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Editor's Note

Dear Readers,

Welcome to the sixth issue of the Johns Hopkins Law Review's Spring journal. I hope this year's selection will inspire thought-provoking dialogue among our readers in order to fulfill our organization's founding ethos.

As my time as Editor-in-Chief comes to an end, I wish to express immense gratitude to those who have contributed to JHULR. I am appreciative of the writer staff's inspiring research and commitment to our Online Publications collection, as well as of our editors who volunteered time and dedication to refine our articles. The work by Yashas Mallikarjun, our Managing Editor, has been critical in fostering an engaging environment in our meetings; his efforts, along with Director of Publications, Jessica Van Tassel, have helped me compile and complete the issue that you are reading.

Finally, I wish next year's Editor, Benjamin Casino, all the best in carrying on this endeavor. Serving for the 2024-2025 term has truly been an incredible honor.

Jacqueline Rosenkranz
Editor-in-Chief
Johns Hopkins Undergraduate Law Review

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Amending the Amendment Process—Through the Lens of the Equal Rights Amendment

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Abstract:
This essay explores the history and application of Article V of the U.S. Constitution, demonstrating its dual role as both a facilitator of progress and a barrier to change. Through case studies of key amendments, such as the Bill of Rights, the Prohibition amendments, and the protracted ratification of the Twenty-Seventh Amendment, the essay highlights Article V's capacity for addressing evolving national needs while emphasizing its procedural rigidity. The challenges of the amendment process, including the high ratification threshold and ambiguities surrounding rescinded votes and time limits, are exemplified by the Equal Rights Amendment (ERA). Despite widespread support, the ERA remains unratified due to these procedural obstacles, underscoring the need for reform. Recommendations include lowering the ratification threshold, clarifying rescission rules, and eliminating arbitrary time limits. These reforms aim to modernize the amendment process, ensuring it remains an effective tool for justice and progress in contemporary American democracy.

Introduction

"Progress is possible, not guaranteed."
Shaina Taub, Suffs [1]

How does a nation ensure its foundational laws remain relevant in an unpredictable future? For the United States, the answer lies in one sentence of its Constitution, Article V. Most of what the world considers fundamental American ideals only exist because of amendments ratified through the Article V processes. According to a Cato Institute poll, when asked, "What is the most important right you have as a United States citizen?" the top four answers were equal protection under the law, the right to vote, freedom of speech, and trial by jury.[2] None of these rights would be enshrined in the Constitution today without the Fourteenth, Fifteenth, Nineteenth, Twenty-Sixth, First, and Sixth Amendments, respectively. So, if Article V is vital to the country's prosperity, why has its process not been used during the last half-century of rapid social and political change?[3] The answer is that even the processes that allow for change are not immune to the erosion of effectiveness over time.

Depending on the number of total states in the country and the popularity of the amendment, ratification timelines have ranged from a few months to two centuries after the proposal by Congress. The founders crafted Article V to encompass this entire range of scenarios. They believed the amendment should pass at whatever point the requisite number of states agreed on its relevance. There are, as there have always been, contemporary social issues not addressed in the Constitution, such as immigration, healthcare, and climate justice, all of which are addressed entirely through legislation visible to the American public. The issue of gender equality, however, is often misunderstood by the American people. As demonstrated by numerous independently conducted polls, 80 percent of Americans believe that gender equality is explicitly protected under the Constitution when, in reality, it is not.[4]

The Equal Rights Amendment, which would enshrine gender equality in the "supreme law of the land," has garnered widespread public support but has not yet achieved ratification. This paper will examine the history of Article V of the Constitution and explore how its application to various issues has led to significant uncertainty regarding procedures not explicitly detailed in the constitutional text. Part III will analyze two instances where Article V processes were reviewed by the Supreme Court, focusing on its rulings regarding the balance of power between Congress and the states in the amendment process. Part IV will propose three solutions to clarify the amendment process and facilitate the passage of future amendments. Using the ERA as a case study, the paper then examines these solutions in practice, with Part V tracing the ERA's history and Part VI assessing its current status under the proposed framework. Finally, Part VII will conclude by synthesizing Article V precedents with modern solutions, arguing that to address the profound social changes of the late twentieth and twenty-first centuries, we must amend the amendment process.

History of Amendments

Article V of the Constitution details how and under what circumstances the nation can amend the Constitution. A key issue that repeatedly arose in debates during the Constitutional Convention of 1787 was the document's validity over time due to the natural social change in any free and prospering nation.[5] The nature of the Constitution, however, is that it is a steadfast, guiding document that underpins all of American government and society, and it would lose a lot of its credibility if it could change on a whim. Thus, the founders wrote the long, arduous processes laid out in Article V in an effort to balance these interests: [6]

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate. [7]

The first half of the article has been used to propose and ratify the twenty-seven current constitutional amendments. This path to amendment starts with Congress proposing an amendment to the states and the state legislatures adopting and officially ratifying it into the Constitution, which seems straightforward enough. However, for Congress to formally propose an amendment, two-thirds of the House and two-thirds of the Senate must vote for it. Then, three-fourths of state legislatures nationwide must vote for its ratification. This means that if slightly more than one-third of the House, slightly more than one-third of the Senate, or thirteen out of fifty states oppose it, the amendment cannot be ratified under this method. [8]

The second amendment process has yet to be used, but it has equal validity and can bypass Congress altogether. In this process, two-thirds of the state legislatures can vote to force Congress to call a convention to propose amendments, regardless of whether Congress agrees with said amendment. The second step is the same, with the proposed amendment being sent to the states and needing a three-fourths consensus for ratification. Additionally, Congress can require that the states call a convention for the sole purpose of a vote for ratification, rather than the state legislatures doing the voting and ratifying process, a process used only by the Twenty-First Amendment.[9] Historically, the nation has ratified constitutional amendments in chunks during periods of radical social change—the first twelve amendments during the first two decades after the Constitution was ratified, three after the Civil War, four between 1913 and 1920, and seven at regular intervals until 1971. Except for the unusual Twenty-Seventh Amendment [10], no constitutional amendments have been ratified since 1971. [11]

The actual constitutional text of Article V is relatively brief, laying out the basic mechanisms for amendments and imposing only two restrictions on the content of proposed amendments. The first, which dictates that no amendment before 1808 can regulate anything regarding the slave trade, a topic that divided the founders, no longer applies. The second restriction is that an amendment cannot deprive a state of equal suffrage in the Senate without that state's consent.[12] Even this, though, does not limit the content of an amendment, just how states must agree upon it.

The Constitution was officially ratified in 1788 after New Hampshire became the ninth state to vote in favor of ratification.[13] However, there was still an ongoing debate about whether the document needed to include a list of guaranteed rights for individual citizens. Many felt strongly enough about this that they withheld their signatures from the document or blocked their state from ratifying it. The Constitution's advocates, the Federalists, argued that a bill of rights was unnecessary because they had designed a government run for and by the people, and thus, taking the time to write out a list of every fundamental right was futile. The Anti-Federalists, however, were wary of the new power given to the executive branch and thought that without specifically laying out these rights, the president could turn into a tyrant like King George III, from whom they had just escaped. Inspired by American leader Thomas Jefferson, who famously said, "A bill of rights is what the people are entitled to against every government on earth…and what no just government should refuse," James Madison drafted and proposed a list of twelve amendments to the Constitution. [14]

An important note about the Bill of Rights is that it was not drafted and adopted to grant these rights to people, but rather to enshrine them. The primary rights listed in these amendments—freedom of speech, religion, assembly, etc.—were believed to be "unalienable rights" that humans are born with and a just government cannot take away.[15] As with the rest of the Constitution, the Bill of Rights contains very vague and general language, which has led to much controversy over what is excluded, but never over its general authoritative power. After four years of intense debate, Congress cut down Madison's original twelve amendments to ten, and they were successfully ratified into the Constitution as the Bill of Rights, representing the first successful implementation of the amendment process.[16]

The next significant milestone in amendment theory came with the ratification of the Eighteenth Amendment in 1919, which prohibited "the manufacture, sale, or transportation of intoxicating liquors."[17] Notably, it did not prohibit private consumption, possession, or production of alcohol, which was intended to make it easier to enforce and more constitutionally sound in terms of balancing individual rights with the limits of governmental interference.[18] With the amendment came three unprecedented events.

