and Spanish constitutional courts do permit dissent, but they are rare. See Ferejohn & Pasquino, supra note 104, at 1693–95. In Italy, a proposal was briefly considered that would permit only anonymous or unsigned dissents, but even this was rejected. See id.

\textsuperscript{109} See Merryman & Pérez-Perdomo, supra note 93, at 35, 36. Speaking of the ordinary civil law courts, Professor Merryman asks rhetorically, “who knows the name of a civil law judge?” Id. at 36.

\textsuperscript{110} See Arthur Taylor von Mehren, Some Comparative Reflections of First Instance Civil Procedure: Recent Reforms in German Civil Procedure and in the Federal Rules, 63 Notre Dame L. Rev. 609, 623–27 (1988); see also Thomas D. Rowe, Jr., Authorized Managerialism Under the
hearings have motivated federal judges to take a number of actions not in keeping with their traditional common law “umpire” role.111 Managerial techniques include departing from the trial plan proposed by the parties, appointing special “science panels,” applying flexible evidentiary rules, and delegating the implementation of an alternative dispute resolution plan to magistrates.112 Such innovations suggest a willingness by judges to override the lawyer’s role in conducting litigation, leading one observer to conclude that “the American federal judge presiding over complex litigation now often acts like his or her civil law counterpart.”113 This is true not only in complex business and commercial lawsuits, but also with respect to public law litigation involving civil rights and institutional reform issues.114

At the same time, there has been a contrary trend in some European countries toward more party-adversarial practices and consequently less of a “hands-on” role for the judge.115 In January 2004, Italy

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111 See Rowe, supra note 110, at 196–98. Although many intensively managed cases in U.S. federal courts have been class actions, the trend within the United States is toward more active case management even in non-class cases. At the same time, other countries are experimenting with “class like” litigation, further enhancing the convergence between the United States and the rest of the world. See Richard B. Cappalli & Claudio Consolo, Class Actions for Continental Europe? A Preliminary Inquiry, 6 Temp. Int’l & Comp. L. J. 217, 225 (1992); Antonio Gidi, Class Actions in Brazil—A Model for Civil Law Countries, 51 Am. J. Comp. L. 311, 312–13 (2003) (listing countries); Richard A. Nagareda, Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism, 62 Vand. L. Rev. 1, 41–42 (2009) (observing foreign convergence toward U.S. class action models); Edward F. Sherman, American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems, 215 F.R.D. 130, 133 (2003).

112 See Mullenix, supra note 5, at 17–20.

113 Id. at 20.


adopted new rules providing alternative dispute resolution for commercial cases that sharply restricted the role of the judge, with the preparation of the factual and legal issues left largely to the lawyers for the parties.\textsuperscript{116} The 2001 Spanish Civil Procedure Rules somewhat reduced the active rule of the judge by, among other things, substituting a system of cross-examination by counsel in place of examination of witnesses by the judge.\textsuperscript{117}

In Germany, as a result of the 1977 revisions to the Code of Civil Procedure, there has been a trend toward a “concentrated trial,” or at least toward making the trial more continuous than in the past.\textsuperscript{118} Concentration involves the development of a cause prior to the actual trial, and is a characteristic traditionally associated with the common law trial procedure and attributed to the practicalities of the jury system.\textsuperscript{119} One observer attributed this change to an increased concern with promoting the value of efficiency, but at the same time perhaps giving less emphasis to “other justice values,” a trend also observed in the United States in regard to “managerial judges.”\textsuperscript{120} In addition to Germany, Austria has moved significantly in the direction of greater concentration.\textsuperscript{121} This movement has been accompanied by a greater emphasis on “orality,” historically regarded as a characteristic of common law procedure.\textsuperscript{122} Additionally, Germany and Austria have moved away from the concept of a “documentary curtain” whereby a hearing judge takes the evidence and prepares a written summary, while a different judge or group of judges hear arguments and render a decision.\textsuperscript{123}

\textsuperscript{116} See Hazard & Dondi, \textit{supra} note 115, at 69; see also Carrara, \textit{supra} note 115, at 11.

\textsuperscript{117} See Stadler, \textit{supra} note 115, at 56. \textit{But see} Santos, \textit{supra} note 115, at 67.

\textsuperscript{118} Mehren, \textit{supra} note 110, at 615.

\textsuperscript{119} \textit{Id.} at 611, 615.

\textsuperscript{120} \textit{Id.} at 627.

\textsuperscript{121} Merryman & Pérez-Perdomo, \textit{supra} note 93, at 113.

\textsuperscript{122} \textit{See id.} at 114–15.

\textsuperscript{123} \textit{Id.} at 115. According to Merryman and Pérez-Perdomo:

A trend toward immediacy in civil proceedings carries with it a trend toward orality, and orality is promoted by the trend toward concentration. Civil law proceduralists think of the three matters as related to one another and one frequently encounters discussions in which concentration, immediacy and orality are advanced as interrelated proposals for reform in the law of civil procedure.

\textit{Id.}
There has also been a movement in Europe toward decreased use of “collegial” or multiple judges in first instance courts. In Germany, it seems that most decisions are now rendered by a single judge, rather than a panel of three, although there is some question about how much this has contributed to making litigation more efficient.\(^{124}\) Nevertheless, this change makes the structure of the German trial more like the U.S. trial, and makes the authority of the German judge more similar to his or her U.S. counterpart.

The German Civil Procedure Rules Act of 2001 places somewhat less emphasis on \textit{de novo} review of facts by second instance courts.\(^{125}\) The original draft of these Rules mandated that courts of appeal would only decide points of law, which would have moved much further in the direction of U.S. practice.\(^{126}\) The reformers’ goal was to strengthen the fact-finding role of first instance judges.\(^{127}\) But after much discussion, this far-reaching change was not included in the final version of the Act.\(^{128}\)

Nevertheless, one should be cautious in generalizing about “civil law” procedure. There always has been diversity among European countries, and diversity is apparently increasing. To give one striking example of a long-standing deviation from the civil law model, in some cantons of Switzerland, judges are elected and come to the bench with prior practice experience.\(^{129}\) Russia is now classified as a civil law country, but between 1995 and 2002 Russia experimented with some “common law like” features involving a more passive role for judges.\(^{130}\) Additionally, Germany and France are the two countries whose judiciaries are most often compared to that of the United States.\(^{131}\) Scholars have cautioned against lumping together the judiciaries of these two countries, pointing out, among other things, that German judges are more

\(^{124}\) See Fisch, \textit{supra} note 75, at 227–36; Mehren, \textit{supra} note 110, at 623; Stadler, \textit{supra} note 115, at 75.

\(^{125}\) Stadler, \textit{supra} note 115, at 60.


\(^{127}\) See Stadler, \textit{supra} note 115, at 60.

\(^{128}\) Id.


“active” than their French brethren. Further, such scholars have noted that if a “model” of a civil law judge “were extrapolated from all the civil law jurisdictions, he or she would look more Italian than French or German.”

C. The Influence of International Arbitration

Many transnational business and commercial disputes are now decided by arbitrators rather than judges. There seems to be more convergence, harmonization, and “mixing” of common and civil law practices in arbitration proceedings than in the courtroom. For example, the International Bar Association Rules of Evidence (IBA Rules), which were drafted by arbitrators from a number of different countries and are often used for international arbitration, combine the historically common law practice of live cross-examination of witnesses with the feature of free assessment of evidence and rejection of exclusionary rules, a characteristic of civil law courts. Discovery, as provided in the IBA Rules, represents a compromise between the very broad scope allowed in the United States and the much narrower scope of discovery permitted in Europe. While dissenting opinions by civil law judges are extremely rare, they are quite common in international arbitration proceedings. Although the use of tribunal appointed expert witnesses is possible, experts in international commercial arbitration are more often appointed by parties. Nevertheless, the Chartered Institute of Arbitrators has attempted to change this practice. An interesting question is whether some of the “blended” procedures now used by international arbitrators will gradually be adopted by national court systems.

132 See id.
133 See id. at 1867.
136 Id. at 74.
138 Karrer, supra note 135, at 80. There is, however, some disagreement on how an arbitrator’s time spent on a dissenting opinion should be compensated. See id. at 81.
139 See id. at 77–78.
140 See id. at 75. This has already happened to some extent in England. See id.
D. Decodification and Global Judicialization

“Decodification” involves a number of trends. One trend is the growth of “special legislation” that treats subjects dealt with by code provisions but “differ ideologically from the code and are in this sense incompatible with it.” Examples of such systems of special statutory law include labor law, intellectual property law, company law, and securities law. Also significant is the growth of judge-made law in the field of torts, a change that is inconsistent with traditional civil law ideology. These developments tend to undercut legislative supremacy and require European judges to make choices that are similar to those made by judges in the “common law world.”

While legislation and codes have become less significant, constitutions have grown in importance. This shift is the result of the post-World War II and post-Communist establishment of constitutional courts, and the consequent ability of dissenting public officials as well as ordinary citizens to challenge the legality of parliamentary legislation and executive decrees. Although the power to strike down legislation on constitutional grounds is strictly limited to the separate constitutional courts, judges in the ordinary court system have still been affected by the phenomenon of “constitutionalization.” Even in ordinary litigation where there is no per se constitutional challenge, the text of the constitution may influence the interpretation of the relevant law. Because the judges of the ordinary courts must be guided in their decisions by the constitutional judges, some characteristics of the latter may rub off on the former. In fact, the lines of jurisdiction be-

141 Merryman, supra note 131, at 1868.
142 Id.
143 Id.
144 See id. at 1869 (“The [French] code provisions are so rudimentary and empty of substance that judges have had to create the applicable law on a case-by-case basis. The effective law of torts is not found in the code but outside it, in widely published, consulted and cited court decisions.”).
145 See id.
146 See id. at 1870–71.
147 See supra text accompanying notes 102–104.
148 See Merryman, supra note 131, at 1872. Merryman writes as follows:

When a choice among competing interpretations of a law must be made, the one that seems more consistent with the constitution will normally be favored. When a party argues that the constitution favors its position, the judge must consider the argument and in so doing must interpret and apply the constitution.

Id.
between constitutional courts and ordinary courts are not always clear, occasionally leading to conflict. An example of such conflict occurred in Italy between the Supreme Court of Cassation and the Constitutional Court “regarding the right to counsel in criminal proceedings and the retroactive effect of holding that a statute deprived an accused of the constitutional right to counsel.”

There are political and structural factors at work in both the “Western Common-Law Democracies” and the “European Romano-Germanic Democracies” that permit and encourage an expansion of judicial power at the expense of the legislative and executive branches. Additionally, the trend appears stronger in the Romano-Germanic countries, which seem more resistant to judicial activism based on historical deference to legislative supremacy. The factors bringing about this “judicialization” include separation of powers, a politics of rights—enabled in part by the new constitutional courts—interest and opposition-group use of the courts, ineffective majoritarian institutions, positive perceptions of the courts, and “wilful delegation of majoritarian institutions.” The delegation of majoritarian institutions occurs when legislators fear voting or even taking a position on controversial questions, and are only too happy to let judges make such decisions. Although these factors mainly influence the constitutional and administrative courts, these effects may “spill over” onto the ordinary courts.

The EU is another powerful “outside” influence on member-state judges. For example, national laws that violate the European Convention on Human Rights are subject to challenge before the European Commission and Court of Human Rights. By undercutting the absolute sovereignty of national parliaments, EU courts have given additional powers and responsibilities to the various national courts, thus furthering “convergence.” As one scholar noted, “[t]hat Great Britain, mother country of the Common Law, is a member of the EEC and a

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151 See id. at 518–23.

152 Id. at 526.

153 See id. at 526–27.

154 See Merryman, supra note 131, at 1873.
party to the Human Rights Convention, suggests the possibility, indeed the necessity of a rapprochement of the civil and common law traditions."

One more possible influence in favor of greater convergence is the ALI/UNIDROIT Principles and Rules of Civil Procedure, a set of standards drafted jointly by a group of scholars from the United States and Europe with a view toward universal “standards for adjudication of transnational commercial disputes.” Although no country has adopted the Principles or Rules in whole or substantial part, they have nonetheless received significant attention on both sides of the Atlantic. Although the Principles and Rules attempt to bridge differences between legal systems, there is something of a “tilt” in favor of European Civil Law. For example, the Principles and Rules generally keep “discovery” under the control of the judge as part of the “trial” rather than a “pre-trial” process. The Principles also contain a strong statement on “Court Responsibility for Direction of the Proceeding.” Although this might seem strange to a rural common law judge, a modern federal judge handling a large case load would feel quite at home with these words.

III. COMPARATIVE LESSONS

As the previous Parts have shown, convergence exists in at least two areas of traditional American exceptionalism: pleading standards and the role of the judge. This Part addresses what these convergences might mean for domestic and transnational civil procedure. There are both promises and perils.

A. COMPARATIVE PROMISES

First, at a minimum, these convergences ought to make comparative studies more approachable and thus might enrich the debates cur-

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155 Id.
158 Id. at 204, 206–07.
159 ALI/UNIDROIT PRINCIPLES, supra note 156, at 784.
rently surrounding these two areas in U.S. academic circles. In the pleadings context, the convergence appears to be happening in a vacuum. Neither Bell Atlantic v. Twombly nor Ashcroft v. Iqbal mentioned foreign pleading systems at all. Perhaps they should have, and perhaps commentators should as well. The foreign models suggest that the New U.S. fact-based pleading is not unique but rather enjoys some support among other advanced legal systems. On the other hand, foreign models may have based their decision to impose rigorous pleading standards on other features of their procedural system that the United States lacks. The point is not that a comparative perspective will necessarily support or undermine the convergence but rather will enrich the debate. It may also facilitate a deeper understanding of the United States’ own procedural system and norms.

Indeed, this has already occurred in the other area of convergence: the role of the judge. That trend of convergence has tapped into the comparativist inquiry—albeit sometimes with harsh criticism—in a way that enlivens and enlightens both understanding and purpose. There are obvious differences of opinion, but at least those differences of opinion are being aired with the benefit of comparative analysis. This Article suggests that the pleadings trend should learn from the judicial role debate and seek out comparativist attitudes as a way to better understand where pleading trends are heading and why.

Second, these convergences may provide opportunities for pleading reform for U.S. or transnational litigation. A major objection to harmonization is a resistance to change. Nonetheless, that objection seems less important in recent years, both because the U.S. judge has become more comfortable in an active role, and also because Iqbal and Twombly have shifted the U.S. pleading system toward foreign pleadings systems. As noted above, U.S. trends in both areas are forcing the change anyway. Because these trends are moving toward foreign models that enjoy wide international support, foreign procedural norms

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160 See Dodson, supra note 23, at 463–64.
161 See Antonio Gidi, Teaching Comparative Civil Procedure, 56 J. LEGAL EDUC. 502, 502 (2006) (“[A]merican proceduralists are among the most parochial in the world.”).
163 See Dodson, supra note 23, at 463–64.
164 See id. at 464–65.
165 See sources cited supra note 75.
166 See Dodson, supra note 23, at 463.
167 See id.
may be more easily imported into U.S. civil procedure. In addition, these convergences may provide support for the ALI/UNIDROIT’s proposals for fact pleading and an active judicial role.\textsuperscript{168} To date, no country has adopted the ALI/UNIDROIT Principles, but these convergences may create opportunities for consideration and support of the Principles within the United States.

Third, these procedural trends may provide an opportunity for the United States to change its “go-it-alone” attitude. Perhaps partly as a result of United States’ isolationism, many foreign scholars resist U.S.-style reforms and ridicule U.S. civil procedure.\textsuperscript{169} A willingness to accept comparative assessments may allow the United States to join, and perhaps even have a respected voice in, the international conversation on global procedural norms. In turn, that may provide opportunities for the United States to export its procedural norms abroad. This may influence a host of reforms in other countries that are converging toward U.S. procedure.\textsuperscript{170} Some of those convergences in civil law countries with respect to the role and status of judges converging toward U.S. norms have already been discussed, but we believe this opportunity has far broader implications. Asian and Russian systems, for example, are experimenting with juries, a feature generally unique to U.S. procedure.\textsuperscript{171} Latin and Scandinavian countries are experimenting with aggregate litigation, another quintessentially U.S. phenomenon.\textsuperscript{172} The trends we have identified provide the opportunity for the United States to make a positive impact on the development of a host of global procedural norms, instead of perennially being contrasted with them.

\textsuperscript{168} See Klebba, supra note 157, at 204. These proposals are contained in Principle 11.3. ALI/UNIDROIT Principles, supra note 156, at 778.


\textsuperscript{170} See Hazard & Dondi, supra note 115, at 68–70 (describing convergence of civil and common law systems in modern commercial disputes).


\textsuperscript{172} See Gidi, supra note 111, at 313 n.1.
B. Comparative Perils

In addition to the promises discussed above, there are perils to avoid. This Article does not address all possible perils, but a few are worthy of mention, if only to express a strong need for caution going forward.

First, tinkering with just one feature of U.S. procedure may disrupt settled features in other aspects of U.S. procedure in unwelcome ways. Pleadings and judicial roles are tied to the scope of discovery, for example, and it is difficult to have a conversation about these features without also having a conversation about discovery. Indeed, failing to do so might lead to grave systemic problems.¹⁷³ But the existence of convergence in these areas suggests that broader undercurrents of convergence are happening. Caution is still warranted, and U.S. scholars should be fully aware of broader trends, but the interconnectedness of civil procedure—long an obstacle to convergence and reform—may end up being an ally.

Tinkering with pleadings and judicial roles may also erode the transubstantivity of the Federal Rules—the foundational assumption that the U.S. rules apply regardless of the underlying substantive issues at stake¹⁷⁴—in unintended ways. For example, Twombly and Iqbal may suggest that the rigor of pleading standards should vary depending on the type of case.¹⁷⁵ Similarly, active case management may be better suited for the “big case” or for public litigation, while passive judicial oversight is better for the small private case. The foundational assumption of transubstantivity would have to be rethought carefully.

Finally, changes in U.S. procedure must be made with full knowledge of the greater systemic repercussions. On the pleadings side, for example, if rigorous pleading standards tend to divert vindication of private rights outside the civil system, will public enforcement of those rights become more robust? What will that mean for the criminal system and the administrative state? Assuming foreign jurisdiction is proper, will litigants resort to other means by, for example, taking their claims abroad, thereby forcing U.S. citizens to defend in foreign courts? Will the U.S. system need to provide an alternative process or system for vindicating claims that otherwise could not be pleaded?¹⁷⁶

¹⁷³ See Dodson, supra note 23, at 445, 466–68.
¹⁷⁵ See Iqbal, 129 S. Ct. at 1944–49.
¹⁷⁶ See Dodson, supra note 23, at 467.
Regarding the trend toward active judicial roles, will such closer attention reduce the impartiality of the ultimate decisionmaker? In counteracting that risk, will trial-level courts rely more heavily on a two-tiered system of judges, in which magistrates become the “active” case managers, while Article III district judges reserve their time for bench trials? Will judges push cases toward settlement or arbitration, against the parties’ wishes? Will active roles erode the high status of judges in the U.S. system? The convergences discussed in this Article may raise these questions, and scholars ought to explore what implications they hold for system stability and workability.

**Conclusion**

This Article explores two areas of recent convergence between U.S. civil procedure and that of the rest of the world: pleading standards and the role and status of judges. Recent pleadings changes in the United States have moved away from a pure “notice” concept and toward a more demanding factual sufficiency standard that is akin to what is required in most other countries. The role of judges has experienced convergence in both directions, with U.S. judges becoming more “activist” and European judges becoming less so. As for the status of judges, several recent events have given more discretion to civil law judges and at the same time increased their prestige and visibility, including “spillover” effects from international arbitration procedures, the post-World War II establishment of constitutional courts and EU courts, as well as a phenomenon called “de-codification.” Therefore, civil law judges look more like their common law counterparts in terms of prestige, visibility, and their role in conducting trials.

These observations prompt speculation about what these convergences might herald for the future. This Article finds potential promises and perils, particularly in the integration and interface with other facets of civil litigation. In particular, it proposes cognizance of how the recent tightening of U.S. pleading standards will affect discovery, and whether civil-law style discovery might hold promise for U.S. procedure. This Article concludes by questioning the continuing vitality of trans-substantivity in light of the pleadings changes and the movement toward more active case management for “big cases.” Finally, the Article questions whether more active case management by judges will undercut the historically high degree of prestige of the common law judge, which has perhaps been based in part on being “above the fray.”

Where these convergences will take civil procedure, both in the United States and elsewhere, is unknown. The challenge will be to max-
imize their promises, both locally and globally, while simultaneously minimizing their perils.
THE TRANS-PACIFIC PARTNERSHIP: NEW PARADIGM OR WOLF IN SHEEP’S CLOTHING?

Meredith Kolsky Lewis*

Abstract: The Office of the United States Trade Representative (USTR) is currently negotiating with seven other countries to form a new trade agreement called the Trans-Pacific Partnership (TPP). The TPP has the potential to expand into a Free Trade Agreement of the Asia-Pacific (FTAAP). At present there are several competing models for Asia-Pacific economic integration that exclude the United States entirely. In such an environment, the TPP presents the United States with a welcome opportunity, not only to participate, but also to take a leadership role in establishing the terms for a region-wide agreement. Nevertheless, the USTR must make the TPP sufficiently attractive to other Asia-Pacific economies, such that those countries will prefer the TPP over other integration models. This will require the USTR to partially diverge from its standard FTA template and liberalize in new areas. Although doing so may be politically challenging, it is the United States’ best strategy if it wishes to solidify a role for itself in an economically integrated Asia-Pacific.

INTRODUCTION

The Office of the United States Trade Representative (USTR) has devoted significant resources to negotiating the United States’ accession to a trade agreement known as the Trans-Pacific Partnership (TPP). Although these negotiations have captured the attention of U.S. negotiators, and are well-known to the countries already participating in the TPP, the TPP’s existence is not otherwise well-known. As of mid-2009, mentioning the TPP at international legal academic conferences drew mainly blank looks. Correspondingly, there is a dearth of legal scholarship on the TPP.¹ Nevertheless, although the TPP has slid beneath the radar until this point, it should not be ignored any longer.

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¹ This author is only aware of two other legal academic articles that discuss the TPP: the first is an article that only mentions the TPP in a passing footnote, and the second is this author’s earlier article on the subject. See Meredith Kolsky Lewis, Expanding the P-A
The TPP is a new type of trade agreement. It does not fit into the more common molds of bilateral free trade agreements or plurilateral customs unions. Rather, the TPP represents an unprecedented free trade agreement (FTA) comprising eight or more members, including the United States, and has implications for regionalism—particularly in the Pacific Rim—and the World Trade Organization (WTO), and for the power dynamics between major trading blocs. The TPP has the potential both to harmonize and to fragment. It reflects both a convergence of economies seeking to form a broader alliance, and a divergence from the multilateral trading system. The TPP has the potential to create a new paradigm for trade agreements, to form the basis for a Free Trade Area of the Asia-Pacific (FTAAP), and to provide an alternative power center within Asia-Pacific Economic Cooperation (APEC) in ways that are distinct from the models that have been jockeying for

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favor the past several years. Nevertheless, if the TPP is not negotiated properly, these results are unlikely to materialize. At times, the United States has appeared to approach the negotiations as if it were negotiating just another FTA according to the standard U.S. template. This tactic is contrary to the United States’ long-term interests, however, as it is likely to result in an agreement that will not be sufficiently attractive to convince other APEC economies to join en masse.

In short, the TPP has the potential to be an exceedingly important agreement. This Article thus seeks to highlight what the TPP is, why it is an agreement to watch, and what negotiating issues will affect whether or not the agreement is truly groundbreaking or merely a repackaged version of the United States’ existing FTAs.

I. What Is the TPP?

The TPP is a trade agreement—currently under negotiation—that has its roots in an existing agreement between Brunei, Chile, New Zealand, and Singapore. The goal of these original four TPP members was not to form a union based on economic synergies among the current partners, but rather to create a model agreement that could be expanded to include additional members from both sides of the Pacific. This is the first non-customs union trade agreement with the avowed purpose—and potential—of transforming into a large, plurilateral free trade agreement.

The United States is currently negotiating to join an expanded version of the TPP, along with Australia, Peru, and Vietnam. An ex-

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3 See Lewis, supra note 1, at 408. These include: an East Asian FTA comprising China, Korea, and Japan; an ASEAN + 3 model, that would see the Association of Southeast Asian Nations (ASEAN) forming an FTA with China, Korea, and Japan; and an ASEAN + 6 model that would additionally include Australia, New Zealand, and India. Id.

4 Id. at 403.

5 Id.

6 See id. at 403, 404; N.Z. MFAT TPP Factsheet, supra note 2, at 1.

amination of the USTR’s website reveals a significant amount of information about the TPP. In fact, the USTR has set up a separate section of its website specifically devoted to this negotiation. Although there is a great deal of material on the USTR website, it does not provide a complete picture of the origins and nature of this agreement.

The USTR website explains that the TPP comprises eight countries—the United States, Australia, New Zealand, Singapore, Chile, Brunei, Peru, and Vietnam—that have recently decided to form a trade agreement. The USTR suggests that the Obama administration became interested in forming the TPP after the administration reviewed its trade policy strategy in conjunction with members of Congress. The USTR also suggests that the TPP is geared toward obtaining market access for U.S. exports. Although not technically inaccurate, this description of the TPP agreement, how it arose, and the USTR’s explanation of why the United States is seeking to join the TPP, is somewhat misleading. The following section sets out a more comprehensive explanation of the TPP, including why the United States may have elected to participate in its expansion.

A. The Genesis of the TPP

The USTR website suggests the TPP is a new agreement that does not have a precursor. This is not entirely accurate. As noted above, in 2005, four countries from different corners of the globe—Brunei, Chile, New Zealand, and Singapore—entered into a unique and potentially path-breaking free trade agreement called the Trans-Pacific Strategic Economic Partnership Agreement. This agreement was informally

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8 Trans-Pacific Partnership, supra note 1.
9 See id.
12 See Ehlers, supra note 11; USTR FACT SHEET: Trans-Pacific Partnership, supra note 10.
13 See N.Z. MFAT TPP Factsheet, supra note 2, at 1.
known as the Trans-Pacific SEP, the P-4 Agreement, or just the P-4.\textsuperscript{14} Since the United States joined negotiations, the agreement has become more commonly referred to as the TPP.\textsuperscript{15}

What is now known as the P-4 Agreement began with negotiations launched by Chile, New Zealand, and Singapore at the APEC leaders’ summit in 2002.\textsuperscript{16} These original negotiations contemplated an agreement known as the Pacific Three Closer Economic Partnership (P3 CEP).\textsuperscript{17} Nevertheless, Brunei attended several negotiating rounds as an observer, and ultimately joined the P-4 Agreement as a “founding member.”\textsuperscript{18} The P-4 Agreement was signed by New Zealand, Chile, and Singapore on July 18, 2005, and by Brunei on August 2, 2005, following the conclusion of negotiations in June 2005.\textsuperscript{19} Following the passage of implementing legislation, the P-4 Agreement entered into force on differing dates in 2006 with regard to the various parties.\textsuperscript{20}

The P-4 Agreement is the first multi-party free trade agreement linking Asia, the Pacific, and Latin America.\textsuperscript{21} In addition to its geographic diversity, the P-4 Agreement is interesting because of the comprehensiveness and depth of its coverage. Unlike most FTAs, the P-4 Agreement provides for nearly total liberalization of all goods, including agriculture.\textsuperscript{22} It calls for Chile, New Zealand, and Singapore to reduce


\textsuperscript{15} See SICE: Trade Policy Developments: Trans-Pacific Partnership Agreement, supra note 14. To avoid confusion, in this article “P-4” will be used to refer to the agreement as originally formed, whereas “TPP” will be used to refer to the agreement that the United States is negotiating.

\textsuperscript{16} Lewis, supra note 1, at 403.

\textsuperscript{17} Id.

\textsuperscript{18} Id. at 403–04.

\textsuperscript{19} Id. at 404. At the same time, the parties signed a binding Environment Cooperation Agreement and a binding Labour Cooperation Memorandum of Understanding. See id.

\textsuperscript{20} Id. Brunei only deposited an instrument of provisional application and the Agreement has therefore provisionally applied to Brunei since June 2006. Id.

\textsuperscript{21} Id.

\textsuperscript{22} Lewis, supra note 1, at 415. It is common for FTAs to exclude a significant percentage of agricultural products from their coverage. See id. at 415–16; see also Richard H. Steinberg, Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints, 98 Am. J. Int’l L. 247, 268 (2004) (noting frequent exclusion of agriculture from European Union FTAs); Anna Turinov, Free Trade Agreements in the World Trade Organization: The Experience of East Asia and the Japan—Mexico Economic Partnership Agreement, 25 UCLA PAC. BASIN L.J. 356, 347 (2008) (discussing Asian FTAs).
tariffs to zero on all goods by 2017, and for Brunei to reduce tariffs to zero on all but a handful of products. The P-4 Agreement did not cover financial services or investment, but provided that these areas would be negotiated two years after the P-4 Agreement came into force. Those negotiations have substantially completed.

Although the P-4 Agreement is comprehensive in its scope—particularly now that the financial services and investment negotiations have taken place—its uniqueness is more attributable to its structure than its content. First, although the participating countries are all APEC members, the P-4 Agreement deliberately joins countries spanning the globe. It creates a strategic linkage that extends to the far corners of the Pacific, joining Latin America, South East Asia, and Oceania. These countries were not motivated by improved access to each other’s markets; Singapore already provided duty-free access on all goods except alcohol and tobacco, and New Zealand maintains very few tariffs. None of the countries has a particularly large economy or population. Instead, the parties’ intent was to form a high-standards agreement.


24 Id. at 47.

25 Trans-Pacific Strategic Economic Partnership Agreement, supra note 1.

26 Cf. Henry Gao, The Trans-Pacific Strategic Economic Partnership Agreement: High Standard or Missed Opportunity? 4–6 (Nov. 2, 2009) (unpublished manuscript), available at http://www.unescap.org/tid/artnet/mtg/con09_papers.htm [hereinafter Gao, Trans-Pacific SEP] (noting the range of goods included in the P-4 Agreement); Trans-Pacific Strategic Economic Partnership Agreement, supra note 1 (highlighting that financial services and investment negotiations have occurred). Not everyone is convinced that the P-4 is truly a “high-standards” agreement. See Henry Gao, A Scorecard for the P4: Full or Fail?, East Asia Forum (Dec. 2, 2009), http://www.eastasiaforum.org/2009/12/02/a-scorecard-for-the-p4-full-or-fail (arguing that the agreement could have phased out tariffs more quickly and that its provisions on rules of origin, trade remedies, and services are more restrictive than necessary).


28 See Gao, Trans-Pacific SEP, supra note 26, at 6.


agreement that could serve as a model for a broader APEC-wide agreement, and to which other APEC members could accede.  

To facilitate the P-4 Agreement’s potential to serve as an APEC-wide model or template for an ultimate Free Trade Area of the Asia-Pacific, the parties included an open accession provision in the P-4. The P-4 Agreement provides that it is open to accession “on terms to be agreed among the [p]arties, by any APEC [e]conomy or other [s]tate.” In theory, FTAs without open accession provisions could be expanded upon the agreement of all of the members. Nevertheless, this does not tend to happen in practice. Indeed, even in the relatively few FTAs that do contain open accession provisions, expansion rarely occurs. Nonetheless, in the context of the P-4 Agreement, the open accession clause is important because the parties’ goal from the beginning was to expand the agreement. Therefore, the parties included the provision in hopes that like-minded countries would consider joining the agreement, propelling it towards a possible APEC-wide phenomenon.

Interestingly, although the P-4 countries included an open accession provision so that other countries could accede to the P-4 Agreement, it appears that TPP negotiations are not going to entail any new-comers formally acceding to the P-4 Agreement. At a conference

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31 See N.Z. MFAT 2005 Report, supra note 23, at 13. In its official publication on the P-4 Agreement, the New Zealand Ministry of Foreign Affairs and Trade (MFAT) states that “[b]ecause of the low barriers to trade between the partners to the Trans-Pacific SEP, a key objective of the negotiations, from the start, was the potential strategic benefits.” Id. at 12–13.


34 Lewis, supra note 33, at 35.

35 See Trans-Pacific Partnership, supra note 32, pmbl. See generally Lewis, supra note 33 (providing a more detailed discussion of open accession provisions).

session of the 2010 American Society of International Law Annual Meeting, official Karl Ehler made clear that the United States was not acceding to the P-4 Agreement, but rather that a new agreement was being negotiated.\(^{37}\) This is consistent with reports from individuals familiar with the negotiations.\(^{38}\) Nonetheless, the genesis of the TPP is clearly the P-4 Agreement. In addition to the obvious fact that all the P-4 countries are involved in the TPP negotiations, the P-4 Agreement contains the key ingredients that are being sought in the TPP: geographic diversity, a high-standards agreement, and a model for expansion.\(^{39}\)

**B. The United States Joins the Party**

Although the Obama administration presents the TPP as its idea—derived after reviewing U.S. trade policy objectives—the United States’ substantive involvement actually dates back to the Bush administration.\(^{40}\) The two-year anniversary of the P-4 Agreement triggered the beginning of the negotiations on investment and financial services.\(^{41}\) The United States expressed interest in joining those negotiations, with the ultimate intention of acceding to the P-4 Agreement if terms could be agreed upon.\(^{42}\) The P-4 Agreement member countries then entered into preliminary negotiations with the United States in early 2008 that were intended to lay the groundwork for the United States’ ultimate accession.\(^{43}\) Shortly after these negotiations commenced, Australia and Peru announced that they also intended to join the P-4 Agreement. More recently, Vietnam was identified as an additional planned partici-

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37 See Ehlers, supra note 11.
38 See, e.g., Trans-Pacific Strategic Economic Partnership Agreement, supra note 1.
39 See Trans-Pacific Partnership, supra note 32, pmbl., art. 1.1.
40 See Ann Capling, Multilateralising PTAs in the Asia-Pacific Region: A Comparison of the ASEAN–Australia–NZ FTA and the P4 Agreement, at 8 (United Nations Econ. & Soc. Comm’n for Asia & the Pacific, Conference Paper, Asia-Pacific Trade Economists’ Conference, 2009), available at http://www.unescap.org/tid/artnet/mtg/2-2Ann%20Capling.pdf. The United States apparently proposed the negotiation of an FTA with Australia, Chile, New Zealand, and Singapore back in 1998, with the goal of sparking further trade liberalization within APEC. See id. at 7. Although Australia, Chile, and the United States ultimately did not pursue this idea, New Zealand and Singapore went on to negotiate a high-standards bilateral FTA. See id.
41 See N.Z. MFAT 2005 Report, supra note 23, at 47.
42 See Trans-Pacific Strategic Economic Partnership Agreement, supra note 1.
pant.\textsuperscript{44} Once the United States signaled its intention to join, the agreement came to be called the Trans-Pacific Partnership or TPP.\textsuperscript{45}

In September 2008, comprehensive negotiations for the United States to join the Trans-Pacific Partnership were launched informally.\textsuperscript{46} The first round of formal negotiations was originally scheduled to commence in March 2009, with Vietnam expected to join as an observer, and Australia and Peru intending to participate.\textsuperscript{47} Nevertheless, with the intervening change in U.S. administration, the first round of negotiations was deferred until the Obama administration conducted a general review of U.S. trade policy.\textsuperscript{48} Accordingly, although the Obama administration decided to participate in the negotiations following a review of its trade policy, the decision can be seen as an extension of Bush administration trade policy.

\textbf{C. Why Is the United States Pursuing the TPP?}

Some scholars have commented that the USTR has not focused significant energy on the WTO Doha Round of trade negotiations, but instead has treated the TPP agreement as the “only game in town.”\textsuperscript{49} Yet it is not obvious why the United States has decided to pursue the TPP. Although the USTR suggests that the TPP will expand market access and is driven by purely economic considerations, this is at best only true in an indirect sense. In reality, the TPP is more significant as a potential Asia-Pacific agreement than as an agreement among the initial eight countries.\textsuperscript{50}

\textsuperscript{44} See id.
\textsuperscript{45} See SICE: Trade Policy Developments: Trans Pacific Partnership Agreement, supra note 14; Understanding the TPP---The Path to Expansion, supra note 43.
\textsuperscript{48} Id.
\textsuperscript{50} See Myron Brilliant, Senior Vice President, Int’l Affairs, U.S. Chamber of Commerce, Oral Testimony to the Trade Police Staff Committee, Office of the United States Trade Representative, 2 (Mar. 4, 2009). Brilliant notes:
The United States’ decision to join the TPP is not driven by the market access potential within the current eight parties. Of the TPP members or members-to-be, the United States already has FTAs with Australia, Chile, Singapore, and Peru. Therefore, the United States could only form new connections with Vietnam, New Zealand, and Brunei. Vietnam is in some ways an attractive potential free trade agreement partner for the United States, but Vietnam joined the talks only after the United States had signaled its interest. Therefore, Vietnam is not driving the United States’ involvement. New Zealand has long expressed its interest in an FTA with the United States.

While new export opportunities in the seven partners of the TPP negotiations . . . may be relatively modest for U.S. companies, . . . [i]f the TPP agreement evolves gradually into the Free Trade Area of the Asia-Pacific, then the United States has the potential to reach into economically significant markets that previously have been closed off to us through bilateral negotiations.

Id.

51 See Free Trade Agreements, Int’l Trade Admin., http://www.trade.gov/fta (last visited Nov. 15, 2010). Indeed, among the eight countries currently negotiating the TPP, there are so many existing free trade agreements that there are only eight bilateral combinations that are not already covered by existing preferential arrangements: Australia–Peru; Brunei–United States; Brunei–Peru; Chile–Vietnam; New Zealand–Peru; New Zealand–United States; Peru–Vietnam; and Vietnam–United States. John Ravenhill, Extending the TPP: The Political Economy of Multilateralization in Asia, at 25 (United Nations Econ. & Soc. Comm’n for Asia & the Pacific, Conference Paper, Asia-Pacific Trade Economists’ Conference, 2009), available at http://www.unescap.org/tid/artnet/mtg/2-3John%20Ravenhill.pdf.

52 See generally Data Profile of Vietnam, World Bank (2010), http://www.worldbank.org (navigate to “Data” hyperlink; then navigate to “By Country”; then navigate to “Vietnam”); Vietnam, Office of the United States Trade Representative, http://www.ustr.gov/countries-regions/southeast-asia-pacific/vietnam (last visited Nov. 15, 2010) (reporting that Vietnam has a relatively large population of approximately 86 million, and yet it is only the United States’ 45th largest goods market as of 2009). Further, entering a free trade agreement that includes Vietnam as a partner would also cause some consternation within the United States. Vietnamese shrimp and catfish exports have been the subject of antidumping investigations and associated litigation within the United States, resulting in the imposition of duties on these products. See generally Sungjoon Cho, A Dual Catastrophe of Protectionism, 25 NW. J. INT’L L. AND BUS. 315 (2005); Stephanie Showalter, The United States and Rising Shrimp Imports from Asia and Central America: An Economic or Environmental Issue?, 29 VT. L. REV. 847 (2005); Joshua Startup, From Catfish to Shrimp: How Vietnam Learned to Navigate the Waters of “Free Trade” as a Non-Market Economy, 9 IOWA L. REV. 1963 (2005). The U.S. industries that filed these petitions are unlikely to be pleased by the prospect of Vietnam’s products obtaining improved market access to the United States in the form of reduced—and perhaps ultimately removed—tariffs. See Cho, supra, at 315–17.

53 See United States of America: Country Information, N.Z. Ministry of Foreign Aff. & Trade, available at http://www.mfat.govt.nz/Countries/North-America/United-States.php. MFAT publicly acknowledges that “[s]ecuring a free trade agreement negotiation with the United States has been a key New Zealand trade objective for more than a decade.” Id.
TPP, however, New Zealand has largely received the “cold shoulder.”\textsuperscript{54} In any case, New Zealand’s market is only four million people and is already highly liberalized,\textsuperscript{55} so it is evident that New Zealand is not the driver. That leaves the small state of Brunei, which is also an unlikely driving force behind the United States’ interest.

The United States clearly sees opportunities beyond the eight current parties, and hopes that more countries will join the TPP. Although the current TPP partners are not major trading partners of the United States, APEC as a whole represents a huge market.\textsuperscript{56} Therefore, the TPP makes a good deal of strategic sense for the United States so long as it continues to expand. Nevertheless, the reasons go beyond the long-term economic potential of a Free Trade Area of the Asia-Pacific; the reasons also include a significant geopolitical component. In particular, the United States has the potential to alter some of the economic power dynamics in the Asia-Pacific, which is consistent with President Obama’s stated goals of increased U.S. engagement in the region.

At a major address in Japan in November 2009, President Obama promised increased U.S. engagement in all aspects of its relations with countries in the Asia-Pacific, proclaiming that he would be “America’s first Pacific president” and announcing that the United States would participate in negotiations to join the TPP.\textsuperscript{57} To its credit, the Obama Administration appears to recognize the strategic significance the TPP could have for the United States—although USTR officials deny the agreement has any purpose other than an economic one—and is presumably pursuing the TPP for these additional reasons.

\textsuperscript{54} See James M. McCormick, The New Zealand—United States Relationship in the Era of Globalization, in SOVEREIGNTY UNDER SEIGE? GLOBALIZATION & NEW ZEALAND 213, 216 (Robert Patman & Chris Rudd eds., 2005). In the past, the United States objected to any suggestion of a free trade agreement with New Zealand because New Zealand refuses to allow United States’ nuclear ships into its territorial waters. See id. In recent years, however, the United States has softened its stance towards New Zealand with respect to this issue. Nevertheless, with a market of only four million people, a highly liberalized economy that is open to United States products, and a competitive dairy export sector, it is likely that the United States sees few potential gains from an FTA with New Zealand. See id. at 217.

\textsuperscript{55} See id.


II. Implications of TPP Expansion for (Both Sides of) the Pacific

A. Implications for the United States

Twenty years ago, then-Secretary of State James Baker famously cautioned that it would be a mistake for the United States to permit “a line to be drawn down the middle of the Pacific” with the United States on one side, separated from Asian countries on the other.\(^{58}\) Notwithstanding this warning, we have seen numerous models for economic integration in East Asia and the Asia-Pacific that exclude the United States from their formulations. ASEAN + 3, ASEAN + 6, and an East Asian FTA comprising Japan, Korea, and China, are all different visions for deeper regional economic integration, and each has deliberately omitted the United States from the equation.\(^{59}\) If the United States could succeed in negotiating the TPP—and additionally succeed in selling the TPP as the basis for broader expansion within APEC—it could represent a major step toward achieving President Obama’s goal of engaging with Asia,\(^{60}\) and would erase the line down the middle of the Pacific, which China,\(^{61}\) Japan,\(^{62}\) and perhaps others, might prefer to draw.\(^{63}\)


\(^{59}\) Lewis, supra note 1, at 408–09. For a more detailed analysis of the competing regional economic models, see id. at 408–13.

\(^{60}\) See Evan A. Feigenbaum, America, Trade, and Asia, COUNCIL ON FOREIGN RELATIONS (May 14, 2010, 2:12 PM), http://blogs.cfr.org/asia/2010/05/14/america-trade-and-asia/ (characterizing the TPP as a “modest effort” that will not be sufficient to restore the United States’ historical economic role in Asia). Some, however, doubt whether the TPP will significantly enhance the United States’ position in Asia. See id.


\(^{62}\) Id. at 7 (noting that Japan’s Prime Minister, Yukio Hatoyama, has advocated for an East Asian Community that would appear to exclude the United States).

An expanded TPP could lead to a different path toward Asian economic integration, which would have neither ASEAN nor the three major East Asian economies as its driver, and which would instead have the United States as a central participant.\(^6^4\)

If the expanded TPP becomes the basis for a Free Trade Area of the Asia Pacific (FTAAP), Asian integration will likely develop along lines more similar to those envisioned (even if primarily in an aspirational sense) by the members of the Asia Pacific Economic Cooperation (APEC) than those being contemplated in the context of ASEAN-plus arrangements or an East Asian FTA. In particular, an expanded TPP would lead to a trans-Pacific integration rather than an intra-Asian integration.

The United States’ decision to negotiate to join the TPP is therefore quite savvy. By joining the TPP, the United States has the potential not only to thwart efforts to shape Asian economic regionalism models that exclude it, but, if the TPP expansion is successful and continues, the United States will also be a leader and agenda-setter with respect to the parameters of a future FTAAP. Further, if the TPP grows into an FTAAP, the global economic order would also be altered. At present there are three major economic blocs—the Americas, Europe, and Asia—and the American bloc is not necessarily the most economically powerful among these.\(^6^5\) An Asia-Pacific integration has the potential to alter the balance into a two-bloc model comprising Europe and the Asia-Pacific, with the latter including Asia, the United States, Oceania, and much of South America. Therefore, joining the TPP could help the United States play an active role in altering the regional power balance, thereby inserting itself into what is likely to be the more powerful of two large blocs as opposed to remaining on the wrong side of a divided Pacific.

Depending on how the expansion is structured, the TPP additionally has the potential to multilateralize some aspects of regionalism,\(^6^6\)

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\(^{64}\) Claude Barfield & Philip I. Levy, *Tales of the South Pacific: President Obama, the Trans-Pacific Partnership and U.S. Leadership in Asia*, Vox (Jan. 28, 2010), http://www.voxeu.org/index.php?q=node/4533 (arguing that the TPP is an ideal mechanism for the United States to assert leadership in the creation of a new, inclusive Asian architecture).


\(^{66}\) See Ann Capling, *The Trans-Pacific Partnership*, East Asia Forum (Nov. 23, 2009), http://www.eastasiaforum.org/2009/11/23/the-trans-pacific-partnership/. Multilateralizing regionalism is an important goal, as it could counteract the fragmenting effects of the hundreds of FTAs currently in existence or being negotiated. Richard Baldwin et al., *Beyond Tariffs: Multilateralizing Non-Tariff RTA Commitments*, in \texttt{Multi-Lateralizing Regionalism}:
which would help facilitate the creation of an FTAAP. In other words, the famous “spaghetti bowl”67 of overlapping and inconsistent FTAs proliferating the globe could be partially untangled if a large group of countries could agree to a harmonized set of commitments to which other countries could accede.68 The TPP—and ultimately an FTAAP—has the potential to serve as a model of open regionalism69 and a stepping stone toward multilateral trade liberalization, rather than the stumbling block that FTAs more commonly present.70

By combining a high-standards, comprehensive trade agreement with an open accession provision and the United States as a party, the TPP has the potential to create a new paradigm for trade agreements. Rather than presenting the usual two country model in which both countries pick and choose the areas they wish to liberalize, the TPP would draw together multiple countries from both sides of the Pacific. The TPP has the potential to be far more comprehensive than the average FTA. With the United States as a party, other countries will be interested in joining the TPP, and doing so would require significant liberalization commitments. If the TPP were negotiated on these terms, it is possible—perhaps even likely—that the TPP would lead to an FTAAP.

Challenges for the Global Trading System 79–80 (Richard Baldwin & Patrick Lows, eds., 2009). This has been the subject of at least one conference: the Conference on Multilateralizing Regionalism, September 10–12, 2007 in Geneva, Switzerland, along with an associated collection of scholarly articles. See Multi-lateralizing Regionalism, supra, at xiv.

67 See Jagdish Bhagwati, U.S. Trade Policy: The Infatuation with Free Trade Areas, in The Dangerous Drift to Preferential Trade Agreements 2, 2–3 (AEI Press, 1995). This description of FTAs was coined by Jagdish Bhagwati. The spaghetti bowl imagery is used in particular to refer to the fact that different agreements apply different rules of origin (ROO), resulting in a highly challenging situation for would-be exporters, as they may find they need to comply with rules that are inconsistent from one importing country to another. Id. at 3. Inconsistent rules of origin are further fragmenting the world trading system; nevertheless, getting the WTO membership to agree to adopt a single, harmonized ROO system has not yet been possible. See generally Won-Mog Choi, Defragmenting Fragmented Rules of Origin of RTAs: A Building Block to Global Free Trade, 13 J. Int’l Econ. L. 111 (2010) (providing an analysis of ROO issues in global free trade).

68 See John Ravenhill, Can the TPP Resolve the ‘Noodle Bowl’ Problem?, East Asia Forum (Nov. 26, 2009), http://eastasiaforum.org/2009/11/26/can-the-tpp-resolve-the-noodle-bowl-problem/ (noting that if TPP expansion were successful, the agreement would have the potential to multilateralize the free trade agreements in the Asia-Pacific region).

69 Barfield & Levy, supra note 64 (describing the TPP as a potential model of open regionalism).

B. Implications for the WTO

If the TPP does expand in the near future into a larger agreement that captures a significant percentage of trans-Pacific trade, it may impact the ability of WTO members to complete the current Doha Round of negotiations.\textsuperscript{71} The nature of this impact could be negative because the United States and other TPP members could determine that expanding the TPP is an easier and more fruitful path towards new trade liberalization gains than is the multilateral framework. On the other hand, the growth of the TPP could have a positive impact on the Doha Round. USTR Ron Kirk has indicated that he believes the TPP will complement the WTO negotiations.\textsuperscript{72} Although Kirk did not explain his comment, it seems feasible that he is correct. Countries that are not currently a part of the TPP discussions may fear that the world is splitting into large trading blocs from which they are currently excluded, and thus be incentivized to reinvigorate the Doha Round. In particular, India and Brazil may determine it is worth giving additional WTO concessions to refocus the United States on the WTO.