Firstly, it was the first amendment that included a time limit—in this case, seven years—for its ratification by the states. The time limit constituted its third section, stating that if the requisite three-fourths state majority had not successfully ratified it after seven years, Congress would remove it from consideration, and it would no longer be viable as a potential amendment.[19] Due to the timeliness of this issue and the temporary state of its necessity with WWI, as well as pressure from many national radical groups such as suffragists, progressives, and nativists, Congress instituted the time limit so that the amendment could solve the problem.[20] At the same time, they acknowledged that if ratification took too long, the issue may no longer be in effect.[21]

Additionally, the Eighteenth Amendment was the first to establish a one-year delay before it would go into effect. Since the states passed the amendment on January 16, 1919, the earliest it could be operative was January 17, 1920. Since the amendment gave Congress the power to "enforce [it] by appropriate legislation,"[22] it passed the National Prohibition Act, also known as the Volstead Act, on October 28, 1919, to go into effect on the date permitted by the amendment. This act defined "intoxicating liquours" and which were forbidden, and assigned the Federal Department of the Treasury with such enforcement powers. President Woodrow Wilson vetoed the bill, but the House and Senate bypassed him and successfully enshrined it into the law.[23]

Despite the efforts enacted to govern the timeliness and effectiveness of the Eighteenth Amendment, it is notoriously unprecedented because it is the only amendment to be directly and wholly repealed by another constitutional amendment.[24] Ratified in 1933, the Twenty-First Amendment is the only one to repeal a previous amendment directly. It does so in the first section, explicitly stating, "The eighteenth article of amendment to the Constitution of the United States is hereby repealed."[25] This amendment's repeal came from the apparent failure of the prohibition experiment. The prohibition of alcohol in commerce only spiked the interest and success of organized criminals, who then used their profits from illegal alcohol sales to corrupt police and weaken Volstead Act enforcement.[26] Like the Eighteenth Amendment, section three specifies a seven-year time limit for state ratification.[27] The second unusual fact about this amendment is its requirement that state-called conventions ratify it rather than state legislatures. Unlike the time limit provision, the state convention route is in the original text of Article V and thus is indisputably constitutional. However, its significance remains, as it furthered the diversity of amendment processes that have been successfully carried out and supported.[28]

The latest and most distinctive amendment is the Twenty-Seventh Amendment, ratified in 1992, over two hundred years after Madison originally proposed it in 1789. The subject matter of this amendment concerns when and how Congress can set its compensation. With the history of legislative corruption in England, where legislators were sometimes appointed solely for economic gain, Madison wanted to guard against this in the United States. His attempts to include regulations on congressional pay in the Constitution were unsuccessful, as the Constitution simply states that the salaries should be provided for by law; in other words, Congress would set its own pay. This straightforward avenue for corruption did not sit well with Madison, who tried to eliminate this oversight.[29] But, when submitted to the states for ratification, the amendment gained only six state votes and did not become part of the Bill of Rights. The First Congress did not set a time limit for ratification, so the amendment remained before the states in the following centuries.[30]

In the nineteenth and early twentieth centuries, four states ratified the amendment, but it went predominantly unnoticed since few believed it would go anywhere. Due to the efforts of a university student a few decades later, the amendment started gaining momentum, and states began considering it for ratification once again.[32] Additionally, the contemporary politics of the time promoted popular support for the amendment since the public generally disapproved of the extreme salaries and benefits of Congress members. In 1992, after three-fourths of the states had officially ratified the amendment and the Archivist of the United States, who preserves and documents government and historical records, declared it to be legally valid, the Madison Amendment became the twenty-seventh amendment to the Constitution more than two hundred and two years after its original proposal.[33] Supporters of this amendment argued that the amendment process has two simple steps: ratification by two-thirds of Congress and three-fourths of the states, and there is not and should not be any doubt around the legitimacy of the Madison Amendment since those two qualifications were met.[34]

On the other hand, many scholars object to the validity of the amendment due to the unusually long period between its proposal in Congress and ratification by the states. They argue that Article V requires a consensus between Congress and the states and that consensus was not fulfilled since the Congress that proposed the amendment was in session over 200 years ago, when it had many fewer members. There were also fewer states, and thus, there was never a moment of consensus between contemporary federal and national supermajorities to add this amendment to the Constitution.[35] Regardless, the ratification of the Madison Amendment set a precedent for ratifying amendments long after their original proposal if there is no declared time limit. Meanwhile, time limits, which are not mentioned anywhere in the Constitution and have only appeared in the last century, are a highly contested part of the amendment process. The Supreme Court has dealt with time limits to an extent in past cases.

Article V in the Supreme Court

The amendment process has largely managed to stay out of the judicial system, as the judiciary does not have a constitutional role in this process. Only two Supreme Court cases deal directly with the validity and enforceability of constitutional amendments. In cases even adjacent to amendments, courts have recognized the sacred nature of a constitutional amendment.[36] This lack of judicial precedent contributes to the extensive speculation and uncertainty surrounding Article V and its interpretation. To illustrate, the restriction on amendments given in Article V concerning equal suffrage in the Senate does not prohibit any type of amendment from being valid; if an amendment proposing to abolish the Senate altogether were to gain enough support, the specifications of Article V allow that. In Dodge v. Woosley, an 1885 Supreme Court case, the justices refer to the “permanent and unalterable…power of amendment.”[37] If constitutional amendments are so consequential, why and how have individual citizens tried to challenge them?

The first Supreme Court case concerning Article V was **Dillon v. Gloss** in 1921.[38] In this case, a man, Dillon, was charged with violating Section 26 of Title II of the National Prohibition Act for illegally transporting intoxicating liquor. Dillon argued against his custody on two different and opposing claims regarding the validity of the Eighteenth Amendment. The first argument was that the amendment itself was invalid, meaning the National Prohibition Act was too, because the time limit is not mentioned in Article V. Accordingly, Congress does not have the power to set such time limits.[39] While this could be true, it is also clear that the amendment was passed well before the expiration date set by the time limit. Hence, the time limit did not play much of a role in the process as a whole. Even Dillon seemed to recognize this as his second argument relied on the amendment's one-year delay in taking effect. It was ratified by the last of the required three-fourths of the states on January 16, 1919, which slated the National Prohibition Act to take effect on January 17 of the following year. However, the Secretary of State did not officially proclaim the ratification until January 29, 1919. Dillon was found in violation of the National Prohibition Act between January 17 and 29, 1920, and thus argued that the one-year delay should not have ended until January 29.[40]

Through a unanimous decision by Justice Van Devanter, the Court upheld Dillon's conviction of illegal transportation of alcohol. The opinion dealt with each of Dillon's arguments separately and provided much-needed clarity on the amendment process as a whole. To start, the opinion defines the fact that, historically, amendments had been ratified within a few years, and Congress decided to set a clear seven-year deadline for the Eighteenth Amendment to avoid uncertainty about what constitutes a reasonable time for an amendment to remain before the states for consideration. The Court reasoned that Congress has the authority to set such limits as part of its power to propose amendments, provided the time is reasonable, as was the case with the seven-year limit. They also dismissed the idea that amendments could be left open indefinitely for ratification by future generations, as this would undermine the purpose of amendments reflecting the needs and will of the people during a specific period.[41]

In response to Dillon's second argument, the Court addressed the fact that Article V says ratification is complete after the requisite three-fourths of states vote to ratify, not after any other symbolic declaration of officiality as done by the Secretary of State, in this case, thirteen days after the states finished voting. Therefore, the amendment became official on January 16, 1919, and the National Prohibition Act was valid on January 17, 1920, negating Dillon's claim that he could not be prosecuted because the law was not yet effective.[42] Not only did this ruling clarify Dillon's criminal case and uncertainty around the Eighteenth Amendment, but it also made sweeping judgments that would affect the amendment process in general. The case upheld Congress' authority to set time limits for ratification of amendments as long as they had clear evidence for the "reasonableness" of such periods.[43]

The second case to address the application of Article V was Coleman v. Miller, which reviewed proceedings related to an unratified amendment, the Child Labor Amendment, proposed in 1924 that would have allowed Congress to regulate labor for children under eighteen.[44] Many states initially rejected the amendment, and it seemed to have stalled. Over a decade later, in 1937, however, the Kansas state senate's ratification vote resulted in a tie. As is customary in the Kansas legislature, the lieutenant governor broke the tie in favor of ratification, which raised many questions about whether the process was valid.[45] The two challenges against the situation came from a group of Kansas legislators who opposed the amendment because they believed (1) the amendment had expired since too much time had passed since its proposal, and (2) the lieutenant governor did not have the authority to break a tie in a ratification vote.[46]

In this case, the majority sided with the Kansas legislative process and upheld their ratification of the Child Labor Amendment. The two dissenters in this case, Justices McReynolds and Butler, argued that the "reasonable time" had elapsed for ratification and the amendment was no longer valid.[47] The Court did not decide whether an amendment must be ratified within a specific time. Instead, it left this question to Congress, which, from that point on, had the sole power to determine if time would be a factor in an amendment's validity. In response to the petitioners' second argument about the Kansas lieutenant governor's vote, the plurality upheld the Kansas legislature's process in its entirety and stated that this was a state procedural matter and, thus, not one for the Court to overrule.[48]

The plurality's standard remains the current one for constitutional amendment processes and validity. In this case, the Court emphasized through its arguments that some aspects of the constitutional amendment process, such as how long an amendment remains viable for ratification, are political questions, not legal ones.[49] This leaves the current judicial precedent that the judiciary should not be heavily involved in questions of constitutional amendments at all, and these should be resolved by Congress, which has the explicit constitutional power to do so.[50] After stripping away the complexities of both Dillon v. Gloss and Coleman v. Miller, the current standard for Article V is that amendments must satisfy "a great variety of relevant conditions, political, social, and economic," and all questions of process should be left to Congress and the states.[51] However, as Congress and the states are both large, diverse systems of government, this judicial conclusion leaves many unresolved issues surrounding the amendment process.

Solutions to the Article V Flaws

Despite the ineffectiveness of the current amendment system, there are many ways it can be improved and clarified to make it possible for the country to continue progressing toward fulfilling our ideals, thereby enhancing the amendment process. While some actions would not be possible without passing a constitutional amendment, Article V, in general, is not a politically controversial subject and thus has a greater chance of securing bipartisan support. Some changes, however, could be done without an amendment, but an amendment would enshrine them into the supreme law of the land. Since there has not been a newly proposed and ratified amendment in over fifty years despite numerous social and political changes, it is clear that reforms must be made to protect our right for the Constitution to change alongside the country.

A procedural change needed in Article V is lowering the standard for state ratification, in addition to other modifications, including clarifying procedures for states rescinding votes and ensuring the validity and execution of time limits. The current procedural amendment standard is a two-thirds majority of Congress and three-fourths of the states. A two-thirds majority is defined as a supermajority—anything with a higher standard than a simply more than 50 percent vote—and it is only used in Congress to enact significant legislative actions in addition to proposing amendments such as presidential impeachment, declaring a president unable to serve under the Twenty-Fifth Amendment, overriding a veto, and expelling a member of Congress.[52] All of these actions support a significant governmental change that would alter the state of the nation; therefore, two-thirds is a reliable standard for passing potential amendments through Congress. Congress has proposed six amendments that did not gain the three-fourths majority of the states.[53] The problem arises when the amendments get passed on to state legislatures.

A pillar of United States society is unity despite cultural diversity, but right now, unity is decreasing exponentially, which is evident in many contexts.[54] For instance, there has not been a presidential election since 1972 where one candidate has secured the support of three-fourths of the states.[55] Considering how influential and powerful the victor of a presidential election is, why does only a simple majority of electoral votes suffice?

The answer: three-fourths is an impossible standard for national decisions, regardless of their importance. According to national election maps throughout history, the periods in which constitutional amendments were passed also had greater national consensus in presidential elections.[56] National consensus in general has decreased significantly over the last century through rapid population growth, the internet's rise, and social media's popularization.

One could argue that presidential elections have less significance than constitutional amendments because presidents can only enact change for a maximum of eight years, while amendments change the country indefinitely. While this is indisputably true, there is a clear middle ground between the easy-to-obtain simple majority and the impossible three-fourths standard: two-thirds. There have been few two-thirds state consensuses in the last sixty years in presidential elections, but they occurred enough to point to the fact that the country can come together when an important decision is on the line.[57]

By changing Article V to dictate that an amendment must be proposed by two-thirds of Congress and ratified by the legislatures of two-thirds of the states, it would be possible to amend the Constitution as society changes. Still, it would not be too low of a standard that excessive and unnecessary amendments would pass. This is proven by various states' ratification methods detailed in their constitutions. California has amended its constitution 523 times since 1879, an average of four amendments per year.[58] On the other hand, Massachusetts has amended its constitution 121 times since its initial ratification in 1780, giving it an average of 0.5 amendments per year, much closer to the national average of 0.1 amendments per year.[59] As predicted, California has a simple majority requirement,[60] while Massachusetts has a 60 percent requirement for ratification.[61] With the two-thirds principle, the nation would have a 67 percent requirement, effectively providing the optimal circumstances for amending the Constitution.

Another barrier to the amendment process is the uncertainty of when or if a state can rescind its ratification vote. The argument for rescinding votes is that if an amendment were ratified by a state one hundred years ago, the population and political ideals would undoubtedly have changed. Accordingly, the amendment may no longer resonate with the state's values. On the other hand, with unchecked rescinding, states could vote for ratification one day and then take it back a week later, which would make it very hard to determine when an amendment has obtained the requisite support and also would take away some of the sacristy and permanence of a ratification vote. Currently, votes of rescission are not viewed as legally valid since no law or precedent views them as such.[62] When counting the votes for the Fourteenth Amendment, right before it gained enough support, Ohio and New Jersey decided it no longer aligned with their values and voted to rescind ratification.[63] The doubt and uncertainty of the legality of these resolutions, combined with the political climate of the post-Civil War era, caused the Secretary of State to officially declare the amendment as part of the Constitution.[64] This precedent does not prove that rescinding votes is invalid because of the social context and urgency of trying to unify the country after the Civil War. However, it does represent the high degree of uncertainty around this issue.

Assuming the majority of states needed to ratify is lowered to two-thirds, the following is a proposed solution. While rescinding a vote for ratification after a long period of time is reasonable, there needs to be more than a simple majority vote in a state to do this. Instead, once the legislature votes to rescind, the states should hold a statewide referendum in the next election. If a majority of the state votes to rescind, it would demonstrate the population's change in values that justifies a rescission vote. Bringing the vote directly to the people would reinforce the gravity of the situation while also avoiding the politics of legislatures, campaigning, and districting biases.[65] This system would likewise prevent the rapid overturn of ratification votes as it takes time to hold a state-wide referendum and calculate the results, and the country would be able to anticipate such a ruling.

A more practical application of Article V uncertainties is around the issue of time limits. There is no formal evidence of the validity of Congress imposing time limits other than the decision in Dillon, which, legally, is very imprecise. The Court's justification for time limits is that "proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor," and therefore the steps must be contemporary.[66] This argument represents educated intuition but not a precise legal argument. Additionally, the later amendment case, Coleman, although dealing with a similar issue, did not attempt to make this claim but instead said that the judicial branch should stay out of Article V issues entirely.[67] The Court's second argument is that "it is only when there is deemed to be a necessity therefore that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently."[68] This argument fails on multiple levels, as there is no rational assumption that just because Congress deems the amendment urgently necessary, the states will feel the same; it takes time to reach a consensus on such significant policy changes. In fact, the need for the amendment might even increase as time passes. This is evident in the passage of the Twenty-Seventh Amendment, where the states saw no essential need for it during its original proposal in 1789; however, 200 years later, Congressional pay corruption became a more noteworthy issue. Many citizens then recognized that a constitutional safeguard against it was needed, and so began the rapid ratification of the amendment.[69]

Including time limits in the amendment process also disrupts the delicate balance of power that Article V gives to Congress and the states. With time limits, Congress is more likely to propose a constitutional amendment because representatives are more likely to vote for an amendment with a smaller chance of being ratified due to the time limit. During the debates around the Eighteenth Amendment, Senator Wesley Jones initially opposed the addition of the seven-year time limit, claiming it to be unconstitutional. However, he soon realized that the indefinite nature of amendments meant that fewer people were willing to vote for them, and he concluded that "a very careful investigation has convinced some of us that a two-thirds vote is very uncertain unless this [time] limitation is put on."[70] Therefore, time limits can persuade opposed and undecided congresspeople to vote for an amendment without considering the merits, which takes away from the idea that the amendment process is meant to be well thought out and debated.