III. Potential Pitfalls for the TPP

Although the USTR appears to be enthusiastically pursuing the TPP, and the other countries involved in the agreement seem to be similarly motivated, TPP expansion is far from guaranteed. There are a number of issues that must be resolved before an expanded TPP can become a reality. These issues comprise substantive obstacles in the negotiating process as well as procedural hurdles that must be addressed once an agreement is reached. Moreover, these issues will significantly affect whether the TPP will multilateralize trade among APEC members, ultimately leading to an FTAAP. Although some scholars have suggested that the United States should conclude the TPP negotiations by the time it hosts the APEC summit in November 2011,\textsuperscript{73} this may be optimistic given the issues that must be resolved.

\textsuperscript{72} Id.
A. Substantive Negotiating Challenges

In most FTA negotiations there are a number of issues relating to substantive coverage that pose challenges to resolve. Although each partner stands to benefit from the market access liberalization measures taken by the trading partner, each partner in turn faces domestic opposition to liberalizing its home market for goods and services produced or supplied domestically.\textsuperscript{74} The P-4 Agreement was relatively unique in being able to overcome some of these obstacles and achieve a highly comprehensive agreement, at least with respect to trade in goods.\textsuperscript{75} With the addition of the United States, however, the TPP negotiations are more typical of many bilateral FTA negotiations.\textsuperscript{76} Accordingly, there are a number of potential issues regarding substantive matters within the negotiation. This section briefly discusses two of these issues: agriculture and intellectual property.

1. Agriculture

The United States has historically refused to liberalize most aspects of trade in agriculture in its FTAs,\textsuperscript{77} yet the P-4 countries have agreed to comprehensive removal of tariffs on agricultural products.\textsuperscript{78} How much of its agricultural sector the United States will be willing to include in its TPP commitments, is likely to be a significant issue. Roughly half of New Zealand’s exports to the United States are agricultural products that the United States considers sensitive: primarily dairy, lamb, and


\textsuperscript{76} See Ravenhill, supra note 51, at 25.

\textsuperscript{77} See Taylor, supra note 74, at 188. At the same time, the United States often insists on agricultural market access concessions from its trading partners. For example, the Korea—United States FTA is unlikely to be presented to Congress until Korea makes new concessions on access to its market for U.S. beef. See Gantz, supra note 74, at 147–48. For a discussion of the general tendency to exclude agriculture from FTAs, see Schaefer, supra note 70, at 588–89.

\textsuperscript{78} See Elms, supra note 75, at 23 n.71. Chile only committed to removing tariffs immediately on a subset of New Zealand’s dairy exports. The remaining Chilean tariffs are subject to a twelve year phase-out period. See id.
beef. The U.S. dairy industry has already reacted with alarm to the idea of an agreement that could involve New Zealand dairy products gaining improved access to the U.S. market, and thirty senators signed a letter to USTR Ron Kirk expressing concern in this regard.

For New Zealand, excluding dairy from the agreement would be a very hard sell. Nevertheless, New Zealand has very little to offer the United States in exchange for including dairy. In fact, the United States may have little to gain from forming an alliance with New Zealand. The New Zealand market is already highly liberalized, so there would be only minimal gains in the form of improved market access. And New Zealand is a small market, currently accounting for less than .05% of U.S. exports. Thus, notwithstanding New Zealand’s long-term goal of achieving an FTA with the United States, it may be that New Zealand does not have enough to offer the United States, or (admittedly less likely) that the United States’ demands will result in insufficient payoffs for New Zealand.

2. Intellectual Property

A second issue that may prove challenging in the negotiations is intellectual property protection. The United States generally includes provisions in its FTAs that are referred to as “TRIPS-plus” in that they provide higher levels of protection than is required by the WTO’s Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement. This does not pose an issue for countries that already have FTAs—including TRIPS-plus provisions—with the United States—such as Australia. Nevertheless, there are aspects of the Australian—United States Free Trade Agreement (AUSFTA) that are inconsistent with the United States—Singapore FTA with respect to intellectual property protection. For example, the United States—Singapore agreement does not prohibit the practice of parallel importation, whereas the AUSFTA does prohibit parallel importation.
For a small market economy such as New Zealand, permitting parallel imports makes good economic sense; indeed, New Zealand allows parallel imports in its domestic law and has yet to agree to limit such imports in any of its FTAs.\(^87\) Presumably the United States will want the TPP to include provisions restricting parallel imports, which will be opposed at a minimum by New Zealand and Singapore. The AUSFTA also imposes restrictions that affect how Australia purchases prescription drugs for its public health system.\(^88\) It is likely that the United States would want New Zealand to make similar changes, which New Zealand would oppose.\(^89\)

**B. Procedural Obstacles Within the United States**

Even if the USTR succeeds in reaching an agreed-upon text with the other seven members of the proposed TPP expansion, it will still need for Congress to enact implementing legislation.\(^90\) In the United States, unless a treaty is self-executing, it will not become enforceable as a matter of domestic law until it is implemented via legislation.\(^91\)

Under the United States Constitution, Congress has the authority to “regulate commerce with foreign nations.”\(^92\) Nevertheless, Congress
has on numerous occasions delegated this authority to the President.93 When the President holds this authority it is referred to as “fast track authority” or “Trade Promotion Authority” (TPA).94 TPA gives the President authority not only to negotiate trade agreements, but also to present Congress with treaty text that Congress must then either accept or reject in its entirety.95 In other words, Congress does not have the power—when the administration is in possession of TPA—to exercise line-item vetoes, to filibuster, or to condition acceptance of the bill on amendments, riders, provisos, or other conditions.96

The President held TPA continuously from 1974 to 1994.97 But following the contentiousness surrounding Congressional approval of the North American Free Trade Agreement (NAFTA) and the Uruguay Round Agreements Act of 1994—the implementing legislation for the Marrakesh Agreement creating the WTO—Congress declined to renew TPA for eight years.98 The majority-Republican Congress finally ended the drought and granted the Bush administration TPA pursuant to the Bipartisan Trade Promotion Authority Act of 2002.99 This Act, which expired in 2007, required the administration to engage in consultations with Congress, domestic stakeholders, and private sector advisory committees throughout the process of negotiating trade agreements.100

In the past, U.S. administrations have succeeded in passing trade agreements through Congress by virtue of having TPA.101 It is widely recognized that in the absence of TPA, it would be extremely difficult for any trade agreement legislation to be passed, and thus difficult for treaties to come into effect.102 Without TPA, Congress would inevitably insist upon redrafting provisions of the agreement texts, and adding to and subtracting from the negotiated and agreed to obligations. The

94 See Gantz, supra note 74, at 117.
95 See id. at 131–32.
96 See id.
97 See id. at 130–31.
100 Id. §§ 3804, 3812.
101 See U.S. Gov’t Accountability Office, supra note 93, at 9.
102 See Gantz, supra note 74, at 153; Taylor, supra note 74, at 162.
other party to the agreement is unlikely to agree to renegotiate significant portions of the treaty in response to Congress’s demands. Thus as a practical matter TPA is seen as all but necessary to get any trade agreements enacted.\textsuperscript{103} Indeed, the Bush administration negotiated a number of trade agreements during its last term, including FTAs with Korea,\textsuperscript{104} Panama,\textsuperscript{105} and Colombia.\textsuperscript{106} The Panama and Colombia agreements have not been submitted to Congress for consideration because the deals are seen as doomed in the absence of TPA.\textsuperscript{107}

Although TPA is of paramount importance, Congress has been unwilling to grant the authority since it expired in 2007.\textsuperscript{108} Moreover, it is unlikely that Congress will grant the Obama administration TPA any time soon. Democrats in Congress are not on the whole favorably inclined toward pursuing a free trade agenda, and wish to see environmental and labor side agreements in any FTA.\textsuperscript{109} Additionally, in the current political environment it is not realistic to think that Republi-

\begin{thebibliography}{10}
\bibitem{103}See Gantz, \textit{supra} note 74, at 122; Taylor, \textit{supra} note 74, at 162–63. \textit{But see} U.S. Gov’t Accountability Office, \textit{supra} note 93, at 9.
\bibitem{104}See Alan Beattie, Obama Aims to Renegotiate S Korea Trade Pact, \textit{FINANCIAL TIMES} (June 26, 2010, 10:25 PM), http://journalisted.com/alan-beattie?allarticles=yes (navigate to article title and click hyperlink; free registration required at Financial Times website) (last visited Oct. 25, 2010). The Korea–U.S. Trade Agreement (“KORUS”) is of important economic and strategic significance for the United States’ ability to be a significant player in Asian markets and to participate in Asian economic integration efforts. See Feigenbaum, \textit{supra} note 60. It is thus troubling that KORUS has been languishing, not presented to Congress since 2007. \textit{See id.} Korea has not been sitting idly; in the interim it has negotiated an FTA with the European Union (although this has yet to be implemented). \textit{See id.;} John W. Miller, \textit{EU, Central America Reach Trade Agreement}, \textit{COSTA RICA NEWS} (May 18, 2010), http://thecostaricanews.com/ eu-central-america-reach-trade-agreement/3175. The European Union has taken advantage of the United States’ failure to implement the agreements negotiated by the Bush administration, having now negotiated FTAs with all of the United States’ pending FTA agreement partners: Colombia, Panama, and Korea. See Miller, \textit{supra}.
\bibitem{107}See Levin Argues Against Fast-Track Trade Authority, \textit{CQ POLITICS} (Dec. 15, 2009), available at http://www.citizenstrade.org/pdf/20091215_levinarguesagainstfasttrack_cqpolitics.pdf. The Bush administration signed KORUS shortly before the expiration of TPA, and thus that agreement could still be presented to Congress for an up or down vote. Nevertheless, it also has not been submitted due to strong pressures from United States interests to renegotiate commitments relating to market access for U.S. beef and auto parts. See Jeffrey J. Schott, Op-Ed., Congress and the KORUS FTA, \textit{KOREA TIMES} (Nov. 8, 2010), available at http://www.iie.com/publications/opeds/print.cfm?researchid=1706&doc=pub.
\bibitem{108}See Levin Argues Against Fast-Track Trade Authority, \textit{supra} note 107.
\bibitem{109}See Beattie, \textit{supra} note 104.
\end{thebibliography}
cans in Congress are going to bestow any power to the Obama administration that they do not have to.

Interestingly, the USTR appears to be following the mandates of the previous grant of TPA even though there is no current authority. The USTR has been engaging in extensive consultations with Congress and interested manufacturing, farming, and other interests. It has held public question and answer sessions on the internet, and has been very vocal in its efforts to consult with interested stakeholders. Presumably this is all part of an effort to soften Congress so that it will ultimately grant TPA—even if only with respect to the TPP. If Congress grants TPA after the negotiations are largely completed—and the grant contains the same constraints on the Obama Administration that the 2002 grant contained—then the USTR has covered itself by fulfilling all required consultations. Nonetheless, there is no guarantee Congress will grant TPA. Accordingly, this remains a large obstacle.

C. Disagreements over the Negotiating Architecture

An important question is whether the TPP will be structured to serve as a model for an FTAAP, or whether it will instead be based on a U.S. bilateral FTA model, which would be much less likely to grow into a larger region-wide agreement.

Following the second round of negotiations in June 2010, the USTR reported that the talks had focused on several negotiating goals,
including “determining the architecture for market access negotiations.”\textsuperscript{114} This determination will significantly impact the nature of any final agreement, and the future attractiveness of the TPP to other countries.

“Determining the architecture for market access negotiations” refers to a difference in approach between the United States, on the one hand, and New Zealand, Australia, and Singapore, on the other. Existing TPP members New Zealand and Singapore, together with the United States’ FTA partner Australia, want to negotiate a unified market access schedule.\textsuperscript{115} This form of schedule would entail reopening the market access schedules within the bilateral FTAs already in place among various TPP countries.\textsuperscript{116} Under this system, each member would have a single tariff schedule, with each concession applying to all TPP members.\textsuperscript{117} The unified market access schedule approach has the benefits of making it more difficult to exclude sensitive sectors and creating an agreement that is relatively straightforward for new countries to accede to, particularly if the agreement included a uniform approach to Rules of Origin (ROO).\textsuperscript{118} This approach would also allow TPP members to revisit the exclusions agreed to in their bilateral agreements. For example, if the approach shared by Australia, New Zealand, and Singapore were adopted, Australia would have an opportunity to attempt to negotiate to have the TPP include sugar.\textsuperscript{119} Thus, adopting a unified market access schedule would lead to a more comprehensive and uniform agreement than the United States’ preferred alternative.

Instead, the United States has taken the position that its negotiations should be on a bilateral basis with the TPP players with which it does not currently have FTAs: namely, New Zealand, Vietnam, and Brunei. Additionally, the United States has maintained that for those countries with which it currently has FTAs the terms of those FTAs should apply in the TPP context.\textsuperscript{120} This would mean that the market

\textsuperscript{114} Press Release, \textit{supra} note 7.


\textsuperscript{116} See \textit{id.}


\textsuperscript{118} See \textit{id.}

\textsuperscript{119} See \textit{id.}

\textsuperscript{120} See \textit{TPP Negotiators to Seek Market Access Structure Deal at August Meeting, supra} note 115.
access schedules in the bilateral agreements would not be reopened but would instead be kept intact within the TPP.\textsuperscript{121} Such an approach would have significant ramifications for the participating countries. For Australia, it would mean that the United States-required carve out of sugar in the AUSFTA would remain in effect.\textsuperscript{122} For New Zealand, it would almost certainly mean having to agree to exclusions—or at a minimum very long phase-ins—for dairy products.\textsuperscript{123} This is in stark contrast to the extant TPP agreement, which provided for the majority of tariffs to be removed entirely upon the TPP’s entry into force, and for any remaining tariffs to be reduced to zero by 2017.\textsuperscript{124} Indeed, in general, the United States’ proposed approach would likely lead to a lower level of market access than if the negotiations began from the standpoint of creating an across-the-board high-standards agreement.

This approach would probably make other countries less likely to want to join the TPP agreement. It is easier to negotiate to join a single agreement than to have to negotiate separate bilateral arrangements with each partner.\textsuperscript{125} Ironically, the United States’ negotiating stance will make it less likely to achieve its goal of forming an agreement that will expand into an APEC-wide FTA. In fact, what would arguably exist under the U.S. approach would not be a single unified FTA, but rather a series of spoke-and-wheel bilateral arrangements existing under a veneer of commonality.\textsuperscript{126}

In the context of multiple bilateral negotiations, one has to worry that the United States will not pursue the “high-standard, comprehensive agreement”\textsuperscript{127} it purports to desire, but will instead succumb to domestic pressures and seek significant exclusions from some of the bilateral relationships. Indeed, the likely outcome if the United States

\textsuperscript{121} See id.
\textsuperscript{123} See id.
\textsuperscript{124} See N.Z. MFAT 2005 Report, supra note 23.
\textsuperscript{125} See TPP Negotiators to Seek Market Access Structure Deal at August Meeting, supra note 115 (noting that the parties have recently agreed that all of the FTAs currently in effect among the TPP parties should co-exist alongside the TPP).
\textsuperscript{126} See Ann Capling, supra note 36 (suggesting that an expanded TPP might not be a genuine region-wide agreement).
\textsuperscript{127} USTR Fact Sheet: Trans-Pacific Partnership, supra note 10 (“The United States will engage with an initial group of seven like-minded countries . . . to craft a platform for a high-standard, comprehensive agreement—one that reflects U.S. priorities and values—with these and additional Asia-Pacific partners.”).
approach prevails is that the United States will negotiate bilateral agreements with New Zealand, Vietnam, and Brunei that are modeled on previous U.S. FTAs.\textsuperscript{128}

In a recent report on trade agreements, the Government Accountability Office notes that “[o]ther countries that negotiate FTAs frequently exclude sensitive industries or issues. Some trade experts argued that USTR’s pursuit of comprehensive agreements limits potential FTA partners since a number of larger economies are unwilling to enter into such comprehensive negotiations.”\textsuperscript{129} Although this is undoubtedly accurate—for example, it would be difficult for the United States to achieve an FTA with Japan because of the exclusions Japan would presumably demand—it is equally true of the United States, which generally insists upon exclusions—or at a minimum, lengthy implementation periods—for various agricultural products.\textsuperscript{130} Therefore, it may well be that the TPP will merely appear on the surface to be a new paradigm, but will in fact represent business as usual. This would be a mistake on the United States’ part. Although it would be the easier negotiating path for the United States, it would be far less likely to achieve the strategic goals that made the TPP an attractive proposition in the first place.

For the TPP to serve as a model for a future FTAAP, it will have to be an agreement that other countries are interested in joining. The TPP agreement is not the only option available for Asia-Pacific regionalism, and if the TPP is not sufficiently attractive, one of the other visions for regional economic integration may instead fill the role as FTAAP model. China would like to see ASEAN + 3 serve this function, particularly because it would exclude the United States.\textsuperscript{131} Japan prefers

\textsuperscript{128} See TPP Countries Examining New Compromise Idea for Market Access Talks, supra note 122; see also Meredith Kolsky Lewis, The Free Trade Agreement Paradox, 21 N.Z. UNIV. L. REV. 554, 564–65 (2005). In the case of New Zealand, the AUSFTA is the most likely model, both because it is relatively recent and because this is the liberalization benchmark New Zealand would likely seek, as its export portfolio is similar to Australia’s in a number of respects. Lewis, supra, at 564. Although not nearly as ambitious or desirable as an agreement that fully liberalizes trade in goods, New Zealand would at least be brought back onto an even footing with Australia in competing in the United States market. Id. at 564. This recalibrating of comparative advantage—sometimes called domino regionalism or the “me too” effect—is often a motivation for entering into FTAs. Id. at 564–65.

\textsuperscript{129} Gov’t Accountability Office, supra note 93, at 18.


\textsuperscript{131} See Vincent Wei-cheng Wang, China-ASEAN Free Trade Area: A Chinese “Monroe Doctrine” or “Peaceful Rise”?, CHINA BRIEF, Aug. 20, 2009, at 9, 10–11 (discussing China’s trade liberalization and economic development in Southeast Asia).
ASEAN + 6 because it would include more economies to counterbalance China, and would still exclude the United States. The TPP needs to be more attractive to potential partners than ASEAN + 3, ASEAN + 6, or any other potential regional models. If the TPP is cleaner and more comprehensive, it will be a more attractive model because it will be relatively simple to incorporate other countries into the partnership. On the other hand, if bilateral agreements must be negotiated between every set of partners that do not already have a bilateral FTA, the negotiations will be highly burdensome and the outcomes will be less attractive. Thus the United States’ approach in the June negotiations is worrisome, and suggests that the USTR does not have a clear idea of what its negotiation goals are, or should be.

More recently, the United States has signaled it may be willing to compromise on this important negotiating issue. Following the June negotiations, Australia, New Zealand, and Singapore have continued, in informal discussions, to push for multilateral market access negotiations. Sources indicate that the parties are now searching for a middle ground, and that there is disagreement within the USTR regarding the best approach to pursue. Reports from the subsequent round of intercessional talks in Peru are that this issue remains unresolved. Hopefully USTR officials will reach agreement and recognize that a significant value of the TPP would be that it provides a leadership role for the United States in an Asia-Pacific economic integration agreement, and that this role is unlikely to materialize if the TPP is merely an assemblage of bilateral agreements that are insufficiently comprehensive.

Conclusion

The Obama administration is wise to negotiate for a Trans-Pacific Partnership. Such an agreement has the potential to re-assert the United States’ position as a leader and economic participant on both sides of the Pacific. It also represents the best chance, among the options otherwise in play, for the United States to play a role in shaping a future Free Trade Area of the Asia-Pacific (FTAAP). The TPP agreement has the potential to act as a building block toward further liberalization,

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133 See TPP Negotiators to Seek Market Access Structure Deal at August Meeting, supra note 115.
134 See TPP Countries Examining New Compromise Idea for Market Access Talks, supra note 122.
135 See id.
136 See TPP Members Examine Proposals in Peru, Do Not Reach Final Agreements, supra note 7.
and to multilateralize some of the fragmentation resulting from the panoply of FTAs today.

If a TPP agreement is reached in the form of one unified agreement with common market access schedules, it will have a greater potential to attract more participants and meaningfully reduce trade barriers among a growing circle of nations. Nevertheless, there is a significant risk that the TPP will not live up to its potential. The more the TPP looks like a series of bilateral U.S. FTAs with exclusions for products the United States considers sensitive, the less likely the TPP will attract other countries to accede. Thus, the United States must carefully assess its goals for the TPP. Moreover, the United States must be careful not to shoot itself in the foot by following a “business as usual” approach, if it truly intends to create a high-standards agreement that will be a model for an FTAAP. The traditional U.S. FTA model is not as likely as the model advocated by Australia, New Zealand, and Singapore, to achieve the result the USTR claims to be pursuing. Nonetheless, it will be surprising if the United States agrees to diverge from its previous negotiating strategies and assent to the model advocated by Australia, New Zealand, and Singapore.

There are a number of impediments that may torpedo the TPP agreement before it is concluded, and other factors that could render any agreement of no more significance than any other U.S. FTA. Nevertheless, the TPP agreement has the potential to become a new paradigm for trade agreements, to help the United States re-assert its position in the Asia-Pacific, and to begin the process of defragmenting international trade. The potential payoffs are significant and important: hopefully the United States can resist the temptation to pursue “business as usual”—an approach that would actually undermine its strategic objectives—and instead take the necessary steps to achieve those goals.
FAITH IN THE LAW—THE ROLE OF LEGAL ARRANGEMENTS IN RELIGION-BASED CONFLICTS INVOLVING MINORITIES

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Abstract: This Article examines the conflict-management role conferred upon the law within Western liberal democracies in the context of cultural tensions involving religious minorities. The Article finds that a threatened hegemonic Christian identity and secular illiberal sentiments disguised in liberal narratives often motivated legislative and judicial actions curtailing the freedom of religious minorities in leading liberal democracies. Based on these findings, this Article challenges the shortcomings of existing liberal scholarship to account for the potential bias presented in the liberal preference to facilitate cultural conflicts through legal means. Yet, the Article suggests that law’s limitations as a neutral vehicle in conflict resolution does not necessarily counteract its ability to manage conflicts. The continued attractiveness of law as the principal conflict-resolution device in liberal democracies springs from its political nature, namely the recognition that shifts in political power could translate into legal change.

INTRODUCTION

Neutrality among competing notions of the good life has been liberalism’s formula for peaceful social coexistence.1 Liberal constitutionalists conferred the implementation of this formula on the law under the assumption that constitutional frameworks and other human rights

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instruments would regulate the democratic process and ensure its impartiality among competing values.\(^2\)

This Article explores the law’s conflict-management role in the context of religion-based controversies within liberal democracies involving practices of religious minorities. Minorities’ religious claims pose a difficult challenge to liberal political thought.\(^3\) Liberalism seeks to guarantee religious liberty and protect minorities who are vulnerable to a majority’s encroachment on their rights. Nevertheless, minorities’ religious claims are frequently at odds with the values and traditions of the dominant culture in Western democracies. Thus, in an increasingly diversifying world, Western policy-makers and judges must grapple with the task of weighing religious freedom claims—possibly involving patriarchal or otherwise discriminatory practices—against competing claims invoking comparable liberal ideals such as liberty, equality, and autonomy.\(^4\)

Western democracies could hardly be regarded as a single unit. With different histories, Western democracies diverge in key variables including demography, religious heritages, and the legal arrangements regulating the relationship between religion and state. Nevertheless, in an attempt to address growing socio-cultural diversity, Western democracies have converged toward a common pluralistic approach on coexistence, cultivating the perception that they offer a hospitable legal environment for religious minorities.\(^5\)

As illustrated in what follows, discrepancies exist between the \textit{de jure} liberal approach of maintaining neutrality toward competing worldviews by way of rights protection, and its \textit{de-facto} legal application in the context of religious minorities. The surveyed legislative and judi-


\(^4\) See \textit{Sunstein, supra} note 2, at 56–57; \textit{Nancy L. Rosenblum, Introduction to Liberalism and the Moral Life, supra} note 1, at 5–6.

\(^5\) See \textit{Benjamin R. Barber, Liberal Democracy and the Costs of Consent, in Liberalism and the Moral Life, supra} note 1, at 55 (“Western liberal states are in fact all liberal democracies, combining principles of individual liberty with principles of collective self-government and egalitarianism.”).
cial actions in Europe and the United States suggest that minorities’ religious liberty has been legally curtailed while dressed in the guise of liberal discourse, often stemming from threatened hegemonic Christian identity and secular illiberal sentiments. Based on these findings, this Article scrutinizes the promotion of law in current liberal thought as the primary device for defusing cultural tensions.

Part I of the Article lays out the theoretical approaches establishing the role of legal institutions as primary vehicles in advancing liberal values. Part II surveys clashes between religious minority claims and competing rights and interests. This survey suggests that minorities’ religious freedom within Western democracies has been repeatedly restricted using neutral liberal narratives that mask illiberal motivations. Part III evaluates the practicality in assigning the role of facilitating coexistence to the law. The Article concludes that the possibility of manipulating legal arrangements does not necessarily counteract law’s conflict-management character. The political character of the law—namely, the intrinsic possibility to change unfavorable legal arrangements by way of political shifts—contributes to preserving law’s authority as a mechanism of dispute resolution.

I. Theoretical Approaches on the Role of Law in Advancing Liberal Ideals

The perpetual quest within Western political thought to resolve social and cultural tensions prompted the contemporary ascendancy of the liberal project. Liberalism’s basic premise is that there is no single best way to live one’s life because different people hold differing ideas on the correct ordering of values. As such, peaceful coexistence in multicultural societies necessitates the protection of personal liberty to all and a governmental commitment to cultural neutrality. In modern

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6 See infra Part I.
7 See infra Part II.
8 See infra Part III.
9 See infra text accompanying notes 196-211.
10 See Rosenblum, supra note 4, at 4 (“[C]urrent political conditions have had a number of consequences . . . [including] that liberalism has emerged as the political theory whose resources are most called upon . . . .”); see also Gray, supra note 1, at 3 (“[L]iberal regimes are often viewed as solutions to a modern problem of pluralism.”); Bhikhu Parekh, RETHINKING MULTICULTURALISM 11 (2000) (“Liberalism is rightly assumed to be the most hospitable of all political doctrines to cultural diversity.”).
11 See Judith N. Shklar, Liberalism of Fear, in LIBERALISM AND THE MORAL LIFE, supra note 1, at 21.
12 See sources cited supra note 1.
Western democracies these ideas have been channeled through legal instruments institutionalizing constitutional guarantees for fundamental rights and freedoms. These constitutional entrenchments are regarded as facilitating pluralism by protecting minorities from majority encroachment and ensuring that social and cultural conflicts are neutrally managed.

Nonetheless, liberalism does not envision rights as absolute concepts, legitimizing their limitation when they conflict with other fundamental rights or when important competing interests are at stake. As Berlin famously noted, “[t]he world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realization of some of which must inevitably involve the sacrifice of others.” Because constitutions are often deliberately abstract, in many Western democracies courts have become the primary institutions determining the ultimate result of constitutional conflicts. This process of judicial interpretation gave rise to ample scholarly debate as liberal thinkers sought to discern neutral principles for the limitations of rights.

The “Law as Integrity” jurisprudential position, developed in the scholarship of Ronald Dworkin and John Rawls, advances the utilization of moral criteria in legal interpretation. According to this view, the process of judicial review necessarily considers values and principles that act as moral constraints on judges, leading them to the true meaning of the law. This principle-driven approach has been sharply criticized by

13 Schneier, supra note 2, at 4.
14 See Murphy, supra note 2, at 9–10; Schneier, supra note 2, at 73–75; Sunstein, supra note 2, at 6–7. For a critical assessment of the global trend of constitutionalism, see generally Ofrit Liviatan, The Impact of Alternative Constitutional Regimes on Religious Freedom in Canada and England, 32 B.C. Int’l & Comp. L. Rev. 45 (2009).
17 See Barry, supra note 2, at 3–4; Murphy, supra note 2, at 6–8, 471–72.
18 See Ronald Dworkin, A Matter of Principle 2 (1985); Ronald Dworkin, Freedom’s Law 81–82 (1996); Dworkin, Law’s Empire, supra note 2, at 255–58; Dworkin, Taking Rights Seriously, supra note 2, at 81. According to Dworkin, principles like justice, equality, political integrity, and the respect for individual rights—often enshrined in constitutional prescriptions—provide the moral foundation for legal judgment and lead judges toward the correct interpretation of the law even in the hardest of cases. Similarly, Rawls argued:

[T]he Justices . . . must appeal to the political values they think belong to the most reasonable understanding of the public conception and its political val-
the Critical Legal Studies (CLS) Movement. CLS scholars dismiss the rational foundation of legal reasoning as masking an overtly biased facilitation of freedoms that reinforces the hegemonic interests and ideologies in society. Nonetheless, the CLS Movement itself has been accused of nihilistic attitudes and circular legal deconstructions, stopping short of offering an alternative political vision for a just society.

Legal Pragmatism attempted to fill this ideological liberal gap by forsaking any grand theory of constitutional adjudication. This approach identified the goal of adjudication in “[helping] society cope with its problems” by applying a flexible “whatever works” criterion as opposed to searching for the “truth, natural law, or some other high-level abstract validating principle.” As such, the pragmatist’s adjudica-


The first is a distrust of metaphysical entities (“reality,” “truth,” “nature,” etc.) viewed as warrants for certitude whether in epistemology, ethics, or politics. The second is an insistence that propositions be tested by the consequences, by the difference they make—and if they make none, set aside. The third is an...
tive approach has been “experimental,” a continuing trial-and-error process of resolving conflict while guided by the aim of generating progressive social and political improvement.\(^{24}\) Furthermore, ardent pragmatists contend that judicial decision-making should be a process that genuinely considers and seeks to improve the status of the dominated and marginalized groups.\(^{25}\)

Methodologically, judicial review of constitutional conflicts has been largely performed through a balancing process known as “weighing,” or the “proportionality principle.”\(^{26}\) The balancing method has been carried out with minor variations\(^{27}\) as a three-pronged test focusing on fairness and even-handedness standards.\(^{28}\) This test is described as follows:

The first stage involves establishing the degree of non-satisfaction of, or a detriment to, a first principle. This is followed by a second stage in which the importance of satisfying the competing principle is established. Finally, in the third

insistence on judging our projects, whether scientific, ethical, political, or legal, by their conformity to social or other human needs rather than to “objective,” “impersonal” criteria.


stage, it is established whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former.29

The nature and scope of the balancing process has been a subject of ample debate. For proponents, balancing is justifiable as a technique that optimizes the reconciliation of rights guarantees with the demands of pluralism in contemporary democracies. Pound, an avid advocate of balancing, wrote in the 1940s:

The law is an attempt to satisfy, to reconcile, to harmonize, to adjust . . . overlapping and often conflicting claims and demands, either through securing them directly and immediately, or through securing certain individual interests, or through delimitations, or compromises of individual interests, so as to give effect to the greatest total of interests or to the interests that weigh most in our civilization, with the least sacrifice to the scheme of interests as a whole.30

More recent advocacy has emphasized the normative rationality of balancing, including: (i) the best available method to neutrally reconcile constitutional conflicts;31 (ii) a method providing the guarantee that political institutions do not exceed their “intrinsic power” to override fundamental rights in the interest of public policy objectives;32 and (iii) a technique that produces order and transparency in the legal decision-making process.33

Scholarly critique of the balancing process is abundant, with three primary concerns standing out. The first major criticism centers on the claim that the act of balancing lacks objective and uniform criteria.34 It is impossible to point toward a common or universal balancing scale that judges could adopt, necessarily transforming the act of balancing into a subjective and unpredictable process that invites judges to rely on personal experiences and preferences.35 Therefore, this ad hoc process involves a real possibility of error in identifying the competing values as

29 Alexy, supra note 16, at 574; see also Aharon Barak, The Judge in a Democracy 167 (2006).
31 Beatty, supra note 25, at 159–61.
32 Gardbaum, supra note 27, at 84–85.
33 Barak, supra note 29, at 164, 173.
35 Id.
well as in constructing the just and correct balance between them. The second type of criticism argues that the act of balancing implicitly presupposes the commensurability of all constitutional conflicts and their inevitable resolution, which “necessarily overrides the broader political question of its irreconcilability.”

Furthermore, once the conflict is staged in legal terms, we presuppose and accept that one principle will trump the other, curbing the prospects of a more accommodative compromise. Finally, critics have warned that balancing substantially expands judicial discretion and thereby replicates “the job that a democratic society demands of its legislature.”

These criticisms were part of a broader call for judicial restraint. Critics of judicial activism argued that the process of judicial review is undemocratic, bestowing far too much authority in the hands of a small group of unelected and unaccountable judges. Critics claimed that the unnecessary involvement of judges in the determination of social values encroaches on the authority of political actors representing the majority. Thus, the facilitation of social conflicts should arguably take place through legislation as opposed to judicial decision-making, with basic rights sorted out through accountable majoritarian processes. The process of legislation entails democratic participation and involves deliberative politics that requires persuasion and reflection upon preferences, generating stronger commitment to “hear the other side.”

Legislative outcomes, according to the democratic critics of judicial activism, better ensure the prospects of peaceful coexistence.

To empirically evaluate these theoretical debates, the next section analyzes legal outcomes stemming from legislative measures and judicial rulings in circumstances involving the weighing of minority reli-

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37 See Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse, at xi (1991) (discussing the impoverishment of political discourse through judicial decision-making).
38 See Aleinikoff, supra note 34, at 984.
42 Stuart Hampshire, Justice is Conflict 8 (2000).
religious practices against competing claims that invoke alternative liberal norms including liberty, equality, and public interest objectives.

II. THE TREATMENT OF RELIGIOUS MINORITIES IN WESTERN DEMOCRACIES

Scholars attributed the politics of difference emerging during the second half of the Twentieth century to the success of generating “new and more pluralistic forms of democratic citizenship” within “established Western democracies.” Increasingly, these democracies view pluralism and coexistence as their legitimizing model, striving to effec-tuate them through domestic and international legal instruments. The following analysis does not attempt to provide a comprehensive account of the religious freedom regimes in the Western world. Religious freedom regimes differ greatly as a result of many factors, including varying constitutional structures and context-specific precedents. The following survey provides a brief sketch of selected religion-based issues, in an attempt to identify general patterns in the rhetoric and outcomes of conflicts involving religious minorities.

A. Classifying Religions

Many constitutions and other human rights instruments guarantee protection to religious liberty without defining religion. In deciding disputes concerning religion, liberal courts have shown a general tendency to refrain from value judgment over the nature or appropriateness of a religious claim, recognizing the personal and subjective aspect of such a system of belief. Instead, legal rulings have focused primarily on evaluating whether the specific circumstances warrant derogation


from religious freedom guarantees. A notable exception was the English Court’s construction of religion “concerned with man’s relations with God.” Consequently, the English Court declined to recognize groups such as Scientology and South Place Ethical Society as religions, because they do not worship a Supreme Being but rather emphasize moral and ethical principles in their spiritual approach to life.

Unlike the restrained approach characterizing the attempt to define religion, recognizing and categorizing religious communities for legal purposes has been a widespread European practice, and one that has proven to be particularly discriminatory in relation to minority religious groups. Domestic laws of many European nations dictate a formal recognition process of religious denominations, generally by way of their registration in a designated governmental body. Originating as

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47 See Church of New Faith v Comm’r of Pay-Roll Tax [1982–83] 154 CLR 120, 136 (Austl.). The High Court of Australia illustrated this pattern by recognizing Scientology as a religion for the purposes of charity law. The Court held the criteria of religion to be:

[F]irst, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.

Id. The U.S. Supreme Court went even further when examining a conscientious objector’s religious objection to war, finding religious belief to be anything that “occupies a place in the life of its possessor parallel to that filled by the Orthodox belief in God.” United States v. Seeger, 380 U.S. 163, 166 (1965). More recently, the Canadian Supreme Court continued this trend by adopting a “subjective understanding” criterion for religious freedom under the 1982 Canadian Charter of Rights and Freedoms: this criterion states that once an individual demonstrates the sincerity of his or her beliefs, it is irrelevant whether such a belief or practice is “required by official religious dogma or is in conformity with the position of religious officials.” Syndicat Northcrest v. Amselem, [2004] 2 S.C.R. 551, 580 (Can.).

48 In re South Place Ethical Society, [1980] 1 W.L.R. 1565, [1571] (Eng.).

49 See id.; R v. Registrar Gen.,[1970] 2 Q.B. 697 at 707 (U.K.). In 2006 the definition of religion for charity purposes was amended in the Charities Act, defining religion to include a belief in god, belief in many gods or belief in no god. Charities Act, 2006, c. 50, p. 1, § 2(3).

cooperative arrangements between church and state, the purpose of this recognition process is to acquire a legal personality, giving rise to different benefits including financial support, tax privileges, advantages under military laws, and the ability to insert religion as part of the general curriculum of educational institutions funded by the state.\footnote{See, e.g., 2001 Portuguese Law on Religious Freedom, \textit{supra} note 50, arts. 12, 24, 33 (establishing such benefits for recognized religions).} From the government’s perspective, this process serves the goals of supervision and control and furthers the orderly relationship between the state and religious movements.\footnote{See \textit{Uitz, supra} note 3, at 93–94.} Arguably, this inquisitive procedure averts the dangers that “fleeting beliefs, or ones which are believed to present a threat to other human rights and values,” will enjoy the status of recognized religions.\footnote{Ann-Marie Mooney Cotter, \textit{Heaven Forbid} 14 (2009).}

Nevertheless, this system of recognition often evolved into a de facto multi-tiered discriminatory apparatus, enabling the classification of religious movements into different categories with differing rights.\footnote{See James T. Richardson, \textit{Regulating Religion: A Sociological and Historical Introduction, in Regulating Religion: Case Studies from Around the Globe} 1, 6 (James T. Richardson ed., 2004).} Thresholds, including sizable membership, visibility, organizational requirements, and mandatory waiting periods have effectively preserved the privileged status of the established religions, blocking the registration of newer religions.\footnote{See Cotter, \textit{supra} note 53, at 10; Stinnett, \textit{supra} note 45, at 430.} This reality is ever more problematic considering the historically privileged status of the Christian Churches in many European countries.\footnote{See \textit{Uitz, supra} note 3, at 94. As noted by Uitz, “the intensity of legal recognition (and its consequences) tends to favour those churches which are understood (at least by an elite of a majority) to have contributed to the formation of the history, identity, culture or other underlying values of the polity.” \textit{Id.}} Under this system, recognized religions have typically included leading Christian denominations, Islam, and Judaism. Religious communities newer to Europe, namely Jehovah’s Witnesses, Scientology, the Unification Church, and in some instances even Mormonism were repeatedly denied recognition.\footnote{See, e.g., Organization for Security and Cooperation in Europe Review Conference, Sept. 1999, \textit{Freedom of Religion or Belief: Laws Affecting the Structuring of Religious Communities} at 21, 32–33, OSCE/ODIHRBackground paper 1999/4, available at http://www.osce.org/odihr/documents/16698 (discussing a case which dealt with discrimination against Jehovah’s Witnesses).} Although domestic courts and the European Court of Human Rights (ECtHR) routinely intervened to alleviate discrimination against religious minorities, the
institutional discrimination generated by this system of classifications remains present throughout Europe.\textsuperscript{58}

The 1998 Austrian Act on the Legal Status of Registered Religious Communities (Religious Communities Act) illustrates the discriminatory apparatus entailed by the recognition procedure.\textsuperscript{59} This legislation was enacted in response to the ruling by the Austrian Court requiring the government to provide a legislative solution to the prolonged struggle of Jehovah’s Witnesses for legal recognition.\textsuperscript{60} This legislation substantially toughened the criteria for registration and recognition of religious groups. The threshold for recognition includes a twenty-year proven existence in Austria, a membership of 0.2% of the Austrian population, and a vague requirement of a positive basic attitude toward society and state.\textsuperscript{61} These harsh prerequisites did not affect the already recognized groups, which continue to enjoy the benefits of recognition regardless of their ability to fulfill the criteria of the Religious Communities Act.\textsuperscript{62} The legislative history of the Religious Communities Act reveals a political and cultural consensus on the necessity to act against certain minority religious denominations widely perceived as “inherently dangerous” for being “antifamily and even anti-Christian.”\textsuperscript{63}

B. Islamic Dress in Educational Institutions

In recent decades Islam rapidly grew into Europe’s largest religious minority.\textsuperscript{64} This demographical transformation generated increased social distrust, with a growing number of Europeans identifying Islam as a threatening force to Europe’s Christian heritage and secular legal ar-


\textsuperscript{59} Austrian Religious Communities Act, supra note 50, at 485, § 3.


\textsuperscript{61} See Austrian Religious Communities Act, supra note 50, § 11(1).


\textsuperscript{63} Miner, supra note 60, at 616, 620. Among those perceived as dangerous groups Miner listed Scientology, the Unification Church, Transcendental Mediation, Yoga, Hare Krishna, and others.

\textsuperscript{64} See THE LEGAL TREATMENT OF ISLAMIC MINORITIES IN EUROPE, at vii (Roberta Aluffi B.-P. & Giovanna Zincone eds., 2004).
rangements. The most prevalent manifestation of this cultural anxiety has been the growing resistance throughout Europe toward the visibility of traditional Muslim female attire in educational institutions. The opposition to the Muslim attire in public schools united two normally atypical allies in European politics: (i) The feminist-liberal position, which views the headscarf as a mark of political extremism and the defiance of gender equality; and (ii) Christian-conservatives, which view the visibility of the Islamic headscarf as a threat to Christian-European identity.

There is no unified European approach with regard to Islamic attire in schools, and many states do not forbid students (and in some cases teachers) from wearing Islamic attire in public schools. Yet, when this matter came under legal consideration—whether under legislative or judicial proceedings—the right to manifest Islamic beliefs by wearing Islamic attire within European educational institutions was systematically denied.

France has the highest percentage of Muslim population in Western Europe. There, the Islamic female attire has been generating considerable controversy since the late 1980s. Debates revolving

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68 See Scott, supra note 67, at 125–27.

69 See Heinig, supra note 67, at 186.


around the impact of Islam’s visibility in the public sphere have focused on France’s fundamental constitutional principle of *laïcité*, the French version of secularism.\(^73\) This public debate culminated in the enactment of a 2004 law by an overwhelming majority—494 for, 36 against, 31 abstentions—\(^74\) banning overtly religious symbols or dress in public schools as a necessary step for securing the secular nature of the Republic.\(^75\) Although the law prohibited conspicuous religious symbols generally, its primary motivation was to ban the public display of Islamic headscarves.\(^76\) The circumstances leading to the ban are widely documented:\(^77\) (i) an emerging political coalition of secular and religious streams connecting the visibility of Islamic headscarves in France’s public sphere to contemporary social and political problems, including immigration challenges, racism and gender-based concerns; (ii) extensive media coverage inflaming public agitation over Islam’s public presence; and (iii) the appointment of the Stasi Commission, a government-appointed commission tasked with investigating the application of *laïcité* in France, which found the Islamic headscarf to be unjustifiably coercive and victimizing of Muslim girls. In this public atmosphere Islam came to be regarded as an imminent threat to France’s secular tradition, repudiating any real possibility to consider the Islamic headscarf as the expression of a genuine religious belief.\(^78\)

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74 Weil, *supra* note 72, at 2701.


76 Bowen, *supra* note 73, at 1 (“Although worded in a religion-neutral way, everyone understood the law to be aimed at keeping Muslim girls from wearing headscarves in school”); Scott, *supra* note 67, at 1–2 (“[T]he law . . . was aimed primarily at Muslim girls wearing headscarves . . . . The other groups were included to undercut the charge of discrimination against Muslims and to comply with a requirement that such laws apply universally.”).


The German debate on headscarves erupted with the *Ludin* case, brought by a public school teacher who was denied employment for wearing the Islamic headscarf.\(^{79}\) The Federal Court framed the question as a clash between the right of a government official in her public role to manifest her religion and the right of students and parents to abstain from religion.\(^{80}\) The Court concluded that although there is an “abstract danger” to the school’s neutral environment, a ban on Islamic headscarves could only be implemented by a state law and not by administrative decisions.\(^{81}\) Without the necessary statutory basis, denying the teacher her right to religious freedom was unconstitutional.\(^{82}\)

At the same time, the Court stressed that the German states have full discretion to arrive at different outcomes, taking “into account school traditions, the composition of the population by religion, and whether it is more or less strongly rooted in religion.”\(^{83}\) The ruling generated an immediate stream of German Land (State) Laws banning public school teachers from wearing headscarves, with some laws even exempting displays of Christian and Jewish symbols.\(^{84}\) The court’s headscarf anxiety has been explained as a distinct German “assumption that Christian culture occupies a privileged place in German public life, and is, indeed, a postulate of German political identity and social cohesion. Consequently its explicit affirmation in the public school context is a compelling state interest.”\(^{85}\)

In England, the House of Lords held that a public school’s denial to allow its student, Shabina Begum, to wear the Muslim jilbab did not violate her right to religious freedom under Article 9 of the European

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\(^{80}\) Id. at para. 46.

\(^{81}\) Id. at para. 72.


\(^{83}\) BVerfG, at para. 47.


\(^{85}\) See Gerstenberg, *supra* note 82, at 96–7.
Convention on Human Rights (ECHR). The school had a mandatory dress code, but created a Muslim dress option (shalwar kameeze) for its majority of Muslim students. It denied Begum’s request to wear the very traditional jilbab out of fear that this would pressure other students to conform to more extreme versions of Islam. The school further suspected that Begum’s decision was unduly influenced by her brother, who belonged to a radical Islamic group. The House of Lords found the school’s decision justified, and concluded that the school was in a better position than the Lords to assess external threats on its students. The House of Lords’ narrative is characterized by a stark contrast between sheer praise of the school and its headmaster’s civility as compared to the characterization of Begum and her brother, who was depicted as possessing a confrontational and threatening attitude.

Baroness Hale’s opinion is a telling example of a widely held European approach to the clash between claims to religious freedom that entrench patriarchal practices and women’s rights to equality and non-discrimination. Baroness Hale seemed unconvinced of Begum’s ability, given Begum’s young age, to reach comprehensive decisions about the extent of her belief and its manifestation in her chosen attire.

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86 See Begum, [2007] 1 A.C. at 119. Article nine of the ECHR prescribes the following:

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.


87 See Begum, [2007] 1 A.C. at 108.

88 Id. at 111.

89 Id. at 109.


92 See id. at 134 (Baroness Hale). For a comprehensive discussion of this clash, see generally Frances Raday, Culture, Religion, and Gender, 1 Int. J. Const. L. 663 (2003), quoted in Begum, [2007] 1 A.C at 134–35 (Baroness Hale).

93 Begum, [2007] 1 A.C at 132 (Baroness Hale) (“The child is on the brink of, but has not yet reached, adolescence. She may have views but they are unlikely to be decisive. More importantly, she has not yet reached the critical stage in her development where this particular choice may matter to her.”).
Concerned with the dominating effect of the Muslim dress on young women, Baroness Hale relied on scholarship alerting of the dangers that religious coverings entail for the continued gender discrimination in patriarchal religions, noting:

Strict dress codes may be imposed upon women, not for their own sake but to serve the ends of others. Hence they may be denied equal freedom to choose for themselves. They may also be denied equal treatment. A dress code which requires women to conceal all but their face and hands, while leaving men much freer to decide what they will wear, does not treat them equally.94

Furthermore, in Baroness Hale’s view the school has a transformative liberal duty. She explained that this task entailed “educat[ing] the young from all the many and diverse families and communities in this country in accordance with the national curriculum.”95 As such, Hale concluded:

Like it or not, [England] is a society committed, in principle and in law, to equal freedom for men and women to choose how they will lead their lives within the law. Young girls from ethnic, cultural or religious minorities growing up here face particularly difficult choices: how far to adopt or to distance themselves from the dominant culture. A good school will enable and support them. This particular school is a good school . . . .96

Guided by its “margin of appreciation” doctrine, the ECtHR in all of its cases concerning the Islamic headscarf has systematically deferred to the policies of national authorities and the expertise of domestic courts.97 The ECtHR’s leading holding on the issue, Sahin v. Turkey, endorsed the view that the Islamic headscarf became a political symbol undermining secularism, a principle that was claimed by the Turkish government to serve as the guarantor of its democratic system.98 A similar rationale led the ECtHR to uphold the expulsion of students from a public secondary school in France. In particular, the ECtHR found that student expulsion following a refusal to remove their headscarves dur-

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94 See id. at 134.
95 See id.
96 See id.
ing sports classes was compatible with the French core principle of *laïcité*.

In *Dahlab v. Switzerland*, the ECtHR held that prohibiting a primary school teacher from wearing a headscarf in class was “necessary in a democratic society,” accepting the Swiss Federal Court’s opinion that such prohibition furthered principles of denominational neutrality and gender equality protected by the Swiss Constitution. The ECtHR acknowledged that there was no evidence of any impact on the children and “no complaints from parents or pupils to date.” Nevertheless, the ECtHR considered the headscarf a powerful external symbol that “might have some kind of proselytizing effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which . . . is hard to square with the principle of gender equality.” Therefore, the ECtHR concluded that it “appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others, and, above all, equality and non-discrimination.”