In addition to time limits pushing Congress to pass amendments without due consideration, they also take power away from the states. The Constitution purposely gives half of the amendment process to states and half to Congress. With time limits, states no longer retain exclusive control over the second half of the process because they are now under an extreme time pressure imposed by Congress. The Twenty-Seventh Amendment and the unratified Child Labor Amendment are perfect examples of this, as they gained a surge of ratifications later as the proposed solution became necessary. The Dillon court attempted to justify its support of time limits as preventing congressional encroachment on the states, but they ended up promoting precisely that.[71] Time limits make encroachment more likely because Congress can pass amendments without having to debate their content seriously and can force ratification "before the States have time for mature consideration."[72] If the Supreme Court's decisions surrounding Article V doctrine influence anything today, it is that the separation of powers is crucial in determining Article V procedures. The Supreme Court declared its efforts to stay out of Article V proceedings in Coleman,[73] and they expressed concern for congressional encroachment on the states in Dillon.[74] Thus, it is reasonable to conclude that the consensus among such differing opinions is to look back at the original text of Article V, which gives Congress the power to propose and states the power to ratify.

If left up to the states, their votes for ratification would reflect the values of the time. This is shown in the comparison between two unratified amendments: the Corwin Amendment, which was proposed in an attempt to prevent the Civil War and would preserve slavery in the Constitution, and the Equal Rights Amendment, which was proposed after the Nineteenth Amendment and would make it unconstitutional to discriminate on the basis of sex.[75]

Putting time limits aside, the nation's current situation would quickly determine which of these amendments are needed. The Corwin Amendment attempts to solve a time-specific problem, and no state would ratify it now.[76] The Equal Rights Amendment, on the other hand, represents the issue of gender discrimination that existed throughout the country's long history; the latest state to ratify the ERA was Virginia in 2020, and no national outrage ensued.[77] The contrast between the two proposed and unratified amendments shows that time limits forcibly imposed by Congress are not necessary; the culture of the nation and the makeup of the states will impose their own time limits on when to stop considering an amendment for ratification.

The Equal Rights Amendment

The only remaining unratified amendment that is still discussed in the present day is the Equal Rights Amendment (ERA). Suffragist leader Alice Paul introduced the amendment at the Seneca Falls Convention in 1923. Her first version of the amendment, called the "Lucretia Mott Amendment," was named after a late feminist leader who stated that "men and women shall have equal rights throughout the United States and every place subject to its jurisdiction."[78] The amendment quickly gained support from the National Woman's Party and professional women such as Amelia Earhart, and thus, it was introduced in Congress in the same year. Both labor reformers and strong conservatives opposed guaranteeing equal rights to women, but for very different reasons. Labor reformers were concerned that the ERA would reverse their progress toward enacting protective labor laws that treated women differently from men. Extreme conservatives, on the other hand, claimed that the ERA would deny a woman's right to be supported by her husband, women would be sent into combat, and abortion rights and homosexual marriages would be upheld.[79]

These opposing groups had little effect at first because, in the early 1940s, both the Republican and Democratic parties added support for the Equal Rights Amendment to their political platforms. Shortly afterward, in 1943, Alice Paul rewrote her draft of the ERA to state, "Equality of rights under the law shall not be denied or abridged by the United States on account of sex." This version was entitled the "Alice Paul Amendment."[80] The anti-ERA groups managed to stall its progress for around a decade, but in the 1960s, women organized again to demand their birth rights as equal citizens under the Constitution. Once organized labor groups joined the movement, other mainstream groups supported them, and politicians reacted strongly to the women's fight.[81] The Equal Rights Amendment passed through the House and the Senate on March 22, 1972, and was sent to the states for ratification.[82] As was precedent after the Eighteenth Amendment, Congress placed a seven-year deadline on the ratification process, but they did so only in the proposing clause, which officially introduces items to Congress for consideration and does not appear in the words of the ERA itself. The ERA quickly gained momentum once it left Congress, getting twenty-two of the necessary thirty-eight ratification votes in the first year. Progress slowed after that, with only eight ratifications in 1973, three in 1974, and one in 1975. By 1976, there were no new ratification votes.[83]

The decline in ERA support in the mid-to-late 1970s was primarily due to the growth of anti-ERA movements led by opponents such as Phyllis Schlafly, the right-wing leader of the Eagle Forum and STOP ERA. She used rhetoric that had been successful in generating female opposition to women's suffrage, such as claiming the ERA would deny women privacy and marriage protection.[84] Other groups also supported the movement, such as states' rights advocates who believed the ERA was a federal power grab, and business industries, such as the insurance industry, believed it would cost them money. Fundamentalist religious groups drew on biblical "evidence" that women do not naturally have the right to attain full equality under the law.[85] Pro-ERA advocacy around this time, on the other hand, was led by the National Organization for Women (NOW), a leading feminist advocacy group, and ERAmerica, a bipartisan coalition that lobbied for the ERA. Due to their efforts, Indiana became the thirty-fifth state to ratify the ERA in 1977.[86]

At the same time, though, widespread support for the ERA continued to drop as many states postponed their consideration or defeated ratification bills. Illinois, for example, changed its rules to require a three-fifths majority to ratify an amendment to ensure that its repeated simple majority votes in favor of the ERA did not count. Other states, such as Nebraska, Tennessee, Idaho, Kentucky, and South Dakota, voted to rescind their ratification of the ERA between 1973 and 1979.[87] As the original 1979 deadline approached, ERA advocates split their ratification strategies. Groups such as the League of Women Voters wanted to use the pressure of the time expiration to convince states to hold ratification votes.[88] In contrast, other groups appealed to Congress for an indefinite extension of the time limit. Congress, bowing to the pressure from both sides, granted an extension until June 30, 1982.[89]

As the 1970s ended, however, the political tide continued to turn more conservative, with Ronald Reagan becoming president in 1980. The Republican Party officially removed support for the Equal Rights Amendment from its platform. Although pro-ERA activists increased with massive lobbying, petitioning, fundraisers, and White House picketing, the Equal Rights Amendment failed in getting three more state ratifications before the 1982 deadline.[90] The ERA has been reintroduced in every session of Congress since 1982, but it has never successfully extended the time limit again. The fight for women's rights, specifically in the areas of equal pay and freedom from sexual harassment, gained momentum again in the 2000s, and support for the ERA has renewed nationwide. In March 2017, Nevada became the thirty-sixth state to ratify the ERA, and Illinois was the thirty-seventh in 2018.[91] On January 27, 2020, Virginia became the thirty-eighth state to ratify the ERA, which meant that the amendment had reached the minimum number of states required for ratification, since the official governmental count does not recognize the rescinded votes.[92]

Congress recognizes two possible paths to ratification. The first is the "Three-State Strategy," which would involve Congress removing the time limit originally added to the proposing clause of the ERA in 1972.[93] Even if one used the flawed reasoning of the Dillon decision, if Congress has the authority to instate and extend deadlines, they can also remove them. A bipartisan bill was introduced in the 117th Congress in 2021 and passed the House of Representatives on March 17, 2021, with four Republicans voting "yea"; the Senate has yet to approve this legislation.[94] The second strategy is the "Begin Anew" strategy, where the ERA would go through the entire Article V process again to remove any legal questions, such as time limits and rescinded votes.[95] There are bills to do this present in both houses of Congress, but no further action has been taken to propose the amendment again officially, which therefore proves that the Dillon standard does not provide the necessary clarifications that would make it possible for amendments to pass.[96]

The ERA, like the Twenty-Seventh Amendment, represents a universal issue, unchanged by time, and thus is still valid in the eyes of the country, as evidenced by the most recent 2020 Virginia ratification.[97] Additionally, the global community recognizes the need for a policy such as the ERA since 85 percent of United Nations member states have constitutions that prohibit discrimination on the basis of sex and/or gender.[98] While the United States does treat sex discrimination cases with intermediate scrutiny (as opposed to the lowest standard of rational basis review), these cases have not attained inclusion on the list of suspect classifications, such as race, religion, and national origin that receive strict scrutiny; the ERA would solve this.[99] The only barrier blocking the proposed ERA from becoming the official twenty-eighth constitutional amendment is the variety of legal uncertainties around all aspects of its history. Following the necessary changes, it is clear that the ERA and other future amendments could secure their rightful place in the United States Constitution.