C. Monitoring Religious Movements

The arrival of Islam in Europe coincided with the surfacing of religious movements previously unknown in the European religious landscape, commonly referred to as New Religious Movements (NRMs). Since the early 1970s, groups such as Jehovah’s Witnesses, the Church of Scientology, Seventh Day Adventists, and the Unification Church

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99 See e.g., Dogru 49 Eur. H.R. Rep. at 179–81; Kervanci v. France, App. No. 31645/04 (Eur. Ct. H.R. Apr. 3, 2009) http://www.echr.coe.int/echr/en/hudoc/ (follow “HUDOC database” hyperlink; then check “Judgments” box on left side; then type “31645” in “Application Number Field”; then click “Search” hyperlink; then click hyperlink to result in French); see also Kelaliv v. Turkey, App. No. 67585/01 (Eur. Ct. H.R. Jan. 24, 2006) http://www.echr.coe.int/echr/en/hudoc/ (follow “HUDOC database” hyperlink; then check “Judgments” box on left side; then type “67585” in “Application Number Field; then click “Search” hyperlink; then click hyperlink to only result in English) (finding no violation of Article 9); Karaduman v. Turkey, App. No. 16278/90, 1993 Y.B. Eur. Conv. H. R. 66 (upholding the denial of a graduation certificate from a student who refused to take off her headscarf for a required picture on the certificate).

100 Dahlab v. Switzerland, App. No. 42393/98 (Eur. Ct. H.R. Feb. 15, 2001), at *9, http://www.echr.coe.int/echr/en/hudoc/ (follow “HUDOC database” hyperlink; then check “Decision” box on left side; then type “42393” in “Application Number Field; then click “Search” hyperlink; then click hyperlink to only result).

101 Id. at *3.

102 Id. at *9 (emphasis added).

103 Id.

have become noticeably successful in attracting followers among the young and the middle class. The visible growth of NRM$s throughout Europe prompted hegemonic anxieties by the Christian churches and suspicion by anti-cult secularists. This translated into an ongoing clash between the state’s view of its role in protecting public safety and the expectations of NRM$s to freely associate and practice their religion.

National and pan-European investigative commissions were established with an expansive mandate to assess the potential threat of NRM$s, particularly in relation to accusations of brainwashing, psychological manipulations, and financial exploitation. The work of these commissions generated publications that were critical of NRM$s, including lists classifying them according to “danger level” along with recommendations to monitor their activities. These developments motivated considerable exertion of control over NRM$s in Europe, notably in France, Belgium, and Germany. Such exertion has been categorized as excessive and unnecessarily burdensome on religious liberty.

Two primary trajectories characterize the regulatory campaign against NRM$s in Europe. First, specific laws were enacted to implement

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105 See James A. Beckford, Cult Controversies 122 (1985); Mikael Rothstein, Regulating New Religions in Denmark, in Regulating Religion, supra note 54, at 221, 226; Nathalie Luca, Is There a Unique French Policy of Cults?, in Regulating Religion, supra note 54, at 53–54.

106 See, e.g., Uitz, supra note 3, at 177–78; Hervieu-Léger, supra note 3, at 55–56; James T. Richardson & Massimo Introvigne, Brainwashing Theories and Administrative Reports on Cults and Sects, in Regulating Religion, supra note 54, at 151, 172–74. Sociologists of religion explained the extreme reaction to NRM$s within Western Europe as a combination of factors, including: (i) NRM$s’ religious alternative is perceived as a threat to the historical hegemony of Christianity in Europe; (ii) a rise of nationalism attributing the rising popularity of NRM$s in Europe to American imperialism; (iii) anti-religion sentiments in a secularizing Europe; and (iv) mass media amplification of NRM$s’ controversies. See Beckford, supra note 105, at 239–40, 271–74; Bryan Wilson, The Social Dimension of Sectarianism 46–47, 66–68 (1990); Eileen Barker, Types of Sacred Space and European Responses to New Religious Movements, in Clashes of Knowledge 155, 165, 167 (Peter Musburger et al. eds., 2008); James A. Beckford, The Mass Media and New Religious Movements, in New Religious Movements 103, 116 (Bryan Wilson & Jamie Cresswell eds., 1999); Bryan Wilson, Absolutes and Relatives: Two Problems for New Religious Movements, in Challenging Religion 12, 12 (James A. Beckford & James T. Richardson eds., 2003).


109 See Uitz, supra note 3, at 170–78; Barker, supra note 106, at 167–68; cf. Richardson & Introvigne, supra note 107, at 144 (Richardson and Introvigne note a wide consensus among scholars that NRM$s “represent neither a danger to their members or to the state”).
recommendations to ban and dissolve NRMs.\footnote{See, e.g., Act No. 3/2002 on the Freedom of Religious Expression and the Status of Churches and Religious Societies and Amendments to Certain Acts, § 5 (Czech) (2005); Osservatirui delle libertà ed istituzioni religios [OLIR], http://www.olir.it/documenti/?documento=682.; CÓDIGO PENAL [C.P.] [CRIMINAL CODE] art. 513, n. 3 (Spain) (added to dissolve destructive cults and criminalize the association with them). For an analysis of the amendments to the Spanish Criminal Code, see Richardson & Introvigne, supra note 107, at 148–49.} One notable example is the 2001 French law, known as the “About-Picard Law,” designed to repress cults and facilitate the prosecution of their leaders.\footnote{Loi 2001-504 du 12 juin 2001 tendant à renforcer la prévention et la répression des mouvements sectaires portant atteinte aux droits de l’homme et aux libertés fondamentales [Law 2001-504 of June 12, 2001 Intended to Reinforce the Prevention and Repression of Sects that Infringe on Human Rights and Fundamental Freedoms], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jun. 13, 2001, p. 9337. This law has been criticized by the Council of Europe, which invited the French government to reconsider it, to no avail. See U.S. Dep’t of State, 2009 Report on International Religious Freedom: France (Oct. 26, 2009), http://www.state.gov/g/drl/rls/irf/2009/127310.htm.} These types of laws attracted wide criticism both for their lack of definition of what constitutes a “dangerous cult” and for their expansive language, broad enough to authorize a ban of any legal entity that is construed as engaging in psychological subjection.\footnote{See Ferrari, supra note 104, at 14–15.} The incentive to legislate such expansive powers to ban NRMs has been explained as a “broad consensus . . . that the fight against sects should be a necessary aspect of the protection of individual liberties and that this fight should prevail, in the final analysis, over the defense of the right of each individual to freedom of religion.”\footnote{Hervieu–Lèger, supra note 3, at 50 (describing France’s reasons for fighting NRMs).}

The second type of legal action taken against NRMs consisted of establishing governmental bureaucracies with an expansive mandate devoted to identifying and combating the influence of sects. Notable examples include the establishment of the French Interministerial Mission of Vigilance and Combat Against Sectarian Aberrations,\footnote{See Mission Interministérielle de Vigilance et de Lutte contre le Dérives Sectaires, http://www.miviludes.gouv.fr (last visited Nov. 27, 2010).} Belgian agencies responsible for gathering information and monitoring the harmful activities of NRMs,\footnote{See U.S. Dep’t of State, 2009 Report on International Religious Freedom: Belgium (Oct. 26, 2009), http://www.state.gov/g/drl/rls/irf/2009/127301.htm (discussing Belgium’s two government agencies established for this purpose, the Center for Information and Advice on Harmful Sectarian Organizations (CIAOSN) and the Interagency Coordination Group on “harmful sects”); see also Willy Faturé, Belgium’s Anti-Sect War, 12(4) SOC. JUST. RES. 377, 387–92 (1999).} Germany’s Office for the Protection of
the Constitution (OPC), and the Austrian Society Against Sect and Cult Dangers (GSK). The work of these bureaucracies generally involves NRM surveillance, advising authorities and the general public of the potential risks of NRMs, coordinating the appropriate responses against NRM activities, and helping victims of cult abuses. These administrative measures have been criticized as overly intrusive, contributing to an overall climate of stigmatization and intolerance toward NRM communities and their individual members.

Thus far, the ECtHR has not shielded NRMs within Western Europe from these drastic domestic monitoring measures. In the two cases coming under its review, the ECtHR did not lay down a substantive holding on NRM monitoring. It rejected the admissibility of Jehovah’s Witnesses’ complaint against the French Law banning dangerous sects, finding that the law had not been directly invoked against them. Another petition by a Jehovah’s Witness against the surveillance of Greek authorities ended in an out-of-court settlement.

D. Treatment of Indigenous Religions

The special nature of indigenous religions has often come in direct conflict with Western policies designed to protect important public in-

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116 See Uitz, supra note 3, at 167–72; U.S. Dep’t of State, 2009 Report on International Religious Freedom: Germany, supra note 84 (noting that the OPC routinely monitors the activities of the Scientology Movement as a possible threat to Germany’s democratic order).

117 See U.S. Dep’t of State, 2009 Report on International Religious Freedom: Austria, supra note 62 (claiming that the State of Lower Austria funds the GSK, which actively works against sects and cults).


120 See Fédération Chrétienne des Témoins de Jéhova de France v. France, App. No. 53430/99 (Eur. Ct. H.R. Nov. 6, 2001), http://www.echr.coe.int/echr/en/hudoc/ (follow “HUDOC database” hyperlink; then check “Decisions” box on left side; then type “53430” in “Application Number Field;” then click “Search” hyperlink; then follow hyperlink to only result).

121 Tsavachidis v. Greece, App. No. 28802/95, at paras. 21–24 (Eur. Ct. H.R. Jan. 19, 1999), http://www.echr.coe.int/echr/en/hudoc/ (follow “HUDOC database” hyperlink; then check “Judgments” box on left side; then type “28802” in “Application Number Field;” then click “Search” hyperlink; then follow hyperlink to result in English).
terests such as environmental policies, drug prevention, and economic development. Considering the discriminatory treatment that indigenous societies have often been exposed to, liberal ideals promote strong and comprehensive protection to indigenous peoples. One such example is the international construction of the right to self-determination in international law as including the protection for religious freedom. Nevertheless, the religious freedom of Native Americans in the United States exemplifies the discrepancy between this liberal ideal and its execution in practice.

The systematic discrimination against the Native American culture in the United States has been widely documented. Being America's “smallest, poorest and weakest minority group,” Native Americans suffered a long and shameful history of government religious suppression “in ways unprecedented for other religions.” These suppressive measures included outright prohibitions on tribal religious rituals, dances, dress, hairstyle, language, and access to religious sites.

Beginning in the 1960s Congress passed a number of bills designed to protect religious freedom of Native Americans. The Bald and Golden Eagle Protection Act (BGEPA) exempted Native Americans from the general prohibition on the use and possession of eagles and eagle parts. However, this religious exemption was narrowly construed by the judiciary to include only those individuals who are Native Americans by blood and belong to federally recognized Tribes. An additional challenge to protecting Native American religions has been a lack of enforcement mechanisms accompanying protective legislation. The American Indian Religious Freedom Act (AIRFA) is one such example. This legislation is notable in its recognition of and sensitivity to Native American culture. It prescribes:

[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the

124 Inouye, supra note 122, at 3–4, 7.
125 Id. at 13–14.
127 See United States v. Dion, 476 U.S. 734, 740–45 (1986); United States v. Antoine, 318 F.3d 919, 922 (9th Cir. 2003); United States v. Hardman, 297 F.3d 1116, 1123 (10th Cir. 2002).
American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.\textsuperscript{129}

Notwithstanding, this legislation amounts only to the expression of general policy, but lacks “any intent to create a cause of action or any judicially enforceable individual rights.”\textsuperscript{130} Thus, “AIRFA requires federal agencies to consider, but not necessarily to defer to, Indian religious values.”\textsuperscript{131}

There are several marked differences between the Western systems of belief and Native American spirituality. Whereas Western religions focus on existential questions about the meaning of life, Native American belief springs from the sanctity of nature.\textsuperscript{132} As such, Native American worship is inextricably linked to the use of certain lands, animals, and hallucinogenic plants. Native American worship is also manifested quite differently than its Western counterparts, in discrete and remote places and with no accepted canonical texts or universal truths.\textsuperscript{133} The contrast between Native American spirituality, on the one hand, and Western concepts of religion and public order, on the other, came to the fore in two Supreme Court decisions dealing with principal elements of Native American worship.

In \textit{Lyng v. Northwest Indian Cemetery Protective Assoc.} the Court examined a religious freedom challenge by Native Americans to a planned use of public land for economic and recreational purposes.\textsuperscript{134} Specifically, the Court reviewed whether the Free Exercise Clause was violated by building a road and harvesting timber in a forest traditionally used by Native Americans for religious worship.\textsuperscript{135} Although the Court recognized that the proposed plan would devastate Native American religious practices that were intimately and inextricably connected with the

\textsuperscript{129} Id.
\textsuperscript{131} Wilson v. Block, 708 F.2d 735, 747 (D.C. Cir. 1983); \textit{see also} Martin C. Loesch, \textit{The First Americans and the “Free” Exercise of Religion}, 18 \textit{Am. Indian L. Rev.} 313, 367 (1993) (“Although AIRFA established a governmental \textit{policy} of protecting Native American religious practice, it did nothing to affect the \textit{practice} of federal land management.”).
\textsuperscript{132} See \textit{Lyng}, 485 U.S. at 460–461 (Brennan, J., dissenting).
\textsuperscript{133} See Loesch, \textit{supra} note 131, at 359–64 (describing the difference between Native American systems of belief and the Judeo-Christian tradition); \textit{see also} Inouye, \textit{supra} note 122, at 15–16. \textit{See generally} \textsc{Vine Deloria, Jr.}, \textsc{God Is Red: A Native View of Religion} (2d ed. 1994) (providing general information on Native American religion).
\textsuperscript{134} See \textit{Lyng}, 485 U.S. at 441–42.
\textsuperscript{135} Id.
concerned land, the Court nevertheless concluded that the planned
construction did not coerce Native Americans to act contrary to their
religious beliefs. By holding that the government has no duty to ac-
commodate Native American religious practices, the Court endorsed
the Anglo-American concept of land as property. In doing so, the
decision effectively foreclosed the possibility of using the Free Exercise
Clause of the First Amendment to protect Native American religious
sites.

Subsequently, the Native American practice of using peyote for
sacramental purposes came under the review of the Supreme Court in
Employment Division, Department of Human Resources v. Smith. Smith
involved the denial of unemployment compensation to two Native Amer-
icans who were fired from their jobs as drug rehabilitators after they
ingested peyote during a Native American religious ceremony. Prior
to Smith, the long-established judicial approach to Free Exercise matters
consisted of a balancing test which allowed laws to burden religion only
when they were narrowly tailored to protect compelling governmental
interests by the least restrictive means. Smith abruptly abandoned this
strict scrutiny test by interpreting the Free Exercise Clause as permit-
ting a neutral law of general applicability to have incidental burdens on
religious freedom. Under the Smith rule, the government is no long-
er required to make exceptions for religious practices or show a comp-
pelling governmental interest to justify a neutral policy that indirectly
buries religious freedom. In a separate concurring opinion, Justice
O’Connor held that even if the compelling state interest test was ap-
plied, the State interest of fighting the war on drugs would be suffi-

136 See id. at 449.
137 See Stephen McAndrew, Lyng v. Northwest: Closing the Door to Indian Religious Sites, 18
Sw. U. L. Rev. 603, 604–05 (1989); Marcia Yalbon, Property Rights and Secret Sites: Federal Regu-
larly Responses to American Indian Religious Claims on Public Land, 113 Yale L.J. 1623, 1629
(2004); see also Brian Edward Brown, Religion, Law, and the Land 169–70 (1999); Wil-
liam Bradford, “With a Very Great Blame on Our Hearts”: Reparations, Reconciliation, and an Amer-
ican Indian Plea for Peace with Justice, 27 Am. Indian L. Rev. 1, 27 (2003); Angela R. Riley, In-
dian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection
and Repatriation Act, 34 Colum. Hum. Rts. L. Rev. 49, 83 (2002); Howard J. Vogel, The Clash of
Stories at Chimney Rock: A Narrative Approach to Cultural Conflicts Over Native American Sacred Sites
139 See id.
141 See Smith, 494 U.S. at 879–90.
142 Id.
ciently compelling to prohibit or regulate peyote use.\textsuperscript{143} Once more, the Court gave primacy to the proclaimed public interest over the Native American religious practice.\textsuperscript{144}

The Court’s decision generated a backlash from religious groups, legislatures, and scholars who interpreted \textit{Smith} as the abandonment of constitutional protection to free exercise.\textsuperscript{145} Congress responded with the enactment of the Religious Freedom Restoration Act (RFRA).\textsuperscript{146} The RFRA was designed to restore the compelling governmental interest test by codifying it as the statutory standard for evaluating Free Exercise concerns.\textsuperscript{147} Nevertheless, its actual contribution to religious freedom has proven malleable because either courts adopted a narrow interpretation for RFRA, or RFRA could not restore what was not judicially protected under the compelling government interest test in the first place.\textsuperscript{148} In the context of Native Americans, this resulted in limiting key elements of their religious practice.

\textsuperscript{143} Id. at 905–06 (O’Connor, J., concurring).
\textsuperscript{144} See id. at 878–79 (stating that the Court has never held an individual’s religious beliefs to excuse him or her from complying with a valid law prohibiting conduct that a State is free to regulate).
\textsuperscript{145} See Inouye, \textit{supra} note 122, at 17–18; William K. Kelley, \textit{The Primacy of Political Actors in Accommodation of Religion}, 22 U. Haw. L. Rev. 403, 438 (2000) (“In the wake of \textit{Smith}, a broad coalition—even a consensus—emerged that it would be appropriate to pass a statute to protect religious liberty more broadly than the Court had interpreted the Free Exercise Clause to require.”).
\textsuperscript{146} See Kelley, \textit{supra} note 145, at 438 n. 163 (“The vote on RFRA was unanimous in the House; in the Senate it passed by a vote of 97–3.”).

(a) . . . Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) . . . .

(b) . . . Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

\textit{Id.} § 2000bb-1.

III. EVALUATING LAW’S ROLE AS A PRIMARY VEHICLE IN ADVANCING LIBERAL IDEALS

This Part cautiously evaluates Part II’s survey in terms of the basic quest within political liberalism to promote peaceful coexistence. This is a guarded attempt because, as previously noted, the above examples concerning minority religions discussed outcomes and rhetoric in a diverse group of liberal systems without accounting for their internal differences. Nevertheless, we trust that this analysis would benefit further inquiry and discussion into the role that law could, should, and does play in contemporary multicultural tensions.

Amid growing diversification of the Western world, two rival responses within liberal political thought rose to prominence. These responses proposed competing notions as to the best mechanism for facilitating cultural diversity in modern democracies. The first response, liberal integrationism, advanced the vision of a common public identity. Although respecting differences as a private matter, integrationists argued that the most promising basis for political stability is the homogenization of ethno-cultural difference in the public sphere. Criticisms of this view suggested that integrationism disregarded demands of diversity and camouflaged the continued dominance of the majority interests. These criticisms prompted the rise of a second approach to political diversity known as multicultural liberalism. This

149 See John McGarry et al., Integration or Accommodation? The Enduring Debate in Conflict Regulation, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES 41, 41 (Sujit Choudhry ed., 2008).

150 See id.


154 See McGarry et al., supra note 149, at 41–42, 51–53 (referring to multicultural liberalism as “accommodation” as opposed to “integration”). Representative examples of “ac-
view justified liberalism through the promotion of multiple identities and cultural rights, viewing the respect for cultural difference as essential to long-term social and political stability.\textsuperscript{155}

In its pursuit of social coexistence, liberalism mandated the protection of a series of fundamental rights and values including equality and the guarantees to freedoms of speech, association, and religion. Specifically, the liberal commitment to religious liberty stemmed from:\textsuperscript{156} (i) liberalism’s moral commitment to choice and personal autonomy;\textsuperscript{157} and (ii) liberalism’s instrumentalist capacity, which envisioned religion as a vehicle to advance desirable social ends.\textsuperscript{158} Considering the centrality of religious freedom in liberal thought, the legal balancing between religious freedom claims and other liberal values and interests could, in principle, have invoked greater accommodation for religious beliefs than the restrictive legal approach discussed in the previous section.\textsuperscript{159}

One possible explanation for these unfavorable outcomes in connection with minority religious practices may be attributed to liberalism’s “built-in” commitment to secularism, which by its nature translates into a less responsive attitude toward religious practices.\textsuperscript{160} Religion poses difficult challenges to liberal thought. In general, religions single out their version of the good life in an absolute manner, which often entails the exclusion of alternative worldviews. Many, if not all, religions also contain aspects of social control, restrictions on freedom of choice, incommodation,” can be found in a number of works. See generally Joseph A. Carens, Culture, Citizenship and Community (2000); Chandran Kukathas, The Liberal Archipelago (2003); Will Kymlicka, Multicultural Citizenship (1995); Charles Taylor et al., Multiculturalism (expanded ed. 1994); James Tully, Strange Multiplicity (1995); Iris Marion Young, Justice and the Politics of Difference (1990).

\textsuperscript{155} See Taylor et al., supra note 154, at 87–88.

\textsuperscript{156} See Rosenblum, supra note 4, at 5 (“Liberalism has also been seen as inseparable from security for religious faith . . . .”).

\textsuperscript{157} See Ahdar & Leigh, supra note 46, at 57–59.

\textsuperscript{158} See id. at 52 (claiming that some “consequentialist or instrumentalist theories” view religious liberty as furthering a desirable social end).

\textsuperscript{159} See William E. Connolly, Why I Am Not a Secularist 91–96 (1999). The centrality of religious freedom in liberal thought is a topic discussed by several authors. See generally Stephen L. Carter, God’s Name in Vain (2000); Michael W. McConnell, Believers as Equal Citizens, in Obligations of Citizenship and Demands of Faith 90 (Nancy L. Rosenblum ed., 2000); Wolterstorff, supra note 152.

\textsuperscript{160} See John Locke, A Letter Concerning Toleration 17 (William Popple trans., Bobs-Merrill Educational Publishing 1955) (1689) (“[T]he whole jurisdiction of the magistrate reaches only to those civil concernsments. . . . [This cannot] be extended to men’s souls.”). But cf. Susan Moller Okin, Is Multiculturalism Bad for Women? (1999) (including a variety of essays on the conflicts between religion and liberal thought, such as whether France can prohibit Muslim girls from wearing traditional headscarves to school).
quality, intolerance, and discrimination toward some of their members (such as women) and non-members (such as homosexuals). As such, religion potentially conflicts with key principles of liberal ideology—including liberty, autonomy, and equality—and potentially jeopardizes liberalism’s endeavor to sustain social and cultural neutrality. Religion also poses a challenge to liberal thought by offering possible antidotes to liberalism’s moral deficiencies and the inability of modern structures to overcome blights such as poverty, violence, and decadence.

In view of these challenges, the entire spectrum of the liberal paradigm, including multicultural liberalism, has maintained political secularism as its philosophical foundation, and expected some level of assimilation by minority religious communities. Consequently, demarcations of religion-state boundaries have produced political regimes ranging from French laïcité to the U.S. model of normative non-establishment, where the institutional relegation of religion to the private sphere may have generated some level of unintended bias against religious minorities.

Nevertheless, this explanation about the unfavorable legal outcomes for religious minorities seems far from comprehensive. Apart from conceptual criticisms portraying liberalism as a power-driven doctrine as opposed to one seeking neutrality, this argument cannot account for the unresponsive attitudes prevalent in multicultural liberal

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163 See Dominick McGoldrick, Multiculturalism and Its Discontents, 5 HUM. RTS. L. REV. 27, 31 (2005) (claiming that throughout the Twentieth Century, states have followed an assimilationist policy because they feared that minority groups would demand self-determination and thereby destroy the state); see also PAREKH, supra note 10, at 333–35 (suggesting that “religiously sensitive secularism” welcomes religions in political life as long as the state “guard[s] against its dangers”); Sajó, supra note 65, at 610 (arguing that the liberal state should permit religious activity, but religious bodies should relinquish “political aspirations”).

164 See AHDAR & LEIGH, supra note 46, at 50 (discussing the “in-built liberal bias against religion” in the context of religion’s general exclusion from the public realm). See generally PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002) (questioning the applicability of the doctrine of the separation of church and state in the U.S. context).

165 See CARTER, supra note 152, at 230; Stanley Fish, Mission Impossible: Setting the Just Bounds Between Church and State, 97 COLUM L. REV. 2255, 2262 (1997); Frederick Mark Gedicks, Public Life and Hostility to Religion, 78 VA. L. REV. 672, 678–81 (1992); cf. Robert P. George, A Clash of Orthodoxies, FIRST THINGS, Aug./Sept. 1999, at 34 (providing examples of liberal beliefs that undermine a position of neutrality).
regimes like England and Germany, both of which regard religion as an integral part of the public sphere.\textsuperscript{166} Thus, a deeper look into the source of reluctance to apply more generous protection to religious minorities is necessary. Moreover, such an inquiry is further dictated by the principles of multicultural liberalism, which advances the protection of religious minorities as a principal liberal ideal.\textsuperscript{167}

The balancing tests incorporated within existing legal frameworks—such as RFRA’s “compelling governmental interest”\textsuperscript{168} or the “necessary in a democratic society” test reflected in international and European instruments\textsuperscript{169}—provide a flexible interpretive margin for the process of balancing rights. As discussed above, both the principled approach to rights protection and legal pragmatism entrust—for different reasons—the judicial process to provide protection for minority interests by way of weighing competing values.\textsuperscript{170} This position was memorably articulated by Justice Jackson in \textit{West Virginia State Board of Education v. Barnett}, where he explained that “the very purpose of [the] Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”\textsuperscript{171} Nevertheless, as is evident from the analysis of Native Americans’ religious practices, their free exercise was predominantly protected in legislative acts of Congress, with RFRA as a primary example. In subsequent developments the Supreme Court continued to encroach on RFRA’s scope, ultimately declaring RFRA unconstitutional as applied to state and local governments for exceeding Congress’s authority under section five of the Fourteenth Amendment.\textsuperscript{172} This legal exchange contributed to extensive debates in the United States over

\textsuperscript{166} See Stephen V. Monsma & J. Christopher Soper, \textit{The Challenge of Pluralism} 203–06 (2d ed. 2009) (discussing the cooperation between religion and state in various aspects of German society); Liviatan, supra note 14, at 64–69 (discussing continuing legal developments in England regarding protections afforded to religious groups).

\textsuperscript{167} See McGarry et al., supra note 149, at 51–52.


\textsuperscript{171} 319 U.S. 624, 638 (1943).

the appropriate government branch to assume the responsibility for free exercise protection, with strong advocates on both sides.173

Nonetheless, the above survey on the treatment of minority religions in Europe takes the sting away from this philosophical debate. Examples concerning the treatment of NRMs and Muslims in the European public sphere demonstrate just how unresponsive and at times exclusionary the attitudes of both legislatures and judicial arms can turn out to be.174 An international legal approach may advocate the defeat of domestic biases by employing international and supranational human rights instruments. Nevertheless, the above analysis does not leave much doubt that supranational bodies have proved unhelpful in addressing the inadequacies of the domestic legal systems, exemplified by the ECtHR’s rulings on the Islamic headscarf and state monitoring of NRMs.175 Moreover, although the European framework protecting reli-

173 See Christopher L. Eisgruber & Lawrence G. Sager, Why the Religious Freedom Restoration Act Is Unconstitutional, 69 N.Y.U. L. Rev. 437, 444–45 (1994) (warning against the hazardous constitutional effects of RFRA’s statutory attempt to “upset[] the appropriate division of authority between the states and the federal government”). Compare Ira C. Lupu, The Failure of RFRA, 20 U. Ark. Little Rock L.J. 575, 600–02 (1998) (arguing that the judiciary possesses the capability “to assess the competing equities and protect religion when it is suffering a significant harm and the state’s interest in inflicting that harm is weak”), and Marci A. Hamilton, The Religious Freedom Restoration Act is Unconstitutional, Period, 1 U. Pa. J. Const. L. 1, 3–8 (1999) (contending that RFRA undermines Article V of the Constitution by allowing Congress to overtake the role of the Court), with Douglas Laycock, Free Exercise and the Religious Freedom Restoration Act, 62 Fordham L. Rev. 883, 895–97 (1994) (finding RFRA within Congress’s power as a statutory guarantee of free exercise), and Michael W. McConnell, The Influence of Cultural Conflict on the Jurisprudence of the Religious Clauses of the First Amendment, in Law and Religion in Theoretical and Historical Context 100, 122 (Peter Cane et al. eds., 2008) (analyzing developments in U.S. Supreme Court jurisprudence and concluding that the legislature, rather than the Court, is becoming the decision-maker in areas of religious conflicts). See generally Jeremy Waldron, Law and Disagreement, supra note 39 (advocating for legislation as the most representative forum for addressing disagreement within a community); Jeremy Waldron, The Dignity of Legislation, supra note 39 (promoting legislation as acknowledging and respecting inevitable differences of opinion in a community); Thomas C. Berg, The New Attacks on Religious Freedom Legislation, and Why They Are Wrong, 21 Cardozo L. Rev. 415 (2000) (defending both federal and state religious freedom legislation); Kelley, supra note 145 (“In the wake of Smith, a broad coalition—even a consensus—emerged that it would be appropriate to pass a statute to protect religious liberty more broadly than the Court had interpreted the Free Exercise Clause to require.”).

174 See Bowen, supra note 73, at 1 (discussing the 2004 French law banning public school pupils from wearing clothing indicating religious affiliation and its primary effect on Muslim girls who wear headscarves); Wilson, supra note 106, at 67 (discussing the court battle between the Exclusive Brethren and the Charity Commissioners in England in the 1970s).

175 See Paul M. Taylor, Freedom of Religion: UN And European Human Rights Law And Practice 344 (2005) (“[T]he European Court is more willing to accommodate
gious minorities is much broader than the rulings by the ECtHR, the actual impact of existing European legislative instruments has been ineffective because they lack enforcement mechanisms to follow-up on the non-binding recommendations produced by their monitoring bodies.\textsuperscript{176}

Moreover, “[n]o society is as liberal as liberals would like [and] none fully realizes the principles and aspirations of liberalism.”\textsuperscript{177} Nevertheless, the evidence suggests that religious minorities face an insurmountable challenge to guarantee their rights when their beliefs are perceived as challenging the socio-cultural mainstream within their states. In these situations, the law—whether legislative or judicially-based—has been utilized time and again in a manner that is contrary to the liberal ideals of pluralism and coexistence. Observers of European politics note that “[r]eligion continues to lurk underneath the veneer of European secularization.”\textsuperscript{178} As illustrated above, Christian forces were pivotal in the campaign to monitor NRM\textregistered s, generating mechanisms that severely encroached on the rights of hundreds of religious groups where those groups were often much less harmful than their original portrayal.\textsuperscript{179} The widespread legislative European system of recognition cultivated and entrenched the supremacy of Christian Europe.\textsuperscript{180} The extreme Austrian system resulted in broad exclusion of religious latecomers.\textsuperscript{181} The lingering Christian supremacy was also evident in \textit{Ludin}, which subsequently generated legislative exemptions for Judeo-Christian symbols from the ban on religious symbols in German schools.\textsuperscript{182} Finally, the legislative history of the French headscarf ban revealed the central role played by the Christian Right in propagating the threat of Islamic headscarves to France’s future.\textsuperscript{183}

Nevertheless, Christian dominance within liberal societies is not the sole force generating challenges to religious liberty for religious


\textsuperscript{177} Stephen Holmes, \textit{The Permanent Structure of Antiliberal Thought, in Liberalism And The Moral Life}, supra note 1, at 227, 230.

\textsuperscript{178} Peter J. Katzenstein, \textit{Multiple Modernities as Limits to Secular Europeanization?, in Religion in an Expanding Europe}, supra note 65, at 1, 33.

\textsuperscript{179} See Beckford, supra note 105, at 224, 263.

\textsuperscript{180} See Casanova, supra note 65, at 65–67.


\textsuperscript{182} See Heinig, supra note 67, at 194–95.

\textsuperscript{183} See Bowen, supra note 73, at 1–4; Scott, supra note 67, at 125–27; Roy, supra note 77, at 1; Gunn, supra note 75, at 7.
minorities. Religious minorities plead for their rights before legislatures and judges who often come from fundamentally different religious and nonreligious backgrounds compared to that of the minority group, which impinges upon understanding and toleration. The case of Native Americans is particularly illustrative. In the early encounters between whites and Native Americans, the whites assumed that Native Americans “knew no religion” because their spirituality was so fundamentally different compared to the prevailing Judeo-Christian tradition.  

But even if one remains skeptical that religio-cultural hegemonic thrust underpins the legal limitation of minorities’ religious liberty, and opts to explain the evidence by way of a sincere secular-neutral endeavor to protect competing liberal values, an important liberal aspect remains noticeably absent of such an explanation. Whereas reasoning offered by courts and legislatures for sanctioning infringements on minorities’ religious liberty has been articulated in liberal terms, it is striking that the process has underemphasized religious freedom claims. In this instance, the example of Islamic dress is particularly illustrative: “when it comes to Islam, secular Europeans tend to reveal the limits and prejudices of modern secularist toleration.”  

Permissible limitations on religious freedom were authorized in *Dahlab* on the basis of cultural neutrality. In *Begum*, such limitations were justified based on equality and autonomy. Similarly, the protection of secularism provided the liberal justification for the French statutory ban and for the ECtHR’s ruling in *Sahin*. Yet, these examples hardly paid lip service to the possibility that Islamic dress may be a true manifestation of a religious belief. Throughout these proceedings, the Muslim attire is “not understood as a religious symbol, but as a primarily political one . . . [thus] being taken as a source of danger.”  

Liberal states assign the public education system the role of inculcating liberal values. In principle, attributing this role to public

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184 See Loesch, *supra* note 131, at 360.
185 Casanova, *supra* note 65, at 78.
schools could have generated the exact opposite approach to that exercised by European courts regarding Islamic attire. Instead of excluding Shabina Begum or Lucia Dahlab from school, permitting Islamic attire may have actually generated an inclusive atmosphere fostering tolerance and respect for others. In *Dahlab*, the judges seemed oblivious to this possibility and completely preoccupied by the threat of Islam to gender equality. In *Begum* the Lords seemed deeply impressed by the school’s willingness to allow a “light” Islamic option as part of its dress code, notwithstanding the fact that this alternative should have been the natural development in an English school composed of a Muslim majority.

Similarly, in the context of NRMs, discriminatory practices were justified as liberal states acting on their duty to protect desirable interests. Justified state’s duties were construed to impose prerequisites for registration of religious communities (Austrian Religious Communities Act), and also for the legal surveillance of religious movements suspected to be dangerous, exemplified by the different monitoring agencies operating in France, Germany, Austria, and Belgium. Yet these steps were repeatedly found to be unnecessarily extreme and disproportionate.

**Conclusion**

Religious liberty, like any other fundamental right, is not absolute. Situations may arise where the manifestation of religious belief should give way to the protection of other rights or public interests. Never-

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194 See *Uitz*, *supra* note 3, at 170–78.
196 See, e.g., Canadian Charter of Rights and Freedoms § 1, Part I of the Constitution Act, *being* Schedule B to the Canada Act, c. 11 (U.K.) (guaranteeing rights and freedoms subject only to “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”); International Covenant on Civil and Political Rights, art. 18, § 3, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (subjecting “[f]reedom to manifest one’s religion . . . only to such limitations as are prescribed by law
theless, the surveyed data suggests that an unreceptive social climate resulting from a perceived threat to the dominant culture—whether motivated by a lingering hegemonic religion or by illiberal narratives—can and does utilize liberal categories and discourse as justifications for legal barriers to the manifestation of minorities’ religious beliefs.

The opportunity for manipulation casts a shadow on the proclaimed neutrality of legal means and should be accounted for in current liberal deliberations. Debates between legal pragmatists and the Dworkinian approach, as well as those between constitutionalists and democratic theorists, should address these limitations in a model that assigns the primary role of conflict resolution to the law. Notably, Professor Rosenberg has constructed an empirical argument against the ability of courts to generate change without the support of the larger political system.197 But this Article suggests an additional dimension for this line of criticism. As long as unpopular religious minorities are presumed threatening to the dominant cultural mainstream, they remain external to the arena of legal possibilities. As outsiders, they are often barred from obtaining judicial protection and the support of the greater political system.

Considering the failure by the above formal and doctrinal approaches to focus on the law’s ability to mask illiberal attitudes, legal discourse is left with the CLS’s position on the law’s inherent subjectivity, alongside those critiquing CLS discourse as unable to provide an alternative political vision for a just society.198 Multicultural liberalism currently represents the preferred approach to social and cultural diversity.199 Nevertheless, the surveyed data reveals the limitations of this theory in its treatment of religious minorities within liberal societies. In effect, multicultural liberalism failed precisely where it attempted to rectify integrationist incarnations of liberal ideas, namely in offering a viable alternative to situations where minority practices should be protected against a majority’s encroachment because of the minority’s intrinsic vulnerability. In the end, the assimilationist thrust seems to remain quite viable even among Western democracies.200

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197 See Rosenberg, supra note 16, at 35.
198 See Hutchinson & Monahan, supra note 20, at 236.
199 See McGarry et al., supra note 149, at 52–53.
200 See Ahdar & Leigh, supra note 46, at 50–51.
A legal realist approach may choose to recommend an executive and administrative approach for facilitating social conflicts. This approach places the protection of minorities in the hands of local governmental agencies that may be better acquainted with the religions of their locale. Recently, this possibility resurfaced in Quebec, Canada, in the recommendations by the Consultation Commission on Accommodation Practices Related to Cultural Differences, known also as the Bouchard-Taylor Commission. This Commission favored the “citizen route,” defined as “less formal and relies on negotiation and the search for a compromise” over the legal route to resolving conflicts, which “ultimately decrees a winner and a loser.” Notwithstanding its promise of dejudicialization for Quebec, this model seems to raise several challenges for a more universal implementation. A clear trend characterizes the politics of contemporary democracies, where those who feel injustice systematically turn to judicial proceedings as their preferred mechanism for effectuating change. It is unclear how this trend could be reversed, particularly in societies replete with cultural conflicts more intense than those in the Canadian context. Moreover, the flexibility offered by an executive-based arrangement also entails a disadvantage because such arrangements often culminate in a more ad-hoc protection than the documented, prescriptive, and generally applicable guarantees offered via legal standards. “Belonging,” it has been noted, “is about full acceptance and feeling at home.” Thus, the formality presented by legal measures remains an important element of recognition and accommodation, evident in the experience of religious minorities within Western democracies.

203 Id.
204 See Liviatan, supra note 40, at 585–86.
205 See id. at 590–92, 608–13 (discussing the use of courts by religious minorities in India and Israel).
206 Parekh, supra note 10, at 237.
207 See Alberto de la Hera, Relations with Religious Minorities: The Spanish Model, 1998 BYU L. Rev. 387, 394–96 (arguing that the 1992 legal arrangements between Spain and its non-Catholic minorities provided much more than communal rights, serving also as an act of recognition by a state whose history is replete with intolerance toward non-Catholics).
For those envisioning law as the watchdog of social, political, and economic abuses, its failure as liberalism’s main vehicle in promoting neutrality among competing worldviews is understandably frustrating. Nevertheless, a legal resolution to conflicts seems to offer practical advantages. As Professor Hampshire has argued, “[a]ll most every organized society requires an institution and also a procedure for adjudicating between conflicting moral claims.” Legal scholarship has highlighted the role of legal devices as strategies enabling coexistence, noting federalism, burden of proof, trial by jury, and the public/private divide as helpful strategies to manage and defuse cultural tensions. The analysis above revealed the preference among the politically powerful for legal resolutions to cultural conflicts because legal resolutions enable creative strategies and orderly procedures by which the powerful can impose their dominant views while dressed in liberal rhetoric.

Nevertheless, the lure of the law seems to hold for weaker sections of society as well, particularly in the context of enduring cultural tensions. A political interest institutionalized as a binding law provides unparalleled opportunities for social conformity because the political interest immediately becomes authoritative and enforceable. When the struggle over the public sphere is perpetual, as is generally the case with religion-based conflicts, legal measures are particularly appealing as opportunities for the opposing parties to mold the public sphere in accordance with their political and moral preferences.

Nonetheless, because law enshrines political preferences, it remains authoritative pending shifts in the distribution of political power. Therefore, weak social actors retain the prospects of changing legal arrangements by way of demographic growth, creative legal or political maneuvering, or any other enabling adjustment to the distribution of political power. The wider scope of religious freedom enjoyed by U.S.-based NRMs compared with their European counterparts is due to

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208 Hampshire, supra note 42, at 7.

209 See Martha Minow, Is Pluralism an Ideal or a Compromise? 40 Conn. L. Rev. 1287, 1309–13 (2008); see also Hampshire, supra note 42, at 6–8 (discussing the necessity of political and judicial procedures in cities and states).

U.S.-based NRMs’ successful recruitment of powerful players within the U.S. legal and political system.\textsuperscript{211} Prior to involving “friends in high places,” U.S.-based NRMs usually lost their legal battles. Nevertheless, once key organizations—such as the ACLU—and scholars studying NRMs joined their cause, NRMs experienced greater responsiveness by the U.S. legal system. This produced a dramatic broadening of their religious liberty guarantees compared to European-based NRMs.

Enduring cultural conflicts amplify law’s political character. In these contexts legal arrangements seem no more than temporary \textit{modus vivendi} that reshuffle once shifts in political power are ripe. Nevertheless, law’s political nature does not seem to counteract its ability to facilitate cultural conflicts. Heraclitus of Ephesus famously coined the phrase “nothing is permanent except change.” The true appeal of law is being unveiled by our infinitely expanding universe of social and cultural conflicts: these conflicts give the impression that changing unfavorable legal arrangements in liberal societies always remains within a feasible reach.

CONTINENTAL DRIFT:
CONTEXTUALIZING CITIZENS UNITED BY COMPARING THE DIVERGENT BRITISH AND AMERICAN APPROACHES TO POLITICAL ADVERTISING

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Abstract: There is perhaps no more vital an issue to a healthy democracy than its attitude towards political speech. Because political speech—and particularly political advertising—has a profound influence on the outcomes of elections, most vibrant democracies recognize the need to avoid arbitrary distinctions among political advertisers that might sway elections for reasons other than the popularity of the candidates. The First Amendment avoids arbitrary distinctions by ensuring a free and open marketplace of ideas in the political speech realm, with almost no restrictions on political advertising. The United Kingdom, by contrast, addresses the problem by way of an outright ban on political advertising. This Note explores the recent, and controversial, Citizens United decision in the context of avoiding such groundless distinctions. In particular, this Note compares the American approach to the British approach, and argues that Citizens United is a correct reaction, within American constitutional law and case law, to the problem of arbitrary distinctions in the political advertising realm.

Introduction

In a democratic society, there is perhaps no more fundamental an issue than choosing how to protect political speech—and why.\(^1\) The Founders of the United States enshrined the right to free speech at the very top of the Bill of Rights.\(^2\) Indeed, the protection of speech enshrined in the First Amendment was one of the reasons for the separa-

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2 See U.S. Const. amend. I.
tion of the Colonies from the United Kingdom. So it is not surprising that, over the last 200 years, American and British conceptions of protected speech have evolved along very different lines.

With the U.S. Supreme Court’s recent decision in *Citizens United v. Federal Election Commission*, the ocean that separates the United States’ and the United Kingdom’s respective laws has grown wider still. In fact, the United States and the United Kingdom are moving in separate directions. Whereas in *Citizens United*, the Supreme Court removed a longstanding ban on corporate expenditures on political advertising, the House of Lords, together with Parliament, has recently circled the wagons against European Union challenges to the United Kingdom’s robust restrictions on political advertising—both by individuals and corporations.

Yet these policies—which differ with respect to political advertising in particular, and independent expenditures in general—are actually reactions to the same basic problems: How can society draw the line in determining which speech to protect, and by whom? And who is to make such decisions? The *Citizens United* Court rejected the distinction between corporations and individuals in the political advertising context, thus widening the scope of protected speech, whereas the categorical ban in the United Kingdom has always applied equally to both.

Part I of this Note sets forth the laws of the United States and the United Kingdom as they relate to corporate political advertising. Part II discusses the policies and assumptions that undergird and explain current law in the United States and the United Kingdom. Finally, Part III

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3 See Talley v. California, 362 U.S. 60, 64–65 (1960) (discussing British impingements on colonial free speech and their deleterious effects on colonial citizens).


5 Compare *Citizens United*, 130 S. Ct. at 917 (striking down a ban on corporate political advertising), with R (on the application of Animal Defenders Int’l) v. Sec’y of State for Culture, Media & Sport, [2008] 1 A.C. 1312 (H.L.)1349 (appeal taken from Eng.) (U.K.) (upholding a categorical ban on all political advertising, no matter the source).


9 See id.

10 Compare Communications Act, 2003, c. 21, § 321(2) (Eng.), with *Citizens United*, 130 S. Ct. at 917.
argues that *Citizens United* is consistent with First Amendment jurisprudence in the United States, and that any attempt to reverse the result of *Citizens United* would require a fundamental reordering of the American electoral process and free speech jurisprudence.

## I. Background

Restrictions on corporate political advertising have followed very different paths in the United States and the United Kingdom. In Britain, heavy restrictions on political advertising—both corporate and otherwise—have been in place in some form for over 100 years. In the United States, restrictions on independent political expenditures are a more recent phenomenon.

As discussed *infra*, the United States has pulled back from its restrictions on political advertising by removing the legal distinction between corporations and individuals in the political advertising sphere; in contrast, the British government has bristled at the European Court of Human Rights’ (ECHR) insistence that the British scheme banning all political advertising runs afoul of Article 10 of the European Convention on Human Rights (the Convention) by imposing an unnecessary restriction on political speech.

A. *The History and Development of U.S. Law on Corporate Political Advertising*

1. Statutory History

   Although political tension has accompanied the corporate form ever since corporations were created by individual acts of state legislatures, the issue of corporate involvement in politics reached fever pitch in the 1904 presidential contest between Theodore Roosevelt and Al-

11 Compare *Citizens United* v. Fed. Election Comm’n, 130 S. Ct. 876, 917 (2010), with R (on the application of Animal Defenders Int’l) v. Sec’y of State for Culture, Media & Sport, [2008] 1 A.C. 1312 (H.L.) (appeal taken from Eng.) (U.K.). Because spending on political advertising is a subset of the broader class of “independent expenditures,” for the purposes of this Note, a restriction on independent expenditures will be considered to be a de facto restriction on political advertising as well.


13 See *Citizens United*, 130 S. Ct. at 953 (Stevens, J., dissenting) (stating that the ban on corporate independent expenditures was passed in 1947); Fed. Election Comm’n v. Wis. Right to Life, 551 U.S. 449, 511 (2007) (Souter, J., dissenting).

Parker noisily drew attention to Roosevelt’s acceptance of large amounts of corporate donations. Although Roosevelt prevailed, he was shamed into calling for a ban on corporate contributions the following year. Congress responded by passing the Tillman Act in 1907, which placed special limitations on corporations’ campaign spending, including a ban on corporate contributions to federal candidates.

The Senate Report that accompanied passage of the Tillman Act was hardly loquacious in justifying the codification in law of a distinction between individuals and corporations:

[T]he evils of the use of [corporate] money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any argument in favor of the general purpose of this measure. It is in the interest of good government and calculated to promote purity in the selection of public officials.

This justification was evidently sufficient to convince thirty-six states to pass similar laws by 1928.

In 1947, Congress passed the Taft-Hartley Act, thereby extending the prohibition on corporate spending to cover not only direct contributions, but also the use of general treasury funds for independent expenditures, defined as non-contribution spending to influence an election. A similar provision restricting individuals from making political expenditures of $1,000 or more was struck down by the Supreme Court, thus creating a de facto distinction in law between independent expenditures made by corporations and those made by individuals.

As of the hearing of *Citizens United*, 2 U.S.C. § 441b contained the restriction on a corporation’s use of general treasury funds to make independent expenditures that expressly advocate for the election or de-

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16 Id.
17 Id.
21 *Citizens United*, 130 S. Ct. at 953 (Stevens, J., dissenting); *Wis. Right to Life*, 551 U.S. at 511 (Souter, J., dissenting).
feat of a particular candidate, or that function as “electioneering communications.” The statute defines “electioneering communications” as communications that: (1) refer to a “clearly identified candidate for Federal office”; (2) are made within thirty days of a primary or sixty days of a general election; and (3) are targeted to the “relevant electorate.”

2. Case Law

Perhaps the best starting point for a discussion on corporate political advertising is the foundational case that established the proposition that corporations should be treated as people under the law. In *Santa Clara County v. Southern Pacific Railroad Co.*, the Supreme Court held that corporations are persons within the meaning of the Fourteenth Amendment. Thus, since *Santa Clara* the onus has been on those arguing that corporations should be distinguished from individuals to prove that they are in fact different under the law.

The ban on independent political expenditures was challenged in the Supreme Court in *Buckley v. Valeo*. In *Buckley*, the Court found that a ban on independent political expenditures of over $1,000 was an unconstitutional restriction on free speech under the First Amendment—at least insofar as it applied to individuals. The Court did not pass explicitly on the question of the constitutionality of sustaining the ban with respect to corporations; the Court did, however, point out that the First Amendment protects political association as well as political expression.

Two years later, in *First National Bank of Boston v. Bellotti*, the Supreme Court considered a Massachusetts law prohibiting corporations from making contributions or expenditures intended to influence or affect the vote on any issue submitted to voters, other than one affecting any of the property, business, or assets of the corporation in a material fashion. The Court held that the law was unconstitutional under the First Amendment, because it restricted expression that the First Amendment protects.
Amendment is designed to protect.\textsuperscript{32} Significantly, the Court wrote that the “inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”\textsuperscript{33} Still, the \textit{Bellotti} case dealt with the issue of restrictions on corporate expenditures during a referendum, not an election.\textsuperscript{34} This fact, together with the Court’s careful limitation of its holding, left unresolved the question of whether a distinction could be made between corporations and individuals in an electoral setting.\textsuperscript{35}

That question was taken up twelve years later in \textit{Austin v. Michigan Chamber of Commerce}.\textsuperscript{36} In \textit{Austin}, the Court evaluated a Michigan statute that prohibited corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office.\textsuperscript{37} The Court found that the statute was constitutional, because it was narrowly tailored to serve the compelling state interest of preventing corruption and distortion of the political process.\textsuperscript{38} In so holding, the Court blessed the legal distinction between corporations and individuals in the political expenditure (and by extension political advertising) sphere.\textsuperscript{39}

\textit{Austin} was at the front of the Court’s mind when \textit{Citizens United} reached the Court’s docket at the end of 2009.\textsuperscript{40} At issue was § 441b, discussed above, and whether its prohibition of corporate political advertising expenditures violates the First Amendment.\textsuperscript{41}

In January of 2008, Citizens United, a nonprofit corporation, released a film entitled \textit{Hillary: The Movie (Hillary)}.\textsuperscript{42} \textit{Hillary} was a ninety-minute documentary meant to expose the shortcomings of Senator Hillary Clinton, a candidate for President.\textsuperscript{43} Citizens United wanted to distribute \textit{Hillary} via video on demand, a technology that allows cable sub-

\textsuperscript{32} Id. at 776.
\textsuperscript{33} Id. at 777.
\textsuperscript{34} See id. at 767–78.
\textsuperscript{35} See \textit{Citizens United}, 130 S. Ct. at 958 (Stevens, J., dissenting); \textit{Bellotti}, 435 U.S. at 787–88.
\textsuperscript{37} Id.
\textsuperscript{38} Id. at 655.
\textsuperscript{39} See id. (implying that corporations and individuals could be treated differently under political speech law because corporate independent expenditures could be suppressed, whereas individuals’ independent expenditures were allowed).
\textsuperscript{40} See \textit{Citizens United}, 130 S. Ct. at 886.
\textsuperscript{41} See id.
\textsuperscript{42} Id. at 887.
\textsuperscript{43} Id.
scribers to download video programs to their home televisions.\textsuperscript{44} In order to avoid the civil and criminal sanctions of § 441b, Citizens United sought declaratory and injunctive relief against the Federal Election Commission (FEC).\textsuperscript{45}

After a lengthy discussion regarding the tenability of a distinction between corporations and individuals in the political speech domain, the Court struck down § 441b as an unconstitutional restriction on protected speech.\textsuperscript{46} Consequently, any law restricting corporate—but not individual—spending for political advertising was rendered unconstitutional.\textsuperscript{47}

B. The History and Development of British Law on Independent Political Expenditures

1. Statutory History

The United Kingdom has placed some manner of restrictions on independent political expenditures since 1883.\textsuperscript{48} In 1983, Parliament passed the Representation of the People Act, which contains a provision providing that only candidates and their agents may incur expenses of the kind set forth in the Act “with a view to promoting or procuring the election of a candidate.”\textsuperscript{49} Expenses set forth in the Act include those associated with public meetings, ads, publications, or otherwise presenting views to the electorate—but with an exception for newspaper editorials.\textsuperscript{50} The Act carved out one additional exception: individuals could make independent political expenditures of fifty pence.\textsuperscript{51} This amount was subsequently raised to five pounds, and has recently been elevated to 500 pounds.\textsuperscript{52}

\textsuperscript{44} Id.
\textsuperscript{45} Id. at 888.
\textsuperscript{46} See Citizens United, 130 S. Ct. at 917. The Justices’ various opinions in Citizens United stretched to over 100 pages and included prolix and nuanced arguments, counter-arguments, and historical analysis. See generally id. at 876–982. Some of the most salient arguments for a ban on political advertising will be detailed below; it is unnecessary for the purposes of this Note to go into any more detail here.
\textsuperscript{47} See id.
\textsuperscript{48} Ewing, supra note 4, at 501.
\textsuperscript{49} Representation of the People Act, 1983, c. 2, § 75 (Eng.); Ewing, supra note 4, at 503.
\textsuperscript{50} Representation of the People Act, 1983, c. 2, § 75 (Eng.); Ewing, supra note 4, at 503.
\textsuperscript{51} Representation of the People Act, 1983, c. 2, § 75 (Eng.); Ewing, supra note 4, at 503.
\textsuperscript{52} Representation of the People Act, 1983, c. 2, § 75 (Eng.) (displaying the new 500 pound limit); Colin Feasby, Issue Advocacy and Third Parties in the United Kingdom and Canada, 48 McGill L.J. 11, 28 (2003).
Nevertheless, because of the Communications Act 2003, none of these 500 pounds may be spent on television or radio advertisements. The Act provides that no licensed broadcast stations may air an advertisement produced by a group “whose objects are wholly or mainly of a political nature,” or any advertisement that is “directed towards any political end.” The Act sets forth a broad definition of “political ends,” including statements that would influence an election, changes in law or policy, or public opinion—whichever in the United Kingdom or elsewhere. Thus the prohibition discriminates based on both the content of speech and the identity of the proponent speaker.

2. Case Law

Unlike in the United States, recent challenges to the United Kingdom’s regulatory structure governing political advertising have come from outside the country. The first such challenge was Bowman v. United Kingdom, a case calling into question the United Kingdom’s scheme on independent expenditures. Mrs. Bowman, a British woman heading a pro-life group, spent in excess of five pounds (the statutory maximum at the time) in order to distribute a leaflet that detailed various parliamentary representatives’ voting histories on abortion issues. Mrs. Bowman was prosecuted under the United Kingdom’s criminal statutes, but she escaped conviction based on a procedural technicality. Nevertheless, she took her challenge of the United Kingdom’s ban to the ECHR.

53 See Communications Act, 2003, c. 21, § 321(2) (Eng.) (stating that advertisements that are political in nature contravene the prohibition set up by the Act).
54 Id.
59 Id. Unimaginably for Americans, the British political parties consider abortion to be an issue of personal moral import, and do not keep track of their members’ voting records on the issue. Cf. id. at 4–5 (stating that Mrs. Bowman had to inform voters of their representatives’ voting histories on abortion); Samuel Issacharoff, The Constitutional Logic of Campaign Finance Regulation, 36 Pepp. L. Rev. 373, 379 (2009). British citizens are similarly in the dark as to their representatives’ votes with respect to abortion. Cf. Bowman, 26 Eur. H.R. Rep. at 4–5; Issacharoff, supra, at 379.
60 Feasby, supra note 52, at 25.
61 Id.
Mrs. Bowman challenged the British political expenditures law on the grounds that it violated Article 10 of the Convention.\textsuperscript{62} Article 10 guarantees protection of free speech in Member States of the European Union.\textsuperscript{63} The ECHR noted that a restriction on free speech could be upheld in the face of Article 10 if it is both proportionate to a legitimate governmental aim and “necessary in a democratic society.”\textsuperscript{64} Ultimately, however, the ECHR found the British government’s arguments in favor of the law unconvincing, and held that the ban violated Article 10 of the Convention.\textsuperscript{65}

Several years later, another ECHR ruling cast doubt on the British regulatory system’s compatibility with Article 10.\textsuperscript{66} Although the specific statute in question in VgT Verein gegen Tierfabriken v. Switzerland (VgT) was Swiss, it was nearly identical in content to the Communications Act 2003 in that it banned political advertising by third parties, and was motivated by largely the same policy concerns.\textsuperscript{67} In VgT, the ECHR held that the Swiss ban on political advertising by third parties violated Article 10; in so holding, the court rejected many of the arguments put forth by Switzerland (and the United Kingdom) that the ban was “necessary in a democratic society.”\textsuperscript{68}

In 2008, the House of Lords responded to these extra-national challenges to British law.\textsuperscript{69} Although British courts are not bound by ECHR decisions, by law they must take these decisions into account—and British courts often follow them.\textsuperscript{70} Nevertheless, in \textit{R (on the application of Animal Defenders International) v. Secretary of State for Culture, Media \& Sport}, the House of Lords upheld the Communications Act 2003 in the face of a challenge to its compatibility with Article 10, stating that the ban on political advertising on television and radio is indeed “necessary in a democratic society,” and is therefore a legitimate restriction on free speech under Article 10.\textsuperscript{71}


\textsuperscript{63} Id.

\textsuperscript{64} See id. at 10, 12.

\textsuperscript{65} See id. at 13.

\textsuperscript{66} See VgT, 34 Eur. H.R. Rep. at 178; Ewing, \textit{supra} note 4, at 522 (calling VgT a potential “mortal blow” to the advertising ban in Britain).

\textsuperscript{67} Ewing, \textit{supra} note 4, at 521.

\textsuperscript{68} See VgT, 34 Eur. H.R. Rep. at 178.

\textsuperscript{69} See Animal Defenders, [2008] 1 A.C. at 1349.

\textsuperscript{70} Human Rights Act, 1998, c. 42, §§ 3, 2(a) (U.K.) (stating that “[s]o far as it is possible to do so, primary legislation and subordinate legislation [in the United Kingdom] must be read and given effect in a way which is compatible with the Convention rights” as spelled out by the ECHR); Ewing, \textit{supra} note 4, at 521.

\textsuperscript{71} [2008] 1 A.C. at 1349.
II. Discussion

Ultimately, the United States’ and the United Kingdom’s divergent approaches to political advertising can be explained by policymakers’ different justifications for their respective rules. In the United States, legislators and courts have focused largely on protection of the marketplace of ideas—a concept that emphasizes the quantity of allowed speech over its quality. The United Kingdom, by contrast, has pursued equality of voice for individuals, corporations, and candidates. In doing so, British policymakers have favored the supposed quality of speech in an election cycle, consciously at the expense of its quantity.

A. Motivations for the Overturned American Ban on Corporate Political Advertising

1. Anticorruption

One of the most commonly deployed arguments in favor of restrictions on corporate political expenditures and, more specifically, political advertising, is the concern over the potentially corruptive influence of corporate spending. Critics of corporate political spending typically address both classic quid pro quo corruption and more subtle, less direct forms of corruption, whereas advocates of corporate advertising focus only on quid pro quo arrangements.

With respect to quid pro quo corruption, the argument is that corporations would use their ability to spend vast sums on political advertising as a lever in securing political favors from the politicians they support. “Subtler,” non-quid pro quo corruption is more difficult to define. In his dissent in Citizens United, Justice John Paul Stevens argues that political expenditures (whether made by individuals or corporations), including political advertising, are essentially fungible with

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73 See Citizens United, 130 S. Ct. at 907, 912; Redish & Wasserman, supra note 8, at 256.
74 See Animal Defenders, [2008] 1 A.C. at 1346.
75 See id.
77 Compare Citizens United, 130 S. Ct. at 907, 912, with Austin, 494 U.S. at 660.
79 See Citizens United, 130 S. Ct. at 961 (Stevens, J., dissenting).
direct campaign contributions—and may even exert “far more influence” than direct contributions.\(^{80}\) The dispute between the majority and Justice Stevens regarding the meaning of “corruption” in Supreme Court jurisprudence—that is, whether it refers to quid pro quo corruption only, or whether it is a more general term—remains unresolved.\(^{81}\)

The Court has bundled the interest to prevent the appearance of corruption into the anticorruption argument, in an effort to preserve not only the functioning of the political system, but also the electorate’s faith in that system.\(^{82}\) As Justice Stevens writes in his *Citizens United* dissent, a “democracy cannot function effectively when its constituent members believe laws are being bought and sold.”\(^{83}\)

Whatever the term’s specific meaning, the Court made it clear in *Austin* that, if corporate political advertising is to be limited at all, the anticorruption interest would be the most convincing rationale for such a limitation.\(^{84}\) According to the *Bellotti* Court, “[p]reserving the integrity of the electoral process [and] preventing corruption . . . are interests of the highest importance.”\(^{85}\) Still, the Court’s decision in *Citizens United* (together with *Buckley*) reversed course from *Austin*, and rejected the argument that the anticorruption interest is sufficient to justify a ban on corporate political advertising.\(^{86}\)

### 2. Antidistortion

Although elements of the antidistortion interest have cropped up in the political speech debate for decades, this interest found its clearest expression in *Austin* and *Citizens United*.\(^{87}\) Whereas the anticorruption interest focuses on the inner machinations of the political process, proponents of the antidistortion interest seek to protect public debate from disruptive influence.\(^{88}\) According to Justice Stevens’ dissent in

\(^{80}\) *See id.* at 965 (Stevens, J., dissenting).

\(^{81}\) *See id.* at 901–02, 965 (showing the dispute between the majority, who only mentioned quid pro quo, and Justice Stevens, who in his dissent also explored subtler forms of corruption); *Teachout*, *supra* note 78, at 385. The academic literature is more helpful than the Supreme Court case law in distinguishing between quid pro quo and other forms of corruption. *See, e.g.*, *id.* at 373–83.

\(^{82}\) *Buckley v. Valeo*, 424 U.S. 1, 27 (1976).

\(^{83}\) *Citizens United*, 130 S. Ct. at 964 (Stevens, J., dissenting).


\(^{85}\) *See Bellotti*, 435 U.S. at 788–89.

\(^{86}\) *See Citizens United*, 130 S. Ct. at 886 (holding that the anticorruption interest is not sufficient to uphold a ban on corporate political advertising); *Austin*, 494 U.S. at 660.

\(^{87}\) *See Citizens United*, 130 S. Ct. at 974 (Stevens, J., dissenting); *Austin*, 494 U.S. at 660.

\(^{88}\) *See Austin*, 494 U.S. at 660.
Citizens United, corporations are capable of “unfair influence” in the electoral process which can “distort public debate in ways that undermine rather than advance the interests of listeners.” This distortive effect is attributable to two characteristics of corporations: first, their unique ability to easily raise large amounts of capital with which to purchase advertisements and other communications; and second, the fact that, owing to directors’ fiduciary duties, corporations must participate in the political process only to enhance shareholder value, “no matter how persuasive the arguments for a broader or conflicting set of priorities.”

This rhetoric masks a somewhat vague set of motivations for the antidistortion interest. As will be discussed below, the antidistortion interest shares with the British political equality interest at least a surface concern with the ability of “ordinary people” to have their voices heard in the political process. Nevertheless, at other times, American advocates of the antidistortion interest have expressly disavowed the argument that limits should be placed on corporate political speech in the pursuit of speech equalization.

Perhaps the most accurate articulation of the antidistortion interest is twofold. First, commentators are concerned about corporations’ ostensibly unique ability to spend prodigious amounts of money to publicize their positions. Second, there is the avowed danger that corporations will use their deep coffers to fund advertisements that bear “little or no correlation to the ideas of natural persons.”

3. Shareholder Protection

The third argument for distinguishing between private individuals and corporations in the political advertising context focuses on the in-

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89 Citizens United, 130 S. Ct. at 974 (Stevens, J., dissenting).
90 See id. (internal quotation marks omitted).
91 Cf. id. at 958 (discussing several possible motivations for the antidistortion interest).
92 Cf. id. (arguing that the Constitution permits restrictions on speech by some in order to “prevent the few from drowning out the many”); Animal Defenders, [2008] 1 A.C. at 1345–46.
93 See, e.g., Citizens United, 130 S. Ct. at 558.
94 See id. at 974 (Stevens, J., dissenting); Austin, 494 U.S. at 660; Robert H. Sitkoff, Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters, 69 U. Chi. L. Rev. 1103, 1111 (2002).
95 See Austin, 494 U.S. at 660; Sitkoff, supra note 94, at 1111. Critics have noted that this argument applies equally to wealthy individuals whose independent political expenditures remain unrestricted. Austin, 494 U.S. at 680 (Scalia, J., dissenting).
96 Citizens United, 130 S. Ct. at 974 (Stevens, J., dissenting) (internal quotation marks omitted).
ternal structure and function of the corporation, rather than on the integrity of the political marketplace of ideas. The shareholder protection rationale begins with the premise that shareholders’ First Amendment rights are compromised when a corporation uses its treasury funds to publicize a view to which its shareholders are opposed.

Opponents respond that, if shareholders are opposed to the political messages that the corporation has broadcast, they are free to either pursue their cause using the normal mechanisms of corporate governance, or sell their shares and invest in a company whose politics are more in line with their own. Proponents of shareholder protection argue that requiring shareholders to sell their shares if they disagree with the political speech of the corporation would “impose a financial sacrifice on those objecting to political expenditures.”

There is intense debate surrounding the latter contention. In the process of rejecting the shareholder protection rationale, the Court noted that “shareholders normally are presumed competent to protect their own interests.” Scholars have also pointed out that shareholders invest in stock for the purposes of securing income, and therefore only a threat to their rate of return could constitute an economic disincentive. By hypothesis, such an economic investor would be indifferent between two companies with similar rates of return. Therefore, unless there is simply no other company offering a comparable return—an unlikely prospect in a well-developed, efficient market—the shareholder faces no economic disincentive from merely shifting his investment to another company. Furthermore, according to the efficient capital markets hypothesis, which postulates that stock prices reflect all publicly available information, proper disclosure of corporate spending on political advertising would ensure that “the size of a corporation’s treasury available for political activity lines up with its investors’ support for that activity.”

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97 See Austin, 494 U.S. at 673.
98 Citizens United, 130 S. Ct. at 977 (Stevens, J., dissenting).
99 See Austin, 494 U.S. at 687 (Scalia, J., dissenting).
100 Id. at 674 (Brennan, J., concurring).
101 See, e.g., Bellotti, 435 U.S. at 795 (Burger, J., concurring); Sitkoff, supra note 94, at 1120 (calling the financial sacrifice argument "nonsense").
102 Bellotti, 435 U.S. at 795.
103 See Sitkoff, supra note 94, at 1120.
104 Id.
105 Id.
106 See id. at 1110. More specifically, commentators claim that investors will react unfavorably to excessive political donations, and managers will respond by reducing such expenditures to remove the drag on their company’s stock price. See id.
In sum, the shareholder protection argument suggests that corporations can receive differential treatment in election law because their internal structure creates First Amendment concerns that are not implicated by individual speech.\textsuperscript{107}

4. Corporations as Creatures of State Law

Proponents of regulation have countered resistance to limitations on corporate political speech by pointing out that corporations are creatures of state law, and are therefore susceptible to regulation by the State.\textsuperscript{108} State law grants corporations “special advantages” like “limited liability, perpetual life, and favorable treatment” that facilitate the raising of capital.\textsuperscript{109} In turn, these special advantages, which are intended to encourage success in the economic marketplace, may be utilized to dominate the political marketplace.\textsuperscript{110} Proponents argue that corporate political speech must be regulated to prevent this potentially harmful spillover into the political sphere.\textsuperscript{111} In his dissent in \textit{Citizens United}, Justice Stevens wrote, “[l]egislatures are entitled to decide that the state-granted privileges of the corporation require particular scrutiny and higher level of regulation of their activities.”\textsuperscript{112}

Notably, this argument is generally advanced as a non-arbitrary reason why the law may distinguish between corporations and private individuals, rather than as an independent justification for the regulation of corporate political advertising.\textsuperscript{113} The impetus for actually making this distinction is generally supplied by one of the arguments discussed above, rendering the state law argument derivative of the others.\textsuperscript{114}

\textsuperscript{107} See \textit{Austin}, 494 U.S. at 673 (Brennan, J., concurring).
\textsuperscript{108} \textit{Citizens United}, 130 S. Ct. at 947 (Stevens, J., dissenting).
\textsuperscript{109} \textit{Austin}, 494 U.S. at 658–59.
\textsuperscript{110} \textit{Bellotti}, 435 U.S. at 809 (White, J., dissenting).
\textsuperscript{111} See \textit{Citizens United}, 130 S. Ct. at 947 (Stephens, J., dissenting); \textit{Bellotti}, 435 U.S. at 809 (White, J., dissenting).
\textsuperscript{112} \textit{Citizens United}, 130 S. Ct. at 947 (Stephens, J., dissenting).
\textsuperscript{113} See \textit{Bellotti}, 435 U.S. at 809 (White, J., dissenting).
\textsuperscript{114} See, \textit{e.g.}, \textit{Citizens United}, 130 S. Ct. at 974 (Stephens, J., dissenting); \textit{Austin}, 494 U.S. at 673 (Brennan, J., concurring).
B. Motivations for the United Kingdom’s Categorical Ban on Political Advertising

1. Anticorruption

As previously discussed, the United Kingdom does not distinguish between private individuals and corporations; its ban on political advertising is categorical. The British anticorruption interest is virtually identical to its American counterpart, and British courts take no great care to distinguish it from the other arguments in support of a ban on political advertising.

2. Antidistortion

The British antidistortion interest is, on the surface, similar to its American counterpart, but courts in the United Kingdom have articulated the interest with more force. British courts and commentators have vociferously advanced the antidistortion rationale as one of the twin pillars of justification for a categorical ban on political advertising.

The British antidistortion interest is grounded in a protective attitude towards British citizens. As the Animal Defenders court commented, there is a risk that “objects which are essentially political may come to be accepted by the public not because they are . . . right but because, by dint of constant repetition, the public has been conditioned to accept them.” In VgT, the ECHR noted that a Swiss statute with similarities to the British ban was motivated by a desire to protect the public from the pressures of powerful financial groups that might distort the political debate. These formulations of the argument each hint at the fundamental risk that some participants in the political process, particularly wealthy individuals and groups, would, if allowed to participate, contribute speech that would lead voters astray. In the United States, such reasoning is anathema to constitutional commentators who argue

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115 See Communications Act, 2003, c. 21, § 321(2) (Eng.).
116 See Feasby, supra note 52, at 16.
118 See id.
119 See id.
120 See id.
122 See Animal Defenders, [2008] 1 A.C. at 1346.
that government cannot suppress speech “on the grounds that it is too persuasive.”123

3. Political Equality

The most important argument advanced by the United Kingdom to justify its ban on political advertising is almost completely absent from the mainstream debate in the United States.124 In the United Kingdom, the powerful blanket ban is justified by the concern that rich citizens and organizations might be able to be heard over the average citizen, based solely on ability to pay.125 In the context of the electoral process, “political equality” is typically defined as the equality of individuals’ ability to affect political debate.126 The role of British electoral law, therefore, is to avoid giving any advantage to wealthy participants.127

The Animal Defenders court explained the theory underlying British elections as follows:

The fundamental rationale of the democratic process is that if competing views, opinions and policies are publicly debated and exposed to public scrutiny the good will over time drive out the bad and the true prevail over the false. It must be assumed that, given time, the public will make a sound choice . . . . But it is highly desirable that the playing field of debate should be so far as practicable level.128

One might question precisely why the State should deny any advantage to the wealthy. The Animal Defenders court stresses that, to function properly, a democracy must be “truly democratic.”129 If participants in the electoral process can purchase opportunities to advertise in proportion to their ability to pay, elections “become little more than an auc-

123 Redish & Wasserman, supra note 8, at 267 (emphasis added).
124 Compare Citizens United, 130 S. Ct. at 958 (Stephens, J., dissenting), with Animal Defenders, [2008] 1 A.C. at 1346. In fact, judges who favor regulation of corporate political speech have been explicit in disavowing political equality as the motivation for their positions. See Citizens United, 130 S. Ct. at 958 (Stephens, J., dissenting). Nevertheless, the idea is not completely devoid of proponents in the academic sphere. See, e.g., Frank Pasquale, Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform, 2008 U. Ill. L. Rev. 599, 602 (arguing that political equality should be a motivating premise in the political speech domain).
126 Feasby, supra note 52, at 17.
127 See Animal Defenders, [2008] 1 A.C. at 1346.
128 Id.
129 Id. at 1345–46.
Commentators have suggested that the concept of political equality should not be stretched to limit speakers’ influence based on their ability to persuade; instead, it ought to be targeted specifically at advantages produced by simple possession of wealth. 

III. Analysis

A. The High Value of Political Speech

Despite the distance between the United States’ and the United Kingdom’s respective approaches to the regulation of political advertising, the two nations start with a common premise: political speech is the most sacred form of communication in a democracy, and therefore deserves the State’s highest protection. In Austin, the Court wrote that independent campaign spending constitutes “political expression at the core of our electoral process and of the First Amendment freedoms.” There are two key reasons for the exalted position of political speech. First, political discourse between and among candidates and citizens is the mechanism by which the government is held accountable to the people. Second, a robust political dialogue enhances the ability of the public to make an informed decision among the various candidates for office.

Similarly, the United Kingdom places great emphasis on freedom of political speech. According to the Animal Defenders court, such freedom is an “essential condition of an intellectually healthy society.” The court also emphasized the importance of political speech for the proper functioning of a democratic government. At first blush, the United Kingdom’s outright ban on third party political ad-

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130 Id. at 1346.

131 See, e.g., Feasby, supra note 52, at 17. Nevertheless, commentators outside the United States have not been as sympathetic as American thinkers to the idea that the ability to accrue wealth in the marketplace might be in some way indicative of personal talents. See, e.g., id.


133 Austin, 494 U.S. at 657 (internal quotation marks omitted).


135 Citizens United, 130 S. Ct. at 898; see Redish & Wasserman, supra note 8, at 246.

136 Buckley, 424 U.S. at 14–15; see Redish & Wasserman, supra note 8, at 246.

137 See Animal Defenders, [2008] 1 A.C. at 1345.

138 Id.

139 Id.
Advertising would seem to be inconsistent with the exalted status of political speech. Nevertheless, as will be discussed more fully below, this result is attributable to the subtly different conceptualization in the United Kingdom of what “free speech” means—specifically, that the right to free speech also encompasses the rights to be protected from potentially damaging speech by others and to ensure the equality of one’s voice in relation to that of others.

### B. Framing the Issue—Same Motivation, Different Approach

As discussed above, American and British electoral laws strive to protect different aspects of the electoral process. The American regulatory system protects the marketplace of ideas, at the expense of voters’ equality of voice. In contrast, the United Kingdom emphasizes political equality by stifling a wide range of political speech. Nevertheless, despite these different approaches, policymakers in the United States and the United Kingdom are reacting to the same reality: distinctions between permissible and impermissible speech are difficult to make, especially in the protected realm of political speech. Except for the narrow exception in statutory law prohibiting corporate political advertising, the United States has largely allowed comparatively extensive political advertising. In sharp contrast, the United Kingdom has banned all third-party advertising pertaining to an election or a candidate. Thus, as will be discussed below, the Citizens United decision makes sense within the American electoral regulation system, and any

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140 See Communications Act, 2003, c. 21, § 321(2) (Eng.) (banning political advertising, an ostensibly significant form of communication); Animal Defenders, [2008] 1 A.C. at 1345 (stating that freedom of speech is an “essential condition of an intellectually healthy society”).


142 See Citizens United, 130 S. Ct. at 901–02; Austin, 494 U.S. at 660; Animal Defenders, [2008] 1 A.C. at 1346.

143 See Citizens United, 130 S. Ct. at 911.


145 See Citizens United, 130 S. Ct. at 892; Animal Defenders, [2008] 1 A.C. at 1345; see also Redish & Wasserman, supra note 8, at 237 (asserting that no argument yet presented justifies a restriction of the scope of protected speech).

146 See, e.g., Buckley, 424 U.S. at 45 (striking down a ban on independent political expenditures by individuals).

147 Communications Act, 2003, c. 21, § 321(2) (Eng.).
effort to change that case’s result must be accompanied by broader electoral reform and a shift in First Amendment jurisprudence.\textsuperscript{148}

C. The American Approach to Regulation of Political Advertising

The United States’ and the United Kingdom’s differing approaches to the regulation of political advertising are, in fact, motivated by the same premise: that a system of fine distinctions among speakers and types of speech is both unjustifiable in theory and unsustainable in practice.\textsuperscript{149} In the United States, whatever the commonsense appeal of a distinction between corporate and individual speakers, courts and commentators have found it surprisingly difficult to articulate a bulletproof argument justifying such a distinction.\textsuperscript{150}

Moreover, advocates of a ban on corporate political advertising have struggled to identify a consistent jurisprudential thread justifying different treatment of corporate speakers.\textsuperscript{151} The \textit{Citizens United} Court notes that, although legislation discriminating against corporate political expenditures has been on the books for some time, until \textit{Austin} in 1990, no Supreme Court case had upheld such a distinction.\textsuperscript{152} Given the consistency of the Court’s decisions prior to \textit{Austin}, especially \textit{Buckley} and \textit{Bellotti}, \textit{Austin} and its progeny seem to be a short-lived aberration in case law.\textsuperscript{153} Additionally, it is difficult to ignore the Court’s commentary on the issue in \textit{Bellotti}: “We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation . . . .”\textsuperscript{154} Thus, the lack of a consistent precedent justifying a distinction between corporate and individual speakers, and the Court’s open hostility to such a concept in \textit{Bellotti}, are significant impediments to a categorical ban on political advertising by corporations.\textsuperscript{155}

\begin{footnotes}
\textsuperscript{148} See U.S. Const. amend. I; \textit{Citizens United}, 130 S. Ct. at 898; \textit{Buckley}, 424 U.S. at 49; Redish & Wasserman, supra note 8, at 264, 268 (arguing that the protection of persuasive speech is a central premise of American democracy).
\textsuperscript{149} See \textit{Citizens United}, 130 S. Ct. at 892; \textit{Animal Defenders}, [2008] 1 A.C. at 1345; Redish & Wasserman, supra note 8, at 260 (discussing the difficulties of distinctions in speech law).
\textsuperscript{150} Cf. Redish & Wasserman, supra note 8, at 287 (citing examples of claims made by the Court with little or no empirical support).
\textsuperscript{151} See \textit{Citizens United}, 130 S. Ct. at 903.
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{See id.}
\textsuperscript{155} See \textit{Citizens United}, 130 S. Ct. at 903; \textit{Bellotti}, 435 U.S. at 784.
\end{footnotes}
Aside from the precedential record, there are also conceptual difficulties with making excessively fine distinctions between speakers and types of speech. One of the fundamental tenets of American government is that the State cannot be trusted with too much discretion in setting the boundaries of acceptable speech. Instead, that trust should be placed in the people. Justice Scalia gave perhaps the most memorable articulation of this view in his dissent in *Austin* (which would later help undergird the majority opinion in *Citizens United*):

> [G]overnmental abridgment of liberty is always undertaken with the very best of announced objectives . . . and often with the very best of genuinely intended objectives. The premise of our Bill of Rights, however, is that there are some things—even some seemingly desirable things—that government cannot be trusted to do.

Thus, unless the case for the unconstitutional nature of corporate political advertising is unassailable, such advertising should be permitted—especially because it is by its nature political speech, which is accorded the highest degree of constitutional protection. The *Citizens United* Court explicitly attacked the *Austin* framework for requiring “intricate case-by-case determinations” and vesting too much power in the FEC to select which political speech deserves constitutional protection.

The American reaction to the problem of distinguishing between productive and unproductive political advertising has been to protect the marketplace of ideas. The result has been implementation of policies that emphasize the quantity of available speech, even to the detriment of its quality. In *Buckley*, the seminal case on political speech, the Court reasoned that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .” Indeed, according to the Court, the very purpose of the First Amendment is to ensure “the widest possible dissemination of information

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156 *See Citizens United*, 130 S. Ct. at 892.
157 *Austin*, 494 U.S. at 692 (Scalia, J., dissenting).
158 *Id*. at 706 (Kennedy, J., dissenting).
159 *Id*. at 692 (Scalia, J., dissenting) (emphasis in original).
160 *See Citizens United*, 130 S. Ct. at 911; *Austin*, 494 U.S. at 657.
161 *Citizens United*, 130 S. Ct. at 891–92.
162 *See id*. at 911; Redish & Wasserman, *supra* note 8, at 246.
163 *See Citizens United*, 130 S. Ct. at 911.
164 *Buckley*, 424 U.S. at 49.
from diverse and antagonistic sources, and to assure unfettered ex-
change of ideas for the bringing about of political and social changes
desired by the people.”165 The Court was even blunter in Citizens United:
“[M]ore speech, not less, is the governing rule.”166

D. The British Approach

British courts have also recognized the difficulty of drawing dis-

tinctions in the political speech domain.167 Still, the reaction of policy-
makers in the United Kingdom has been decidedly different from that
of their American counterparts.168 In the United Kingdom, the exercise
of drawing distinctions among third party expenditures has been elim-
inated altogether; instead, all third-party political advertising has been
banned outright.169

The justification for this categorical ban has taken two forms.170
First, the ban supports the soundness of the framework for political de-
bate by equalizing political voice and denying an advantage to “those
best able to pay.”171 Second, and most salient for the purposes of this
discussion, “[t]he completeness of the prohibition avoids arbitrary and
anomalous distinctions in practice.”172 Such a system, so different from
that in the United States, is only possible because of the unique British
electoral approach: protect political equality at the expense of protec-
tion of speech.173

E. Contextualizing the Citizens United Decision

Simply put, the Citizens United decision is the natural extension of
the American approach to the regulation of political advertising.174
First, the First Amendment establishes a presumption that speech—
especially political speech—is constitutionally protected, absent some

165 Id. (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266, 269 (1964)).
166 Id.
168 Compare Citizens United, 130 S. Ct. at 917 (expanding the scope of protected speech), with
Animal Defenders, [2008] 1 A.C. at 1349 (upholding a blanket ban on political advertising).
169 See Communications Act, 2003, c. 21, § 321(2) (Eng.).
171 Id.
172 Id. at 1345.
173 See id. at 1345–46; cf. Feasby, supra note 52, at 16–17 (contrasting the anticorruption
rationale of American campaign finance regulation with the political equality of the British
ban on political advertising).
174 See U.S. Const. amend. I; Citizens United, 130 S. Ct. at 898, 907; Redish & Wasser-
man, supra note 8, at 264.
overriding reason for its prohibition. Thus, any argument for banning corporate political speech because of its source is subject to strict scrutiny. Given this high hurdle, any argument to ban corporate political advertising because it unduly distorts the political process is unlikely to carry the day, due to what can be called the proof problem—it is difficult, if not impossible, to produce viable empirical proof that corporate political speech is damaging to the democratic process.

In contrast, the United Kingdom does not have such a powerful tradition of protecting individual units of speech. Instead, British policymakers actually justify banning individual units of speech in order to protect equality of speech in the aggregate, and to protect against potentially misleading speech. Therefore, the commonsense argument that corporate political speech—and, indeed, individual political spending—can distort elections because of its self-serving nature has produced a blanket ban on such speech during election time.

Second, the American system is predicated on a fundamental distrust of the government’s capacity to make important distinctions in a variety of areas, speech foremost among them. In his influential dissent in Austin, Justice Scalia wrote, “[t]he fundamental approach of the First Amendment, I had always thought, was to assume the worst, and to rule the regulation of political speech ‘for fairness’ sake’ simply out of bounds.” Consequently, there is little room for maneuver in conjuring a blanket ban on a certain type of speech by certain speakers.

175 See U.S. Const. amend. I; Citizens United, 130 S. Ct. at 898.
176 See Citizens United, 130 S. Ct. at 898.
177 See, e.g., id. at 910, 912; Redish & Wasserman, supra note 8, at 287 (citing as an example Judge Wright’s argument that a divergence between early poll results and the final tally in an election indicated that corporate advertisements distorted the result, despite having no empirical evidence to that effect).
178 See Animal Defenders, [2008] 1 A.C. at 1354. Indeed, in Animal Defenders, the court wrote: “Important though political speech is, the political rights of others are equally important in a democracy.” Id.
179 See id. at 1346.
180 See Communications Act, 2003, c. 21, § 321(2) (Eng.); Animal Defenders, 1 A.C. at 1346.
181 See Austin, 494 U.S. at 692 (Scalia, J., dissenting).
182 Id. at 692–93.
183 See id. Further, the argument that government would have good reason to silence the voices of corporations because they are more prevalent and persuasive, owing to corporations’ large treasuries, has not been applied to other logical targets. See id. at 704–05 (Scalia, J., dissenting); Radish & Wasserman, supra note 8, at 284, 286. For instance, this contention would also seem to justify a ban on political advertising by extremely wealthy individuals, or by particularly notable individuals like actors or athletes. See Austin, 494 U.S. at 704–05 (Scalia, J., dissenting); Radish & Wasserman, supra note 8, at 284, 286.
In the United Kingdom, the government has adopted as its purpose the goal of equalizing political voice and purifying the political process.¹⁸⁴ British elections are closely regulated events that are “not [arenas] of open political discourse,” but instead “confined decision[s] by the voters among the choices presented by the established political parties.”¹⁸⁵ In *Animal Defenders*, the House of Lords discusses—in an explicit manner unimaginable to Americans—the government’s duty to protect its citizens from the “potential mischief” of political advertising.¹⁸⁶ As evidence of this mischief, the court openly voices distrust in British citizens’ ability to reach electoral decisions on their own: “The risk is that objects which are essentially political may come to be accepted by the public not because they are . . . right but because, by dint of constant repetition, the public has been conditioned to accept them.”¹⁸⁷ In this environment, banning certain categories of political speech is not only justifiable—it is encouraged.¹⁸⁸

Third, the American electoral process relies heavily on third party participants to develop the marketplace of ideas.¹⁸⁹ When the aim is to ensure the robustness of that marketplace—to encourage the highest volume of speech in order to ensure that the most productive ideas are expressed and given the opportunity to prevail—it becomes quite difficult to limit speech for any but the most compelling reasons.¹⁹⁰ In *Citizens United*, the Court attacked the ban on corporate political advertising for depriving the public of “information, knowledge and opinion vital to its function,”¹⁹¹ and pointed out that corporations may possess “valuable expertise” in certain areas, as well as the unique ability to facilitate discussion on such topics.¹⁹² The Court’s emphasis on the completeness of the political debate creates an environment that is toxic to excessively fine distinctions between permissible and impermissible political speech.¹⁹³

¹⁸⁷ Id. at 1345–46.
¹⁸⁸ See *id.* In the United States, the equality debate takes on another meaning—namely, that government should behave neutrally towards speakers and speech, as opposed to the idea that all speakers are entitled to equal amounts of expression. See Redish & Wasserman, *supra* note 8, at 295.
¹⁸⁹ See *Citizens United*, 130 S. Ct. at 907.
¹⁹¹ *Citizens United*, 130 S. Ct. at 907 (internal quotation marks omitted).
¹⁹² Id. at 912.
¹⁹³ See *id.* at 907, 912; Redish & Wasserman, *supra* note 8, at 290–91.
In contrast, the British system relies far more heavily on the political parties to set the political agenda. Third party political speech by citizens and corporations is seen as a potential source of disruption and distortion, rather than as vital participation in the democratic process. British policymakers view regulation of third party expenditures as a way to dissipate layers of distortion around the core of the electoral process—specifically, the parties’ agendas. As such, it is easier to justify a ban, whether comprehensive or limited, in the British system.

F. How to Change the Citizens United Result

In order to change course from the Citizens United decision in an internally consistent way, American policymakers would have to make serious structural changes to the American electoral approach—if not its First Amendment jurisprudence. The American approach is predicated upon a robust marketplace of ideas furnished by third party participants and facilitated by a powerful presumption that speech is protected. Further, given this foundation, the proof problems associated with the argument that corporate advertising significantly distorts the political process render an outright ban untenable.

In short, a critique of the Citizens United decision really goes to the core of the American attitude towards political speech and elections. Whether one approves of the result in Citizens United or not, it is difficult to argue that the decision was not at least consistent with the American political structure. Absent compelling empirical evidence of the distortional effect of corporate political advertising, no interpretive gloss over existing law can justify a blanket ban on corporate political

194 Compare Citizens United, 130 S. Ct. at 907, with Feasby, supra note 52, at 19.
196 See id.; Feasby, supra note 52, at 19.
197 See Animal Defenders, [2008] 1 A.C. at 1346; Feasby, supra note 52, at 19.
198 See U.S. CONST. amend. I; Citizens United, 130 S. Ct. at 898, 911; Buckley, 424 U.S. at 49; Redish & Wasserman, supra note 8, at 264, 268 (arguing that restrictions on speech run contrary to American values).
199 See U.S. CONST. amend. I; Citizens United, 130 S. Ct. at 898, 907, 911; Redish & Wasserman, supra note 8, at 290–91.
200 See U.S. CONST. amend. I; Citizens United, 130 S. Ct. at 907; see also Redish & Wasserman, supra note 8, at 287 (citing examples of claims made by the Court with little or no empirical support).
201 See Citizens United, 130 S. Ct. at 898; Buckley, 424 U.S. at 49; Redish & Wasserman, supra note 8, at 268.
202 See U.S. CONST. amend. I; Citizens United, 130 S. Ct. at 898, 907; Buckley, 424 U.S. at 49; Redish & Wasserman, supra note 8, at 264.
advertising. Consequently, a principled ban on political advertising would require modification of current law, perhaps by grafting a U.K.-like political equality interest onto American jurisprudence, in order to provide a basis in American law for a distinction between corporate and individual political advertising. Alternatively, Congress could pass legislation that makes corporate political advertising more difficult or expensive.

Conclusion

A democracy can survive only if its institutions exhibit unswerving devotion to their foundational limiting principles in the face of tempting opportunities for digression. The political advertising realm presents a beguiling challenge: although common sense may suggest that the value of participants’ speech may differ, it is difficult to maintain principled distinctions among speakers and types of speech. In the United Kingdom, courts have displayed their fidelity to the British electoral approach by upholding a blanket ban on political advertising against outside challenges—a policy that furthers the twin goals of equalizing political voice and maintaining the political parties as the center of electoral debate. In the United States, the Supreme Court has recommitted itself to upholding the fundamental protection of the political marketplace of ideas enshrined in both the First Amendment and the general American approach to elections.

Comparing the United Kingdom’s and the United States’ recent reactions to the question of how to make distinctions in the political speech domain illuminates the internal consistency in each country’s respective answer. In the end, any attempt to contest the Citizens United result will have to contend with the fact that, far from representing a dramatic shift in judicial attitudes towards elections, Citizens United is in fact a reaffirmation of basic First Amendment principles long-recognized in Supreme Court jurisprudence.

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203 See Citizens United, 130 S. Ct. at 876, 898, 907, 911; Redish & Wasserman, supra note 8, at 268.

204 See Citizens United, 130 S. Ct. at 898, 907, 911; Ewing, supra note 4, at 520 (stating that the British ban pursues the goal of political equality); Redish & Wasserman, supra note 8, at 268; see, e.g., Pasquale, supra note 124, at 603.

LIFTING THE VEIL: FRANCE’S NEW CRUSADE

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Abstract: France is home to the largest Muslim population in Europe, comprising six percent of the French population, making Islam the second most practiced religion in France. With an influx of Muslim immigrants, France struggles with concerns over its national identity and culture. In 2009, the French government began to consider a ban on the face veil, or burqa, in public. Critics accused France of discrimination and Islamophobia, while officials calling for such a ban defended it on constitutional grounds: secularism and a belief that the burqa represents gender discrimination. On September 14, 2010, the French Senate approved the bill to ban women from wearing the veil in public and with the approval of the Constitutional Council, the law will go into effect in the Spring of 2011. This Note calls on the European Court of Human Rights to depart from its history of deference to Member State governments regarding issues of religious expression; instead, the court should ensure that any decision to restrict religious expression in France through a burqa ban does not violate the European Convention on Human Rights.

[A]s long as women are in shrouds[,] . . . [h]alf the nation is not alive.

—Farzaneh Milani

Introduction

On June 22, 2009, French President Nicolas Sarkozy sparked controversy when he became the first French President in a century to address Parliament, delivering “a US-style state of the union address” to both houses at the Chateau of Versailles, which received mixed reviews from the various political factions in the French Parliament.2 Overturn-

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2 Angelique Chrisafis, Sarkozy to Break Century-Old French Tradition with ‘State of the Union’ Address, GUARDIAN (London) (June 22, 2009), http://www.guardian.co.uk/world/2009/jun/22/nicolas-sarkozy-parliament-address-versailles (noting that Green and Communist Parliament members planned to boycott Sarkozy’s speech and Socialists would attend, but
ing a century of precedent was not the only controversial aspect of this address, as President Sarkozy took the opportunity to express his distaste for the burqa, describing it as unwelcome on French soil and a violation of “the French [R]epublic’s idea of women’s dignity.” President Sarkozy’s remarks arrived on the heels of a call by cross-party members of Parliament, led by Communist André Gérin, to establish a parliamentary commission to investigate an increasing trend of Muslim women in France wearing the burqa. The purpose of this parliamentary commission was to determine whether the burqa was compatible with “French secularism.”

Following a five month study, a parliamentary commission created by the French National Assembly—which included thirty-two members of Parliament from various political parties—issued a report stating that “[t]he wearing of the full veil is a challenge to our [R]epublic. . . . We must condemn this excess.” The commission did not call for legislation to outlaw the burqa in public spaces out of constitutional concerns, but did request that Parliament adopt a resolution calling the burqa “contrary to the values of the Republic.” Rather than a complete ban, the proposal would instead require women to show their faces when entering any public building and while on public transportation; specifically, the proposal would require women to keep their faces uncovered in order to receive the public services.

As a resolution, the recommendations by the commission were not legally binding—Parliament was still required to enact a law, which many anticipated would be focused on a burqa ban in public buildings and on transportation. Nevertheless, on July 13, 2010, the French lower house of Parliament passed a full ban on veils that cover the face in any public location—by a vote of 335 to 1, with most members of the planned to walk out early believing Sarkozy’s move to address Parliament, particularly at Versailles, was a sign of “narcissism”).

In this Note, the use and meaning of the term burqa mirrors that of the French, which references not the traditional burqa found in Afghanistan, but the niqab, a head-to-toe covering that leaves only a slit open for the eyes.


Id.

Id.


Id.

Id.

Socialist and Communist parties abstaining from the vote. On September 14, 2010, the French Senate also passed the full ban on the burqa in public spaces—by a vote of 246 to 1. Proposed restrictions on the veil did not just have widespread political support in Parliament, but were also supported by many mainstream Muslim organizations. In fact, discussion of the proposed ban prompted relatively little controversy inside France leading up to its passage in the Parliament. This is not surprising considering France’s century-long history of laïcité (French for “secularism”) and egalitarian values as a foundation of French society. The proposed ban had received criticism from the “intellectual world,” including the United States. In becoming law, the ban faced one final hurdle—surviving constitutional council approval by the highest judicial authority in France, which was granted on October 7, 2010. The ban, however, is likely to face a challenge in the European Court of Human Rights (ECtHR), the body established “to interpret, articulate, and enforce the norms of the European Human Rights Convention.”

Part I of this Note provides background for the French concept of laïcité and its origins and manifestations in French culture and law, particularly in the modern era as a response to a surge in the Muslim migrant population in France. Part II of this Note lays the legal framework regarding jurisprudence on the freedom of religious manifestation—both inside France as well as under the European Convention on Hu-

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13 Bremner, supra note 7.
14 Id.
16 See Bremner, supra note 7.
19 Steven Erlanger, France: Full-Face Veil Ban Approved, N.Y. Times, Oct. 8, 2010, at A8 (noting that the Constitutional Council ordered the law not to be applied in public places of worship because of the freedom of religion).
man Rights (Convention)—focusing on the promulgation of laws centering on religious or cultural expression, particularly in relation to non-European minorities and the societal functions these laws purport to achieve. This Part also discusses the ECtHR’s jurisprudence under Article 9 of the Convention, determining the legal standard applied when hearing cases on the restriction of religious expression. Part III analyzes the proposed ban on the burqa in the public sphere in France to determine if proposed societal advantages to such a law comport with French and European law, focusing on whether such a ban is appropriate under the French Constitution and the Convention. In addition, this Part evaluates various critiques of the French approach to assimilating the growing migrant population inside its borders and addresses whether the proposed ban furthers French goals of a secular society or whether such laws only serve to exacerbate the problems that such laws attempt to rectify in the first place. This Note concludes with an explanation of how France might better ameliorate concerns over fundamentalist expressions of religion in the Republic, while also calling on the ECtHR to restrict the margin of appreciation given to Member States in restricting religious expression.

I. Background

A. Laïcité as Syntax

Laïcité is a word that, while “difficult to define,” has come to represent a philosophy, or concept, which describes the appropriate relationship that should exist between Church and State in France.21 For the French, it is a concept that has come to represent what it means to be French and is used by “politicians, scholars, and citizens”22 to describe a conceptual foundation of French politics and culture and the modern French politic. It is a word that embodies a concept revered in France23 in a manner similar to the way the word democracy is revered in the United States. In 2003, then-Prime Minister Jean-Pierre Raffarin referred to laïcité as “the syntax, the code by which all religions can live and peacefully enter into a dialogue within our Republican State.”24


22 See id. at 428.

23 See id.

24 Jean-Pierre Raffarin, Prime Minister of Fr., Speech to the Conseil représentatif des institutions juives de France [Representative Council of Jewish Institutions of France] (Jan.
Stressing the importance of *laïcité* to the Republic, Raffarin stated that the “secularism” it represents “cannot be called into question,” and that it “is a freedom.”