VI. ERA Status According to the Proposed Changes to Article V

Using the model proposed in Section IV, the ERA is either already in the Constitution or, at the very least, remains legally viable for ratification. The first revision was to bring the percentage of state votes needed for ratification from three-fourths down to two-thirds.

This would effectively make the amendment process attainable but still functioning at the same degree of difficulty as the founders intended. If the ERA were held to this standard, it would only need thirty-four state ratifications rather than thirty-eight. Observing the original counts from 1972-1975, thirty-four states ratified it shortly after it was proposed, and it would have been officially declared part of the Constitution before the first time limit ever expired.[100]

Thirty-four state ratifications in four years is a supermajority of states in a short time, which is precisely what the amendment process is designed for. Furthermore, advocates continue to support the ERA, and similar language is present in most other countries, indicating continued broad public support.

Five states also rescinded their ratifications: Nebraska in 1973, Tennessee in 1974, Idaho in 1977, Kentucky in 1978, and South Dakota in 1979.[101] Nebraska and Tennessee both voted for ratification in 1972. Thus, it is implausible that the entire makeup of the state had changed in one or two years, which is the only argument in favor of allowing rescission. In Nebraska, voting patterns did not change between the ratification and rescinding, and in Tennessee, the voters became more Democratic, indicating that the people of the state did not have a change of heart about the ERA—just the legislature did.[102] Therefore, a state-wide referendum would not have overturned the ERA. Using the state-wide referendum method, it is reasonable to conclude that if the amendment had enough popular support to pass the first time, it did not lose that support. Of course, carrying out the referendum is an important step, and if the population truly has changed, then it is reasonable, but this is most likely not the case.

Idaho, Kentucky, and South Dakota's rescission votes came five to six years after their ratification vote and, most notably, still within the original seven-year ratification period. The three states had little change in their political makeup during this period, with each party retaining largely the same base of support, differing by at most three percentage points.[103] Similar to Nebraska and Tennessee, the states' legislatures changed their minds, not the citizens. Thus, their rescissions likely would also be invalid under the state-wide referendum method. The sole argument for rescinding ratification votes is for cases like the ERA, where amendments linger for almost a century. What those in favor of it fail to realize is that the recessions did not occur a century after the original vote. They did not even occur a few decades later. Instead, they occurred within the original seven-year period, when Congress had first declared the amendment to be valid and an appropriate time for deliberation and initial voting.

The seven-year time limit added to the ERA is a prime example of limiting states' equal role in the amendment process. By giving Congress the power to control states this way, states cannot ratify amendments when they feel they are socially necessary. In the case of the ERA, there have been four ratifications since the time limits expired, and there has not been a multi-state rescission movement.[104] Therefore, it is reasonable to assume that most states still find the ERA important to society, and the Constitution directly gives them the sole power to make that decision. Looking back at the original text of Article V, there is a way to amend the Constitution without involving Congress, but never by not involving state-by-state votes to reach official ratification.[105] By imposing a time limit on the Equal Rights Amendment, Congress is effectively taking the constitutionally given power of ratification away from the states and preventing the implementation of an amendment that they deem necessary.

The placement of the time limit in the ERA is also a significant legal issue. In every other amendment that has a time limit, it is placed as the final section of the amendment's text and appears in the actual Constitution itself.[106] The ERA, however, only has a time limit in the proposing clause, which, if ratified, would not appear at all in the Constitution.[107] Additionally, the states only ratify the amendment's text, not the proposing clause. Thus, by ratifying, they do not agree to the time limit as they would in cases like the Eighteenth Amendment. Suppose one chooses to view the ERA's time limit as constitutionally permissible. In that case, it is also important to note that under the Dillon and Coleman decisions, Congress can revise, extend, or ignore a time limit.[108]

In the case of the ERA in the present day, they have effectively chosen the "ignore" option as there has been no Congressional guidance regarding the ERA since 1979.[109] Therefore, assuming Congress can change time limits, they are responsible for exercising that power. By choosing not to do so, it remains legal for thirty-eight ratification votes to be sufficient to conclude the ERA is part of the Constitution.

Yet, this hypothetical scenario highlights how such limits significantly diminish the power of the states. If the requisite number of states determine that the Equal Rights Amendment is a valuable addition to the Constitution, why should they be forced to wait decades for Congress to act on the time limit? Given that the amendment process has succeeded only twenty-seven times in the nation's history, it is unsurprising that its procedures are riddled with uncertainties. However, these ambiguities are stalling vital national progress, and resolving them is critical to ensuring the country's continued growth and development.

Conclusion

The history of Article V and its application over two centuries of American history demonstrates both the resilience and limitations of the amendment process. Beginning with the Bill of Rights ratified within five years of constitutional ratification, the process has allowed for critical updates to the Constitution that address the evolving needs and desires of the nation.[110] Later landmark changes, such as the implementation and later repeal of prohibition through the Eighteenth and Twenty-First Amendments, highlight the complexity and unpredictability of Article V's application.[111] Furthermore, the Twenty-Seventh Amendment's multi-century delay of ratification illustrates the importance of the passage of time in determining an amendment's significance.[112] However, these examples also emphasize the challenges inherent in the process, which was designed to balance the need for progress with safeguards against hasty changes.

Despite all it has accomplished for the country, the amendment process is far from perfect, given the time that has elapsed since its creation. Among the most significant flaws in the amendment process are the high ratification threshold—three-fourths of state legislatures—and the ambiguities surrounding rescinded votes and added time limits. These challenges create substantial barriers to amendments that aim to address crucial social issues, as evidenced by the ongoing struggle to ratify the Equal Rights Amendment. The ERA presents a compelling case study of the difficulties central to the Article V processes. Despite obtaining the requisite number of state ratifications, a challenging task, the amendment's legal status remains in question due to controversies over rescinded votes and the expiration of its time limit.[113] These procedural uncertainties, combined with the rigid approval thresholds, have blocked an amendment that embodies the principles of equality and justice at the core of American democracy.[114]

Addressing these flaws is necessary not only for the ERA but also for ensuring that the amendment process remains a viable tool for constitutional change. Lowering the state threshold from three-fourths to two-thirds allows for the possibility of ratification while also preserving the principle of broad consensus. Similarly, providing more precise guidelines on the validity of rescinded votes by instituting the state-wide referendum system and eradicating the use of time limits would eliminate unnecessary obstacles to ratification. These reforms would allow the ERA to be included in the Constitution and for future amendments to address critical issues that arise as the nation moves forward.

In conclusion, the amendment process outlined in Article V has enabled profound changes in the nation's history, but it must evolve to meet the needs of twenty-first-century America. The fight for the Equal Rights Amendment underscores the importance of clarifying and refining this process to make it more inclusive, efficient, and responsive to the will of the people.[115] By addressing its inherent flaws, we can ensure that the Constitution will remain a living document capable of adapting to the demands of justice, equality, and progress in a growing and changing society.