Although the modern notion of *laïcité* is seen by some as promoting tolerance, *laïcité* originated in a period of French history that was rife with conflict and hostility towards religion. After the storming of the Bastille during the French Revolution in 1789, the new government seized property of the Catholic Church and shortly after, completely reorganized the structure of the Catholic Church in France, severing ties with the Pope altogether. For several years, the French Republic essentially controlled the Catholic Church in France. Soon after, the revolutionaries turned on Protestants and Jews, beginning a movement to secularize the nation. On February 21, 1795, a new law passed that formally separated Church and State, and it included a prohibition on the wearing of “religious ornaments or clothing’ in public.” This time period was characterized by a “recurring demand that citizens choose between their religion and the state.”

In 1901, France adopted the Law on Associations which, despite including progressive provisions on the freedom of association, also required parliamentary recognition and approval of “religious congregations.” Four years later, the National Assembly adopted the Law on the Separation of Churches and the State (Act of 1905), designed by the Socialist party in a negotiation with the right wing minority of Parliament, which did not vote, but did not disapprove the law. According to legal scholars, this liberal legal framework was built on three overriding

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25 Id.
26 See Gunn, *supra* note 21, at 428, 432–33.
27 See id. at 433–34.
28 See id. at 433–37.
29 See id. at 437.
31 Id. at 438.
33 See id. at 439 n.75, 440–41 (citing Law of Associations of July 1, 1901, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 2, 1901, p. 4025).
principles: “freedom of conscience, separation of State and Churches and the equal respect of all faiths and beliefs.” The law was viewed as a reaction to the growing power of the Catholic Church in public affairs, and represented a far more peaceful response to a perceived threat to the Republic than revolutionary ancestors took a century earlier. Public subsidization of religious institutions ended and the State was to remain neutral toward religious beliefs in the public sphere, making no endorsements of any religious beliefs, and, as “[m]anager of the temporal world . . . [was to] refuse[] to envisage what is beyond this management.”

B. Laïcité in Modern France

In the modern era, laïcité arguably defines the “collective, public identity” of the French people, the cornerstone of a national personality, defining what it means to “be French.” French citizens from all political backgrounds view laïcité as a reflection of “national identity” in the public sphere and the majority seeks to protect this collective French identity from minority differences. Laïcité protects the French citizen from the pressure of any minority group that threatens the secular French identity, particularly when that group is religious in nature. For centuries, this protection focused on reducing the influence of the Catholic Church. Laïcité is now seen as a concept that requires an individual in the “public space” to “abstract her/him self from those traditions” and histories, from his or her roots, as part of a “social contract” moving the collective citizenry “from pluralism to unity through consent.” From this French perspective, the individual joins other individuals to live together in society as opposed to the Anglo-Saxon view of freedom of religion that promotes pluralism and a society as

35 Id.
36 See id.
37 Id. at 2705 (quoting Jean Rivéro, De l'idéologie à la règle de droit: la notion de laïcité dans la jurisprudence administrative, LA LAÏCITÉ 266 (1960)).
39 Id. at 22.
40 Id.; Weil, supra note 34, at 2704–05.
41 See Gunn, supra note 21, at 433–42.
“isolated rights-bearing individuals or . . . as communities defined by religion, race, or ethnicity.”

In France, religion is seen as:

[O]rganized, bounded, orderly, contained in its buildings and defined by worship practices in those buildings. If it strays into the street, selling tracts or proselytizing, it is out of bounds, and even when it is tolerated it is no longer protected by the French constitution and can easily be quashed in the name of protecting public order.

In the last few decades however, laïcité has centered on a fear of Europe “sliding lazily towards a Muslim-dominated ‘Eurabia.’” As France is home to the largest Muslim population in Western Europe—roughly 3.5 million, representing six percent of the population and making Islam the second most practiced faith in France—the influx of Muslim immigrants in the last few decades has brought tension over laïcité into the public discourse and into the halls of Parliament.

In 1989, then-Minister of Education Lionel Jospin requested from the Conseil d’Etat, France’s highest administrative court, a statement on the legal rights of female Muslim students to wear veils in public schools.

The request came as a reaction to what has come to be known as l’affaire du foulard (“the affair of the headscarves”), where three female Muslim students were suspended from a public secondary school for wearing the Muslim hijab, or headscarf.

The Conseil d’Etat concluded:

[The display] by students, in the schools, of signs whereby they believe to be manifesting their adherence to one religion is itself not incompatible with . . . laïcité, since it constitutes the exercise of their liberty of expression and manifestation of their religious beliefs; but this liberty does not permit students to exhibit . . . signs of religious belonging which, by their na-

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43 Id. at 14–15.
44 Id. at 18.
46 Weil, supra note 34, at 2699; France Moves Closer to Ban on Burqas, supra note 20.
ture . . . would constitute an act of pressure, provocation, proselytizing or propaganda.\textsuperscript{49}

Although this ambiguous conclusion left the legal status of the headscarf in public schools up for interpretation, the three girls in question were eventually readmitted by Jospin.\textsuperscript{50} The Conseil’s decision, despite finding a complete ban on the display of religious symbols illegitimate, attempted to balance the constitutional principles of \textit{laïcité} and freedom of conscience.\textsuperscript{51} Although forty-nine legal disputes over headscarves were heard by the Conseil between 1992 and 1994, all but eight ended in favor of the student.\textsuperscript{52} On a few occasions, however the Conseil did rule in favor of the school administrators if they were able to demonstrate that the student “was frequently absent from school, engaged in proselytism, or refused to remove the scarf” during physical education or chemistry class.\textsuperscript{53}

Fourteen years later, on May 27, 2003, the National Assembly created a Committee of Inquiry to investigate the wearing of religious symbols in schools.\textsuperscript{54} On July 3, 2003, then-French President Jacques Chirac established an Independent Commission to investigate a wider issue: how to incorporate principles of \textit{laïcité} within the political and demographic makeup of the French Republic, which had changed dramatically since the Act of 1905.\textsuperscript{55} On December 11, 2003, the Presidential commission recommended twenty-six measures, two of which would require legislation and only one of which was ultimately and easily passed in the Act of March 15, 2004 (Act of 2004) by Parliament—a ban on “the wearing of signs or clothing which conspicuously manifests students’ religious affiliations . . . .”\textsuperscript{56} The ECtHR has not heard a case involving the Act of 2004, although in \textit{Sahin v. Turkey}, the court did rule that a similar ban in Turkey did not violate Article 9 of the Convention, which protects the right of a person to manifest his or her religion.\textsuperscript{57} In fact, the Act of 2004 was drafted only to ban conspicuous manifesta-

\textsuperscript{49} Weil, \textit{supra} note 34, at 2700 (quoting Seyla Benhabib, \textit{Another Cosmopolitanism: Hospitality, Sovereignty, and Democratic Iterations} 54–55 (2006)).
\textsuperscript{50} See Mazza, \textit{supra} note 48, at 314.
\textsuperscript{52} Bowen, \textit{supra} note 42, at 87.
\textsuperscript{53} Id.
\textsuperscript{54} Weil, \textit{supra} note 34, at 2700.
\textsuperscript{55} See id. at 2699.
\textsuperscript{56} Id. at 2699, 2701 (adding that the Act of 2004 became known as “loi sur le voile,” or “the law of the veil”).
tions of religious affiliation because the drafters feared that the ECtHR
would find a law banning all visible signs of religious affiliation as a
move too disproportionate to the goal of preserving *laïcité* and unnec-
essarily restrictive to religious freedom.\(^{58}\) Although the Act of 2004 dis-
parately impacts Muslim students, its prohibition seemed more likely to
survive legal challenges than an all-out ban.\(^{59}\)

The less than equitable origins of *laïcité* is a reason to be skeptical of
its importance in shaping modern French law. Nevertheless, scholars
who believe that *laïcité* is worthy of reverence argue that the concept will
and should influence French society in the modern age.\(^{60}\) Still others
note the invocation of *laïcité* is a useful political tool precisely because it
is an undefined concept invoked in the references to a fictionalized his-
tory over the Republic’s struggle in defining the roles of Church and
State: this is in spite of the fact that there has never been agreement as
to what *laïcité* is or what it requires of the Republic.\(^{61}\) Whether one be-

\(\text{\textsuperscript{58}}\) See Bowen, *supra* note 42, at 139–40.

\(\text{\textsuperscript{59}}\) Id.

\(\text{\textsuperscript{60}}\) See Weil, *supra* note 34, at 2703–04.

\(\text{\textsuperscript{61}}\) See Bowen, *supra* note 42, at 32–33.

\(\text{\textsuperscript{62}}\) 1958 Const. art. 1 (Fr.), *available at* http://www.assemblee-nationale.fr/english/8ab.asp.

lieves that *laïcité* should influence modern law and, if so, to what degree,
shapes one’s view regarding the Act of 2004, as well as the burqa ban.
Without understanding the historical context in which this concept has
developed, it is impossible to understand the motivations behind the
burqa ban in 2010.

II. DISCUSSION

A. French Constitutional Structure

Article I of the French Constitution of 1958 begins as follows:
“France shall be an indivisible, secular, democratic and social Republic.
It shall ensure the equality of all citizens before the law, without distinc-
tion of origin, race or religion. It shall respect all beliefs.”\(^{62}\) Although
the Constitution of 1958 replaced the Constitution of 1946, in 1971, the
Constitutional Council (Council)—a body created by the Constitution
of 1958 as the ultimate constitutional authority in France (much like
the Supreme Court of the United States)—determined that the Pre-
amble of the Constitution of 1946 was incorporated into the new Con-
stitutional Structure
stitution and had the full force of law. This was an important decision because the Preamble of the Constitution of 1946 proclaimed that the law guarantees women equal rights to those of men in all spheres.

Prior to July 23, 2008, the Council’s power of review was limited by Article 61 of the Constitution of 1958 to “a mandatory constitutional review of institutional acts and rules of procedure of parliamentary assemblies and an optional constitutional review of ordinary statutes.” After this date, Article 61 was revised (now Article 61–1) to allow appeal to the Council from the Conseil d’Etat or from the Cour de Cassation by a party who claims an infringement of rights and freedoms guaranteed by the Constitution. Statutes and Institutional Acts are necessary to implement Article 61–1 and this process is currently ongoing. This represents an important change, because prior to the 2008 revision, only the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate or sixty deputies or sixty senators could refer an ordinary statute to the Council for review.

From a Constitutional perspective, this means that ordinary laws or statutes passed by the French Parliament are not automatically reviewable by the Council, and prior to 2008, the only parties with the power to request such a review were high-ranking members of the French government, as opposed to citizens of the Republic. The Act of 2004 implementing the headscarf ban in public schools was not referred to the Council to determine its constitutionality because no government officials with access to this body acted to trigger such review—not surprising considering the overwhelming support the legislation received in Parliament. What is even more striking is that without having been reviewed by the Council, the law is deemed constitutional, effectively leaving the interpretation of constitutionality to those who themselves pre-

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63 Id. arts 56–63; Conseil constitutionnel [CC] [Constitutional Court] decision No. 71–44DC, July 16, 1971, J.O. 7114 (Fr.).
68 See Custos, supra note 65, at 377–78, 377 n.223.
69 See id. at 377 n.223.
70 See id. at 377.
sented and promulgated the law.\(^{71}\) Whether an \textit{a posteriori} review of the Act of 2004 by the Council under Article 61–1 will occur is as yet unknown.\(^{72}\) With the implementation of Article 61–1, the constitutional viability of future laws relating to \textit{laïcité} could potentially reach the Council for review.\(^{73}\)

The Council has, on one occasion, reviewed the principle of \textit{laïcité} in France.\(^{74}\) In November 2004, the Council was asked to determine whether ratification of the Treaty establishing a Constitution for Europe would require France to amend the Constitution of 1958.\(^{75}\) In that decision, the Council determined that Article I of the Constitution of 1958, which declared France to be “a secular republic” was compatible with the Constitution of Europe.\(^{76}\) The Council determined that because Article II-70 of the Constitution of Europe—recognizing an individual right to manifest religion in public—mirrored a similar right guaranteed by Article 9 of the Convention, it was subject to the same limitations as those recognized by the ECtHR in order to reconcile the principle of religious freedom with that of secularism.\(^{77}\) Such limitations involve concerns over “public safety, the protection of public order, health or morals and the protection of the rights and freedoms of others . . . .”\(^{78}\) Although the Council has yet to hear a citizen-based challenge relying on the freedom to manifest one’s religious beliefs, it has declared limitations on such freedoms constitutionally acceptable to maintain \textit{laïcité}.\(^{79}\)

On October 7, 2010, the Council approved the burqa ban (known as the law banning the concealment of the face in public) after the President of the National Assembly and the President of the Senate referred the law to the Council.\(^{80}\) The law itself makes no mention of the

\(^{71}\) See \textit{id.} at 377–78.

\(^{72}\) See CC decision No. 2009–595DC at 21381 (providing analysis by Constitutional Council regarding constitutionality of Institutional Act pertaining to application of art. 61–1).

\(^{73}\) See \textit{id.}


\(^{75}\) See Custos, \textit{supra} note 65, at 378.

\(^{76}\) See CC decision no. 2004–505DC at 19885; Custos, \textit{supra} note 65, at 378 n.226 (noting that Article I “forbids anyone from freeing oneself from the common rules governing the relationships between public authorities and individuals”).

\(^{77}\) See CC decision no. 2004–505DC at 19885.

\(^{78}\) Id.

\(^{79}\) See \textit{id.}

burqa or the Muslim faith specifically, but imposes a fine and potential imprisonment on any person who, in public, conceals their face or forces another to conceal their face.\textsuperscript{81} The Council noted the intent of Parliament—concealment of the face is “dangerous for public safety and security and fail[s] to comply with the minimum requirements of life in society” and “women who conceal their face, voluntarily or otherwise, are placed in a situation of exclusion and inferiority incompatible with constitutional principles of liberty and equality”—and found that because the penalty for non-compliance was low, the law represented a proportional balance between “safeguarding public order and guaranteeing constitutionally protected rights.”\textsuperscript{82} The Council continued on to make clear that so long as the law does not prohibit the concealment of the face in public places of worship, it does not violate the French Constitution.\textsuperscript{83}

\textbf{B. Conseil d’Etat Standard of Review}

Although jurisprudence regarding the interplay between the freedom of religion and \textit{laïcité} under the Constitutional Council is limited, and the Council’s decision with regard to the burqa ban is highly deferential to Parliament’s own balancing of the competing interests at play, the Conseil d’Etat provides more insight into how restrictions on religious expression have been treated under French law.\textsuperscript{84} When questions of religious expression came before the Conseil d’Etat after the 1989 suspension of three Muslim girls for wearing headscarves in a public classroom, the Conseil spoke to the compatibility of the headscarf with the concept of \textit{laïcité}.\textsuperscript{85} The Conseil announced that freedom of conscience is a “fundamental principle[]” of the Republic and operates inside the “domain of education.”\textsuperscript{86} As such, students were permitted to wear religious symbols provided that such symbols were not so ostentatious as to intimidate, provoke, or proselytize, thereby threatening “the dignity and freedom of students or other members of the edu-

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\textsuperscript{82} CC decision no. 2010-613DC at 18345.  
\textsuperscript{83} Id.  
\textsuperscript{84} See Choudhury, \textit{supra} note 15, at 226–31; see also Custos, \textit{supra} note 65, at 377–78 (discussing the limited jurisprudence of the Council in this area).  
\textsuperscript{85} Choudhury, \textit{supra} note 15, at 226.  
\textsuperscript{86} Id. (quoting the Conseil d’Etat).
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cational community.” Displays of religious expression could not result in the following: “offend the dignity or freedom” of others; “threaten health or safety; disturb school activities; or jeopardize the pedagogic role of teachers,” school order, or the functioning of the education system. The right to religious expression exists, but is not absolute and the Conseil employed a balancing test to resolve the initial debate.

The Conseil d’Etat’s response is particularly interesting because it acknowledged that its understanding of laïcité not only originated from constitutional and legislative texts, but also from international engagements to which France was a party, citing twenty-three such engagements including the Convention. Recognizing that there must be a balance between a student’s individual right to manifest a religious belief and the need to secure the principle of laïcité for all students, the Conseil ultimately took a “soft” approach—deferring to the schools to determine the policies necessary to secure a balance of rights. Then-Minister of Education Jospin, in a ministerial circular, allowed the local schools to determine whether to allow headscarves on a case-by-case basis.

Five years later, on September 20, 1994, Jospin’s replacement, François Bayrou, declared that “ostentatious” signs of religious affiliation were banned in all schools, thereby revoking the authority of local educational officials to make such determinations. Shortly after, sixty-nine girls were expelled for wearing the veil. Upon challenge of the decree, the Conseil reaffirmed its ruling of 1989 that the headscarf was not per se incompatible with laïcité, reasserting the discretion of local educational authorities to make such determinations. The Conseil declared that Bayrou’s decree was not binding on educators. For the next five years, the Conseil ruled in favor of students seeking to wear the headscarf in almost every case it heard on this issue. In these cases, the Conseil implicating the right of a student’s religious expression, which “warranted deference unless the specific exceptions outlined in

87 Id. at 226–27.
88 Mancini, supra note 51, at 2644.
90 Id. at 228.
91 See Mancini, supra note 51, at 2644; Mazza, supra note 48, at 315.
93 Id. at 27; Mancini, supra note 51, at 2645.
94 Scott, supra note 92, at 27.
95 Id. at 28.
96 Id.
97 Choudhury, supra note 15, at 229.
the 1989 decision applied."\textsuperscript{98} This approach by the Conseil has been referred to as the “contextual approach,” requiring a case-by-case analysis of the facts to determine if a student’s right of religious expression unduly burdens other students’ rights to a public education free of religious proselytizing—as guaranteed by laïcité.\textsuperscript{99}

Public schools are not the only arena in which the Conseil has balanced religious expression through veiling with another constitutionally guaranteed right—that of gender equality.\textsuperscript{100} In the case of Mme M, a Moroccan woman who married a French national applied for French nationality in 2004.\textsuperscript{101} Her application was opposed by the French government on the grounds that she had failed to sufficiently assimilate in accordance with French law and “preserved very strong ties with [her] culture of origin.”\textsuperscript{102} As such, her conduct was “incompatible” with the French value of gender equality.\textsuperscript{103} In its decision, the Conseil concluded that Mme M had adopted a “radical practice of her religion” and, basing its decision on the government’s findings, ruled that the denial of French nationality was a legitimate reaction by the French government.\textsuperscript{104} Although the Conseil’s decision was not solely based on Mme M’s choice to veil—and such a choice would not alone amount to insufficient assimilation per se—her admitted choice to veil out of obedience to her husband and not as a personal expression of her faith contributed to the finding that veiling in this circumstance was incompatible with the French value of gender equality.\textsuperscript{105} Mme M also admitted to leaving her home very rarely and always veiling when she did, which led the government to find that she lived in “total submission” to male members of her family.\textsuperscript{106}

The fact that the Conseil relied so heavily on the government’s findings in its decision emphasizes the high level of deference given to Parliament in determining the outcome of a balancing test between a right to manifest one’s religious beliefs (through veiling) with another

\textsuperscript{98} Id.
\textsuperscript{100} See Anastasia Vakulenko, Gender Equality as an Essential French Value: The Case of Mme M, 9 HUM. RTS. L. REV. 143, 144 (2009).
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 145.
\textsuperscript{105} Id. at 145–46.
\textsuperscript{106} Vakulenko, supra note 100, at 146, 148.
inherent constitutional value, such as gender equality.\textsuperscript{107} With that historical deference to Parliament in mind, the Council’s decision to uphold the ban on veiling is less surprising.

C. International Law and the Margin of Appreciation

To date, the ECtHR has not heard a challenge to the Act of 2004.\textsuperscript{108} Three ECtHR decisions, however, illuminate the legal standards in religious expression jurisprudence under Article 9 of the Convention: \textit{Dahlab v. Switzerland}, \textit{Sahin v. Turkey}, and \textit{Dogru v. France}.

1. \textit{Dahlab v. Switzerland}: Enunciating a Standard

The ECtHR heard \textit{Dahlab v. Switzerland} in 2001, which involved a Swiss schoolteacher who, after converting to Islam, began to wear the headscarf.\textsuperscript{109} Four years after her conversion, she was told by the director of her school that it interfered with the religious neutrality of a public education.\textsuperscript{110} Although the ECtHR ultimately dismissed her claim as inadmissible under Article 9 of the Convention, the court did explain its rejection of her claim, enunciating a standard that would evolve in later cases.\textsuperscript{111}

The court rejected claims by Dahlab that the restriction had been imposed because she was a woman, finding that the ban pursued the “legitimate aim” of ensuring religious neutrality in the Swiss primary education system, citing other restrictions that had been placed in Swiss schools for similar purposes, such as the removal of crucifixes from the classrooms.\textsuperscript{112} The court reasoned that preserving secularism in the classroom was a legitimate aim and the headscarf represented a powerful external symbol that could negatively impact the freedom of conscience and religion of young children.\textsuperscript{113} To further support the “legitimate aim” standard, the court noted that the headscarf was difficult to reconcile with the right to gender equality and that a ban on the gar-

\textsuperscript{107} See \textit{id.} at 145–47.
\textsuperscript{108} Choudhury, \textit{supra} note 15, at 265.
\textsuperscript{109} See Dahlab v. Switzerland, App. No. 42393/98 (Eur. Ct. H.R. Feb. 15, 2001), www.echr.coe.int/echr/en/hudoc/ (follow “HUDOC database” hyperlink; then check “Decision” box on left side; then type “42393” in “Application Number Field”; then click “Search” hyperlink; then click hyperlink to only result).
\textsuperscript{110} \textit{Id.}; Choudhury, \textit{supra} note 15, at 270–71.
\textsuperscript{111} See Choudhury, \textit{supra} note 15, at 270–73.
\textsuperscript{112} Dahlab, App. No. 42393/98.
ment would ensure the protection of such equality. The court would later develop the “legitimate aim” analysis into one prong of a four-part test when evaluating claims under Article 9.

2. Sahin v. Turkey: Applying the Standard

In 1998, Istanbul University implemented a ban on female students wearing headscarves and male students with beards from attending the university. Shortly after, Leyla Sahin, a medical student, was not allowed to take an exam because she wore a headscarf and was ultimately “barred from enrollment and attendance for refusing to remove the headscarf.” Sahin subsequently brought a complaint to the ECtHR, arguing that the ban violated Article 9 of the Convention, among other provisions. A seven-judge chamber of the court—and upon petition for a rehearing, the Grand Chamber—upheld the ban on the headscarf in Turkish public universities, while also holding that the ban “was a justified restriction of Sahin’s Article 9 rights.” Article 9, however, stipulates circumstances under which this right can be restricted. This “clawback” provision states that restrictions will be deemed legitimate if they are: “prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.” Sahin was the first case the ECtHR decided dealing with a state-instituted ban on the headscarf as worn by a student.

In its analysis of the Sahin case, the ECtHR focused on two grounds to justify its decision to uphold the Turkish ban: the threat to secularism as a constitutionally guaranteed right and the promotion of gender inequality by allowing the headscarf. The ECtHR applied a four-part inquiry in determining if Sahin’s Article 9 claims had merit, requiring a showing of the following: (1) that there was a demonstrated interference with a protected freedom; (2) that limitation of such freedom is prescribed by law; (3) that limitation of such freedom pursues a legiti-

115 Id. at 267, 272–73.
116 Id. at 276.
117 Id.
118 Id. at 276–77.
119 Id. at 277.
121 Id.
122 See Choudhury, supra note 15, at 265.
123 Id.
mate aim (as in the *Dahlab* analysis); and (4) that limitation of such freedom is necessary in a democratic society.\[^{124}\]

Regarding the first inquiry, the ECtHR found that the Turkish ban on the headscarf in public universities interfered with Sahin’s “right to manifest her religion,” regarding her decision to wear the headscarf as “motivated or inspired by a religion or belief.”\[^{125}\] The court was not willing to dive further into the question of whether it was in fact a duty mandated by her religion—the court found that the mere influence of her beliefs on her decision to wear the headscarf were sufficient to find an interference.\[^{126}\] On the second inquiry, the ECtHR determined that the limitation of her freedom to manifest her religious beliefs was prescribed by law.\[^{127}\] Specifically, the court found that the measure had a “basis in domestic law” and was accessible, such that it was “foreseeable” to Sahin that a refusal to comply would result in her being in violation of that restriction.\[^{128}\] The court introduced a point it recalled in later cases, such as *Dogru v. France*,\[^{129}\] regarding the view that “prescribed by law” does not require a formal law, but focuses on the substantive nature of the law, which would include judge-made (if applicable) and statutory law.\[^{130}\]

The ECtHR’s analysis regarding the third inquiry—requiring that state limitation on the freedom of religion be made in pursuit of a legitimate aim, as set forth in Article 9—mirrors the analysis it conducted in the *Dahlab* case.\[^{131}\] As in *Dahlab*, the court found that the restriction on the ability to wear a headscarf served to protect the rights and freedoms of others and to protect the public order in universities, findings that were not disputed by the parties.\[^{132}\]

Finally, the court addressed the fourth inquiry under the Article 9 analysis: whether the regulation in question was “necessary in a democratic society.”\[^{133}\] The court found the following:

> [F]reedom of thought, conscience and religion is one of the foundations of a “democratic society” . . . one of the most vital

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\[^{124}\] *Id.* at 267.


\[^{126}\] *Id.*

\[^{127}\] *Id.* at 126–28.

\[^{128}\] *Id.*


\[^{131}\] *Id.* at 128; Choudhury, *supra* note 15, at 270–71 (discussing the legitimate aim analysis in *Dahlab*).


\[^{133}\] *Id.* at 124–25.
elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, \textit{inter alia}, freedom to hold or not to hold religious beliefs and to practise or not practise a religion.\footnote{Id.}

The court found that the ability to secure to everyone the rights protected by the Convention for everyone requires some ability of the State to restrict a person’s outward manifestation of his or her religious beliefs, to ensure mutual tolerance between opposing groups.\footnote{Id. at 131.} The court reasoned that individual interest in this right must be subordinated at times, although such subordination comes with a duty by the state to ensure fair and proper treatment.\footnote{See id.} Because differing religious demographics within individual nations will require a contextual approach to ensure the preservation of such tolerance, the court held that a certain “margin of appreciation” would be granted to an individual state to determine the existence and extent of such a necessity for a regulation, as well as the proportionality of the limitation.\footnote{See id. at 131–32, 134; see also Choudhury, \textit{supra} note 15, at 273–74 (discussing “legal pluralism within Europe,” as well as acknowledging national courts as competent to interpret religious symbols within “their specific contexts”).}

Given that the sanctions imposed were “mild and ultimately revoked,”\footnote{Jilan Kamal, \textit{Justified Interference with Religious Freedom: The European Court of Human Rights and the Need for Mediating Doctrine Under Article 9(2)}, 46 \textit{Colum. J. Transnat’l L.} 667, 692 (2008).} the university in question sought to ameliorate the situation in a manner that allows access to the universities for students wishing to wear the veil.\footnote{Sahin, App. No. 44774/98, 41 Eur. H.R. Rep. at 134.} The court acknowledged that national courts retained greater competency to interpret various manifestations of religious beliefs within specific contexts and that on matters concerning the relationship between the State and religions—where opinions vary widely—the ECtHR will give great deference to the national decision-making body.\footnote{See Choudhury, \textit{supra} note 15, at 273–74.}
3. **Dogru v. France: Refining the Balancing Test**

Dogru is another example of the ECtHR applying the balancing test formulated in the Sahin case. Although Sahin involved a state-implemented ban on wearing a veil, the ECtHR has since used similar reasoning to uphold a restriction on the headscarf using a more contextual approach. In Dogru, decided in 2009, the ECtHR decided a case involving a French student who, in 1999, was expelled from school for failing to remove her headscarf during physical education classes. The student claimed her expulsion was an infringement of her right to manifest her religion as guaranteed by Article 9 of the Convention. The court began its analysis by stating that the ban on wearing the headscarf during a physical education class and Dogru’s subsequent expulsion for refusing to remove it represented a restriction on her right to manifest her religious beliefs.

In determining that the restriction in question was “prescribed by law,” the court noted that the events serving as the basis for Dogru’s claim occurred prior to the enactment of the Act of 2004. The court held that, although banning headscarves in physical education classes was not mandated by any particular law, the measures were justified based on three factors that existed in statutory and regulatory provisions, as well as in decisions of the Conseil d’Etat: “the duty to attend classes regularly, the requirements of safety and the necessity of dressing appropriately for sports practice.” Finding that “law” equates to substance, not formality, the court found the restriction had “a sufficient legal basis in domestic law.” The next requirement the court focused on was that the restriction had a “legitimate aim.” The court rather succinctly—in one sentence—found that the interference “pursued the legitimate aims of protecting the rights and freedom of others and protecting public order,” thereby satisfying that requirement. In fact, to date, the ECtHR has not considered a single case under Article 9 where the decision was based on a finding that the State in question had failed to pursue a “legitimate aim.”

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142 *Id.* at 190.
143 *Id.* at 193.
144 *Id.* at 194.
145 *Id.*
146 *Id.* at 196.
148 *Id.*
Finally, the court turned its attention to the requirement that an infringement be “necessary in a democratic society.” The court, recognizing that freedom of religion has an external component—the “freedom to manifest one’s religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares”—recognized that it may be necessary to place restrictions on this freedom in a pluralistic society. The court listed numerous and varied ways different states in Europe balance freedom and restriction, finding that legitimate limitations on the freedom of religion are sometimes required to protect “the rights . . . of others, public order and public safety.” As such, a headscarf ban imposed during physical education classes was reasonable because it was necessary to comply with school rules on health and safety. The court recognized that a “margin of appreciation” must be afforded Member States in regards to establishing “delicate relations between the Churches and the State.” This “margin of appreciation” analysis has also been used by the ECtHR in jurisprudence dealing with alleged Article 10 violations (freedom of expression), most notably in areas dealing with obscenity and blasphemy. Ultimately, the ECtHR found that the interference—a requirement to remove the headscarf or face expulsion—was proportionate to the pursued aim of ensuring health and safety during physical education classes, summarily finding no violation of Article 9 of the Convention.

III. Analysis

For Sarkozy and Parliament, an outright burqa ban in France represented an unworkable option in 2008. In an attempt to find middle ground, Sarkozy argued for Parliament to vote on a non-binding resolution that would affirm that the full face-covering burqa violates the French Republic’s fundamental principles of secularism and gender

151 Id. at 196–97.
152 Id. at 197, 198.
153 Id. at 199.
154 Ovey & White, supra note 113, at 332–33 (discussing how a margin of appreciation is given to States dealing with the regulation of freedom of expression under Article 10 in matters involving offense to personal convictions, or religious matters).
The newfound call for a full burqa ban is thought to have reemerged in light of the defeat of Sarkozy’s Union for a Popular Movement (UMP) against the Front National party in regional elections in March 2010. Even Sarkozy, in light of his party’s recent defeats, pushed for a stronger burqa ban in an effort to seem more conservative regarding immigration. During a debate on the text of the burqa ban, Jean-François Cope, head of the ruling UMP party in Parliament, agreed to send the proposed ban to the Constitutional Council for approval, indicating a compromise over the ban. As the Council has upheld the burqa ban based on the reasons discussed above, the responsibility for further review lies with the ECtHR.

To understand how the ECtHR may react to a challenge of the burqa ban, a prediction of the legal arguments by the French government in support of the law is necessary. Two overarching constitutional principles have been invoked by the French government when it has attempted to pass restrictions on religious expression relating to dress: protection of secularism in France and the protection of gender equality. Whether a judicial body hearing a claim involving a restriction on an individual’s right to religious expression will adequately protect that individual’s rights will depend on the severity of the restrictions passed in Parliament. Although the jurisprudence in this area lends itself to the conclusion that a ban would be upheld, this Note makes two requests to the judicial bodies eligible to hear challenges to the ban: first, to require the French government to show greater justification for such a ban; and second, to provide less deference to the decisions of the French Parliament in the absence of greater justification compared to the deference shown to other similar restrictions in the past.

A. Constitutional Failure of the French Legal System

When first comparing French and U.S. constitutional protections, particularly regarding the freedoms of religion and expression, the two systems seem similar, having established the “world’s two oldest, extant

158 Id.
160 See id.
161 See Le Roux, supra note 18.
162 See, e.g., Mancini, supra note 51, at 2644; Bremner, supra note 7; Chrisafis, supra note 2; Heneghan, supra note 10 (demonstrating that when restrictions on dress as a manifestation of religious belief are argued for (or against), the two principles of secularism and gender equality are at the root of those arguments).
national constitutional texts guaranteeing freedom of religion” at roughly the same time. From there, however, the approach to constitutional issues diverges tremendously, with the United States vesting constitutional authority in the judicial branch, and France vesting authority in its legislature. In the United States, Supreme Court Justices interpret the Constitution, whereas in France judges presume the constitutionality of acts of Parliament. Admittedly, legislative changes in France are seeking to give greater constitutional oversight to a body other than Parliament. Nevertheless, the long history of presumptive correctness of Parliamentary decisions plays a role in how proposed restrictions on religious dress in public play out.

The hesitation over whether to enact a complete burqa ban in public or to limit the ban to state premises stemmed from concerns of political backlash, rather than constitutional concerns. Nevertheless, it seems apparent that even those political leaders who see the burqa as anathema to French values, such as Sarkozy, feared that a complete ban would not pass constitutional muster. The possibility that a law invoking constitutional principles such as secularism or gender equality would be challenged by an adversely impacted French citizen, and likely reach the Constitutional Council, contributed to these concerns. These concerns explain the response by UMP leader Cope to submit the law for approval by the Constitutional Council before it would go into effect: submitting the law for approval would prevent the law from being overturned later by a burqa-clad woman challenging such a law, and were she successful, exposing the party as weak, or inept.

Until reviewing the ban on the veil in public, the Council had never reviewed a case concerning whether a statute passed by Parliament

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164 See generally Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing that judicial review is vested in the Supreme Court to hear constitutional issues).
165 See, e.g., Gunn, supra note 163, at 974 (noting that acts of Parliament are assumed to be constitutional).
166 See id.
167 See Custos, supra note 65, at 377–78.
168 See Bremner, supra note 157. The lack of concern over constitutional challenges to the ban is not particularly surprising when one considers that Parliamentary statutes have traditionally been given constitutional validity by their mere passage. See Gunn, supra note 163, at 974.
169 See Bremner, supra note 157.
170 See id.; Custos, supra note 65, at 377–78.
171 See Le Roux, supra note 18.
violated the secularism requirement of the French Constitution.\textsuperscript{172} Although leading up to the decision there was vast speculation as to how the Council might approach a challenge to a restriction on a woman’s right to veil as a manifestation of her religious beliefs, the actual decision holding the ban constitutional ultimately followed the reasoning in prior jurisprudence by the Conseil d’Etat and the ECtHR: as a balancing act between the right to manifest one’s religious beliefs with the right to gender equality or secularism.\textsuperscript{173}

The invocation of constitutional principles by Sarkozy and members of Parliament as a basis for the promulgation of the burqa ban\textsuperscript{174} makes it unlikely that the concerns over the burqa will be left to local authorities to manage. As such, the Council had an opportunity—and arguably an obligation—to require the government to defend this restriction with powerful and well-reasoned explanations as to how the law preserves the constitutional principles invoked, rather than presuming the constitutionality of the law based on its passage in Parliament.\textsuperscript{175} Simply invoking secularism or gender equality without a determination that the law is necessary to preserve those principles—or that such principles are at all threatened by the burqa—is inadequate.\textsuperscript{176}

As in the Conseil d’Etat’s advisory opinion on headscarves in public schools prior to the promulgation of the Act of 2004, the Council should have required evidence that the burqa’s presence in public violates the principles of secularism through some proselytizing effect on others, thus endangering secularism.\textsuperscript{177} It was insufficient to apply the same reasoning presented by the government in the debate over proposed headscarf restrictions, as the proselytizing effect of headscarves in secondary schools invoked the malleability of young students’ be-

\textsuperscript{172} See Gunn, supra note 163, at 969 n.117 (noting that the Council did speak to secularism in its finding that the European Constitution was not incompatible with the secularism requirements in the French Constitution, as previously discussed).

\textsuperscript{173} Frances Raday, Secular Constitutionalism Vindicated, 30 Cardozo L. Rev. 2769, 2792 (2009). Raday discusses restriction on dress in the context of dress representing the expression of one’s religious views. Id. at 2790–95.

\textsuperscript{174} See Bremner, supra note 7; Chrisafis, supra note 2.

\textsuperscript{175} See Gunn, supra note 163, at 974; see also Lucas Swaine, The Liberal Conscience: Politics and Principle in a World of Religious Pluralism 18–19 (2006) (arguing that it is morally problematic for liberal governments to institute laws and policies, particularly in the context of legal restrictions on polygamy, without well-reasoned explanations to justify the regulations of theocrats).

\textsuperscript{176} See generally Swaine, supra note 175, at 17–20 (discussing the fact that liberal governments owe an explanation for “coercing theocrats where they break the law” and should justify such laws with “explanations . . . that are powerful and well reasoned”).

\textsuperscript{177} See Choudhury, supra note 15, at 290.
—a factor that seems far less plausible when applied to adult women who are in public and who may have little interaction with other citizens.

Likewise, to show that the restriction of religious dress is proportional to the harm alleged to gender equality, the Council should have required evidence by the government supporting a claim that the burqa contradicts the constitutional principle of gender equality. Had Parliament limited the ban to state premises—rather than a complete ban—it would have opened the government to criticism that gender equality could not warrant such a restriction, as a partial ban would fail to protect gender equality under the assumption that the burqa threatens this constitutional principle. Logically, however, if the burqa truly violates the constitutional principle of gender equality, then the government has a positive obligation to ban the burqa entirely. Applying this logic, limiting the ban to public spaces undermines this constitutional argument: certainly, if the burqa is a threat to gender equality in public, it is a threat to such equality in private as well. One might envision the need for such a law for various logistical reasons—such as for ease of providing identification or out of security concerns—but lawmakers who denounce the burqa on constitutional principles should have been required by the Council to defend the ban on those principles as well. Without such a defense, a moral dilemma arises wherever the government violates an individual’s right to manifest her religious beliefs—excessively burdening her and making religious observation difficult, or impossible—without adequate justification for doing so.

B. Less Appreciation for the Margin of Appreciation

In reviewing Article 9 claims, particularly those involving the manifestation or expression of religious beliefs, the ECtHR had not heard a

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178 See id. at 229–30; see also Dahlab v. Switzerland, App. No. 42393/98 (Eur. Ct. H.R. Feb. 15, 2001), www.echr.coe.int/echr/en/hudoc/ (follow “HUDOC database” hyperlink; then check “Decision” box on left side; then type “42393” in “Application Number Field”; then click “Search” hyperlink; then click hyperlink to only result) (discussing the impact the presence of the headscarf in public schools would have on students).

179 See, e.g., Dogru v. France, App. No. 27058/05, 49 Eur. H.R. Rep. 179, 194–96 (2009) (finding that a showing that a particular restriction of religious dress is proportionate to a legitimate aim by the state is a justifiable restriction under art. 9(2)).


181 Id.

182 See id.

183 See Swaine, supra note 175, at 16.
case under Article 9(2) until 1993. Nevertheless, the jurisprudence in this area has grown alongside the growth of the Muslim population in Europe. Among the cases heard under Article 9(2), almost all decisions of the ECtHR “have hinged . . . [on the] necessary in a democratic society” requirement developed in the legal standard discussed above. The “necessary in a democratic society” inquiry is not just used for freedom of religion claims, but also in Articles 8, 10 and 11 of the Convention protecting privacy, expression and assembly. Establishing that an implemented restriction is necessary in a democratic society requires a showing that the action taken is in response to a pressing social need and that the interference “is no greater than necessary to address that pressing social need.” As discussed above, however, the ECtHR has found that States enjoy a certain—although not unlimited—margin of appreciation when imposing restrictions on protected freedoms under the Convention. It is in applying this “margin of appreciation” doctrine, particularly in dealing with Article 9(2) challenges, where the ECtHR has failed to adequately delineate a standard by which domestic governments can legitimately exercise a restriction on an individual’s right to express his or her religious beliefs.

Although caselaw before the ECtHR relating to Article 9(2) challenges is fairly limited, a trend has emerged in the factual background of the cases that fall into three categories: (1) government recognition of religious organizations or leadership within those organizations; (2) proselytism; and (3) ostensible religious dress or symbols in schools. To date, the ECtHR has only heard cases involving restrictions on religious dress in the context of public schools, as discussed in the Dahlab, Sahin, and Dogru cases. Ultimately, those decisions have rested on

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184 See Kamal, supra note 138, at 672.

185 See id.

186 Id. at 681.

187 European Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 120, arts. 8–11; Ovey & White, supra note 113, at 232 (discussing application of this inquiry into restrictions on the freedoms protected in Articles 8 through 11 generally).

188 Ovey & White, supra note 113, at 232.

189 See id. at 232–39 (discussing the “margin of appreciation” standard).

190 See generally Kamal, supra note 138, 693–95 (arguing that the ECtHR has interpreted and applied the “margin of appreciation” standard inconsistently).

191 See id. at 684–92. Kamal identifies four categories, dividing recognition of religious leadership and religious organizations into two distinct categories. This Note does not discuss those cases and because the ECtHR treats those streams of cases the same under the “margin of appreciation” standard, they are grouped together here.

192 See discussion supra Part II.C.
what is described in the *Dogru* case as a “margin of appreciation which
must be left to the Member States with regard to the establishment of
the delicate relations between the churches and the state . . . .”193 The
court has failed to consider whether a pressing social need was actually
addressed in these cases and whether the restrictions imposed were the
least restrictive means to addressing that social need.194 Instead, the
ECtHR simply chose to take the government’s word on the matter as
sufficient.195

The court has failed to examine the facts in the restrictions in play
to determine whether the state action taken addresses a pressing social
need and, if so, was the least restrictive alternative to address that
need.196 Nevertheless, the court has conducted more detailed factual
analyses in other cases involving state recognition of religious organiza-
tions or leadership, as well as in cases involving proselytizing con-
cerns.197 In these cases, the court has not applied a margin of apprecia-
tion, and has always found state-imposed restrictions in violation of
Article 9(2).198 Scholars have found the court’s jurisprudence in this
area inconsistent and often confusing, particularly in its apparent selec-
tivity in whether to apply the “pressing social need” standard for de-
termining if a restriction is “necessary in a democratic society.”199

With Parliament moving forward with a full ban on the burqa in
public spaces, the ECtHR has a unique opportunity to synthesize some
of the important issues underlying such a ban by choosing to abandon
its margin of appreciation standard and focus on the “pressing social
need” standard.200 In applying this rationale, the court would place the
burden on France to show that there is a pressing social need that calls
for a burqa ban—whether on state premises or entirely in the public
sphere—requiring France to defend the position that the burqa is anathema
to both secularism and gender equality, and to demonstrate that
a ban is the most appropriate restriction available to address such con-

194 See id. at 200.
195 See, e.g., id. (finding that “whether the pupil expressed a willingness to compromise,
as she maintains, or whether . . . she overstepped the limits of the right to express and
manifest her religious beliefs on the school premises, as the Government maintains . . .
falls squarely within the margin of appreciation of the state”).
197 See id.
198 Id.
199 Id. at 696, 699; see also Rorive, *supra* note 180, at 2676 (arguing that the use of the
margin of appreciation standard “has made it difficult to develop a coherent model of
State-religions relations”).
200 See Kamal, *supra* note 138, at 705–06.
cerns. By abandoning a “margin of appreciation” default in analyzing the issue of religious dress, the court can determine whether the restriction of this particular manifestation of religion is appropriate, rather than taking France’s word as truth.

The Sahin case shows that—although the court acknowledged that a pressing social need existed in Turkey to prevent extremist political movements from taking hold inside public universities, a threat to both the principles of secularism and gender equality—the court did not question whether the headscarf ban in this particular case was a proportional action to address those concerns. The court chose not to look at the specific facts behind Leyla Sahin’s circumstances, and instead allowed Turkey to impose such a restriction in defense of secularism and gender equality with no analysis showing that the restrictions meet those ends. Criticism of this decision and the court’s use of the margin of appreciation focuses on the court’s unwillingness to consider alternative meanings surrounding the headscarf, as well as pointing out the inconsistency inherent in a State argument that the headscarf offends gender equality, but recognizes no positive obligation to prohibit it completely.

Should the ECtHR choose to review a ban on the burqa in the same manner as it did in Sahin, it may inadvertently promote the populist imagery on the meaning of the burqa. This popular imagery is deeply entrenched in the political debate, both in France and across Europe, as evidenced by the fact that nearly all cases involving restrictions on religious dress are aimed at Muslim men or women. The ECtHR, in reviewing the French law, should focus great attention on the political climate driving the decision-making behind Parliament. This would help the court determine if the call for a ban is truly driven by a threat to laïcité and gender equality, or is simply a move to gain the political support of French citizens seeking stronger immigration restrictions. Restrictions on religious dress in public schools—such as the headscarf ban in France—are legitimate state actions taken to secure laïcité and gender equality, as schools are tools by which the state creates

201 See id. (noting that adopting the “pressing social need” standard will require governments to demonstrate specific grounds for their decisions to restrict religious expression).
202 See Bennoune, supra note 99, at 382; Rorive, supra note 180, at 2683.
203 See Rorive, supra note 180, at 2683.
204 See id. at 2683–84.
205 See id. at 2683–85.
206 See id.
207 See Bowen, supra note 42, at 12.
citizens who are prepared to become part of French society and who respect the constitutional values of laïcité and gender equality.\textsuperscript{208} Pluralism in such institutions threatens the role of secondary schools (similarly to universities in Turkey) in this regard.\textsuperscript{209} This argument, however, falls short when the ban or restriction on religious dress moves out of schools and into the streets of Paris. The ECtHR must not give France a margin of appreciation, but must require France to show that allowing the burqa to be worn in other contexts equally threatens laïcité and gender equality and that there is a substantial need to restrict religious expression through the ban—either entirely or in particular public spaces—to preserve those values for all citizens.\textsuperscript{210} Eliminating the margin of appreciation standard for determining what is necessary in a democratic society will protect laïcité and gender equality from being hijacked by politicians hoping to win elections by targeting minorities and their rights to express their religious beliefs. Additionally, eliminating the margin of appreciation will allow the ECtHR to enunciate a clearer standard when it comes to restricting such religious expression.

**Conclusion**

The notion of veiling is a very sensitive issue for many— from Muslim women who freely wear the veil out of respect for their faith to outspoken feminists who view the veil as an archaic patriarchal symbol that denigrates and oppresses women. Whatever the views on the issue, it is dangerous to assume that those who choose to veil do so for any particular reason and to assume that the veil is anathema to the democratic safeguards of equality and secularism. In the wake of the Constitutional Council’s deference to Parliament in upholding the burqa ban, the ECtHR should require a stronger burden on the French Parliament to show that the burqa cannot coexist with its constitutional ideals, rather than blindly accept the notion that they are incompatible. Although France is on the front lines of this debate, other European nations have taken their lead and are mulling over their own burqa restrictions. Although there are undoubtedly salient arguments both for and against the burqa, by refusing to engage in the arguments, the ECtHR does injustice to the ideals upon which it was founded after World War II: to supervise the Convention and to “serve as an alarm that would bring

\textsuperscript{208} See id.
\textsuperscript{209} See id.
\textsuperscript{210} See Kamal, supra note 138, at 694–95 (noting that simply stating that a state action is justified in principle does not mean it is “entitled to deference”).
such large-scale violations of human rights to the attention of the Western European states in time for action to be taken.”

It also proves an injustice to women who view the veil as a sort of “second skin”:

[The veil is] like a second skin to me. It is supple as a living membrane and moves and flows with me. There is beauty and dignity in its fall and sweep. It is my crown and my mantle, my vestments of grace. Its pleasures are known to me, if not to you.

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211 See id. at 701–02 (quoting D.J. Harris et al., Law of the European Convention on Human Rights 2 (1995)).


213 Id.
“GROSS VIOLATION”: WHY UGANDA’S ANTI-HOMOSEXUALITY ACT THREATENS ITS TRADE BENEFITS WITH THE UNITED STATES

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Abstract: In the fall of 2009, a Ugandan Minister of Parliament introduced legislation to further criminalize homosexual conduct in Uganda, which has been illegal since colonialism. This legislation would impose the death penalty on certain homosexual activity and would require citizens to report homosexual activity to the police or face jail time. Condemned by world leaders, some western governments threatened to withhold financial aid. In the United States, Senator Ron Wyden of Oregon has argued that, should the legislation become law, Uganda would be ineligible for trade benefits under the African Growth and Opportunity Act (AGOA). AGOA requires that beneficiary nations not engage in gross violations of internationally recognized human rights. This Note argues that sexual orientation is an internationally recognized human right and that the criminal penalties provided for in the Ugandan legislation constitute a gross violation of this right. It concludes that should the Ugandan legislation become law, Uganda would be ineligible for trade benefits under AGOA.