[1] Shaina Taub, Keep Marching, 2024.
[2] Emily Ekins, "New Poll: 74% Worry Americans Could Lose Our Freedoms If We're Not Careful," Cato Institute, July 4, 2024, https://www.cato.org/blog/new-poll-74-worry-americans-could-lose-our-freedoms-were-not-careful.
[3] Ekins, "New Poll." This social and political change is characterized by the rapid polarization of the two-party system as well as the increase in social media usage, both of which are unique to this time in history.
[4] Cheryl Dellecese, "Still Unequal," Smith College, January 10, 2023, https://www.smith.edu/news-events/news/still-unequal.
[5] Michael B. Rappaport and David A. Strauss, "Article V," National Constitution Center, 2013, https://constitutioncenter.org/the-constitution/articles/article-v/interpretations/277.
[6] Rappaport and Strauss, "Article V."
[7] US Constitution, art. V.
[8] Rappaport and Strauss, "Article V."
[9] Rappaport and Strauss, "Article V."
[10] The Twenty-Seventh Amendment was originally proposed in 1789 with the Bill of Rights and was ratified in 1971; this will be addressed later.
[11] Rappaport and Strauss, "Article V."
[12] Rappaport and Strauss, "Article V."
[13] Center for the Study of the American Constitution, "Ratification at a Glance," University of Wisconsin—Madison. https://csac.history.wisc.edu/wp-content/uploads/sites/281/2024/05/DC9_Ratification-at-a-Glance-Table-v2.pdf.
[14] "The Bill of Rights: A Brief History," ACLU, March 4, 2002, https://www.aclu.org/documents/bill-rights-brief-history.
[15]"The Bill of Rights," ACLU. It is also essential to recognize that, at the time of the Bill of Rights, these rights were only unalienable to a particular subset of citizens: white, property-owning males.
[16] "The Bill of Rights," ACLU.
[17] US Constitution, amend. XVIII, sec. I.
[18] Robert P. George and David A.J. Richards, "The Eighteenth Amendment," National Constitution Center, https://constitutioncenter.org/the-constitution/amendments/amendment-xviii/interpretations/169.
[19] George and Richards, "Eighteenth Amendment."
[20] The prohibition movement began due to national concern surrounding the obsessive drinking habits of Americans. In particular, alcohol abuse by men had significant negative effects on the women in their lives who had few legal rights and were completely dependent on their husbands for financial resources. As more European immigrants came to America, they worked to assimilate to the new culture while also keeping their excessive drinking habits due to the large European brewing industry. With the ratification of the income tax amendment (Sixteenth Amendment), the government was no longer reliant on liquor taxes for funding and thus prohibition became a plausible reality. Groups such as the Anti-Saloon League (ASL) and Women's Christian Temperance Union became even more powerful in their messaging surrounding how severely the culture of alcohol and saloons had ruined the lives of so many women and children. As World War I began, anti-German attitudes rapidly developed and the ASL successfully employed propaganda that connected beer and alcoholism with Germany and thus war and treason. Most politicians were also fearful of the war and therefore the proposed Eighteenth Amendment quickly passed through both houses of Congress and was ratified by the states in just over a year. Consequently, it is shown that the passage of this amendment was very much a matter of timeliness and in-the-moment fervor against Germans and fear of war. Ken Burns, "Roots of Prohibition | Prohibition | Ken Burns | PBS," Prohibition (PBS, 2022), https://www.pbs.org/kenburns/prohibition/roots-of-prohibition.
[21] Mason Kalfus, "Why Time Limits on the Ratification of Constitutional Amendments Violate Article V," University of Chicago Law Review 66, no. 2 (March 1, 1999).
[22] US Constitution, amend. XVIII, sec. II.
[23] George and Richards, "Eighteenth Amendment."
[24] George and Richards, "Eighteenth Amendment."

[25] US Constitution, amend. XXI, sec. I.
[26] Robert P. George and David A. J. Richards, "The Twenty-First Amendment," National Constitution Center, 2017, https://constitutioncenter.org/the-constitution/amendments/amendment-xxi/interpretations/151.
[27] George and Richards, "Twenty-First Amendment."
[28] George and Richards, "Twenty-First Amendment."
[29] The Twenty-Seventh Amendment is commonly referred to as the Madison Amendment.
[30] Steven G. Calabresi and Zephyr Teachout, "The Twenty-Seventh Amendment," National Constitution Center, 2017, https://constitutioncenter.org/the-constitution/amendments/amendment-xxvii/interpretations/165.
[31] Kenneth Thomas and Larry Eig, "Analysis and Interpretation of the Constitution," 2013, https://www.govinfo.gov/content/pkg/GPO-CONAN-2013/pdf/GPO-CONAN-2013.pdf.
[32] Calabresi and Teachout, "Twenty-Seventh Amendment." The student, Gregory Watson, wrote a paper on the potential ratification of the amendment and received a C from his professor, who stated that she was not convinced it was still viable. Upon an unsuccessful appeal to the professor, he began a national campaign to get the amendment ratified and prove to her he was correct. He was retroactively given an A by the university in 2017.
[33] Calabresi and Teachout, "Twenty-Seventh Amendment."
[34] Calabresi and Teachout, "Twenty-Seventh Amendment."
[35] Calabresi and Teachout, "Twenty-Seventh Amendment."
[36] Douglas Linder, "What in the Constitution Cannot Be Amended?," Arizona Law Review 23, no. 717 (1981).
[37] Linder, "What in the Constitution Cannot Be Amended."
[38] Dillon v. Gloss, 256 U.S. 368, 2 (1921).
[39] Dillon at 371.
[40] Dillon at 371.
[41] Dillon at 374.
[42] Dillon at 376-77.
[43] Dillon at 375.
[44] The passage of the Thirteenth Amendment abolishing slavery coincided almost perfectly with the peak of United States industrialization, particularly the growth in factory production. With a large demand for cheap, readily available labor, the industrial industry turned to children. Despite the fact that children were losing limbs in factory machines, the Supreme Court continuously denied Congress the power to regulate labor hours and conditions on the grounds that such laws violated the extent of Congress' Commerce Clause powers. Additionally, progressive reformers began advocating for mandatory schooling until age sixteen which would dismantle the entire labor industry. Thus, the only answer was an official child labor amendment giving Congress the power to regulate such things. In 1933, the success of the National Industrial Recovery Act (NIRA) that federally regulated child labor almost stopped the push for the Child Labor Amendment (CLA). However, the Supreme Court struck the NIRA down a few years later. Finally, in 1937 the Supreme Court changed its attitude toward Congress regulating child labor and they allowed the Fair Labor Standards Act that forbade interstate shipment of goods produced by "oppressive child labor," and thus the need for the CLA disappeared which effectively made it the only amendment never ratified that was informally adopted through law. Samuel Lowry, "The Child Labor Amendment," Amendments Project, 2023, https://amendmentsproject.org/story/child-labor-amendment.
[45] Coleman v. Miller, 307 U.S. 443, 435-36 (1939).; The debate here is surrounding the fact that even though the Vice President has the power to break ties in the Senate, it is never stated that the Lieutenant Governor can do that at the state level—especially for an amendment which has a unique legislative-specific application.
[46] Coleman at 437.
[47] Coleman at 473 (Butler, J., dissenting).
[48] Coleman at 437; What the Court actually did here was not decide anything and almost all the justices wrote separate decisions detailing different variations of the idea that they did not want to make a conclusion regarding these matters.