Introduction

Uganda, long associated with a bloody decades-long conflict plagued by child abductions, rape, and murder, has garnered attention again in the Western media due to a new human rights matter.¹ In the fall of 2009, after a visit by a group of U.S. evangelicals who promote conversion from homosexuality to heterosexuality through prayer and faith, Ugandan Minister of Parliament (MP) David Bahati introduced

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the Anti-Homosexuality Bill of 2009 (Anti-Homosexuality Bill).\(^2\) Although homosexuality has been illegal in Uganda for more than 100 years, the proposed legislation goes significantly further than current law.\(^3\) The Anti-Homosexuality Bill creates the crime of “aggravated homosexuality” which makes engaging in homosexual sex while living with HIV, or repeatedly engaging in homosexual activity, a crime punishable by death.\(^4\) It would also impose prison sentences on anyone who fails to report homosexual activity to the police within twenty-four hours.\(^5\) The author, a first-term lawmaker, stated that “[a]nybody who does not believe that homosexuality is a crime is a sympathizer.”\(^6\)

The global backlash to this bill has been significant.\(^7\) President Barack Obama recently denounced it as “odious” and Secretary of State Hillary Clinton communicated her “strongest concerns” over the proposed legislation directly to Ugandan President Yoweri Museveni.\(^8\) Resolutions have been introduced in the U.S. Congress condemning the proposed bill, calling on the Ugandan Parliament to reject it, and urging all governments to reject and repeal similar laws criminalizing homosexuality.\(^9\) Some countries have gone even further; Sweden has threatened to cut off all aid to Uganda should the bill become law.\(^10\) In the United States, Senator Ron Wyden, Chairman of the International Trade Subcommittee of the Senate Committee on Finance, has suggested that this proposed legislation could violate the African Growth and Opportunity Act (AGOA).\(^11\) AGOA, among other things, provides duty-free treatment to imports from eligible beneficiary countries.\(^12\) One of the eligibility requirements is that a beneficiary nation “not en-


\(^4\) Anti-Homosexuality Bill, pt. II § 3.

\(^5\) Id. pts. I § 1, III § 14.

\(^6\) Thompkins, *supra* note 3.


\(^8\) Spetalnick, *supra* note 1.


\(^10\) *Uganda Anti-Gay Law “Unnecessary,”* *supra* note 7.


\(^12\) Id.
gage in gross violations of internationally recognized human rights.”  

Senator Wyden argues that should the Anti-Homosexuality Bill become law, it would constitute a “gross violation of internationally recognized human rights,” making Uganda ineligible for the benefits of AGOA.  

He has announced that he intends to sponsor legislation to amend U.S. trade laws to “preclude countries that fail to adequately respect sexual orientation and gender identity as human rights from benefitting from any U.S. trade preference scheme.”  

This Note first examines the proposed Ugandan legislation and the requirements of AGOA. Then, through an analysis of multilateral treaties and statements, regional actions, and the behavior of state actors, this Note explores whether sexual orientation is an internationally recognized human right. Assuming, arguendo, that sexual orientation is an internationally recognized human right, this Note discusses what would constitute a gross violation. Finally, this Note argues that sexual orientation has evolved into a protected international human right and that capital punishment, or life imprisonment for homosexual acts constitutes a gross violation of this human right.

I. Background

A. The Ugandan Anti-Homosexuality Bill of 2009

On September 25, 2009, MP Bahati introduced the Anti-Homosexuality Bill, his first-ever piece of legislation. News reports have suggested that the legislation was not homegrown but the result of a conference held in Kampala, Uganda in March 2009 with U.S. evangelicals. The conference, which drew thousands of Ugandans, focused on how to convert homosexuals into heterosexuals. The U.S. conference participants have since distanced themselves from the legislation, but speculation remains about their influence. Nevertheless, culturally
and legally, gays have long been ostracized and subject to unequal treatment in Uganda.\textsuperscript{20}

Under the Ugandan Penal Code, any person who has “carnal knowledge of any person against the order of nature” commits an offense that is punishable by life in prison.\textsuperscript{21} This indistinct language, deriving from the British common law system, refers to sodomy.\textsuperscript{22} Although the law does not distinguish between homosexual and heterosexual sodomy, practically speaking, only homosexual sodomy is criminalized.\textsuperscript{23} Despite the fact that it is rarely enforced, the law serves as a justification for discrimination, harassment, and the denial of government services.\textsuperscript{24} Homosexuals face harassment in public spaces, expulsion from schools, and discrimination in employment.\textsuperscript{25} There have also been high-profile asylum cases of homosexual Ugandans fleeing persecution.\textsuperscript{26} Furthermore, a misconception exists that homosexuality itself is illegal.\textsuperscript{27} As one scholar writes:

[I]t is not illegal to be a homosexual nor is it illegal for men to kiss, live together, or take any other action short of intercourse. Only anal sex has been criminalized in Uganda; however, people throughout the country seem to have taken this to mean that it is illegal merely to be homosexual.\textsuperscript{28}

As a result, many non-governmental organizations (NGOs) and government service providers refuse to provide assistance to homosexuals for fear of retribution.\textsuperscript{29} In its most recent human rights report, the U.S. State Department reported that homosexuals in Uganda face discrimination and legal restrictions.\textsuperscript{30} It also noted that several members of the Ugandan NGO Sexual Minorities Uganda were harassed and


\textsuperscript{21} The Penal Code Act of 1950 (Uganda), ch. 120 § 145.

\textsuperscript{22} Hollander, \textit{supra} note 20, at 220 n.2 (citing Lillian Tibatemwa-Ekirikubinza, \textit{Criminal Law in Uganda: Sexual Assaults and Offenses Against Morality} 97–99 (2005)).

\textsuperscript{23} \textit{Id.} at 259.

\textsuperscript{24} \textit{Id.} at 222.

\textsuperscript{25} \textit{Id.} at 221.


\textsuperscript{27} Hollander, \textit{supra} note 20, at 224.

\textsuperscript{28} \textit{Id.} at 222 n.12.

\textsuperscript{29} \textit{See id.} at 222.

arrested by police after protesting against sexual orientation discrimi-
nation.\textsuperscript{31}

MP Bahati’s legislation, however, proposes to take the existing laws
and policies a step further.\textsuperscript{32} According to its preamble, the purpose of
the bill is to “protect the cherished culture of the people of Uganda, le-
gal, religious, and traditional family values of the people of Uganda
against the attempts of sexual rights activists seeking to impose their val-
ues of sexual promiscuity on the people of Uganda.”\textsuperscript{33} The bill creates
the “offense of homosexuality,” which is defined to include any act to
penetrate or stimulate the sexual organ or mouth of a person of the
same sex.\textsuperscript{34} Furthermore, touching another person with the “intention
of committing the act of homosexuality” is also an offense.\textsuperscript{35} These off-
fenses would be punishable by life in prison.\textsuperscript{36} Attempts to commit ho-
mosexual acts are also considered a felony, punishable by seven years in
prison.\textsuperscript{37}

The most egregious provision, which has garnered international
attention, is the creation of the offense of “aggravated homosexuality,”
which is punishable by death.\textsuperscript{38} As drafted, aggravated homosexuality
occurs: (1) when an adult offender has homosexual sex with someone
under the age of eighteen; (2) when the offender is a person living with
HIV; (3) when the offender is the parent or guardian of the victim; (4)
when the offender is a person of authority over the victim; (5) when the
victim has a disability; (6) when the offender uses anything to “stupefy
or overpower” another in order to have homosexual sex; or (7) where
the offender is a serial offender, defined as a person who has previous
convictions of the offense of homosexuality or related offenses.\textsuperscript{39} Any
person charged with aggravated homosexuality would be required to
undergo HIV testing.\textsuperscript{40} Attempts to commit aggravated homosexuality
would also constitute a felony punishable by life in prison.\textsuperscript{41}

The proposed bill also requires an authority figure to report sus-
ppected offenses to relevant authorities within twenty-four hours or face

\begin{itemize}
\item\textsuperscript{31} Id.
\item\textsuperscript{32} See generally Anti-Homosexuality Bill.
\item\textsuperscript{33} Id. at memorandum § 1.1.
\item\textsuperscript{34} Id. pt. II § 2.
\item\textsuperscript{35} Id.
\item\textsuperscript{36} Id.
\item\textsuperscript{37} Id. pt. II § 4(1).
\item\textsuperscript{38} Anti-Homosexuality Bill, pt. II § 3(2); see Gettlemen, supra note 18.
\item\textsuperscript{39} Anti-Homosexuality Bill, pts. I § 1, II § 3(1).
\item\textsuperscript{40} Id. pt. II § 3(3).
\item\textsuperscript{41} Id. pt. II § 4(2).
\end{itemize}
up to three years in prison. Of great concern to many human rights organizations and NGOs is a broadly-worded provision that criminalizes the promotion of homosexuality. Some argue this provision could potentially curb HIV/AIDS prevention activity.

News stories have sought to demonstrate the cumulative effect of these proposed provisions—a doctor who treats HIV-positive gay patients could be imprisoned for “aiding and abetting homosexuality,” anyone who fails to report him could also be imprisoned for “failure to disclose the offense,” and his patients could end up on death row. Pressure on the Ugandan government, and President Museveni in particular, mounted for months after the bill was introduced, and there was speculation that the death penalty would be dropped from the final bill and replaced with life in prison. A year after its introduction, the bill remains unamended; it is an open question whether any potential amendments would soften the positions of those who assert that the Act violates recognized international human rights.

B. The African Growth and Opportunity Act

Within the United States, Senator Wyden was an early vocal opponent of the proposed Act and has suggested that its passage would make Uganda ineligible for trade preferences under AGOA. In a letter to U.S. Secretary of State Hillary Clinton and U.S. Trade Representative Ron Kirk, Wyden wrote: “I strongly urge you to communicate immediately to the Ugandan government, and President Yoweri Museveni directly, that Uganda’s beneficiary status under AGOA will be revoked should the proposed legislation be enacted.”

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42 Id. pt. III § 14.
44 Anti-Homosexuality Bill, pt. III § 13; see HRW Uganda, supra note 43.
45 Alsop, supra note 2.
46 Gettlemen, supra note 18.
48 See Press Release, supra note 11.
49 Id.
AGOA was enacted in 2000 in order to encourage economic growth in Africa.\textsuperscript{50} Eligible sub-Saharan African countries benefit from trade preferences, including duty-free and quota-free access to the United States, and receive technical assistance and trade capacity support.\textsuperscript{51} Uganda has been an eligible beneficiary since AGOA’s initial passage.\textsuperscript{52} One of the eligibility requirements of AGOA beneficiaries is that they “not engage in gross violations of internationally recognized human rights . . . and cooperate[] in international efforts to eliminate human rights violations.”\textsuperscript{53} Though undefined in AGOA, this requirement is described in the U.S. Foreign Assistance Act as the “right to life, liberty, and the security of person.”\textsuperscript{54} Senator Wyden argues that the “jurisprudence in the area of international human rights supports respect of sexual orientation and gender identity as human rights.”\textsuperscript{55}

President Obama has demonstrated a willingness to remove countries from the AGOA process if they no longer meet the eligibility criteria.\textsuperscript{56} In December 2009, the White House announced that Guinea, Madagascar, and Niger were being terminated from the AGOA program due to recent undemocratic transfers of power.\textsuperscript{57} The White House explained that these events are “incompatible with making progress toward establishing the rule of law or political pluralism . . . and make it extremely difficult to achieve the progress necessary to satisfy the other AGOA eligibility criteria.”\textsuperscript{58} As one scholar indicated, President Obama’s recent stated support for human rights abroad in his 2010 State of the Union address may mean that should Uganda enact this Anti-Homosexuality Bill, its AGOA benefits will be terminated.\textsuperscript{59}

\textsuperscript{51} Id. at 2.
\textsuperscript{52} Wyden Press Release, supra note 11.
\textsuperscript{55} Wyden Press Release, supra note 11.
\textsuperscript{57} Id. at 69,230; Doug Palmer, Obama Ends Benefits for Guinea, Madagascar, Niger, REUTERS (Dec. 23, 2009), http://www.reuters.com/assets/print?aid=USTRE5BM4HZ20091224.
\textsuperscript{58} Palmer, supra note 57.
\textsuperscript{59} Gregory Simpkins, AFRICA RISING 2010 (Feb. 1, 2010, 14:10 EST), http://africaring2010.blogspot.com (stating that President Obama’s recent removal of three countries from AGOA and his support for international human rights “likely will mean a termination of AGOA benefits for Uganda if the anti-homosexual law is approved”).
II. Discussion

A. Is Sexual Orientation an Internationally Recognized Human Right?

The legal definition of human rights is “[t]he freedoms, immunities, and benefits that, according to modern values (esp. at an international level), all human beings should be able to claim as a matter of right in the society in which they live.”

The particulars of these rights have evolved from a sum of international, regional and state action. Legal positivists note that international and regional treaties and conventions, as well as state practice informs the development of international human rights norms. The terminology, “internationally recognized human rights,” is briefly defined in the U.S. Foreign Assistance Act of 1961 as the “right to life, liberty, and the security of the person.” The U.S. State Department has taken this to mean rights set forth by the Universal Declaration of Human Rights (UDHR), which is discussed more fully below. An assessment of international, regional, and state action informs whether protection of sexual orientation has risen to the level of an internationally recognized human right.

1. International Action

The close of World War II ushered in a new era of international recognition of human rights. The development of the United Nations Charter in 1945 and the Nuremberg and Tokyo trials forever changed the landscape of international law. These events led to the creation and adoption of international agreements which “converted moral imperatives to international law.” The basis of modern multilateral hu-

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64. See U.S. Dep’t of St., Human Rights Reports, http://www.state.gov/g/drl/rls/hrrpt/.
67. Id.
68. Id. at 221.
man rights treaties is the UDHR, signed in 1948. The UDHR applies to all people and has been adopted as a sort of charter by the international community, forming the basis for future human rights treaties. As the African Union Commissioner for Political Affairs stated, it has “inspired regional human rights instruments and mechanisms that [have] led to a comprehensive system of legally binding treaties for their promotion and protection.” The UDHR states that all human beings are “born free and equal in dignity and rights” and that everyone is entitled to all the rights and freedoms in the declaration regardless of status. Some of the rights include: the right to equal protection and freedom from discrimination; freedom from arbitrary arrest and cruel or inhuman treatment; the right to freedom of thought, opinion, and association; and the right to protection against “arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.”

The International Covenant on Civil and Political Rights (ICCPR), to which Uganda is a signatory, is derived from the UDHR and restates it in “greater detail and with legal precision.” Although no treaty explicitly states that sexual orientation is a protected human right, because the treaties were ratified in the 1970s and jurisprudence surrounding sexual orientation evolved in the 1990s, the ICCPR has


70 See G.A. Press Release, supra note 69; Thomas Buergenthal et al., International Human Rights in a Nutshell 35–36 (3d ed. 2002) (“Because of its moral status and the legal and political importance it has acquired over the years, the Declaration ranks with the Magna Carta, the French Declaration of the Rights of Man and the American Declaration of Independence as a milestone in mankind’s struggle for freedom and human dignity.”).


73 Id. art. 2.

74 Id. art. 7.

75 Id. art. 9.

76 Id. art. 5.

77 Id. arts. 18–20.

78 UDHR, supra note 72, art. 12.

79 Hollander, supra note 20, at 226–27.

been used to uphold the rights of gays and lesbians. The adjudicating body of ICCPR, the Human Rights Committee (HRC), has ruled that discrimination on the basis of sexual orientation is prohibited under the treaty. Each ruling relied in part on Articles 2, 17, and 26 of the ICCPR, which recognize the rights of individuals regardless of status; protect interference with privacy, family, honor or reputation; and govern non-discrimination regardless of status.

In Toonen v. Australia, the ICCPR HRC directly applied these provisions to overturn a Tasmanian law criminalizing sodomy. Toonen, a citizen of Tasmania, claimed that the Tasmanian criminal code, which penalized sexual conduct between men, violated his right to privacy under the ICCPR. The HRC found the Tasmanian law to be in direct violation of Article 17, and held that “in so far as Article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of ‘privacy.’” Even though the Tasmanian law had not been enforced in a decade, the HRC found that this lack of

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81 See Laurence R. Helfer & Alice M. Miller, Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence, 9 Harv. Hum. Rts. J. 61, 61 (1996); Hollander, supra note 20, at 225, 229 (noting that the Human Rights Committee, the adjudicating body of the ICCPR, has utilized the treaty to uphold the rights of gays and lesbians); Mittelstaedt, supra note 80, at 360–61.

82 Hollander, supra note 20, at 229.


Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

84 Id. art. 17 (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”).

85 Id. art. 26:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

86 Hollander, supra note 20, at 22–30.


88 Id. ¶¶ 8.2, 8.6.
enforcement did not guarantee that it would not be enforced in the future, stating, “[t]he continued existence of the challenged provisions therefore continuously and directly ‘interferes’ with the author’s privacy.” The HRC also extended the meaning of the word “sex” in Articles 2 and 26 of the ICCPR to include sexual orientation. This unanimous decision was groundbreaking and added “force to the claim that both criminalizing consensual homosexual conduct and discriminating on the basis of sexual orientation violate international human rights law.” For the first time, protection against discrimination on the basis of sexual orientation was extended to the global forum with the HRC clearly stating that sexual orientation was a protected status under the ICCPR. This decision became the foundation for international protection of homosexual rights.

Other decisions in recent years have expanded on Toonen. In 2000, the HRC found that the denial of pension rights to the same-sex partner of a deceased Australian war veteran was a violation of Article 26 of the ICCPR. And in 2006, the U.N. Working Group on Arbitrary Detention found that the detention of eleven men in Cameroon based on their sexual orientation violated the ICCPR.

In addition to HRC rulings, other U.N. treaty bodies have advocated for the decriminalization of consensual sexual relations and have denounced policies that discriminate on the basis of sexual orientation. The U.N. Committee on the Elimination of Discrimination Against Women (CEDAW) recommended that Kyrgyzstan consider lesbianism a sexual orientation and abolish related penalties. Similarly, the Committee on Economic, Social and Cultural Rights (CESCR) expressed regret that Hong Kong’s anti-discrimination legislation failed to

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89 Id. ¶ 8.2.
90 Id. ¶ 8.7 (“The Committee confines itself to noting, however, that in its view the reference to ‘sex’ in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.”).
91 Helfer & Miller, supra note 81, at 62–63.
92 Id. at 69–70.
93 Mittelstaedt, supra note 80, at 361.
94 See Hollander, supra note 20, at 229–30; Mittelstaedt, supra note 80, at 361.
95 Mittelstaedt, supra note 80, at 361.
96 Hollander, supra note 20, at 229–30.
include discrimination on the basis of sexual orientation. Other treaty bodies have requested that nations repeal laws that criminalize consensual sexual relations between same-sex individuals. For instance, in 2002, the HRC and the Committee against Torture (CAT) requested that Egypt repeal its law criminalizing same-sex sexual relations, and in 1998, the HRC and CESCR requested that Cyprus repeal a similar law. In fact, HRC regularly expresses concern that nations are discriminating on the basis of sexual orientation, noting this concern in thirteen out of eighty-four country reviews between 2000 and 2006.

The proceedings of the Special Procedures of the U.N. Human Rights Council, formerly the U.N. Human Rights Commission, also lend support for the concept that general human rights protections extend to homosexuals. In 2005 and 2006, two joint statements were offered in support of sexual orientation as a human right and were supported by dozens of states. High-level U.N. officials have spoken out against discrimination and condemned attacks against gays and lesbians. In 2004, a Special Rapporteur on physical and mental health declared that “fundamental human rights principles, as well as existing human rights norms, lead ineluctably to the recognition of sexual rights as human rights.” In 2007, the former High Commissioner for Human Rights, Louise Arbour, noted that cultural and moral beliefs were no justification for criminalizing consensual same-sex private relations, and that laws which criminalize this behavior “violate the fundamental right to life, security and privacy.” Ms. Arbour’s remarks were offered in support of the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and

99 See id.
100 IGLHRC, Summary, supra note 97.
101 Id.
102 O’Flaherty & Fisher, supra note 98, at 218.
103 Id. at 222.
105 O’Flaherty & Fisher, supra note 98, at 222–23 (quoting the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health).
106 Id. at 223.
gender identity. Developed by human rights experts and promulgated in 2007, the purpose of these principles is to provide clarity to states on their obligations under international human rights law as it relates to sexual orientation and gender identity. The Principles unequivocally state that international human rights law applies to sexual orientation and gender identity.

Following the launch of the Yogyakarta Principles, the U.N. Statement on Human Rights, Sexual Orientation and Gender Identity (The Statement) was presented to the U.N. General Assembly in December 2008. The Statement, sponsored by France and Argentina and backed by a group of states from all five U.N. regions, was unprecedented. It reaffirmed the principle of non-discrimination in the UDHR and explicitly stated that its protections extend to sexual orientation and gender identity. It also urged all states to take action to ensure that individuals are not subject to arrest, detention, or criminal penalties due to their sexual orientation. The largest-ever statement on this matter, 66 out of 192 member countries signed the declaration. Though the Holy See opposed the statement, it urged, for the first time ever, that all states decriminalize homosexuality and it called for an end to discrimination against homosexuals.

The Organization of the Islamic Conference, led by the Syrian delegation, proposed an opposing statement. This statement, signed by fifty-seven nations—including most of Africa and Asia—claimed that the “notion of orientation spans a wide range of personal choices that expand way beyond the individual’s sexual interest in copulatory behav-

108 Id.
ciples.org/principles_en.pdf.
110 See generally The Yogyakarta Principles, supra note 109.
foundation.org/assets/pdf/UN_General_Assembly.pdf (last visited Nov. 1, 2010); see Neil
113 Statement on Human Rights, supra note 111, ¶ 3.
114 Id. ¶ 11.
115 Arcus, supra note 112, at 4.
116 See Press Release, Holy See, Statement of the Holy See Delegation at the 63rd Ses-
117 Arcus, supra note 112, at 4; MacFarquhar, supra note 112.
bour with normal consenting adult human beings, thereby ushering in the social normalisation . . . of paedophilia.” Nevertheless, it still deplored “all forms of stereotyping, exclusion, stigmatisation, prejudice, intolerance, discrimination and violence directed against people, communities and individuals on any ground whatsoever” and urged all states to promote and protect human rights for all.

This division between Western nations and those in Africa and parts of Asia emerged again in December of 2009 when these nations voted along these lines to delete a reference to sexual orientation in the CESCR General Comment. The proposed General Comment No. 20 passed through the CESCR and would have explicitly added sexual orientation and gender identity as categories protected from discrimination. Although many believe that sexual orientation is a protected status under U.N. human rights treaties and norms, many nations in Africa and parts of Asia do not recognize an extension of these rights to sexual minorities. As one scholar states:

Over the past thirty years, an international consensus has emerged condemning laws that discriminate against gay individuals. . . . [T]his emerging consensus is almost entirely a Western phenomenon, not one that has been embraced by Africa or many parts of Asia. However, the recognition of a right in much of the world should serve as an indicator . . . that this is neither a fleeting right nor an outrageous claim.

2. Regional Action

The actions of regional instrumentalities provide further insight into the state of sexual orientation as an internationally recognized human right. Again, the divide between Africa and the West is ap-

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118 See Arcus, supra note 112, at 4; see also MacFarquhar, supra note 112.
119 Arcus, supra note 112, at 4.
122 See Hollander, supra note 20, at 236.
123 Id. at 235–36.
124 See O’Flaherty & Fisher, supra note 98, at 218.
parent. The African Charter on Human and People’s Rights, while a “well-meaning rhetorical device,” has not been used to uphold the rights of gays and lesbians. Because the majority of African states do not recognize the rights of gays and lesbians to non-discrimination, privacy, and freedom of association, the commission overseeing the Charter also does not recognize or enforce these rights. As one scholar writes, “[a]n adjudicative and protective body is only as strong as the members that comprise it.”

On the other hand, Europe has made serious steps towards equal rights for gays and lesbians. In 1994, the European Union (EU) Parliament called for the decriminalization of homosexual activity in all EU member states and in 2000 the Council of Europe’s Parliamentary Assembly stated that it would only accept states that had abolished criminal prohibitions on homosexual intercourse. By August 1, 2003, Europe was free from all laws criminalizing same-sex, consensual, adult sex. Quite significantly, the European Court of Human Rights (ECtHR) has struck down anti-sodomy laws and required equal treatment for gays and lesbians. The ECtHR held that Articles 8 and 14 of the European Convention on Human Rights (ECHR) guarantee the right to privacy, family, and freedom from discrimination. In its influential case on the matter, Dudgeon v. United Kingdom of Great Britain and Northern Ireland, the court held in 1981 that the crimes of “buggery” and “attempted buggery” violated the ECHR. The court noted the “extreme effects that the mere existence of the anti-sodomy laws had on the private lives of gay individuals.” The court reaffirmed this position in Modinos v. Cyprus, in 1993, where the plaintiff claimed that he was negatively affected by a Cypriot anti-sodomy law even though he

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125 See Hollander, supra note 20, at 235.
126 Id. at 234.
127 Id. at 235.
128 Id.
130 Id. at 821.
131 Id. at 822.
132 Id. at 814.
133 Hollander, supra note 20, at 239.
134 Id.
was not charged with a crime.\(^{137}\) The court held that failure to enforce was not a defense, and was no guarantee that individuals would not be prosecuted in the future.\(^{138}\)

Building on this case law, the ECtHR expressly found that sexual orientation is a protected “other status” under the ECHR, which as one scholar writes, “open[s] the way for the application of all other Convention rights to lesbians and gay men.”\(^{139}\) The ECtHR has held that failing to extend benefits available to unmarried heterosexual partners to same-sex partners violates the rights to privacy, family, and equality.\(^{140}\) Significantly, more nations in Europe provide constitutional protections for gays and lesbians than anywhere else in the world.\(^{141}\)

The Organization of American States (OAS) also has stated that non-discrimination principles apply to sexual orientation.\(^{142}\) In June 2008, the OAS General Assembly unanimously voted to condemn human rights violations based on sexual orientation and to affirm the fundamental principles of non-discrimination.\(^{143}\)

3. State Action

State behavior also illuminates the trend toward recognizing sexual orientation as a human right.\(^{144}\) As one scholar writes, “there has been an undeniable, if gradual, trend toward recognition of freedom from state interference in sexual conduct and nondiscrimination based on sexual orientation in the corpus of international human rights law through state domestic practices.”\(^{145}\) In 1996, South Africa was the first country in the world to explicitly include sexual orientation as a protected class in its Constitution.\(^{146}\) Relying on this provision and the constitutional principles of equality, dignity, and privacy, the Constitutional


\(^{140}\) Id.

\(^{141}\) Reeves, supra note 66, at 259.


\(^{143}\) Id.

\(^{144}\) See Fellmeth, supra note 129, at 811.

\(^{145}\) Id.

\(^{146}\) Hollander, supra note 20, at 247.
Court then struck down the common law offense of sodomy. As Justice Albie Sachs stated in his concurrence: “At the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group.”

Other nations have followed and abolished anti-sodomy laws. In Lawrence v. Texas in 2003, the U.S. Supreme Court held that state anti-sodomy statutes unconstitutionally infringed on an individual’s freedom and privacy. The Court recognized that by criminalizing homosexual conduct, it could encourage further discrimination against homosexuals. Today decriminalization of homosexual sexual relations is the “fastest receding area of state discrimination against sexual minorities.” As of 2008, sexual relations between women were subject to criminal penalties in 41 out of 192 U.N. member states, and 81 states and 3 sub-states criminalized sexual relations between men.

States have also extended non-discrimination protections to individuals on the basis of sexual orientation. In the landmark Canadian case of Vriend v. Alberta, Vriend was dismissed from his job because of his sexual orientation. He brought a complaint to the Alberta Human Rights Committee; the complaint was denied because sexual orientation was a not a protected status. Vriend claimed that excluding sexual orientation from the Individual Rights Protection Act of 1975 (IRPA) violated Section 15 of the Canadian Charter of Rights and Freedom. The Canadian court held that excluding sexual orientation from IRPA “sends a message that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation.” The court concluded that sexual orientation

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148 See Hollander, supra note 20, at 246–47.
150 Lawrence v. Texas, 539 U.S. 558, 578 (2003); Fellmeth, supra note 129, at 822.
151 Lawrence, 539 U.S. at 575; Hollander, supra note 20, at 250.
152 Fellmeth, supra note 129, at 814.
153 Id. at 815.
154 See Bromley & Walker, supra note 149, at 111.
156 Vriend, 1 S.C.R. at 508.
157 Id.
158 Id. at 551.
should be read into IRPA as a protected status. Beyond Canada, at least ten OAS countries have laws which prevent discrimination on the basis of sexual orientation.

Refugee law is considered by some scholars to be a part of international human rights law, and it provides unique insight into the trend towards support for sexual orientation as a human right. Over the past fifteen years, thousands of refugee claims based on sexual orientation have been brought under the Refugee Convention. As one scholar writes, “[d]espite initial doubt over whether sexual orientation could be regarded as a particular social group for the purposes of the Convention, by the mid to late 1990s this was well accepted in most refugee receiving nations.” Alien homosexuals in the United States are considered members of a particular social group for the purposes of asylum; criminal prosecution due to sexual orientation can be considered persecution where the law or punishment is particularly severe. Severity can be determined by comparing United States law to the law in the alien’s home country; in the case of prosecution due to same-sex consensual sex, courts may rely on Lawrence v. Texas to determine that a law criminalizing same-sex consensual sex is persecutory.

Although great strides have been taken to protect gays and lesbians from discrimination and prosecution, many countries retain anti-sodomy laws with grave punishments. Should Uganda’s Anti-Homosexuality Act become law, it would join seven other nations that impose the death penalty for the crime of sodomy.

159 Id. at 578.
160 HRW-OAS, supra note 142.
161 See Millbank, supra note 139, at 197.
163 Berg & Millbank, supra note 162, at 195.
164 Nat’l Immigrant Justice Ctr., Winning Asylum, Withholding and CAT Cases Based on Sexual Orientation, Transgender Identity and/or HIV-Positive Status 1, 21, 26 (June 2006).
165 Id. at 21.
166 Fellmeth, supra note 129, at 816.
167 Id. (noting that those countries include: Afghanistan, Iran, Mauritania, Pakistan, Saudia Arabia, Sudan, and Yemen).
B. What Constitutes a Gross Violation of Internationally Recognized Human Rights?

Although neither AGOA nor its legislative history defines “gross violation” of human rights, the term derives some meaning from the U.S. Foreign Assistance Act of 1961, as amended.168 According to this Act, a “gross violation” of internationally recognized human rights includes:

[T]orture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, causing the disappearance of persons by the abduction and clandestine detention of those persons, or other flagrant denial of the right to life, liberty, and the security of person.

Furthermore, a consistent pattern of the violation of fundamental rights “intrinsic to human dignity,” such as “systematic harassment, invasions of the privacy of the home, arbitrary arrest and detention, . . . denial of personality before the law [and] denial of basic privacy” as a matter of state policy may be “deemed ‘gross’ ipso facto.”170 A state party to the ICCPR is responsible for even a “single, isolated violation of any of these rights.”171

Capital punishment may be considered a gross violation where it is disproportionate to the crime.172 Article 6 of the ICCPR provides that capital punishment may only be imposed for the “most serious crimes in accordance with law in force at the time of the commission of the crime.”173 Whether “aggravated homosexuality” is considered the most serious of crimes is discussed later in this Note.

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169 Id.
171 Id.
172 Id. § 702(f).
173 ICCPR, supra 83, art. 6(2).
III. Analysis

A. Sexual Orientation Has Evolved into an Internationally Recognized Human Right

Over the past twenty years there has been a remarkable shift in the approach to sexual orientation and human rights.\(^{174}\) Today, the right to privacy, a fundamental internationally recognized human right, includes the right to adult consensual homosexual sex.\(^{175}\) Additionally, non-discrimination principles include protection from discrimination based on sexual orientation.\(^{176}\) As discussed earlier in this Note, these rights have evolved from international, regional, and state action.\(^ {177}\) Even though the ICCPR does not explicitly reference sexual orientation, the HRC has ruled that adult consensual sex is protected under Article 17 (the right to privacy), and that discrimination on the grounds of sexual orientation is prohibited under Article 26 (non-discrimination regardless of status).\(^ {178}\) These rulings often impact the direction of signatory nations.\(^ {179}\)

Courts and regional and national bodies from Europe, North America, and Latin America have reinforced the principle that the right to privacy applies to adult consensual homosexual sex.\(^ {180}\) The ECtHR in *Dudgeon* and *Norris* recognized that criminalizing adult consensual sex violated the right to privacy under the European Convention and had a detrimental effect on homosexual individuals, even if the criminal law was not enforced.\(^ {181}\) The reasoning employed in *Dudgeon*, and also in

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\(^{178}\) See generally *Toonen*, U.N. Doc. CCPR/C/50/D/488/1992 (holding that the right to privacy under the ICCPR includes the right to adult consensual homosexual sex and that the ICCPR prohibits discrimination on the basis of sexual orientation).


\(^{181}\) See Bromley & Walker, *supra* note 149, at 94–95, quoting the court:

\[\text{"The very existence of this legislation continuously and directly affects his private life... either he respects the law and refrains from engaging—even in private with consenting male partners—in prohibited sexual acts to which he\} \]
Toonen, impacted the U.S. Supreme Court in Lawrence.\textsuperscript{182} There, the Court found that the power of the state could not be used to control the personal private lives of consenting adults.\textsuperscript{183} The impact of Dudgeon spread beyond Europe as, over the next twenty years, nations liberalized their sodomy laws.\textsuperscript{184} In the 1980s, Cuba and New Zealand decriminalized same-sex intercourse, followed by Hong Kong, China, most of Eastern Europe, the Baltics, and some Central Asian countries in the 1990s.\textsuperscript{185} Constitutional courts in Colombia, Ecuador, and South Africa struck down anti-sodomy laws as well, with the South African Court referring explicitly to Toonen.\textsuperscript{186} These events demonstrate the effect that state actions had on the global spread of decriminalization.\textsuperscript{187}

Although there are still nations that criminalize consensual adult homosexual sex, and some which penalize it through death, jurisprudence indicates that these nations are increasingly becoming the minority.\textsuperscript{188} International human rights jurisprudence has not required universal agreement before a principle can be considered a norm.\textsuperscript{189} Instead these norms evolve from the words and deeds of international and regional treaties, conventions and state practices.\textsuperscript{190} Thus, the actions of multilateral institutions, regional bodies, and state actors lend credence to the principle that consensual homosexual sex is protected under the international human rights norm of the right to privacy.\textsuperscript{191}

The crimes of “aggravated homosexuality”\textsuperscript{192} and the “offense of homosexuality” in the Anti-Homosexuality Bill most clearly violate internationally recognized human rights because they intrude on an individual’s fundamental right to privacy by criminalizing the private be-

\begin{footnotesize}
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\item Id.
\item See Hollander, supra note 20, at 250–51.
\item See id. at 250.
\item See Bromley & Walker, supra note 149, at 109–11; Fellsmeth, supra note 129, at 819.
\item Bromley & Walker, supra note 149, at 111; Fellsmeth, supra note 129, at 819.
\item See Fellsmeth, supra note 129, at 821–22.
\item See Bromley & Walker, supra note 149, at 109–11; Fellsmeth, supra note 129, at 819–22.
\item See Fellsmeth, supra note 129, at 814–15.
\item See Heinze, supra note 62, at 123–24.
\item Id. at 122.
\item See id. at 122–24.
\item Anti-Homosexuality Bill, pt. II § 3. The section of the Anti-Homosexuality Bill that applies to minors would not be a violation of this principle, but perhaps could be considered disproportionate punishment if heterosexual sex with a minor is not also punishable by death; however, this topic is outside the scope of this note. See id.
\end{itemize}
\end{footnotesize}
havior of consenting adults. Nevertheless, because the Ugandan penal code currently criminalizes sodomy, the United States could find that Uganda is in violation of an internationally recognized human right even without passage of the Anti-Homosexuality Bill.

The provision of the Anti-Homosexuality Bill that makes the promotion of homosexuality a crime also violates the internationally recognized human right of non-discrimination on the basis of status. Discrimination based purely on sexual orientation violates the ICCPR. As the HRC stated in Toonen, the reference to sex in Articles 2 and 26 of the ICCPR includes sexual orientation, thereby extending the rights of non-discrimination on the basis of status to sexual orientation. Additionally, a more recent case dealing with the denial of benefits to a same-sex partner was found to violate the non-discrimination provision of Article 26. Moving beyond these multilateral actions, regional and state actors have also found that it is impermissible to discriminate on the grounds of sexual orientation. As discussed earlier, in Vriend, the Canadian Court held that sexual orientation is a protected status under Article 15 of the Canadian Charter of Rights and Freedoms. Similarly, the ECtHR expressly stated that sexual orientation is included as an “other status” under the ECHR. Thus, because promotion of heterosexual activity is not a crime in Uganda, this proposed provision is discriminatory and violates internationally recognized human rights standards.

B. The Criminalization of Consensual Homosexual Acts and the Promotion of Homosexuality Is a Gross Violation of This Right

The offenses included in the Anti-Homosexuality Bill, which are punishable by death or life imprisonment, violate internationally rec-

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195 See ICCPR, supra note 83; Anti-Homosexuality Bill, pt. III § 13; Mittelstaedt, supra note 80, at 361.
196 See ICCPR, supra note 83, art. 26; Mittelstaedt, supra note 80, at 361.
198 See Mittelstaedt, supra note 80 at 361.
200 See Hollander, supra note 20, at 248.
201 See Millbank, supra note 139, at 202.
ognized human rights in such a way as to constitute gross violations of these rights.\textsuperscript{203}

The crime of “aggravated homosexuality,” carrying the punishment of death, is in direct violation of Article 6 of the ICCPR, which provides that capital punishment be reserved only for the most serious crimes.\textsuperscript{204} The HRC has interpreted the phrase “most serious crimes” restrictively, meaning that capital punishment should only be used as an “exceptional measure.”\textsuperscript{205} According to the HRC, exceptional measure is limited to crimes resulting in loss of life.\textsuperscript{206} In fact, the HRC stated that homosexual acts do not meet the standard of “most serious crimes.”\textsuperscript{207} As such, the act of adult consensual sex where one party is HIV positive, or a serial offender,\textsuperscript{208} or the “victim” is disabled should not be considered the most serious of crimes.\textsuperscript{209}

Should capital punishment be replaced with life in prison, as has been suggested as a possibility, the punishment would still be considered a gross violation of internationally recognized human rights.\textsuperscript{210} Where the state, as a matter of policy, denies basic privacy to individuals it may be considered a gross violation \textit{ipso facto}.\textsuperscript{211} As discussed earlier in this Note, consensual adult sex, whether homosexual or heterosexual, is covered by the notion of privacy under Article 17 of the ICCPR.\textsuperscript{212} Here, the state, through its penal code, is denying individuals of the right to privacy by criminalizing consensual adult homosexual sex.\textsuperscript{213} As such, Uganda’s punishment of this private activity would con-
stitute a gross violation of this right. As Uganda’s current law criminalizing sodomy, which carries the punishment of life imprisonment, as well as these proposed provisions, are invasions of the basic internationally recognized human right to privacy. As such, Uganda is currently in violation of the eligibility requirements of AGOA and should be removed as a beneficiary. The criminalization of the promotion of homosexuality would also constitute a gross violation of internationally recognized human rights. Because only the promotion of homosexuality, and not heterosexuality, is criminalized in Uganda, this provision would constitute systematic discrimination by the state. Where the state singles out one particular group over another, systematic discrimination can occur, and this type of state-sponsored discrimination is also considered a gross violation ipso facto. As a result, unless Uganda also prohibited the promotion of heterosexuality, this provision would constitute a gross violation of internationally recognized human rights, making Uganda ineligible under AGOA.

The conclusion that the criminalization of homosexual adult consensual sex and systematic state-sponsored discrimination on the basis of sexual orientation constitutes a gross violation of internationally recognized human rights extends to countries beyond Uganda. Any nation that receives trade preferences under AGOA and criminalizes adult consensual homosexual sex or systematically discriminates based

214 See Restatement (Third) of Foreign Rel. L. of the U.S. § 702(m) (1987); Anti-Homosexuality Bill, pt. II §§ 2–4; HRC-Sudan, supra note 207, ¶ 8; HRC-Iran, supra note 206, ¶ 8.
218 See generally Ugandan Penal Code (demonstrating that only homosexuality is a crime because of the absence of the crime of heterosexuality in the Code); Anti-Homosexuality Bill, pt. III § 13.
on sexual orientation could be at risk of losing its eligibility.\textsuperscript{222} Currently forty nations in Sub-Saharan Africa are eligible under AGOA, and twelve of these nations (not including Uganda) criminalize adult consensual homosexual sex.\textsuperscript{223} As a result, close to half of the current beneficiaries may be ineligible for assistance under AGOA.\textsuperscript{224}

**Conclusion**

Beginning with *Toonen* in 1994, major multilateral, regional and state bodies have addressed the rights of gays and lesbians. From asylum claims and non-discrimination provisions to the decriminalization of consensual homosexual sex, the law has evolved such that sexual orientation has become part of the fabric of international human rights law. Though gays and lesbians do not enjoy full equal rights under the law in many countries—most notably the right to marry—a majority of nations provide for the basic human rights of freedom from discrimination and protection of privacy. These rights have evolved into internationally recognized human rights and the gross violation of these rights could, in the future, result in nations losing their eligibility to participate in AGOA or other U.S. foreign assistance programs.

\textsuperscript{222} See 19 U.S.C. § 3703(a) (3); AGOA Eligible Countries, supra note 221; HRW-Sodomy, supra note 221.

\textsuperscript{223} See 19 U.S.C. § 3703(a) (3); AGOA Eligible Countries, supra note 221; HRW-Sodomy, supra note 221.

\textsuperscript{224} See 19 U.S.C. § 3703(a) (3); AGOA Eligible Countries, supra note 221; HRW-Sodomy, supra note 221.
HASTA LA VISTA? AN ASSESSMENT OF THE CALIFORNIA GOVERNOR’S PROPOSAL TO SEND UNDOCUMENTED INMATES TO MEXICO

STEVEN H. JOSEPH*

Abstract: At a press conference in January 2010, California Governor Arnold Schwarzenegger proposed sending undocumented inmates from California prisons to cheaper, privately run prisons in Mexico as a solution to the state’s budget crisis and prison overcrowding problems. Though seemingly far-fetched, the Governor’s proposal represents a creative solution to a nation-wide problem of growing illegal immigrant populations, overburdened penal systems, and increasing pressures to cut costs. National trends in privatization and the offshoring of government functions make exporting inmates to lower cost prisons abroad a tempting remedy, albeit one that is fraught with legal complications. This Note argues that the California Governor’s proposal is infeasible because it does not fit within the existing U.S.-Mexico treaty structure and California is constitutionally prohibited from entering into its own treaty with Mexico. Furthermore, the massive civil liability risk created by a private extra-territorial prison substantially reduces the cost savings incentives.

Introduction

In the 1987 film The Running Man, Arnold Schwarzenegger plays a prisoner forced to take part in a gruesome television game show, in which convicted felons compete against deadly gladiator-like “stalkers” for their freedom. Now, as the governor of California, Arnold Schwarzenegger has proposed a similarly “creative solution” to the state’s overstretched budget and overcrowded prison problems—send inmates who are illegal immigrants across the border to new and cheaper prisons in Mexico.

In January 2010, Governor Schwarzenegger responded to a reporter’s request for examples of “reckless state spending [Schwar-

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1 The Running Man (Braveworld Productions 1987).

zenegger] would like to curtail” by suggesting that the state reduce its prison expenses by building prisons in Mexico to house illegal immigrant inmates: “We pay them to build a prison down in Mexico and then we have those undocumented immigrants be down there... it will halve the costs to build the prisons and halve the costs to run the prisons.” The Governor’s spokesman was quick to point out that this was not a formal proposal, and the idea has already drawn criticism from politicians and the press. The California Governor is not the first, however, to propose sending undocumented inmates to cheaper prisons in Mexico. Arizona, another state grappling with immigration problems, proposed a similar plan in 1997 and was still considering it as late as 2005.

Governor Schwarzenegger has proposed a novel solution to a dire problem that warrants consideration; in March 2009, the California State Corrections Secretary Matthew Cate complained that the state prison system is “out of room... and out of money.” California is under a federal court order to spend hundreds of millions of dollars to upgrade its prisons and reduce its prison population by 40,000 inmates within the next two years. With time running out, California is in desperate need of innovative solutions to its financial and penological problems.

Meanwhile, the dual forces of shrinking state budgets and economic globalization have driven governments to outsource state functions to private service providers abroad. These government contracts

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3 Id.
4 Id.
5 Id.
7 See James Brooke, With Jail Costs Rising, Arizona Wants to Build Private Prison in Mexico, N.Y. TIMES, Apr. 20, 1997, at 1 (detailing Arizona’s 1997 proposal to send undocumented prisoners to a privately run prison in Mexico).
8 Id.
11 Carlton, supra note 2; Diaz, supra note 6.
12 See Carlton, supra note 2; Diaz, supra note 6.
have created some cost savings, but the concept of sending essential state functions to be carried out abroad has caused political controversy. In 2004, the California State Auditor surveyed thirty-five select state agencies and five University of California campuses with medical facilities and found that in 185 state contracts, which were worth a total of $638.9 million, at least some of the work was being performed offshore. Even if California does not implement the Governor’s plan to send illegal immigrant prisoners to Mexico, national trends of privatization and offshoring, combined with growing populations of illegal immigrants and prisoners, would likely tempt other states to consider similar proposals in the near future.

This Note examines the feasibility of implementing the Governor’s proposal to move undocumented inmates to prisons in Mexico. Part I introduces the situation facing the U.S. and Californian penal systems. Part II discusses the existing U.S.-Mexico prisoner transfer treaty and individual states’ ability to act internationally. Part II also explains the constitutional rights and remedies of individuals detained by U.S. citizens or agents outside the borders of the United States. Part III then analyzes the Governor’s proposal in light of the existing international legal institutions, as well as the potential liability facing state contractors in Mexico and the associated costs facing the state itself. Finally, the Note concludes that Governor Schwarzenegger’s proposal is not practicable because it does not fit within the existing U.S.-Mexico treaty

14 Id. at 173 (noting that New York City awarded a contract for environmental citation processing to a Delaware-based firm that subcontracted the work to Ghana, “where typists typically earn about $70 per month . . . .”); see id. at 172 (noting that Indiana awarded a contract to upgrade a state agency’s computers to an Indian firm whose bid was $8 million below the next lowest bid).
15 Id. at 172, 173–74 (describing Senator Ted Kennedy’s criticism of then-governor Mitt Romney for “jumping on the offshoring bandwagon” and the public debate over offshoring that took place during the 2004 presidential election).
16 Cal. State Auditor, Bureau of State Audits, The State’s Offshore Contracting: Uncertainty Exists About Its Prevalence and Effects 1 (2005). The report notes, however, that state agencies are not required to track or report their offshore contracting, so the full extent to which California outsources its public functions to offshore contractors is unclear. Id.
17 See Zuckerman, supra note 13, at 168.
20 Cf. Brooke, supra note 7 (detailing Arizona’s 1997 proposal to send undocumented prisoners to a privately run prison in Mexico).
structure; additionally, the massive civil liability risk created by an extra-territorial prison substantially reduces the cost savings incentives.

I. BACKGROUND

Prison populations and costs in the United States have sky rocketed in recent years.\(^{21}\) The U.S. prison population increased tenfold in the last four decades,\(^{22}\) reaching over 2 million in 2008.\(^{23}\) Including individuals on parole or probation, there were a total of 7.3 million people in the United States in the penal system in 2008, costing the United States $47 billion.\(^{24}\)

A 2007 study of federal prisons revealed that Latinos constituted one-third of federal prisoners but comprised only thirteen percent of the U.S. population—"a result the study attributed to the sharp rise in illegal immigration and tougher enforcement of immigration laws."\(^{25}\) Illegal immigration has increased from 3.9 million new illegal immigrants in 1992 to 11.9 million by 2008.\(^{26}\) Legal and illegal immigrants also compose seventeen percent of California’s adult prison population.\(^{27}\) Furthermore, “of the 20,000 undocumented inmates [in California]—about 68 percent . . . are from Mexico.”\(^{28}\) The large proportion of immigrant prisoners in the United States has “become a major domestic and international issue.”\(^{29}\)

In addition to immigration, global integration of trade and politics has fostered a globalized approach to criminal justice.\(^{30}\) The United States signed a treaty with Mexico in 1976 to permit voluntary prisoner

\(^{21}\) See Anderson, supra note 19; Solomon Moore, Study Shows High Cost of Criminal Corrections, N.Y. Times, Mar. 3, 2009, at A13 (describing state and national growth in prison spending) [hereinafter High Cost].

\(^{22}\) Anderson, supra note 19.

\(^{23}\) Id.

\(^{24}\) High Cost, supra note 21.

\(^{25}\) Hispanics, supra note 18.

\(^{26}\) Id.


\(^{28}\) Diaz, supra note 6.