[49] Coleman at 442-43.
[50] Noel Dowling, "Clarifying the Amendment Process," Washington and Lee Law Review 1, no. 2 (March 1, 1940).
[51] Coleman at 453.
[52] Robert Longley, "Supermajority Vote in US Congress," ThoughtCo, October 7, 2021, https://www.thoughtco.com/the-supermajority-vote-in-us-government-3322045.
[53] "Proposed Amendments Not Ratified by the States," Constitution Annotated (Congress.gov, 2024), https://constitution.congress.gov/browse/essay/intro.3-7/ALDE_00000026/.
[54] 270 To Win, "Historical Presidential Election Map Timeline," 270toWin.com, 2020, https://www.270towin.com/historical-presidential-elections/timeline/.
[55] 270 To Win, "Map Timeline."; The exception to this statement is Reagan who managed to secure over three-fourths of the states through his charismatic personality and campaign style which no other political candidate since has managed to replicate.
[56] 270 To Win, "Map Timeline."
[57] 270 To Win, "Map Timeline."
[58] "Number of State Constitutional Amendments in Each State," Ballotpedia, 2017, https://ballotpedia.org/Number_of_state_constitutional_amendments_in_each_state.
[59] "Amendments in Each State," Ballotpedia.
[60] David A. Carrillo and Danny Y. Chow, "California's Constitution Is for the People," State Court Report, September 25, 2024, https://statecourtreport.org/our-work/analysis-opinion/californias-constitution-people.
[61] "Amending State Constitutions," Ballotpedia, 2021, https://ballotpedia.org/Amending_state_constitutions#Massachusetts.
[62] Grover Rees III, "Rescinding Ratification of Proposed Constitutional Amendments - a Question for the Court," Louisiana Law Review 37, no. 4 (1997).
[63] Rees III, "Rescinding Ratification." If their rescinding votes had been validated, we would not have the amendment that guarantees equality under the law and due process and that has been used to incorporate the Bill of Rights to the states. In other words, our country would have made nowhere near the progressions we have without this amendment. The Fourteenth Amendment is the constitutional foundation for some of the most important Supreme Court decisions in history such as the right to homosexual marriage, and previously, the federal right to abortion and the entire idea of a right to privacy. Keep in mind these serious implications as we continue.
[64] Rees III, "Rescinding Ratification."
[65] Richard Wike et al., "Support for Democracy High around the World," Pew Research Center's Global Attitudes Project, October 16, 2017, https://www.pewresearch.org/global/2017/10/16/globally-broad-support-for-representative-and-direct-democracy/.
[66] Dillon at 374-75.
[67] Coleman at 453.
[68] Dillon at 375.
[69] Kalfus, "Time Limits Violate Article V."
[70] Kalfus, "Time Limits Violate Article V."
[71] Dillon at 376.
[72] Kalfus, "Time Limits Violate Article V."
[73] Coleman at 453.
[74] Dillon at 376.
[75] Calabresi and Teachout, "Twenty-Seventh Amendment."
[76] Calabresi and Teachout, "Twenty-Seventh Amendment."
[77] Alice Paul Institute, "ERA History," Equal Rights Amendment, 2014, https://www.equalrightsamendment.org/history.
[78] Alice Paul Institute, "Equal Rights Amendment," Equal Rights Amendment, 2014, https://www.equalrightsamendment.org/the-equal-rights-amendment.
[79] Alice Paul Institute, "ERA History." Yes, these are in fact direct quotes from their platforms.

[80] Alex Cohen and Wilfred U. Codrington III, "The Equal Rights Amendment Explained," Brennan Center for Justice, January 23, 2020, https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained.
[81] Alice Paul Institute, "ERA History."
[82] Cohen and Codrington, "ERA Explained."
[83] Alice Paul Institute, "ERA History."
[84] Cohen and Codrington, "ERA Explained.
[85] Alice Paul Institute, "ERA History."
[86] Alice Paul Institute, "ERA History."
[87] Cohen and Codrington, "ERA Explained."
[88] Even though this strategy is in favor of the ERA, it demonstrates exactly why time limits are unconstitutional because they can be used simply to pressure states into ratifying permanent constitutional amendments when they might not be ready to. This is dangerous no matter what the context is and allowing it even in the positive case of the ERA would set a dangerous precedent for future amendment cases.
[89] Alice Paul Institute, "ERA History."
[90] Cohen and Codrington, "ERA Explained."
[91] The prime example of the idea that states will set their own time limits. If an amendment is still necessary in the eyes of the country, why would Congress have power to deny that?
[92] Alice Paul Institute, "ERA History."
[93] Alice Paul Institute, "Paths to Ratification," Equal Rights Amendment, 2018, https://www.equalrightsamendment.org/pathstoratification.
[94] Alice Paul Institute, "ERA Frequently Asked Questions," Congress.gov, 2018, https://www.congress.gov/116/meeting/house/109330/documents/HHRG-116-JU10-20190430-SD013.pdf.
[95] Alice Paul Institute, "Paths to Ratification."
[96] Alice Paul Institute, "In Congress," Equal Rights Amendment, 2014, https://www.equalrightsamendment.org/incongress.
[97] Alice Paul Institute, "ERA History."
[98] "We Need the Equal Rights Amendment," Equality Now, 2024, https://equalitynow.org/we-need-the-equal-rights-amendment/.
[99] Alice Paul Institute, "ERA Frequently Asked Questions."
[100] Cohen and Codrington III, "ERA Explained."
[101] Alice Paul Institute, "Ratification State-By-State," Equal Rights Amendment, 2014, https://www.equalrightsamendment.org/era-ratification-map.
[102] Right Data USA, "US State Election Results," 2024, https://rightdatausa.com/election_results.
[103] Right Data USA, "US State Election Results."
[104] Alice Paul Institute, "ERA History."
[105] US Constitution, art. V.
[106] US Constitution, amend. XVIII, XX, XXI, XXII.
[107] Alice Paul Institute, "ERA Frequently Asked Questions."
[108] Alice Paul Institute, "ERA Frequently Asked Questions."
[109] Alice Paul Institute, "ERA History."
[110] ACLU, "The Bill of Rights."
[111] George and Richards, "Eighteenth Amendment" and "Twenty-First Amendment."
[112] Calabresi and Teachout, "Twenty-Seventh Amendment."
[113] Alice Paul Institute, "ERA History."
[114] The fact that women have not been included in the Constitution as of yet is fundamentally against everything the United States claims to stand for and as we enter an age with politicians that want to limit instead of extend rights, it is even more vital that we ensure our supreme law of the land does not allow such restrictions to occur.
[115] The U.S. Constitution, though brilliant, requires updates over time. Amendments provide a way to move forward and create a better future for all Americans.

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Private Governance, Public Harm: Rethinking Antitrust Law in the Age of Digital Platforms

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Abstract:

The digital revolution has fundamentally reshaped market dynamics, challenging the foundations of U.S. antitrust law. Initially crafted for industrial monopolies, the Sherman Act struggles to address the complexities of platform-based ecosystems, where market power is not just about price and market share but also data control and user behavior. The landmark case Epic Games v. Apple (2021) exemplifies this tension, raising critical questions about the definition of the relevant market, the limits of platform control, and the consumer welfare standard's applicability in the digital age. While the court ultimately ruled that Apple was not a monopoly, the case exposed the difficulties of regulating digital gatekeepers under a framework designed for a pre-digital economy. This article explores the legal reasoning behind the ruling, contrasts it with Epic Games v. Google, and examines how the European Union's Digital Markets Act offers a proactive alternative. In doing so, it argues for a necessary evolution of U.S. antitrust law, one that moves beyond outdated market definitions and embraces regulatory mechanisms tailored to the realities of platform capitalism.

Introduction

Since the industrial revolution, progress and technological evolutions have been an engine of economic, and even social transformation. In recent decades, this was particularly embodied by the rise of digital platforms, which have reshaped economies, industries, and societies. Tech giants like Google, Amazon, and Apple came to dominate global markets, often wielding more power than nations. This concentration of control raised profound questions about how traditional antitrust laws, designed to protect competition and consumers, should be applied in a world where dominance is no longer measured solely by market share or price, but by data, network effects, and user behavior. Data, often described as the new oil of the 21th century, is the primary resource of the digital age, enabling companies to convert user behavior into actionable insights, optimize their services, and reinforce their market positions. Essentially, data is formation, and information is power. Additionally, data accumulation has become more than just a competitive advantage; it is now central to economic power, as tech giants increasingly profit from collecting, analyzing, and even selling it. As the digital age continues to evolve, the need for antitrust reform has never been more urgent, prompting lawmakers, regulators, and courts to confront a new set of challenges that were unthinkable in the era of brick-and-mortar monopolies.

The digital economy refers to an economy that is based on digital computing technologies, primarily involving the internet, data, and digital platforms to create value and facilitate business activities. It includes a broad range of economic activities such as e-commerce, digital marketing, cloud computing, and the use of big data for business decision-making. Key components include digital platforms like social media, search engines, and online marketplaces, as well as the growing reliance on artificial intelligence and automation in business processes. This new market has completely reshaped other domains by forcing leaders to rethink the way they were doing business.

The digital economy has strong tendencies to turn into a monopoly. Computing technologies require large infrastructure, such as square kilometers of data centers and a highly qualified workforce to function efficiently. Companies continue to push themselves further beyond the limits in order to generate profit. Unless they innovate, they won't be able to successfully capture a large enough portion of the market. These natural high costs to entry tend to structure the market into a natural monopoly, in which amortization over large scales prevents small businesses from entering competition.