\(^{30}\) See David S. Finkelstein, “Ever Been in a [Foreign] Prison?”: The Implementation of Transfer of Penal Sanctions Treaties by U.S. States, 66 Fordham L. Rev. 125, 137 (1997) ("[T]he NAFTA agreement signifies the beginning of a larger economic integration and globalization; these economic forces can combine with political integration to bring about supranational approaches to cooperation in criminal law and, specifically, the transfer of prisoners.").
transfers.\textsuperscript{31} This Treaty has “served as a model” for numerous subsequent bilateral and multilateral prisoner transfer agreements with other countries.\textsuperscript{32} The United States also has extradition agreements with over a hundred countries, which require the parties to apprehend foreign nationals within their borders and hand them over to stand trial for alleged crimes abroad.\textsuperscript{33}

On top of the challenges posed by illegal immigration and growing prison populations, tighter state budgets have left policymakers scrambling for ways to cut costs.\textsuperscript{34} In recent decades, politicians who wanted to show that they were tough on crime implemented mandatory minimum sentences that drastically increased prison populations and expenses.\textsuperscript{35} Most states have now reduced sentences and costly parole programs,\textsuperscript{36} but others have taken more drastic measures.\textsuperscript{37}

Many states are now privatizing prisons and exporting inmates to reduce prison costs and overcrowding.\textsuperscript{38} In 2007, the \textit{New York Times} reported that “[c]hronic prison overcrowding has corrections officials in Hawaii and at least seven other states looking increasingly across state lines for scarce prison beds, usually in prisons run by private companies.”\textsuperscript{39} At that time, California was planning to send over 8,000 prisoners out of state.\textsuperscript{40} This approach has been politically popular because it reduces prison overcrowding without the need to increase taxes, issue bonds, or hold a referendum.\textsuperscript{41}

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\textsuperscript{34} See Steinhauer, \textit{supra} note 10 (quoting the President of the National Council on Crime and Delinquency: “[W]hen dollars are as tight as they are now, you have to make really tough choices”).
\textsuperscript{35} See id.
\textsuperscript{36} Id.
\textsuperscript{37} See Solomon Moore, \textit{States Export Their Inmates as Prisons Fill}, N.Y. Times, July 31, 2007, at A1 (“Chronic prison overcrowding has corrections officials in Hawaii and at least seven other states looking increasingly across state lines for scarce prison beds, usually in prisons run by private companies.”) [hereinafter \textit{States Export}].
\textsuperscript{38} See id.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} See Anderson, \textit{supra} note 19, at 115.
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Both corrections officials\(^{42}\) and the legal community,\(^{43}\) however, have criticized prison privatization and inmate exports. “[E]xcessive prisoner churn” reduces access to training programs.\(^{44}\) Private prisons have also raised concerns about the legitimacy of delegating “inherently governmental function[s]” to private parties.\(^{45}\)

Private prisons are part of a larger national trend of privatizing public functions, and some states and government contractors are now sending contracts for public services abroad to further reduce costs.\(^{46}\) Privatization, or contracting with the private sector to perform public functions, began in the 1980s and increased through the 1990s.\(^{47}\) In 2008, state and local governments in the United States spent $12 billion on outsourcing, which is expected to increase to $20 billion by 2011.\(^{48}\) Offshoring, the practice of relocating all or part of an entity’s operations to a foreign country, has been a prominent trend in the private sector, and it is now “creeping . . . into the arena of government.”\(^{49}\) Reliable data on public sector offshoring is lacking, but national estimates of state spending range from $2 to 3.8 billion.\(^{50}\)

Most states now offshore public services to some degree, although the extent of this practice varies greatly across states.\(^{51}\) According to a study by the Government Accountability Office in 2006, forty-three out of fifty states offshored some portion of their work related to child support enforcement, food stamps, temporary assistance for needy families, and unemployment insurance.\(^{52}\) Within those programs, states most frequently delegated customer service and information technology functions to offshore contractors.\(^{53}\) India and Mexico were the

\(^{42}\) See States Export, supra note 37 (discussing concerns raised by prison officials about “excessive prisoner churn, consistency among private vendors and safety in some prisons”).

\(^{43}\) See Anderson, supra note 19, at 117 (criticizing private prisons in the Public Contract Law Journal published by the American Bar Association).

\(^{44}\) States Export, supra note 37.

\(^{45}\) See Anderson, supra note 19, at 121–25. Anderson argues: “When a private company assumes responsibility for the administration of inmate punishment and rehabilitation, it improperly undertakes to perform an inherently public discretionary function at the expense of inmates’ fundamental liberty interests.” Id. at 115–16.

\(^{46}\) See Zuckerman, supra note 13, at 168.

\(^{47}\) Id.

\(^{48}\) Id.

\(^{49}\) Id.

\(^{50}\) Id. at 169.

\(^{51}\) Id. at 170.

\(^{52}\) Gov’t Accountability Office, Offshoring in Six Human Services Programs 2–3 (2006).

\(^{53}\) Id. at 17–20. For detailed examples of state and municipal offshoring, see Zuckerman, supra note 13, at 171–73.
most common recipients of offshore government contracts, but public functions were also offshored to Argentina, Canada, Chile, France, Ireland, Poland, and Spain.\(^{54}\) One scholar writes that “state officials rarely contracted directly with foreign companies; instead, offshoring generally occurred when state contractors either hired foreign subcontractors or used their own offshore operations.”\(^{55}\)

Although Governor Schwarzenegger’s proposal to offshore correctional services directly to a foreign contractor is unusual,\(^{56}\) he is not the first American governor to propose offshoring as a solution to a state budget and prison overcrowding problem.\(^{57}\) In 1997, Governor Fife Symington of Arizona proposed building a privately-run prison in Mexico to house the majority of the state’s Mexican prisoners.\(^{58}\) Under the proposal, Mexican inmates would be transferred to a private prison in Mexico “according to American standards, just the way major American corporations operate in Mexico.”\(^{59}\) The Chief Operating Officer of a private prison corporation estimated that by taking advantage of lower labor costs, the state could run the prison for half of what it would cost in the United States.\(^ {60}\) Although state officials were confident that the proposal would survive any legal challenges,\(^ {61}\) Arizona Governor Janet Napolitano eventually vetoed the proposal in 2005.\(^ {62}\)

Transferring Mexican inmates to prisons in Mexico is an attractive prospect for both the state and the prisoners.\(^ {63}\) Labor constitutes seventy percent of prison expenses, and the cost of labor in Mexico is substantially lower than in the United States.\(^ {64}\) For the Mexican inmates, repatriation for the remainder of their sentence has many benefits—familiar language and food, as well as easier access to family.\(^ {65}\) Furthermore, “Mexican prisons are much more lenient in the area of fam-

\(^{54}\) Gov’t Accountability Office, supra note 52, at 21–22.  
\(^{55}\) Zuckerman, supra note 13, at 171 (internal quotations omitted).  
\(^{56}\) See supra notes 53, 55 and accompanying text (explaining that offshored functions are typically in the fields of IT services and customer service and that states rarely directly contract with a foreign service provider).  
\(^{57}\) Brooke, supra note 7.  
\(^{58}\) Id.  
\(^{59}\) Id.  
\(^{60}\) Id.  
\(^{61}\) Id.  
\(^{62}\) Arizona Governor, supra note 9.  
\(^{63}\) See Brooke, supra note 7 (describing benefits of lower prison operating costs in Mexico and the benefits of easier access to family and familiar language and food for prisoners).  
\(^{64}\) See id.  
\(^{65}\) Id.
ily visitation and, unlike most U.S. correctional institutions, Mexican prisons permit conjugal visits.”

Despite these apparent benefits and privileges, Mexico has a poor reputation for its treatment of prisoners. High profile cases of Americans incarcerated in Mexico and investigations by the State Department in the 1990s revealed widespread physical abuse of prisoners, extortion, and corruption. Prisons are often overcrowded, and prisoners depend on relatives to supply them with food. A large and violent prison population combined with insufficient security leads to dozens of deaths each year in violent prison riots—all of these facts illustrate the need for legislators to evaluate Governor Schwarzenegger’s proposal cautiously before agreeing to send California inmates to prisons across the border without their consent.

II. Discussion
A. International Law

The California Governor’s proposal is not the only means by which prisoners could be transferred internationally; there is already a treaty governing prisoner transfers between the United States and Mexico. The Treaty on the Execution of Penal Sentences (Treaty) was enacted in 1977 as a response to reports that U.S. citizens incarcerated in Mexico were subjected to inhumane treatment and corrupt prison conditions. The Treaty was intended to resolve both the heavily publicized

67 See Díaz, supra note 6 (“Prison management is not exactly Mexico’s strong suit.”).
69 See Díaz, supra note 6 (highlighting prison conditions depicted in the documentary PRESUMED GUILTY (Abogados con cámara 2009)).
71 See Carlton, supra note 2 (“‘Think about it,’ Schwarzenegger said. ‘California give [sic] Mexico the money . . . . We pay them to build a prison down in Mexico and then we have those undocumented immigrants be down there in a prison with their prison guards and all this.’”) (ellipsis in original).
72 See Treaty, supra note 31.
73 See Abramovsky, supra note 68, at 454–55.
humanitarian concerns, as well as the diplomatic tension caused by the public outcry.\textsuperscript{74}

Specifically, the Treaty permits Mexican nationals sentenced in the United States to serve their sentence in Mexico, and vice-versa,\textsuperscript{75} in order to promote the “social rehabilitation of the offender.”\textsuperscript{76} Consistent with this humanitarian purpose, the Treaty states that “[t]he Receiving State shall not be entitled to any reimbursement for the expenses incurred by it in the completion of the offender’s sentence.”\textsuperscript{77}

Transfers are subject to a number of conditions.\textsuperscript{78} The Treaty requires the crime to be punishable in both states.\textsuperscript{79} Furthermore, the offense for which the offender was convicted and sentenced cannot be a “political offense” or “an offense under the immigration . . . laws of a party.”\textsuperscript{80} Additionally, the offender “must be a national of the Receiving State”\textsuperscript{81} and not a “domiciliary of the Transferring State.”\textsuperscript{82}

Procedurally, transfers are initiated by the authority of the transferring country through diplomatic channels, though the offender may submit a request to the authority where he or she is held.\textsuperscript{83} Exercising the Treaty requires the consent of: the federal authority of the receiving country; the federal authority of the transferring country; the authority of the transferring state, if sentenced by a state court; and the consent of the offender.\textsuperscript{84}

Once transferred, the offender’s sentence is “carried out according to the laws and procedures of the Receiving State.”\textsuperscript{85} Furthermore, under Article VI of the Treaty, the “[t]ransferring State [retains] exclusive jurisdiction over any proceedings, regardless of their form, intended to challenge, modify or set aside sentences handed down by its courts.”\textsuperscript{86} U.S. courts have interpreted the offender’s consent to consti-

\textsuperscript{74} Oliviařež, \textit{supra} note 66, at 396–97.
\textsuperscript{75} Treaty, \textit{supra} note 31, art. I.
\textsuperscript{76} \textit{Id.} art. IV(4).
\textsuperscript{77} \textit{Id.} art. V(4).
\textsuperscript{78} \textit{Id.} art. II.
\textsuperscript{79} \textit{Id.} art. II(1); \textit{see} Sherman, \textit{supra} note 29, at 519–20 (explaining the principle of double criminality).
\textsuperscript{80} Treaty, \textit{supra} note 31, art. II(4).
\textsuperscript{81} \textit{Id.} art. II(2).
\textsuperscript{82} \textit{Id.} art. II(3).
\textsuperscript{83} \textit{Id.} art. IV(1)–(2).
\textsuperscript{84} \textit{Id.} art. IV(2)–(3), (5).
\textsuperscript{85} \textit{Id.} art. V(2).
\textsuperscript{86} Treaty, \textit{supra} note 31, art. VI.
tute a waiver of the right to challenge the foreign conviction in U.S. courts.87

The Treaty does not prescribe a procedure for consent, but it does permit the receiving country to “verify, prior to the transfer, that the offender’s consent to the transfer is given voluntarily and with full knowledge of the consequences thereof . . . .”88 The U.S. implementing legislation requires a hearing before a U.S. magistrate to verify that the offender’s consent is “voluntary and with full knowledge of the consequences.”89 The courts have also required that the offender “have access to competent council.”90

The Treaty requires implementing legislation.91 Even though the Treaty acknowledges the federal nature of Mexico and the United States,92 individual states cannot be party to the Treaty.93 Therefore, the federal government and each state must enact separate pieces of enabling legislation.94 To effect an international prisoner transfer, a state must transfer the prisoner to the federal government, and the federal government may then transfer the individual to his or her home country.95

California’s current implementing legislation is particularly proactive in encouraging prisoners to take advantage of the transfer option.96 The state’s legislation requires the appropriate agency to “devise a method of notifying each foreign born inmate . . . that he or she may be eligible to serve his or her term of imprisonment in his or her nation of citizenship”97 and to “actively encourage each eligible foreign born in-

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87 See Pfeifer v. U.S. Bureau of Prisons, 615 F.2d 873, 876 (9th Cir. 1980) (“[T]he Treaty and its implementing legislation provide that, prior to transfer, an offender must first consent to the conditions of the Treaty. This consent constitutes a waiver of, or at least an agreement not to assert, any constitutional rights the offender might have regarding his or her [foreign] conviction. The issue is whether this consent is obtained in a manner that meets the constitutional tests for a valid waiver.”).

88 Treaty, supra note 31, art. V(1).
90 Pfeifer, 615 F.2d at 876.
91 See Treaty, supra note 31, art. IV(9).
92 See id. art. IV(5) (“If the offender was sentenced by the courts of a state of one of the Parties, the approval of the authorities of that state, as well as that of the Federal Authority, shall be required.”).
93 See Finkelstein, supra note 30, at 143.
94 Id.
95 Id.
96 See id. at 150 (“California is the only state other than New York which has enabling legislation that formally addresses the prisoner’s ability to obtain information regarding his options and the possibility of transfer under an international treaty.”).
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mate to apply” for a transfer.”98 Between 1994 and 2004, California went so far as to offer up to $2000 to receiving states for each year that they held a transferred prisoner.99

Overall use of the Treaty has decreased in recent years.100 In the first fourteen years following the Treaty’s enactment, 968 U.S. citizens and 577 Mexican citizens transferred their sentence to their home country pursuant to the Treaty.101 From the period between 1990 and 1995, however, California had transferred only four Mexican citizens pursuant to the Treaty.102

The United States is party to numerous prisoner transfer treaties and processes around 1500 transfer applications per year.103 Most prisoners are transferred from the federal penal system, and Mexicans compose a large portion of total transfers.104 On average, the United States denies approximately sixty percent of transfer applications; Mexican applicants have the highest denial rate because their status as domiciliaries of the United States often renders them ineligible for transfer.105 Of the prisoners transferred out of the United States pursuant to transfer treaties, it is reasonable to assume that very few are Mexican citizens from California state prisons.106

Despite California’s proactive efforts in the field of international prisoner transfers, states are actually quite limited in their ability to act internationally.107 Article I, § 10 of the U.S. Constitution withholds the Treaty Power from the states.108 The third clause states: “No State shall, without the consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . .”109

98 Id. § 2912(b)(1).
100 See Olivarez, supra note 66, at 406.
101 Abramovsky, supra note 68, at 452.
102 Olivarez, supra note 66, at 406.
104 Id.
105 Id.; See Treaty, supra note 31, art. II(3) (“[T]he offender [must] not be a domiciliary of the Transferring State.”).
106 See Wolff, supra note 103 (explaining that most transfers come from federal, not state, convictions and that Mexicans have the highest application denial rate).
107 Leanne M. Wilson, The Fate of the Dormant Foreign Commerce Clause After Garamendi and Crosby, 107 COLUM. L. REV. 746,776 (2007) (describing the preemptive power of executive actions and statements); see id. at 771–72 (explaining the limits imposed on states by the “one voice” principle).
108 See U.S. CONST. art. 1, § 10, cls. 1 & 3.
109 Id. cl. 3.
Known as the “Compact Clause,” this provision has been broadly interpreted to permit states to enter into some compacts, as long as they are not binding or do not “[i]nappropriately enhance the political power of the states.”

The Dormant Foreign Commerce Clause and the principles of preemption also limit the ability of states to act in the international realm. The Dormant Foreign Commerce Clause is an expansion of the Dormant Interstate Commerce Clause derived from Article I of the Constitution. Under the Dormant Interstate Commerce Clause, state action is invalid if it discriminates against out-of-state commerce either facially or by effect, or if it unduly burdens interstate commerce. The Dormant Interstate Commerce Clause has been applied to international commerce as well, based on a “fear of states interfering with the nation’s foreign affairs, resulting in harm to the nation from the retaliatory actions of foreign governments.” The foreign application of the dormant commerce clause is intended to promote uniformity in the treatment of foreign nations and to permit the federal government to present a single uniform policy towards international trading partners.

The Dormant Foreign Commerce Clause’s exact scope is ambiguous, but it generally prohibits states from interfering with federal commerce. In the most recent cases addressing the international activities of the states, the Supreme Court has applied the principles of the Dormant Foreign Commerce Clause; however, the Court ultimately resolved both cases on preemption grounds. In *Crosby v. National Foreign Trade Council*, the Court struck down a Massachusetts law directed at trade with Burma because it interfered with authority Congress had

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111 See Wilson, *supra* note 107, at 771–72, 776.
112 Id. at 753 (explaining the origins and basis of the Dormant Foreign Commerce Clause).
113 Id. at 749–50.
114 Id. at 753.
115 Id.
delegated to the President in that field.\footnote{Crosby, 530 U.S. at 388 ("Because the state Act’s provisions conflict with Congress’s specific delegation to the President . . . it is preempted, and its application is unconstitutional . . . .").} In \textit{American Insurance Ass’n v. Garamendi}, the Court struck down a California law requiring insurance companies to disclose their dealings with Germany during the Second World War because the President had already taken executive action in that field.\footnote{Garamendi, 539 U.S. at 425 ("The express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield.").} In both cases, the Court considered the "need for the nation to speak with one voice in foreign affairs," but ultimately decided that the federal action on the specific issues superseded the conflicting state action.\footnote{See Wilson, supra note 107, at 766 (addressing the Court’s use of “one voice” analysis), 773 (“Garamendi, then, reinforces Crosby by showing the Court’s preference for deciding cases on conflict preemption grounds rather than dormant Foreign Commerce Clause grounds.”).}

Despite these constitutional limitations, some state action in international affairs is permitted.\footnote{See Schrag, supra note 110, at 429–30.} Traditional state activity in the international sphere falls into one of three categories: entering nonbinding agreements with foreign entities to promote trade and investment; adopting laws and policies pursuant to federally negotiated international treaties; and lobbying the federal government to support the states’ international agenda.\footnote{Id. at 430.} Most international state activity relates to promoting trade and investment.\footnote{Lee, supra note 116, at 735.} For example, with the approval of the Department of Homeland Security, Wisconsin has created a "special economic zone" that is designed to attract foreign investment by offering U.S. residency as an incentive to qualifying investors.\footnote{Id. at 748.} Wisconsin has also negotiated a “bilateral trading relationship” with China to offer favorable treatment to Chinese investors.\footnote{See id. at 737 (“[T]he history of dormant-foreign-commerce jurisprudence has been inconsistent, leaving ‘much room for controversy and confusion.’”), 759 (“[T]here is no clear delineation of the legitimate bounds of state activity . . . .”).} Similarly, many states and municipalities enter “sister city” relationships, which are nonbinding diplomatic arrangements designed to build cultural connections and encourage economic development between U.S. and foreign communities.\footnote{Id. at 748.} Despite these developments, the exact limits on states’ international activities remain unclear.\footnote{Id. at 737 (“[T]he history of dormant-foreign-commerce jurisprudence has been inconsistent, leaving ‘much room for controversy and confusion.’”), 759 (“[T]here is no clear delineation of the legitimate bounds of state activity . . . .”).}
B. Extra-Territorial Liability

The Constitution is silent regarding its application outside U.S. territory; thus, it is uncertain whether prisoners held abroad under U.S. law can demand constitutional protections and seek civil damages in U.S. courts.\textsuperscript{128} In recent years, the question of whether foreign nationals detained outside the United States possess any rights has surfaced repeatedly in the context of the War on Terror.\textsuperscript{129} Thousands of foreign nationals have been arrested for suspected terrorist activities and held with U.S. assistance in foreign states.\textsuperscript{130} Critics describe this practice of extra-territorial detention and interrogation as a “legal black hole,” where detainees possess no enforceable rights and governments may act unconstrained by their own national laws.\textsuperscript{131} For example, at various times during the U.S. detention of suspected terrorists in Guantanamo Bay, Cuba, individuals were denied constitutional habeas corpus and due process rights, as well as the Prisoner of War protections guaranteed by international law.\textsuperscript{132}

Although the law regarding prisoners’ rights is not totally clear, recent cases have held that foreign nationals held abroad under color of U.S. law do possess some constitutional rights.\textsuperscript{133} In \textit{Boumediene v. Bush}, Justice Kennedy wrote that three factors ought to be used to determine whether aliens in U.S. custody outside U.S. borders have the right to petition the courts for a writ of habeas corpus: “(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.”\textsuperscript{134} The holding in \textit{Boumediene}, which stipulates that Guantanamo Bay detainees have habeas rights, implies that aliens in U.S. custody elsewhere have some constitutional rights as well.\textsuperscript{135}

\textsuperscript{128} See Cabranes, \textit{supra} note 33, at 1662.
\textsuperscript{129} \textit{Id.} at 1664–65.
\textsuperscript{131} \textit{See id.} at 772–75.
\textsuperscript{132} \textit{Id.} at 773–74.
\textsuperscript{133} \textit{See id.} at 775.
Although the scope of constitutional rights of alien detainees remains contentious, Congress has clearly prescribed causes of action for harms committed under the color of U.S. law, some of which have been applied to harm caused abroad.\textsuperscript{136} The Court’s holding in \textit{Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics} created liability for federal employees who violated constitutional and statutory rights under color of federal law,\textsuperscript{137} and the Court has suggested that such liability extends to violations committed outside U.S. borders.\textsuperscript{138}

Liability for constitutional torts committed by state actors is enshrined in 42 U.S.C. § 1983.\textsuperscript{139} \textit{Monroe v. Pape} established that the statute also applies to violations of state law,\textsuperscript{140} and in \textit{Johnson v. Larabida Children’s Hospital}, the Seventh Circuit held that the statute applied to private actors acting under the direction of the state or performing a delegated state function.\textsuperscript{141} In \textit{West v. Atkins}, the Supreme Court applied this principle to individuals contracted to provide services to prisoners, holding that a doctor hired to treat prisoners was acting under state law and thus was liable for Eighth Amendment claims under § 1983.\textsuperscript{142} The Court has also found § 1983 liability for violations of state law committed outside the state by a private agent of that state.\textsuperscript{143} In \textit{Gwynn v. TransCor America, Inc.}, the court permitted a Colorado prisoner to bring a claim under § 1983; the prisoner alleged that her Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendment rights were violated outside of Colorado by employees contracted by the Colorado Department of Corrections to transport her from Oregon to Colorado.\textsuperscript{144} This case law demonstrates that § 1983 could be a remedy for constitutional violations occurring outside the United States by private parties acting under state law.\textsuperscript{145}

\begin{itemize}
\item \textsuperscript{137} See 403 U.S. 388, 395–97 (1971) (reasoning that a victim is entitled to monetary damages for violations of his Fourth Amendment rights by federal agents).
\item \textsuperscript{138} See Borrowman, \textit{supra} note 136, at 416 (discussing inferences drawn from Justice Souter's decision in \textit{Sosa v. Alvarez-Machain}, 542 U.S. 692 (2004)).
\item \textsuperscript{139} 42 U.S.C. § 1983 (2006).
\item \textsuperscript{140} 365 U.S. 167, 183 (1961).
\item \textsuperscript{141} 372 F.3d 894, 896 (7th Cir. 2004) (“While generally employed against government officers, the language of § 1983 authorizes its use against private individuals who exercise government power; that is, those individuals who act ‘under color of state law.’”).
\item \textsuperscript{142} See 487 U.S. 42, 56 (1988).
\item \textsuperscript{143} See 26 F. Supp. 2d 1256, 1264–66 (D. Colo. 1998).
\item \textsuperscript{144} \textit{Id.} at 1259, 1264–66 (describing and upholding the plaintiffs § 1983 claims).
\item \textsuperscript{145} See \textit{West}, 487 U.S. at 56; \textit{Gwynn}, 26 F. Supp. 2d at 1264–66.
\end{itemize}
III. Analysis

A. International Law

The Governor’s proposal to forcibly export undocumented Mexican inmates to Mexican prisons would not work under the existing U.S.-Mexico Treaty because the Treaty requires consent, is expressly for rehabilitative purposes, and excludes domiciliaries of the transferring state. First, either eliminating the consent requirement of the Treaty or ignoring it, as the Governor seems to propose, would render both the Treaty and the transfer unconstitutional. A major concern at the drafting of the Treaty was that Americans transferred from Mexico would be incarcerated under U.S. law, but without the due process protections guaranteed by the Constitution. The constitutionality of the present Treaty is supported by the consent requirement because it represents a critical waiver of due process rights. The elimination of the consent requirement from the Treaty altogether would likely render the Treaty and any nonconsensual transfers unconstitutional.

Even if the Governor retained the consent requirement, complying with the required legal procedures could be prohibitively burdensome. If the Governor’s plan required consent, the prisoner would be entitled to legal counsel, would have to appear before a magistrate judge to declare his consent, must receive federal approval, and then would have to be transferred to federal custody to effect the transfer to Mexican authorities. Providing counsel and holding a magistrate hearing for the thousands of inmates that the Governor proposes to transfer in order to adjudicate their consent could be logistically prohibitive if the Governor intends to meet the federally

147 Treaty, supra note 31, art. IV(4).
148 Id. art. II(3).
150 Id. at 237.
151 See id. at 240.
152 See id. at 239–40.
153 Treaty, supra note 31, art. II(3).
154 Pfeifer v. U.S. Bureau of Prisons, 615 F.2d 873, 876 (9th Cir. 1980).
156 Treaty, supra note 31, art. IV(5).
157 Finkelstein, supra note 30, at 143.
158 See 18 U.S.C. § 4107 (requiring Magistrate hearings for consent); Pfeifer, 615 F.2d at 876 (requiring access to counsel for transfer proceedings).
mandated a two-year deadline to ameliorate state prison conditions. The dual requirements of federal consent and transfer to federal authority would also allow the federal government to block the Governor’s plan or, at a minimum, add significant administrative delay.

Second, forced transfers without consent would frustrate the humanitarian and rehabilitative goals and spirit of the existing Treaty. Article IV of the Treaty states, “[i]n deciding upon the transfer of an offender the Authority of each Party shall bear in mind all factors bearing upon the probability that the transfer will contribute to the social rehabilitation of the offender . . . .” Transferring prisoners purely for financial reasons would impermissibly ignore this term of the Treaty. Consistent with Article IV’s humanitarian purpose, the Treaty also specifically disregards financial considerations. Article IV asserts that “[t]he Receiving State shall not be entitled to any reimbursement for the expenses incurred by it in the completion of the offender’s sentence.” This language indicates that the drafters of the Treaty did not intend financial motivations or incentives to be a consideration in the decision to transfer or accept prisoners. Thus, exploitation of the Treaty to expand the California penal system into Mexico purely for financial and logistical reasons would be outside the Treaty’s scope and purpose.

Finally, the Treaty excludes domiciliaries of the transferring state from eligibility. The Treaty defines a domiciliary as “a person who has been present in the territory of one of the parties for at least five years with an intent to remain permanently therein.” As stated previously, most Mexican applicants for transfer are currently ineligible because they have achieved domiciliary status in the United States.

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159 Carlton, supra note 2; Diaz, supra note 6.
160 See 18 U.S.C. § 4107; Pfeifer, 615 F.2d at 876.
161 Clark, supra note 149, at 239.
162 Treaty, supra note 31, art. IV(4).
163 See id.
164 See id. arts. IV(4) (discussing “social rehabilitation” purpose of transfer) & V(4) (dismissing financial incentives and reimbursements, which indicates that Treaty was not intended to be used for profit).
165 Id. art. IV(4).
166 See id.
167 See id. arts. IV(4) (indicating a humanitarian purpose through exclusive consideration of factors bearing on “social rehabilitation” of the prisoner) & V(4) (indicating that Treaty was not intended to be used for profit by dismissing financial incentives and reimbursements).
168 Treaty, supra note 31, art. II(3).
169 Id. art. IX(4).
170 See Wolff, supra note 103.
Unless the Governor also violates this provision of the Treaty, most of his intended transferees would not be eligible.\textsuperscript{171}

The existing Treaty does not permit the Governor to execute his proposal, and the U.S. Constitution prohibits California from drafting its own treaty to suit its needs.\textsuperscript{172} The Compact Clause of the Constitution prevents states from entering binding agreements with foreign nations.\textsuperscript{173} Most international agreements with states survive constitutional scrutiny because they are “‘nonbinding’ resolutions that call upon the parties to use their best efforts to facilitate trade.”\textsuperscript{174} The Governor’s proposal goes beyond “best efforts” and would require a binding compact with Mexico, which the Constitution forbids.\textsuperscript{175}

A new agreement between California and Mexico would also violate the principles of the Dormant Foreign Commerce Clause and would conflict with the existing federal action in the field, thus subjecting it to preemption.\textsuperscript{176} Under \textit{Garamendi} and \textit{Crosby}, a state action is preempted if there is a specific federal interest that conflicts with the state action.\textsuperscript{177} The federal government has already acted in this specific area by negotiating and ratifying a treaty with Mexico and passing enabling legislation.\textsuperscript{178} Therefore, California’s competing state treaty would be preempted because it conflicts with the existing Treaty and also inhibits the nation’s ability to speak to Mexico with one unified voice on the issue of prisoner transfers.\textsuperscript{179}

As a last resort, California could try to lobby the federal government to amend the existing Treaty.\textsuperscript{180} The current Treaty, however, has been the model for most subsequent bilateral prisoner transfer agreements, so it is unlikely that the federal government would be willing to

\begin{itemize}
\item \textsuperscript{171} See \textit{id}.
\item \textsuperscript{172} See U.S. Const. art. 1, § 10, cl. 3.
\item \textsuperscript{173} Schrag, \textit{supra} note 110, at 434.
\item \textsuperscript{174} Id. at 447–48.
\item \textsuperscript{175} See U.S. Const. art. 1, § 10, cl. 3; Schrag, \textit{supra} note 110, at 434.
\item \textsuperscript{177} See \textit{Garamendi}, 539 U.S. at 425; \textit{Crosby}, 530 U.S. at 388.
\item \textsuperscript{178} See, e.g., 18 U.S.C. §§ 4107–4108 (enabling legislation requiring verification of consent prior to transfers); see Treaty, \textit{supra} note 31.
\item \textsuperscript{179} See \textit{Wilson}, \textit{supra} note 107, at 771–72 (explaining the “one voice” principle), 782 (“If the actions of the executive have the force of law, that is if they are constitutionally valid treaties, then the state law should be evaluated against the treaty to see if it is preempted.”).
\item \textsuperscript{180} See Schrag, \textit{supra} note 110, at 429–30.
\end{itemize}
depart significantly from its basic terms.\textsuperscript{181} Furthermore, any new treaty that did not require prisoner consent, a key element of the Governor’s plan to move tens of thousands of prisoners out of the country, would be unconstitutional.\textsuperscript{182} Given these insurmountable challenges of international and constitutional law, Governor Schwarzenegger’s plan is completely untenable.\textsuperscript{183}

\textbf{B. Extra-Territorial Liability}

The feasibility of the Governor’s plan is weakened further by the fact that the anticipated cost savings of using private prisons in Mexico operated under California law would be negated by the high risk of costly lawsuits.\textsuperscript{184} Boumediene established that prisoners held outside the territorial United States under the color of U.S. law have some enforceable constitutional rights, specifically the right to habeas corpus.\textsuperscript{185} Based on the three factors that the Boumediene Court enumerated and used to determine whether detainees had a right to habeas corpus—status and status certainty, location of arrest and detention, and practical obstacles—Mexican nationals transferred from California prisons to Mexico would have some enforceable rights, including habeas corpus\textsuperscript{186} and Eighth Amendment protections.\textsuperscript{187}

The first factor enumerated in Boumediene is status and status certainty; in that case the Court found that the uncertain status of the Guantanamo Bay detainees and the inadequacy of their Combatant Status Review Tribunals supported their claim that a writ of habeas was necessary in order to determine their status and rights.\textsuperscript{188} Conversely, in the case of California’s undocumented inmates, U.S. courts would have already adjudicated their criminal status prior to incarceration,

\begin{itemize}
  \item \textsuperscript{181} See Emanuel, \textit{supra} note 32, at 204.
  \item \textsuperscript{182} See Clark, \textit{supra} note 149, at 240.
  \item \textsuperscript{183} See, e.g., U.S. Const. art. 1, § 10, cl. 3 (prohibiting states from forming compacts); Treaty, \textit{supra} note 31, arts. II(3) (excluding domiciliaries of transferring state), IV(2) (requiring prisoner consent) & (4) (listing humanitarian considerations); Clark, \textit{supra} note 149, at 240 (explaining that a prisoner transfer treaty without consent would be unconstitutional).
  \item \textsuperscript{184} See Anderson, \textit{supra} note 19, at 131–32.
  \item \textsuperscript{185} See Neuman, \textit{supra} note 135, at 285–86 (“The Boumediene opinion makes clear that lacking presence or property in the United States does not make a foreign national a constitutional nonperson whose interests deserve no consideration.”).
  \item \textsuperscript{186} See Boumediene v. Bush, 553 U.S. 723, 766 (2008).
  \item \textsuperscript{187} See Borrowman, \textit{supra} note 136, at 404–06 (explaining the unique quality and application of the Eighth Amendment).
  \item \textsuperscript{188} Boumediene, 553 U.S. at 767–68.
\end{itemize}
thus entitling them to the same habeas rights and legal protections enjoyed by inmates of the same criminal status retained in California.\textsuperscript{189}

Second, whereas the Guantanamo Bay detainees were captured and held outside the United States at all relevant times and had to premise their claims to constitutional rights on Guantanamo Bay’s de facto status as a U.S. territory, California inmates would have spent substantial time in undisputed U.S. territory and under U.S. control.\textsuperscript{190} Prisoners transferred to Mexico would thus have a stronger claim to constitutional protections than the detainees in \textit{Boumediene}, given that California inmates would had lived on actual U.S. territory prior to their arrest and during their detention therein.\textsuperscript{191}

Finally, the practical obstacles to providing enforceable rights to undocumented California inmates in Mexico are less severe than the obstacles to providing enforceable rights to Guantanamo Bay detainees.\textsuperscript{192} Although issues related to distance, national borders, and the language barrier present substantial and costly logistical challenges to enforcing the rights of California prisoners transferred to Mexico, these challenges do not surpass the financial and national security concerns that the Government put forth in \textit{Boumediene} and that the Court ultimately rejected.\textsuperscript{193}

In addition to the habeas rights articulated in \textit{Boumediene}, California prisoners in Mexico would, at a minimum, also be entitled to Eighth Amendment protection from cruel and unusual punishment.\textsuperscript{194} The

\textsuperscript{189} \textit{Cf.} West v. Atkins, 487 U.S. 42, 56 (1988) (“Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State’s prisoner’s of the means to vindicate their Eighth Amendment rights.”). Just as prisoners are entitled to medical care and Eighth Amendment protections, whether served under color of state law by state employees or by state contractors, prisoners would be entitled to the same rights and protections whether held under color of state law in California or in Mexico. \textit{See id.}

\textsuperscript{190} \textit{See Boumediene}, 553 U.S. at 768 (holding that the location of the detainees’ “apprehension and detention [is] technically outside the sovereign territory of the United States,” but that Guantanamo Bay is “[i]n a very practical sense . . . within the constant jurisdiction of the United States”).

\textsuperscript{191} \textit{Cf. id.} at 768 (Guantanamo Bay detainees’ capture and incarceration outside the territorial United States is “a factor that weighs against finding they have rights under the Suspension Clause”).

\textsuperscript{192} \textit{See id.} at 768–69.

\textsuperscript{193} \textit{See id.} at 769 (“While we are sensitive to these [cost] concerns, we do not find them dispositive . . . . [Furthermore, t]he Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims.”).

\textsuperscript{194} \textit{See Borrowman}, \textit{supra} note 136, at 404–06 (explaining the unique quality and application of the Eighth Amendment).
Eighth Amendment is unique in that it regulates specific conduct, and therefore would apply to U.S. actors and agents wherever they are.\textsuperscript{195}

Regardless of the outer limits of the constitutional rights and protections of California prisoners detained in Mexico, these prisoners would have a cause of action in U.S. courts for cognizable harm done to them during their Mexican incarceration.\textsuperscript{196} By enacting 42 U.S.C. § 1983, Congress created a cause of action for violations of constitutional rights committed by state actors.\textsuperscript{197} Even though state governments enjoy qualified immunity from claims arising under § 1983,\textsuperscript{198} the courts have extended the coverage of this statute to include violations of state law\textsuperscript{199} and the conduct of private individuals if the state directs their actions or empowers them to perform public functions.\textsuperscript{200}

Section 1983 would apply to Mexican prison operators under the Governor’s plan because state contractors and privately run prisons operate as state actors.\textsuperscript{201} In \textit{West}, the Supreme Court sustained a prisoner’s claim under § 1983 against a doctor whom it found to be acting under the color of state law when he treated a prisoner pursuant to a contract with the state prison.\textsuperscript{202} In \textit{Street v. Corrections Corp. of America}, the Sixth Circuit applied the “public function test” to determine if the conduct of a private prison corporation and its employees was done under the color of state law for the purposes of § 1983.\textsuperscript{203} The court noted that “[t]he public function test requires that the private entity exercise powers which are traditionally exclusively reserved to the state.”\textsuperscript{204} The court determined that the private prison company and its employees could be subject to liability because they were performing a “traditional state function.”\textsuperscript{205} Therefore, employees of Mexican prisons and others associated with the prisons would be acting under state

\textsuperscript{195} See id.
\textsuperscript{197} See id.
\textsuperscript{198} Anderson, supra note 19, at 131.
\textsuperscript{200} Johnson v. Larabida Children’s Hosp., 372 F.3d 894, 896 (7th Cir. 2004).
\textsuperscript{202} See West, 487 U.S. at 56–57.
\textsuperscript{203} See Street, 102 F.3d at 814.
\textsuperscript{204} Id. (internal quotations omitted).
\textsuperscript{205} See id.
law and in performance of a traditional state function and, therefore, could be subject to liability under § 1983.206

Prisoners have also successfully brought § 1983 claims against contractors acting under color of state law when the questionable conduct took place outside the state that had hired the contractors.207 In Gwynn, a female prisoner brought an action under § 1983 in the Colorado District Court against private contractors hired by the Colorado Department of Corrections to transport her from Oregon to Colorado.208 The prisoner alleged that she was subjected to dangerous conditions, mistreated, and sexually assaulted throughout Oregon, California, Nevada, Utah, Wyoming, and Idaho.209 The court ruled that the transportation employees, “as agents and prison guards of the State of Colorado, pursuant to the contract between TransCor and the Colorado Department of Corrections,” were acting under the color of Colorado state law when they sexually assaulted the plaintiff prisoner whom they were contracted to guard and transport.210 The court noted that the contractual relationship with Colorado would have been sufficient to justify venue there, even if none of the tortious conduct had occurred in the state.211

Thus, based on the reasoning of West and Street, which both opened the door to potential § 1983 liability for state prison contractors,212 as well as the Gwynn court’s extension of that liability to conduct outside the forum,213 privately run prisons and their employees in Mexico would be subject to § 1983 liability in California courts because they would be acting under color of California law.214

The history of violence, corruption, and neglect in Mexican prisons215 combined with the fact that private prisons in the United States have a reputation for mismanagement would create dangerous conditions and a high risk of endless and exacting prisoner lawsuits against officials of private Mexican prisons.216 Private prisons in the United

206 See id.
208 Id.
209 Id. at 1260.
210 Id. at 1265.
211 Id. at 1263 n.2. The judge ultimately granted venue in Colorado based on an allegation that one of the several sexual assaults took place there. Id. at 1262–63.
212 See supra notes 201–205 and accompanying text (explaining and applying West and Street).
213 See supra notes 207–210 (explaining and applying Gwynn).
214 See West, 487 U.S. at 56–57; Street, 102 F.3d at 814; Gwynn, 26 F. Supp. 2d at 1265.
215 See Abramovsky, supra note 68, at 454–55; Olivarez, supra note 66, at 404–06.
216 See Anderson, supra note 19, at 131–32 (describing the high cost of legal challenges related to private prisons in the United States).
States have been accused of providing inferior inmate services in order to maximize profits.\footnote{Id. at 116. “A for-profit prison operator [has] almost no contractual incentive to provide rehabilitation opportunities or educational or vocational training that might benefit inmates after release, except insofar as these services act to decrease the current cost of confinement.”} Employees at private U.S. prisons also receive much less training than state prison employees, which has led to riots, injuries, and mistreatment.\footnote{Id. at 126 (“Private prison guards receive thirty-five percent fewer service training hours than public prison employees.”); States Export, supra note 37. Poorly trained guards who had only been working for several days were blamed for a riot at a private prison in Indiana that left two corrections officers and five inmates injured. Id.} Across the border, the Mexican prison system has a reputation for severe mistreatment, corruption, and violence.\footnote{See Abramovsky, supra note 68, at 454–55; Olivarez, supra note 66, at 404–06.} The Supreme Court has repeatedly held that “deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth Amendment.”\footnote{See Street, 102 F.3d at 814 (internal quotations omitted); see also Estelle v. Gamble, 429 U.S. 97, 104–05 (1976) (holding that a prison guard’s or doctor’s “deliberate indifference to serious medical needs of prisoners” violates the Eighth Amendment and constitutes a cause of action under 42 U.S.C. § 1983).} The poor conditions in Mexican prisons,\footnote{See Diaz, supra note 6 (“Prison management is not exactly Mexico’s strong suit.”).} if coupled with the indifference shown in U.S. private prisons,\footnote{See Anderson, supra note 19, at 116 (“Cost-cutting measures promote inferior contract performance, undue safety risks, and poor delivery of inmate services.”).} would lead to a high risk of Eighth Amendment claims by California prisoners held in private prisons in Mexico.\footnote{See Estelle, 429 U.S at 104–05; Street, 102 F.3d at 814.}

One of the primary goals of the Governor’s proposal is to reduce costs; however, the expenses of monitoring privately-run prisons in Mexico in an effort to manage risks and control liability would substantially offset the perceived savings.\footnote{See Anderson, supra note 19, at 131 (“[R]ather than reducing levels of red tape that would otherwise exist in a purely public system, private prison systems require costly monitoring and enforcement procedures to keep the symptoms of profit maximization in check as much as possible.”).} The cost to private prisons of insure against and litigating these types of lawsuits would likely be passed on to the state through higher contract prices which would further reduce or eliminate any potential savings.\footnote{See id. at 131–32 (“Litigation expenses, settlement agreements, and adverse court judgments against private prison operators and their employees augment the Government’s expenses by way of contract pricing increases and a higher degree of liability exposure than would exist under a purely public system.”).}

Additionally, offshoring correctional services to Mexico would likely create high political costs, especially if reports of prisoner abuse and
mistreatment at the hands of contracted Mexican prison operators became publicized.\textsuperscript{226} Even offshored programs that created substantial state savings have been terminated following public outcry over sending an essential state function out of the country.\textsuperscript{227} For example, the state of Indiana contracted with an India-based consulting firm to provide work visas for sixty-five Indian contractors to upgrade the state’s job placement agency’s computer system.\textsuperscript{228} The contract would have saved the state $8 million, but it was cancelled when the details were publicized.\textsuperscript{229}

Thus, even if the international and constitutional legal barriers of the Governor’s prison proposal were not prohibitive, the exorbitant monitoring and litigation expenses,\textsuperscript{230} as well as the potential political backlash,\textsuperscript{231} would likely make the proposal too costly for the Governor to pursue.\textsuperscript{232}

\section*{Conclusion}

Governor Schwarzenegger’s proposal to relieve California’s budget deficit and overcrowded prisons by sending illegal immigrant inmates to privately run Mexican prisons is fatally flawed. Despite its creativity, it is untenable under international law, and the liability expenses it would pass on to the state would substantially eliminate the anticipated savings. Moreover, Governor Schwarzenegger is only addressing the superficial effect of two much greater underlying causes—international immigration and domestic criminal sentencing. Because of the inherent complications in addressing these effects through offshoring, attacking these problems at their root would likely do more to relieve prison expenses and overcrowding. Instead of pressing the limits of state action in the international arena, California should act within the limits set by

\textsuperscript{226} See Zuckerman, \textit{supra} note 13, at 172–74 (describing Senator Ted Kennedy’s criticism of then-governor Mitt Romney for “jumping on the offshoring bandwagon” and the public debate over offshoring that took place during the 2004 presidential election).

\textsuperscript{227} See id. at 172 (describing a situation in Indiana in which the Governor canceled a contract with an Indian consulting firm that would have saved the state $8 million after it was publicized).

\textsuperscript{228} Id.

\textsuperscript{229} Id.

\textsuperscript{230} See \textit{supra} notes 223–224 and accompanying text.

\textsuperscript{231} See \textit{supra} notes 225–228 and accompanying text.

\textsuperscript{232} See Anderson, \textit{supra} note 19, at 132 (“These additional indirect financial costs seriously undermine the economic argument in favor of private prison contracts and demonstrate why the privatization ‘solution’ has so far failed to ease governments’ corrections budgets.”); Zuckerman, \textit{supra} note 13, at 172 (describing how political backlash caused Indiana to cancel a contract with an Indian firm).
the Constitution and Supreme Court. California should lobby the federal government and work with immigration authorities to stop the flow of undocumented immigrants into the state and to deport those already there. This will prevent illegal immigrants from becoming part of the state criminal justice system in the first place. The state should also revise its sentencing guidelines and promote alternative probation and rehabilitation programs to reduce the number of inmates in its prison system and their associated costs. The globalized world is increasingly creating challenges and opportunities that transcend national borders and state lines: state governments must recognize, however, that sending essential public functions abroad will not always solve their problems at home.
LEVELING THE PLAYING FIELD: THE INTERNATIONAL LEGALITY OF CARBON TARIFFS IN THE EU

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Abstract: In the absence of any robust international agreements to combat climate change, some countries undertake climate change policy unilaterally. One such example is the European Union’s emissions trading system, a government program that sets the quantity of authorized carbon emissions in the EU. This system, however, places the EU’s energy-intensive industries at a competitive disadvantage compared to foreign firms without similar environmental restrictions. In order to level the playing field, some have proposed carbon border taxes or “carbon tariffs.” This Note assesses the legality of these proposed carbon tariffs under the General Agreement on Tariffs and Trade, part of the World Trade Organization. Because such tariffs will likely violate the main text of the GATT, this Note examines whether Article XX exceptions may apply to permit carbon tariffs. The Note concludes that despite the importance of climate change mitigation and the recent liberalization of WTO jurisprudence, Article XX should not be interpreted so broadly as to permit the introduction of carbon tariffs in the EU.

Introduction

Climate change is a natural phenomenon, but most scientists now agree that human behavior has exacerbated this natural process.¹ More specifically, carbon dioxide emissions from human activities have rapidly accelerated the “greenhouse effect” where greenhouse gases trap infrared radiation (heat energy) in the Earth’s atmosphere, contributing to an increase in the warming of the Earth’s surface.² Studies esti-
mate that concentrations of carbon dioxide in the atmosphere have risen more than thirty percent since pre-industrial times, and scientists predict that if emissions continue at the same rate, greenhouse gases will be twice pre-industrial levels by the middle of the twenty-first century. Many experts insist that this would have catastrophic consequences, and that there is an urgent need to reduce carbon emissions.

In response to climate change, the European Union (EU) has adopted an emissions trading scheme in which total carbon emissions in the EU are capped, and the EU distributes allowance permits to be traded among producers. Although this regional emissions agreement may be a major step toward reducing global carbon emissions, energy-intensive industries in the EU have expressed concern over competitiveness with energy-intensive industries outside the EU. Additionally, this asymmetry between EU and non-EU industries may create a phenomenon referred to as “carbon leakage.” Accordingly, a debate has emerged in the EU over possible border measures to address these perceived problems. Although EU commissioners remain skeptical, France has insisted upon border taxes related to carbon emissions for several years. In the wake of a largely unsuccessful climate convention in Copenhagen, the debate over carbon border taxes may reemerge in the EU with a new sense of urgency.

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3 WTO Report, supra note 1, at 3.
4 Stern Review, supra note 2, at 15. Admittedly, the Stern Report is viewed by some as “controversial” or alarmist. See Jody Freeman & Andrew Guzman, Climate Change and U.S. Interests, 109 Colum. L. Rev. 1531, 1595 (2009).
5 Stern Review, supra note 2, at 21; Harper, supra note 2, at 412. The phrase “climate change” has generally replaced “global warming” because the issue is not simply a rise in temperature, but also (and perhaps more importantly) actual changes in the global climate system. See Harper, supra note 2, at 412–13. As a recent WTO report notes, “[i]t is reasonable to argue that climate change will be experienced most directly through changes in the frequency and intensity of extreme weather events. Such weather events are ‘hidden’ in the changes in climatic averages and have immediate short-term implications for well-being and daily livelihoods.” WTO Report, supra note 1, at 13.
6 WTO Report, supra note 1, at 91.
9 See Asselt & Biermann, supra note 7, at 498.
This Note explores the possibility of an EU-wide carbon border tax. Part I addresses the economics of climate change, and explains the EU response. It then explains carbon border tax adjustments and the EU’s position on using such adjustments to eliminate the artificial advantage for non-EU industries that do not have similar environmental restrictions. Part II examines the international legality of carbon border taxes under World Trade Organization (WTO) law, and discusses whether carbon border taxes might fit into an environmental exception under Article XX of the General Agreement on Tariffs and Trade (GATT). Part III analyzes the recent evolution of Article XX in WTO jurisprudence. As a result of this analysis, Part III suggests that carbon tariffs in the EU should fail the Article XX analysis for reasons that illustrate significant concerns with the recent liberalization of WTO jurisprudence. Despite a generally favorable response to this development in WTO jurisprudence, climate change mitigation presents a novel policy that demonstrates the inherent limitations of Article XX.

I. BACKGROUND

A. Climate Change and the EU’s Collective Response

In economic terms, climate change attributed to carbon emissions is a “negative externality.”\(^\text{12}\) A negative externality is a cost of economic activity that is not internalized to the economic activity itself.\(^\text{13}\) As such, negative externalities are costs imposed on third parties without market correction.\(^\text{14}\) As a result, they are generally treated as phenomena that policymakers must correct.\(^\text{15}\) Climate change represents a global negative externality because it involves the “global environmental commons.”\(^\text{16}\) Unregulated exploitation of the global environment by individual countries may create a “tragedy of the commons” in which every individual country has an incentive to exploit resources in the short

\(^\text{12}\) WTO Report, supra note 1, at 88.

\(^\text{13}\) Michael J. Trebilcock & Robert Howse, The Regulation of International Trade 509 (3d ed. 2005). A simple example would be pollution that spills over from the productive activities of one country to the territory of another country. See id.

\(^\text{14}\) Stern Review, supra note 2, at 27.

\(^\text{15}\) See id. Stern refers to climate change due to human carbon emissions as a “market failure on the greatest scale the world has seen.” Id.

\(^\text{16}\) Trebilcock & Howse, supra note 13, at 509.
term without investing in long-term preservation. The most logical solution to this problem is international collective action.

The most significant and well-known global response to climate change is the Kyoto Protocol. The Kyoto Protocol was signed in 1997 and requires industrialized countries to reduce emissions over an initial commitment period from 2008–2012. Although the United States refused to ratify the Protocol, it came into force with Russia’s ratification in November 2004.

In 2003, to comply with Kyoto’s goals, the EU created the “largest emissions trading scheme ever implemented.” An emissions trading scheme (ETS) represents a government program that sets the quantity of authorized emissions and distributes permits accordingly, allowing the market to determine the price of carbon emissions. The EU ETS began on January 1, 2005, with a mandatory “warm-up” phase from 2005–2007, and a second mandatory phase from 2008–2012 that corresponds to the Kyoto Protocol’s first commitment period. As of 2009, the EU ETS covered “more than 10,000 installations in the energy and industrial sectors that are collectively responsible for about half of the EU’s emissions of CO₂.”

B. Leveling the Playing Field: Carbon Border Taxes in the EU?

The EU’s domestic regulation of carbon emissions through an ETS has provoked serious debate about the international competitiveness of energy-intensive industries within the EU. The EU ETS represents a
domestic program addressing a global negative externality. As such, the possibility of inequity arises because other countries with which the EU engages in commerce do not have similar programs in place. Accordingly, two major problems emerge. The first is the competitiveness of energy-intensive industries in the EU vis-à-vis competing industries in jurisdictions without similar environmental restrictions. Normally, a foreign producer that operates at lower costs is simply more competitive and should, under free trade principles, be able to out-compete its domestic rival. But when lower costs result from the lack of environmental costs, the advantage is artificial. Because the foreign producer is not subject to environmental restrictions and continues to emit carbon into the global commons, the foreign producer unfairly benefits from the efforts of domestic industry. This creates an “unequal playing field” in international trade within the energy-intensive sector of the global economy.

The second potential problem is “carbon leakage,” which means that any domestic carbon reduction would be offset in the global environmental commons by an increase in carbon emissions elsewhere. Unlike the first concern, which is essentially one of fairness, carbon leakage involves the effectiveness of environmental regulations. Foreign firms without environmental costs may be more competitive and produce higher emissions than they otherwise would, thereby offsetting some or all of the emissions reductions made by the domestic industry. Further, regulatory asymmetry may create “carbon havens” where industries relocate to benefit from lower environmental standards, which may accelerate the offsetting envisaged above.

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27 See Stern Review, supra note 2, at 27.
28 See Asselt & Biermann, supra note 7, at 498.
29 See Trebilcock & Howse, supra note 12, at 511.
30 See id.
31 See Tania Voon, Sizing Up the WTO: Trade-Environment Conflict and the Kyoto Protocol, 10 J. Transnat’l L. & Pol’y 71, 74 (2000) (“The theory of comparative advantage suggests that countries should specialize in producing those goods and services that they can produce most efficiently.”).
33 See Asselt & Biermann, supra note 7, at 498.
34 See id.
35 See OECD Report, supra note 8, at 23.
36 See WTO Report, supra note 1, at 98.
37 See OECD Report, supra note 8, at 23.
38 See WTO Report, supra note 1, at 99.
Border tax adjustments are one of the most straightforward mechanisms by which the EU could attempt to level the playing field and reduce carbon leakage.\(^39\) The Organization for Economic Co-operation and Development’s (OECD) 1970 Working Party on Border Tax Adjustments defined a border tax adjustment as “any fiscal measures which put into effect, in whole or in part, the destination principle,” where the destination principle enables products to be taxed at the same rates in the importing and exporting countries.\(^40\) In other words, a border tax adjustment consists of either a charge on imports corresponding to a tax borne domestically or a tax exemption on exports.\(^41\) The potential policy mechanism by which the EU could level the playing field and reduce carbon leakage is a border tax on imports from foreign energy-intensive industries: colloquially, a “carbon tariff.”\(^42\)

There has been discussion regarding a possible carbon tariff since the inception of the EU ETS.\(^43\) In 2008, former EU Trade Commissioner Peter Mandelson remarked that a carbon border tax was the “elephant in the room” amid discussions of international trade incentives related to climate change programs.\(^44\) Since 2007, French President Nicolas Sarkozy has insisted upon some form of compensation mechanism for EU energy-intensive industries,\(^45\) and in 2009 he expressed interest in an EU-wide carbon border tax as part of the Copenhagen summit.\(^46\) Moreover, although the German State Secretary for

\(^{39}\) See Asselt & Biermann, supra note 7, at 502.


\(^{41}\) Working Party, supra note 40. Although border tax adjustments may involve imports or exports, this Note focuses on imports only. Notably, relieving domestic energy-intensive industries from regulations through export BTAs would completely defeat the environmentalist purpose of domestic regulations. See Steve Charnovitz, Free Trade, Fair Trade, Green Trade: Defogging the Debate, 27 CORNELL INT’L L. J. 459, 500 (1994).


\(^{45}\) France Wants EU Carbon Tax, supra note 10, at 983.

the Environment referred to carbon tariffs as “eco-imperialism,”47 Germany recently reversed its position and joined France in support of an EU carbon border tax.48 Still, many within the EU have remained skeptical of border taxes on carbon emissions.49 The European Commission has insisted that a carbon border tax should be considered only as a last resort.50

In the wake of a largely unproductive Copenhagen summit, the serious possibility of an EU-wide carbon tariff may reemerge.51 In light of this possibility, the overarching question arises as to whether a border tax for carbon emissions—a carbon tariff—would be legal under prevailing international trade law: the WTO.52

II. Discussion

A. Are Carbon Tariffs Eligible for Border Tax Adjustment?

Although the economic efficiency and administrative feasibility of carbon tariffs are subjects worthy of debate, the overarching issue is legal: would such tariffs comply with international trade law?53 In 1947,

47 Cf. Steve Charnovitz, The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality, 27 YALE J. INT’L L. 59, 62–63 (2002) (“[T]he rich country may be viewed as trying to coerce the poor country into placing a higher value on the environment than the poor country considers appropriate.”).
49 See Kristen A. Parillo, EU Commissioner Criticizes Carbon Border Tax, 56 TAX NOTES INT’L 234, 234 (2009) (noting the reservations of EU Environment Commissioner Stavros Dimas to an EU carbon border tax); France to Push EU Members States to Embrace Carbon Border Taxes, (BNA) (WTO Rep.) (June 17, 2009) (noting that former EU Trade Commissioner Peter Mandelson said that a carbon border tax would likely alienate countries, invite retaliation, and run the risk of violating WTO law); OECD Chief Warns Green-Conscious Nations Not to Apply Carbon Levies via Border Taxes, (BNA) (WTO Rep.) (Aug. 28, 2009) (noting that the Secretary General of the OECD, Angel Gurria, discouraged countries from applying border taxes related to climate change).
50 See France, Germany Aiming to Propose ‘Carbon’ Leakage Tax, Sarkozy Says, (BNA) (WTO Rep.) (Sept. 21, 2009); see also Parillo, supra note 49, at 235 (quoting EU Environment Commissioner Stavros Dimas as stating, “I believe, fully in line with the longstanding EU position on this, that the best way to avoid carbon leakage and address competitiveness concerns is to agree on an ambitious and comprehensive climate change deal in Copenhagen”).
51 See Sindico, supra note 11, at 333; U.N. Officials Say Climate Change Process ‘Taking Stock’ After Copenhagen Summit, supra note 11, at 85.
52 See Veel, supra note 42, at 770.
53 See id.
twenty-three major trading countries formed the GATT\textsuperscript{54} as a provisional agreement in the wake of World War II.\textsuperscript{55} Nevertheless, it has remained the “permanent institutional basis for the multilateral world trading regime” to this day.\textsuperscript{56} In 1994, the WTO replaced the GATT, although under the WTO agreement the GATT remains operative international law (now referred to as “GATT 1994”).\textsuperscript{57} The GATT’s purpose is to supervise trade restrictions and generally prohibit protectionist policies, thereby promoting competition.\textsuperscript{58} The international legality of a trade-restrictive measure such as carbon tariffs must be assessed under the provisions of the GATT.\textsuperscript{59}

Border tax adjustments are legal under the GATT in limited circumstances for internal taxes.\textsuperscript{60} Article II:2(a) governs the legality of customs charges unless the charge (tariff) is an adjustment for an internal tax.\textsuperscript{61} For such adjustments, Article III for internal taxes applies.\textsuperscript{62} There is no precedent, however, for whether an ETS like the EU’s could qualify as an internal tax.\textsuperscript{63} The term “tax” is not defined in the WTO agreement’s analytical index, and some authors suggest that the OECD’s definition should be used.\textsuperscript{64} Under this definition, a tax is a “compulsory contribution imposed by the government for which taxpayers receive nothing identifiable in return for their contribution.”\textsuperscript{65} Several authors argue that although an ETS is not technically an internal tax, a border tax adjustment could likely still be employed as long as permits were auctioned rather than freely distributed: this would create


\textsuperscript{55} Trebilcock & Howse, supra note 13, at 23.

\textsuperscript{56} Id.

\textsuperscript{57} See Agreement Establishing the Multilateral Trade Organization, 33 I.L.M. 1144, 1145 (1994) [hereinafter WTO Agreement].

\textsuperscript{58} See Charnovitz, supra note 41, at 485, 524–25.

\textsuperscript{59} See Asselt & Biermann, supra note 7, at 499.


\textsuperscript{62} See id. at 306.

\textsuperscript{63} See WTO Report, supra note 1, at 100–01.

\textsuperscript{64} See, e.g., Cendra, supra note 22, at 135.

a charge on domestic producers that could be adjusted at the border via carbon tariff.\textsuperscript{66} Notably, however, the EU ETS originally distributed most permits for free.\textsuperscript{67}

Nevertheless, if the permit allowance system under the EU ETS is characterized as an internal tax for purposes of the GATT, the question is whether this “tax” on carbon emissions qualifies for border tax adjustment.\textsuperscript{68} The basic distinction, first promulgated by the GATT Working Party on Border Tax Adjustments in 1970, is between direct and indirect taxes.\textsuperscript{69} Direct taxes are taxes on producers rather than products, and do not qualify for border tax adjustment.\textsuperscript{70} Indirect taxes, on the other hand, are taxes on products rather than producers, and qualify for border tax adjustment.\textsuperscript{71} Under the destination principle all products should be taxed in the country of consumption.\textsuperscript{72} Thus, the traditional rationale for the distinction is that product taxes will be passed forward to consumers while producer taxes will not.\textsuperscript{73}

Whether WTO and GATT case law establishes this bifurcation between product and producer taxes is somewhat controversial,\textsuperscript{74} but the distinction at least appears to be recognized in case law.\textsuperscript{75} Although there is no formal principle of stare decisis in WTO case law, there is practical precedent in the sense that dispute settlement bodies tend to follow past decisions.\textsuperscript{76} In any event, there is no precedent that answers

\textsuperscript{66} See, e.g., Cendra, \textit{supra} note 22, at 136; see also Ismer & Neuhoff, \textit{supra} note 65 (arguing that “the costs of obtaining the permits should not be seen as providing such a service” because the beneficiary is not the producer but the “wider community”).

\textsuperscript{67} See WTO Report, \textit{supra} note 1, at 94. One author suggests that, even if distributed for free, the opportunity cost of selling the freely distributed permits could make an ETS qualify as an internal tax. See Joost Pauwelyn, \textit{U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law} 21–22 (Nicholas Inst. for Envtl. Policy Solutions, Working Paper No. 07–02, 2007).

\textsuperscript{68} See WTO Report, \textit{supra} note 1, at 103.

\textsuperscript{69} Working Party, \textit{supra} note 40, para. 14. The panel also referred to “taxes occultes,” (“hidden taxes”) for which there was a divergence of views regarding eligibility for border tax adjustment. See id. at para. 15. One author argues that a tax on carbon emissions best fits into this category because the Report specifically listed “energy taxes” as an example. See Veel, \textit{supra} note 42, at 772.


\textsuperscript{71} See \textit{id}.

\textsuperscript{72} See Demaret & Stewardson, \textit{supra} note 40, at 6.

\textsuperscript{73} See Pauwelyn, \textit{supra} note 67, at 18.

\textsuperscript{74} See Trebilcock & Howse, \textit{supra} note 13, at 539–40.

\textsuperscript{75} See, e.g., Superfund Panel Report, \textit{supra} note 60, at para. 5.2.4.

whether border tax adjustments can be applied for domestic taxes on carbon emissions.77

The closest analogy to carbon tariffs in case law is discussed in United States—Taxes on Petroleum and Certain Imported Substances (Superfund).78 The GATT Panel found that border tax adjustments could be applied to chemicals used in the production of imported products, and reasoned that domestic taxes on chemicals were product rather than producer taxes.79 Although some have suggested that this precedent paves the way for carbon border tax adjustments,80 there is a significant distinction: whereas the chemicals in Superfund were “physically incorporated” into the final products, carbon emissions are not incorporated into any product, but are a by-product of the production process.81 This distinction seems to weigh heavily in favor of carbon taxes as producer rather than product taxes.82 Indeed, most scholars agree that inputs must be physically incorporated into the final product to qualify for border tax adjustment, and that carbon tariffs would not be considered indirect taxes under Article III.83

Moreover, even if carbon tariffs are considered Article III border tax adjustments, Article III requires that the importing country does not discriminate between domestic and foreign “like products.”84 The key issue here is whether foreign and domestic products can be distinguished based on the quantity of carbon emitted during the production process.85 If products cannot be distinguished, the tax burden on imports cannot exceed that on domestic products.86 A carbon tariff will thus violate GATT unless production methods with different carbon emissions are sufficient grounds for distinguishing between domestic

77 See Aaron Cosbey & Richard Tarasofsky, Climate Change, Competitiveness and Trade 20 (2007).
78 See Superfund Panel Report, supra note 60, at para. 5.2.4.
79 Id. In doing so, the Panel upheld the Working Party’s distinction. See id.
80 See Veel, supra note 42, at 773.
81 See id.
82 See id. Several authors argue that the purpose of a carbon tax demonstrates that it is really a tax on the product rather than on the producer. See, e.g., Mary Kate Crimp, Environmental Taxes: Can Border Tax Adjustments Be Used to Counter Any Market Disadvantage?, 12 N.Z. J. ENVTL. L. 39, 55 (2008); Pauwelyn, supra note 67, at 20–21.
83 See Schoenbaum, supra note 61, at 311; Veel, supra note 42, at 778.
84 GATT art. 3, paras. 2, 4.
and foreign products. In *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* (Asbestos), the Appellate Body reasoned that “likeness” should be determined on a case-by-case basis, but involves factors such as end-use, consumer tastes, and physical properties. Most authors point out that, because carbon emissions are not incorporated into the final product, it is difficult to distinguish between products based solely on carbon emissions. Even a commentator who supports a more flexible characterization of the term “like product” insists that “it would be a radical shift to differentiate products on the basis of how they are produced, manufactured, or harvested.” For the same reason that carbon taxes are probably not product taxes, they are probably not compliant with Article III’s non-discrimination rule for like products.

**B. Article XX Exceptions**

If carbon tariffs do not qualify as border tax adjustments consistent with Article III, Article XX provides a list of exceptions where violations of other GATT provisions may be permitted. Indeed, some commentators describe Article XX as an “environmental charter” because it allows trade restrictions related to protecting the environment (although the term “environment” is conspicuously absent). Article XX requires a two part analysis: first, whether the trade measure is provisionally justified by one of the substantive exceptions; second, whether the trade measure satisfies the Article’s prefatory “chapeau.” The treatment of trade measures in GATT jurisprudence changed radically after the WTO’s formation, and has since evolved to encompass broader policies.

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87 See Veel, supra note 42, at 780.
89 See, e.g., Sindico, supra note 11, at 337–38; Veel, supra note 42, at 780–81. But see Daniel C. Esty, *Greening the GATT* 220 (1994) (“[T]he GATT must move beyond the existing distinction between trade restrictions on like products and those on production processes . . . . The same result could be achieved by redefining ‘like product.’ If products using different processes were deemed to be unlike, trade restrictions could be applied to goods produced using environmentally unacceptable methods without changing the existing structure of GATT rules.”).
90 Schoenbaum, supra note 61, at 289–90.
91 See Veel, supra note 42, at 778. But see Charnovitz, supra note 47, at 63 (“Even today, a pervasive myth exists that the WTO forbids PPMs.”).
92 GATT, art. XX.
93 See Trebilcock & Howse, supra note 13, at 514.
94 WTO Report, supra note 1, at 107.
under its exceptions.\textsuperscript{95} Although the WTO dispute settlement system has not yet addressed climate change mitigation, two exceptions may prove extremely relevant.\textsuperscript{96}

Article XX(b) allows trade restrictions that are “necessary to protect human, animal or plant life or health,” and Article XX(g) allows trade restrictions “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”\textsuperscript{97} Importantly, WTO case law suggests that the policy objective underlying these exceptions is not at issue; rather, it is the trade measure and how it relates to the policy objective that is examined under Article XX.\textsuperscript{98} Several authors argue that Article XX(b) could cover policies aimed at reducing carbon emissions because of the possible adverse effects of global warming for humans, animals, and plants.\textsuperscript{99} Further, Article XX(g) could also cover such policies due to the conservation of the planet’s atmosphere and climate, as well as animal and plant species that may become extinct due to climate change.\textsuperscript{100}

1. Article XX(g) Exception

Most commentators treat Article XX(g) as a less restrictive exception than Article XX(b).\textsuperscript{101} Article XX(g) requires that the policy objective is within the range of policies for the conservation of exhaustible natural resources, and that the trade measure is “related to” this policy and is employed “in conjunction” with similar domestic restrictions.\textsuperscript{102} Early GATT case law did not permit the application of Article XX(g) to extraterritorial measures, reasoning that such an interpretation would allow “each contracting party [to] unilaterally determine the conserva-

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  \item \textsuperscript{95} See Wofford, \textit{supra} note 76, at 567–68, 572–73.
  \item \textsuperscript{96} See WTO Report, \textit{supra} note 1, at 107 (noting that XX(b) and XX(g) are the relevant environmental exceptions).
  \item \textsuperscript{97} GATT, art. XX(b), (g).
  \item \textsuperscript{99} WTO Report, \textit{supra} note 1, at 108 (discussing attempts to fit climate change under XX(b) or XX(g) in the literature).
  \item \textsuperscript{100} Id.
  \item \textsuperscript{102} See GATT art. XX(b).
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tion policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement.”

More recent WTO case law reveals that Article XX(g) is not limited to purely domestic conservation efforts. Additionally, the “conservation of exhaustible resources” is not limited to non-living stock resources (such as minerals), which is likely how the phrase was interpreted when the GATT was adopted. In United States—Standards for Reformulated and Conventional Gasoline (Gasoline), the Panel found that clean air was an exhaustible natural resource because, even though it was renewable, it could be depleted. Further, in United States—Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp/Turtle), the Appellate Body found that migratory sea turtles were an exhaustible natural resource because conservation was not limited to non-living resources.

The panel reasoned that the term “exhaustible natural resources” must be read by a treaty interpreter in light of contemporary concerns of the community of nations about the protection and conservation of the environment” and that the term is “not static in its content or reference but is rather ‘by definition, evolutionary.’”

In recent WTO case law, the second requirement under XX(g)—“related to”—has been interpreted as a “substantial relationship” between the policy objective and the trade restriction. Although in United States—Restrictions on Imports of Tuna (Tuna/Dolphin II), the panel reasoned that an import ban on tuna was not “related to” the conservation of dolphins because the Article XX exceptions were to be interpreted narrowly, this interpretation has been relaxed in recent jurisprudence. For example, in Shrimp/Turtle, the Appellate Body found that trade measures prohibiting the importation of shrimp caught in

107 Shrimp/Turtle Appellate Body Report, supra note 104, at paras. 131–33.
108 Id. at paras. 129–30.
109 WTO Report, supra note 1, at 108.
111 See Wofford, supra note 76, at 577–80.
ways inimical to migratory sea turtle populations were “related to” sea turtle conservation. Additionally, the requirement that any trade restriction be “in conjunction with” domestic restrictions only requires “even-handedness.”

The case for carbon tariffs under Article XX(g) usually begins with an analogy to the clean air argument from *Gasoline.* Because the panel found that “clean air” was an exhaustible natural resource, it is likely to find that the atmosphere’s greenhouse gas concentration is also an exhaustible natural resource. Additionally, the panel might find that “cool air” is a natural resource, or that the relevant natural resource involves the “potentially damaging environmental conditions that may arise [in a warmer world] such as impact on biodiversity and ecosystems.” In all these cases, the characterization of climate mitigation as conservation of a natural resource is admittedly attenuated. Given the recent interpretation of the term “conservation” as contextual and evolutionary, however, some suggest that climate change mitigation could be considered within the range of conservation efforts.

If WTO jurisprudence characterizes mitigating climate change as conservation, the next step is to determine whether a carbon tariff is “related to” climate change mitigation, and is imposed in conjunction with similar domestic restrictions. Although climate change is not confined to the EU, carbon tariffs may bear a substantial relationship to climate change, as shrimp import restrictions did to the conservation of migratory sea turtles. Further, because proposed carbon tariffs are a direct response to the EU’s domestic ETS regime, it is quite likely that the trade measures would satisfy the even-handedness requirement. This leads one scholar to conclude that carbon tariffs would easily satisfy Article XX(g)’s three-part analysis.

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113 *See* *Gasoline* Appellate Body Report, *supra* note 98, at 20–21.
114 *See* Veel, *supra* note 42, at 776.
115 *See* Pauwelyn, *supra* note 67, at 35.
116 *See* Green, *supra* note 101, at 183.
117 *See id.*
118 *Cf.* *id.* (suggesting that interpreting climate change mitigation as “conservation” under Article XX(g) might require some creativity).
120 *See, e.g.,* Veel, *supra* note 42, at 776–77.
121 *See* GATT art. XX(g).
122 *See* Veel, *supra* note 42, at 777.
123 *See id.*
124 *See* Pauwelyn, *supra* note 67, at 35–36.
2. Article XX(b) Exception

Article XX(b) is a stricter exception than Article XX(g) because the former requires a necessary connection between the challenged trade restriction and the protection of human, animal, or plant life or health.\(^{125}\) Case law establishes that the term “necessary” does not mean “indispensable,” but it is stricter than “making a contribution to.”\(^{126}\) In earlier GATT case law, such as *Tuna/Shrimp II*, panels found that there could be no necessary connection if a policy was only effective where it “force[d] other countries to change their policies.”\(^{127}\) Recent case law presents a less restrictive interpretation, where “necessary” includes a balancing of factors and requires a “genuine relationship of ends and means between the objective pursued and the measure at issue.”\(^{128}\) In *Asbestos*, the Appellate Body further suggested that vital policy objectives would more easily satisfy the test for “necessity” compared to non-vital policy objectives.\(^{129}\) In *Asbestos*, the policy objective was “the preservation of human life and health” from hazardous asbestos, a vital policy objective weighing heavily in favor of finding a “necessary” connection.\(^{130}\)

When the GATT was adopted in 1947, the “protection of human, animal and plant life or health” was probably limited to sanitary issues, but is no longer characterized in this limited manner.\(^{131}\) In *Gasoline*, the Panel found that reducing air pollution was a policy objective aimed at protecting life or health.\(^{132}\) Most recently, in *Brazil—Measures Affecting Imports of Retreaded Tyres*, the Appellate Body found that retreaded tire imports contributed significantly to tire waste that posed a risk of fire and mosquito-borne disease,\(^{133}\) and an import ban thus

\(^{125}\) See Green, *infra* note 101, at 177.


\(^{130}\) See id.

\(^{131}\) See Charnovitz, *infra* note 105, at 44–45.

\(^{132}\) See Gasoline Panel Report, *infra* note 106, at para. 6.21. Although this was not considered by the Appellate Body because the “necessary” test under XX(b) was not satisfied. *Trebilcock & Howse*, *infra* note 13, at 527.

served the policy objective of protecting life or health.\textsuperscript{134} In fact, the Appellate Body even briefly addressed climate change:

We recognize that certain . . . environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. . . . Moreover, the results obtained from certain actions—for instance, measures adopted in order to attenuate global warming and climate change . . . can only be evaluated with the benefit of time.\textsuperscript{135}

In addition to mentioning climate change mitigation, the Appellate Body emphasized the importance of understanding the relationship between a trade measure and the protection of life or health against the broader context of a comprehensive strategy.\textsuperscript{136} This seems to suggest a liberalization of the once stringent exception.\textsuperscript{137}

Establishing that climate change mitigation involves the protection of life and health is often viewed as plausible.\textsuperscript{138} Carbon emissions are deemed analogous to the relatively non-specific environmental damage in the most recent Article XX(b) case, \textit{Retreaded Tyres}.\textsuperscript{139} Authors point to the potential damage that may result from increased global temperatures, such as: increased death rates among the very young, old, and sick; increased tropical diseases; increased air and water-borne parasites; loss of habitation due to rising sea levels; and even various adverse effects on trees and forests.\textsuperscript{140} These potential damages suggest that climate change mitigation involves the protection of life or health, broadly construed.\textsuperscript{141}

If WTO jurisprudence characterizes climate change mitigation as the protection of life or health, the next step is to determine whether a carbon tariff is “necessary” to this objective.\textsuperscript{142} Commentators tend to view this second prong of Article XX(b) as the more difficult obstacle.\textsuperscript{143} Because Article XX(b) has a narrower scope than Article XX(g),

\textsuperscript{134} \textit{Id.} at para. 258. Retreaded tires presented a health risk under Article XX(b) because they would reach the stage of waste earlier than new tires. \textit{See id.} at paras. 3, 118–19, 121.

\textsuperscript{135} \textit{Id.} at para. 151 (emphasis added).

\textsuperscript{136} \textit{See id.}


\textsuperscript{138} \textit{See}, e.g., Sindico, \textit{supra} note 11, at 338.

\textsuperscript{139} \textit{See} Condon, \textit{supra} note 137, at 914.

\textsuperscript{140} \textit{See}, e.g., Jinnah, \textit{supra} note 20, at 733.

\textsuperscript{141} \textit{See id.}

\textsuperscript{142} \textit{See} GATT art. XX(b).

\textsuperscript{143} Cendra, \textit{supra} note 22, at 144 n.122; Schoenbaum, \textit{supra} note 61, at 276.
commentators seem concerned that the somewhat attenuated connections between climate change and carbon tariffs will not hold up to stricter scrutiny under Article XX(b). Still, in Retreaded Tyres, the Appellate Body emphasized the need to view trade measures against the context of a comprehensive regulatory strategy, and suggested that as long as the measure makes a serious contribution to this strategy, it could be deemed “necessary” under Article XX(b). This provides some commentators with hope that Article XX(b) may provide an alternative justification for carbon tariffs.

Many scholars see one or both Article XX exceptions as the key to providing for carbon tariffs under international trade law. Nevertheless, WTO jurisprudence has evolved to the point where the most challenging obstacle for environmental trade restrictions in the Article XX analysis lies in its preamble.

C. Article XX Chapeau

Even if carbon tariffs fit into one of the exceptions discussed above, they must still survive the prefatory chapeau to Article XX. Indeed, the chapeau has evolved into the filter through which otherwise acceptable trade restrictions cannot pass. The chapeau states that trade measures must not represent a means of unjustifiable or arbitrary discrimination, and must not represent a disguised restriction on international trade. As the Appellate Body stated in Gasoline, the purpose of the chapeau is to prevent “abuse of the exceptions.”

144 Cf. Cendra, supra note 22, at 144 n.122 (arguing that although climate mitigation involves the protection of life and health, Article XX(g) is the more likely exception for carbon tariffs because it does not include the stricter test of “necessity”).
146 See, e.g., Werksman, supra note 101, at 260.
147 See, e.g., Pauwelyn, supra note 67, at 3.
148 See id. at 37.
150 See Pauwelyn, supra note 67, at 37 (“In all cases where the Appellate Body found that the GATT Article XX exception was not met, it did so under this introductory phrase.”).
151 Gasoline Appellate Body Report, supra note 98, at 22. In Shrimp, the Appellate Body stated that “[t]he task of interpreting and applying the chapeau is . . . the delicate one of locating and making out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of other Members under varying substantive provisions . . . of GATT 1994, so that neither of the competing rights will cancel out the other.” Shrimp/Turtle Appellate Body Report, supra note 104, at para. 159.
chapeau represents the requirement that any exception be made in “good faith.”

In all recent cases where the Appellate Body found that Article XX was not satisfied by environmental trade restrictions, the trade measures were provisionally justified under the substantive exceptions but did not satisfy the chapeau. In *Gasoline*, the Appellate Body found that trade restrictions related to gasoline standards that were provisionally justified as conservation of clear air nonetheless violated the chapeau. Specifically, the Appellate Body reasoned that the United States had not attempted to resolve its concerns through cooperation, and had discriminated between foreign and domestic firms for purposes of alleviating costs to domestic firms. Similarly, in *Shrimp/Turtle*, the Appellate Body found that the United States’ prohibition on shrimp imports, though provisionally justified as conservation of sea turtles, was nonetheless an unjustifiable and arbitrary means of discrimination under the chapeau. Specifically, the Appellate Body noted that the United States had failed to attempt serious negotiations before turning to unilateral measures, and that the trade restriction failed to take into account the different situations which may exist in exporting countries. Most recently, in *Retreaded Tyres*, the Appellate Body again found that trade measures that were provisionally justified as the protection of life or health, nonetheless violated the chapeau. Brazil had allowed some imports of used tires through court injunctions, which the Appellate Body found inconsistent with the policy objective, demonstrating arbitrary or unjustifiable discrimination.

With an ever more liberal interpretation of the Article XX substantive exceptions, the crux of the Article XX analysis has shifted to the chapeau, such that carbon tariffs appear to face a greater challenge from the chapeau than from the Article XX(b) and XX(g) exceptions themselves. In other words, as long as carbon tariffs are designed such that the chapeau is satisfied, they will most likely be legal under

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156 See id. at 26–28.
158 See id. paras. 164–66.
160 Id. at para. 246.
162 See Pauwelyn, *supra* note 67, at 37.
international trade law. This shifts the focus to the design of carbon tariffs, rather than the legal (conceptual) permissibility of such trade measures.

Nevertheless, it would be a mistake to begin designing the most chapeau-friendly carbon tariff under the assumption that the overarching legal question is so easily answered. Although GATT jurisprudence has evolved to encompass ever more environmental issues under its Article XX exceptions, climate change is a global externality and thus presents a wholly novel issue for Article XX analysis.

III. Analysis

Unilateral extraterritorial trade restrictions pose a special challenge in the context of international trade law. Justification for such environmental trade restrictions can either involve leveling the playing field with respect to domestic measures or can involve trade measures employed for non-trade goals. This distinction mirrors that between Article III’s purpose (achieving commercial parity) and Article XX’s purpose (allowing certain trade restrictions otherwise illegal under GATT). When trade measures are aimed at preserving commercial parity between domestic and foreign industries, Article III provides for border tax adjustments to level the playing field. But for environmental trade measures that violate Article III, such as carbon tariffs, Article XX is the only remaining justification. Although Article XX may be employed for extrajurisdictional trade restrictions targeting cosmopolitan objectives like the environment, Article XX should not

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163 See Veel, supra note 42, at 798–99. The same author even suggests that the issue of whether unilateral trade measures related to carbon emissions would comply with the GATT has been resolved in the affirmative, and scholars should no longer focus on this question. Id. Rather, future research should “focus on how to make this work given the existing legal and political constraints.” Id. at 799.

164 See id.

165 Cf. Stern Review, supra note 2, at 27 (arguing that climate change “must be regarded as market failure on the greatest scale the world has ever seen”).

166 See Trebilcock & Howse, supra note 13, at 523–24.

167 See id. at 511.

168 See id.

169 See Charnovitz, supra note 41, at 498.

170 Given that the purpose of Article III is to achieve commercial parity for internal taxes, a broad interpretation of Article III that permits discrimination based on production process would pose serious protectionist concerns. See Goh, supra note 86, at 423.

171 See Trebilcock & Howse, supra note 13, at 514.

172 See Charnovitz, supra note 41, at 525.
apply when the policy objective is to level the playing field.\textsuperscript{173} Thus, reducing carbon emissions and preventing carbon leakage are relevant for purposes of the Article XX analysis, whereas leveling the playing field between EU and non-EU energy-intensive industries is not relevant.\textsuperscript{174}

If the policy behind carbon tariffs in the EU is in fact commercial parity, which seems likely, the measures should be assessed under Article III and not Article XX.\textsuperscript{175} But importantly, carbon tariffs should not fail the Article XX analysis merely because the policy objective is unreasonable under the chapeau; rather, carbon tariffs should not even be provisionally justified under the substantive exceptions of Article XX.

\section*{A. Chapeau Shift}

The evolution of GATT jurisprudence since the WTO’s creation displays a larger emphasis on the prefatory chapeau compared to the substantive exceptions themselves.\textsuperscript{176} Most commentators see this evolution as an enlightened response to rigid, poorly reasoned GATT decisions such as the \textit{Tuna/Dolphin} cases.\textsuperscript{177} In addition to a change in the structure of the analysis, such that the chapeau is applied only after provisional justification vis-à-vis the exceptions, the jurisprudence has also rejected the categorical exclusion of unilateral extraterritorial measures.\textsuperscript{178} Indeed, as many authors point out, such categorical exclusion renders Article XX nugatory because the point of the exceptions is to allow unilateral action for international trade measures that would otherwise violate GATT.\textsuperscript{179} Nevertheless, the broad interpretation of the substantive exceptions may lead to the opposite problem, rendering the exceptions themselves nugatory.\textsuperscript{180} Some authors suggest that the purpose of GATT is strictly limited to eradicating protectionism,\textsuperscript{181} and therefore Article XX should only require that the importing country is not blatantly externalizing domestic costs through its unilateral,


\textsuperscript{174} See Charnovitz, \textit{supra} note 47, at 106.

\textsuperscript{175} See id.

\textsuperscript{176} See supra text accompanying notes154–64.

\textsuperscript{177} See Wofford, \textit{supra} note 76, at 579 n.105.

\textsuperscript{178} See \textit{Tuna/Dolphin II Panel Report}, \textit{supra} note 104, at para. 5.16.

\textsuperscript{179} See Jinnah, \textit{supra} note 20, at 737.

\textsuperscript{180} Cf. Pauwelyn, \textit{supra} note 67, at 37 (arguing that measures have been provisionally justified under Article XX in every recent WTO case).

\textsuperscript{181} See, \textit{e.g}. Charnovitz, \textit{supra} note 41, at 485–86.
extraterritorial action. Yet this perspective seems to imply that the substance of the exceptions poses virtually no separate limitation for the design of border measures.

As mentioned above, carbon tariffs in the EU would probably fall short of Article XX justification in any event. But the “chapeau shift” remains quite significant within the context of carbon tariffs, even if the practical implications are not dramatic in the immediate future. Climate change mitigation—no matter how important—does represent the most archetypal global negative externality to be assessed under Article XX. As such, the presumption that carbon tariffs aimed at mitigating climate change will satisfy the ever broadening interpretation of the substantive exceptions themselves, only to fail the chapeau, is problematic. Namely, it represents a shift from assessing the trade measures themselves to examining only the reasonableness of their application. But clearly this cannot be right, as the two prongs of the analysis are separate, and the analysis of the policy and its connection to the trade restriction in question cannot be collapsed into the chapeau’s analysis of whether the trade restriction is reasonable and not protectionist in nature. Although the consensus appears to be that carbon tariffs would be provisionally justified under the Article XX exceptions, this consensus is no replacement for substantive analysis, and such analysis is needed before assessing the reasonableness of carbon tariffs under the chapeau.

182 See Trebilcock & Howse, supra note 13, at 534.
183 See Charnovitz, supra note 41, at 485–86.
184 See supra text accompanying notes 170–72.
185 Cf. Veel, supra note 42, at 798 (arguing that as long as carbon tariffs are applied reasonably under the chapeau, they will comply with GATT).
186 Cf. Stern Review, supra note 2, at 27 (implying that compared to all other negative externalities, climate change is the most significant “market failure”).
187 See Vanes, supra note 161, at 278.
188 See Shrimp/Turtle Appellate Body Report, supra note 104, at para. 149.
189 Cf. Charnovitz, supra note 41, at 485 (arguing that the GATT’s limited role is to determine whether trade measures constitute protectionism).
190 See, e.g., Pauwelyn, supra note 67, at 37.
191 Cf. Shrimp/Turtle Appellate Body Report, supra note 104, at para. 149 (noting that the two steps in the Article XX analysis are separate).
B. Reassessing Substantive Exceptions for Climate Change

As an archetypal global negative externality, climate change clearly presents a novel situation for Article XX application, despite the liberalization of WTO jurisprudence in recent years. The categorical ban of unilateral extraterritorial measures envisaged by the Panel in Tuna/Dolphin I and the categorical permission implied by recent environmentalists are equally misplaced. Clearly, unilateral extraterritorial measures can be provisionally justified under the Article XX exceptions, but they need not be. The question is how to assess which measures should fit into the exceptions, without relying upon a categorical approach (either exclusionary or inclusionary). Although a balancing approach that considers proportionality may appear the obvious solution, there are considerable difficulties involved in assessing the value of the policy objective of such extraterritorial measures. Namely, such values are incommensurate and change country-to-country, so there is no way to objectively weigh them. Moreover, the WTO dispute settlement bodies are ill-equipped to judge domestic policies and weigh the costs and benefits of such policies when applied unilaterally and extraterritorially.

If categorical approaches are unwise, and a balancing approach is unworkable, Articles XX(b) and XX(g) would appear to pose intractable interpretive challenges. This causes some authors to reiterate that Article XX should be viewed simply as a mechanism for assessing the reasonableness of the relationship between the trade restriction and its policy objective. But again, this only focuses on the chapeau and ig-

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192 Cf. Stern Review, supra note 2, at 25–27 (arguing that global negative externalities are market failures, and that climate change is a “market failure on the greatest scale the world has seen”).
193 See WTO Report, supra note 1, at 107.
194 Cf. Jinnah, supra note 20, at 737 (arguing that the Appellate Body has not made clear when unilateral extraterritorial measures will be permitted versus prohibited).
195 See id.
196 Cf. Vanes, supra note 161, at 100 (explaining attempts in the literature to avoid a categorical approach to jurisdictional conflicts).
197 See id. at 404.
198 See Charnovitz, supra note 41, at 481–82, 486.
199 See Charnovitz, supra note 47, at 101.
200 See Charnovitz, supra note 41, at 483.
201 Cf. Vanes, supra note 161, at 404 (noting that a balancing approach is the only alternative to categorical approaches to unilateral extraterritorial trade measures).
202 See Trebilcock & Howse, supra note 13, at 534 (arguing that it should not be necessary, for Article XX analysis, to go beyond a determination of whether the trade measure is protectionist in nature).
nores the independent nature of the substantive exceptions. Instead, it is worth considering that the relevant jurisprudence may not necessitate the radical broadening of the environmental policies covered under the exceptions. Despite protestations to the contrary, the Appellate Body does sometimes assess the legitimacy of policy objectives. Although it pays significant deference to a Member Country to create its own domestic policies, the Appellate Body does not shy away from assessing whether a policy fits under the enumerated exceptions. In fact, it is only under the presumption that such measures should apply to climate change mitigation—due to the importance of climate change mitigation coupled with the assumption that Article XX is a broad “environmental charter”—that it is at all convincing that they actually do.

Put plainly, the analogies to climate change mitigation under Articles XX(b) and XX(g) are weak. The relevant cases under Article XX(b) involved the removal of hazardous asbestos in Asbestos, the reduction of air pollution in Gasoline, and the health hazards of tire waste in Retreaded Tyres. Although scholars seem to imagine a clear connection between climate change mitigation and the “protection of life or health,” climate change mitigation is considerably distinct from these cases, each of which involved clear and direct health hazards. Climate change mitigation simply does not pose a similar distinct health hazard, whatever its potential future implications may be.

Further, no Article XX(b) case to date has involved extraterritorial policies: they each involved domestic health hazards for which import restrictions were created. Early environmentalists even attacked Article

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204 Vanes, supra note 161, at 406.
205 See id. at 264.
206 Cf. Trebilcock & Howse, supra note 13, at 514 (reasoning that Article XX should be viewed as a broad environmental charter, influencing the conclusion that the substantive exceptions are in fact broad enough to cover most environmental issues).
207 Cf. Esty, supra note 89, at 221–22 (suggesting that Article XX does not, on its face, apply to climate change).
211 See Cendra, supra note 22, at 144; Sindico, supra note 11, at 338; Werksman, supra note 101, at 260.
213 See Voon, supra note 31, at 86.
214 See Condon, supra note 137, at 917–18.
XX(b) for its narrowness and failure to cover environmental policies aimed at the global commons.²¹⁵ Lastly, although the Appellate Body in *Retreaded Tyres* suggested that “climate change” might be justified under Article XX(b), it did not explain its reasoning beyond noting the general direction of evolutionary interpretation in WTO jurisprudence.²¹⁶

The relevant cases under Article XX(g) may pose even more attenuated policy analogies than the cases under Article XX(b).²¹⁷ Although *Shrimp/Turtle* established that exhaustible natural resources could be transboundary,²¹⁸ migratory sea turtles are clearly an exhaustible natural resource because the species has tangible value and can become extinct.²¹⁹ Further, although *Gasoline* is the most obvious parallel to carbon tariffs in the EU, “clean air” is also a clear exhaustible natural resource because clean air has value and can tangibly be depleted by air pollution.²²⁰ But it is not at all obvious that current atmospheric carbon levels can be characterized as exhaustible (what is being depleted?) or even as resources (where is the tangible value?).²²¹

Additionally, were climate change mitigation deemed a legitimate policy objective under Article XX(b) or XX(g), the nexus between carbon tariffs in the EU and the policy objective is questionable. Although “necessary” and “related to” have been interpreted more liberally in recent jurisprudence,²²² the relevant case law again evinces poor analogies.²²³ Unlike those cases discussed above, the contribution that carbon tariffs would make to climate change mitigation remains quite unclear, in large part due to scientific uncertainty surrounding global warming.²²⁴ Commentators will often appeal to the “precautionary principle” to establish that a policy objective such as climate change mitigation should not be dismissed simply due to the lack of a clearly evidenced connection between a policy and a trade measure.²²⁵ Although categorical dismissal based on uncertainty would thus be unwarranted, this uncertainty may still pose challenges to forging a suffi-

²¹⁷ See Green, *supra* note 101, at 183.
²¹⁹ See id. at paras. 131–32, 134.
²²¹ See Green, *supra* note 101, at 183.
²²³ See Green, *supra* note 101, at 183.
²²⁴ See id. at 186, 189.
²²⁵ See Voon, *supra* note 31, at 86.
cient nexus.\textsuperscript{226} Moreover, for the very reason that carbon tariffs may fail the chapeau— that the measures are too intimately related to “leveling the playing field” and \textit{not} to carbon leakage—they should probably not survive the “sufficient nexus” tests under the substantive exceptions either.\textsuperscript{227} Notably, there is scant evidence regarding the specific effects that such trade measures would have on carbon leakage or reductions in atmospheric carbon content.\textsuperscript{228} As long as more than subjective intent is required for the nexus between trade measures and policy objectives, carbon tariffs will face problems.\textsuperscript{229}

Although it is unclear what the Appellate Body would actually do if faced with carbon tariffs in the EU, these trade measures pose a novel issue that is not easily resolved by examining recent jurisprudence or paying lip service to the “enlightened liberalization” of WTO jurisprudence in recent years.\textsuperscript{230} In fact, carbon tariffs are precisely the kind of trade measure—aimed explicitly at a global negative externality with limited connection to any particular jurisdiction—\textsuperscript{231} that demonstrates the importance of breathing life back into the substantive exceptions of Article XX.\textsuperscript{232} The “chapeau shift” implies that any environmental trade restrictions otherwise violating GATT may be justified under the Article XX exceptions, so long as the application of the restriction satisfies the reasonableness test of the chapeau.\textsuperscript{233} But this cannot be right, because Article XX does not cover every possible environmental restriction: it is not the “environmentalist charter” that some imagine it to be.\textsuperscript{234} Indeed, the word “environment” does not even appear in Article XX.\textsuperscript{235} As environmentalists argued before the advent of expansive

\textsuperscript{226} See Gasoline Appellate Body Report, \textit{supra} note 98, at 21–22. One author notes that carbon tariffs may actually discourage global climate change mitigation by other countries. See Goh, \textit{supra} note 86, at 405.
\textsuperscript{227} Cf. Charnovitz, \textit{supra} note 47, at 106 (arguing that “leveling the playing field” is not appropriate rationale under Article XX).
\textsuperscript{228} See Goh, \textit{supra} note 86, at 405; Green, \textit{supra} note 101, at 186.
\textsuperscript{229} Cf. Vamos, \textit{supra} note 161, at 268 (noting the difficulties with interpreting whether a trade restriction is “related to” a policy in terms of “the regulator’s subjective intentions”).
\textsuperscript{230} See Condon, \textit{supra} note 137, at 914; Pauwelyn, \textit{supra} note 67, at 37.
\textsuperscript{231} See \textit{Stern Review}, \textit{supra} note 2, at 27.
\textsuperscript{232} Cf. Pauwelyn, \textit{supra} note 67, at 37 (arguing that measures have been provisionally justified under Article XX in every recent WTO case).
\textsuperscript{233} See Veel, \textit{supra} note 42, at 798–99.
\textsuperscript{234} See Trebilcock & Howse, \textit{supra} note 13, at 514.
\textsuperscript{235} See \textit{id}. Although recent jurisprudence does not seem particularly concerned that the word “environment” is absent from Article XX, this Note suggests that this absence may be quite significant because it cautions strongly against a broad liberalization of Article XX that renders the substantive exceptions virtually meaningless. See \textit{supra} text accompanying notes 178–83.
WTO jurisprudence, Article XX is too narrow for environmental issues such as “the atmosphere and other elements of the global commons,” and to deal with such issues GATT should be amended or replaced.\(^{236}\) Interestingly, this Note reaches a similar conclusion. The substance of Article XX should not be interpreted so broadly as to cover carbon tariffs, and if this is viewed as dissatisfactory in light of the growing significance of climate change, WTO members should propose an amendment to Article XX.\(^{237}\)

**Conclusion**

The EU emissions trading system represents the largest domestic program addressing climate change—a significant achievement. Unfortunately, in a world with few similar programs, the EU’s progressive approach places its energy-intensive industries at a competitive disadvantage. As a result, some EU members have proposed carbon border taxes to level the playing field. The analysis for WTO-compliance of these carbon tariffs consists of several steps. The first step is to determine whether the border measure is in fact an “internal tax” for purposes of Articles II and III, and, if so, whether it is an indirect rather than a direct tax. If characterized as an indirect internal tax, the tax imposed on foreign products must not exceed taxes on “like domestic products.” If the border tax does not comply with Article III of GATT, it may be saved by the Article XX exceptions, which involve both a substantive analysis of whether an exception applies provisionally, as well as an analysis of whether the measure complies with the prefatory chapeau. At present, the consensus is that carbon border taxes would likely fail to comply with Article III, but succeed in satisfying one or both relevant exceptions when liberally construed, and that the most important question is thus whether a carbon tariff would satisfy the chapeau—largely a question of practical design.

Nevertheless, this Note suggests that for the unique policy of climate change mitigation, this general consensus is misplaced. Rather, the Article XX exceptions should be construed to pose a significant obstacle to carbon tariffs, such as those proposed for the EU. Accordingly, carbon tariffs in the EU should fail, not because their application would be unreasonable, but because Article XX probably does not permit trade restrictions related to climate change mitigation. If true, WTO Members intent on unilaterally addressing climate change should

\(^{236}\) See Esty, supra note 89, at 221–22.

\(^{237}\) See Charnovitz, supra note 47, at 108.
propose an amendment to GATT Article XX to explicitly allow such measures under international trade law.