Monopolies are highly monitored and limited through antitrust law. Antitrust law is a "set of regulations and legal decisions aimed at promoting competition in markets and protecting consumers from anticompetitive practices". [1] Its primary goal is to ensure that markets operate freely and fairly by prohibiting business practices that restrict competition, such as price-fixing, market division, and abuse of market power. Antitrust laws aim to protect consumers from high prices, low quality, and limited choices, and they encourage innovation and efficiency by fostering competitive markets.

Antitrust law is a well-established principle in the US, dating back to the end of the 19th century with the establishment of the Sherman Act (1890).

This foundational piece of legislation in U.S. antitrust law was completed in 1914 by the Clayton Act, designed to clarify the Sherman Act, and by the Federal Trade Commission Act, creating an institution enforcing antitrust law. This framework has established guiding principles to assess the possibilities of restriction to competition, and to balance individual liberty and promotion of efficiency with the right to fair competition and consumers' welfare. This equilibrium was reshaped by the emergence of the digital revolution, unlocking entirely new business practices in the late 20th century and questioning the ability of last century's legislation to firmly regulate the new challenges posed by tech companies.

This debate has been pushed one step further by the case Epic Games v. Apple (2021). This landmark legal battle opposed two digital giants in antitrust-related concerns. On one hand, Epic Games is the creator of Fortnite, a popular video game and worldwide phenomenon amassing 2.250 million active players per day as of January 2025. [2] On the other hand, Apple is a tech giant which has created a veritable closed ecosystem around its own brand through the use of the walled-garden technique. An internet walled-garden is a gatekeeping practice by which companies control the content and services offered to their subscribers at the application level. In other words, Apple restrains its users by enabling them to only access Apple products. For example, applications on iPhones can only be downloaded through the App Store, and not via any other provider such as Google Play Store. [3] This technique enables Apple to set its rules within the Apple world, and one of these rules was at the heart of the 2021 case.

The dispute concerned the payment methods allowed by Apple. Every application on the App Store signs a contract whereby it agrees not to use any other in-game payment method than the one provided by Apple, which takes 30% of the benefits as a commission for the service. In 2020, Epic Games decided to bypass Apple, by implementing its own payment method in Fortnite. As a result, Apple claimed that Epic Games had breached its contract and removed Fortnite from the App Store, making it impossible for Apple users to access the game. Epic Games filed a lawsuit in the US District Court Northern District of California to contest Apple's monopoly, and Apple countersued to denounce the breach of contract. [4]

This case raises central questions regarding antitrust law, questioning the efficiency of the Sherman Act and related regulations in dealing with the new digital market. In this article, I will argue that the US antitrust law requires profound reforms to adapt to the digital economy. At the end of the paper, I will suggest an addition, not a replacement, to current antitrust law specifically designed to oversee large technology companies, and some avenues modernizing antitrust law.

This article is divided into six sections. In the first section, I will provide a quick overview of the main historical developments of US antitrust law from the end of the 19th century to now. Then, I will briefly summarize the facts of the 2021 case, by pointing out key legal arguments. In the third part, I will delve into the Court's ruling in Epic Games v. Apple, and its consequences on how to analyze antitrust law. In the two following sections, I will adopt a comparative approach, by analyzing the case at hand in relation to another lawsuit filed by Epic Games against Google for similar motives, and then in a broader comparison between US antitrust law and the European approach through the Digital Markets Act (DMA).

Finally, I will provide some methods for reflection regarding possible futures of American antitrust law, drawing from both the case law orientations provided by the two Epic Games cases and inspiration from Europe.

Background on U.S. Antitrust Law: The Sherman Act in the Digital Era

In this section, I will provide a historical background regarding key legislations in U.S. antitrust law and analyze how they interact with the digital revolution.

Development of antitrust law in the U.S. dates back to the end of the 19th century. Following the industrial revolution, a series of new factors created a change in the market structure. Factors including the construction of a railway network throughout the U.S., the expansion of the telegraph and the telephone, along with technological improvements in chemistry, metallurgy and energy, created favorable conditions for the emergence of two key movements. First, a movement of increased connection. Thanks to the improvement in transportation and communication networks, companies were able to compete in previously inaccessible markets, globalizing the playing field. Second, technological improvements triggered the emergence of economies of scale, by which companies were able to produce at a lower cost by increasing quantity. [5] Altogether, these movements incentivized companies to grow in size as they were expanding their market to the whole country, requiring substantial increase in the size of firms. This was quickly followed by concerns regarding the power these oil producers and goods manufacturers could hold on to the market, and especially how this reduction in competition adversely affected consumers in both quality and price.

The Sherman Act was introduced in 1890 in reaction to this evolution of the market structure. It aimed at counterbalancing the newly acquired power of large companies to allow competition and mitigate effects on consumers. The first two sections of the Sherman Act are the most relevant when working with antitrust law.

The first section states that “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony”. [6] Essentially , this section is concerned with the prohibition of contracts or conspiracies restraining trade. This can take the form of an unfair exclusivity clause.

The second section directly mentions the concept of monopoly. It states that “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other per son or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony”. [7] While this section does not clarify what a ‘monopoly’ is, it simply bans its formation.

As the Sherman Act stayed silent on the definition of a monopoly, case law completed it by defining the relevant market. In the words of early 20th century legal writer William Thornton, monopolizing represents the act “to destroy reasonably competitive conditions in a branch of trade”. [8]

Therefore, a monopoly case is highly dependent on the definition of the "branch of trade", or relevant market considered as a modern term. The Supreme Court has made the term relevant market account for two dimensions: the relevant product market and the relevant geographic market. The relevant product market, as established in United States v. E.I. du Pont de Nemours & Co., is concerned with reasonable substitutes standard. This metric assesses whether consumers can switch to another product in response to a small but significant and non-transitory increase in price. If so, then the two products belong to the same market. [9] An example of two products belonging to the same market under this definition are Pepsi and Coca-Cola. The second dimension is the relevant geographic market. It considers whether consumers can reasonably find substitutes for a product, accounting for transportation costs, regulation and trade barriers, as well as consumer preferences. For example, in Tampa Electric Co. v. Nashville Coal Co., the Supreme Court found that the coal market is deemed to be national and not local because coal is easily shipped. [10] On the other hand, in United States v. Philadelphia National Bank, the Supreme Court ruled that the banking market is local because of general consumers' preference for banks near their homes. [11] Nowadays most monopoly cases revolve around the definition of the relevant market. The broader the market, the weaker the antitrust case.

Historically, the criteria used to constitute restraints on trade have seen three separate periods of interpretation by the Supreme Court. In 1911, the Standard Oil Co. and American Tobacco Co. cases created the rule of reason. They both asserted that "the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act". [12] Restraints of trade applied only to agreement that harmed the public interest. [13]

Then after World War II, the United States v. Alcoa decision made antitrust law enter into the pre-consumer welfare era. This era was based on recognizing the important size of a firm as highly suspicious, questioning whether size without intent could be a mere violation. In the words of Thomas Nachbar, Professor of Law at the University of Virginia, "domination of the market by a few, large entities" was seen as "a form of economic despotism exercised by managers who wield absolute authority". [14] The Alcoa decision in 1945 established that market power itself, as it relates to size and dominance, could be enough to establish a violation. Even without any anti-competitive intent, maintaining monopoly power by restricting market entry was deemed to be illegal, regardless of whether this power was acquired through efficiency. [15] The market structure in itself was at the center of this pre-consumer welfare era. Completing the Alcoa decision, The Brown Shoe Co. Inc. v. United States case blocked the merger of two shoe manufacturers, on the basis that even a small market share increase in an industry could violate antitrust if it reduced competition. [16] The focus of the pre-consumer welfare era was centered on long-term effects on the market structure rather than immediate economic harm, the protection of small businesses and the importance of market diversity and consumer choice.

A substantial evolution of antitrust law followed in the mid-1970s, with the arrival of the consumer welfare standard. This standard evaluates violations in terms of economic effects, rather than market structure.

It has remained the dominant framework until nowadays. In the landmark decision United States v. General Dynamics, the Supreme Court shifted its approach towards a more lenient antitrust policy. The consumer welfare standard considers whether business practices, such as mergers and monopolistic behaviors, harm consumers by raising prices or reducing product quality. If not, then the operation should be allowed to pursue. [17] United States v. General Dynamics Corp. case marked a shift away from the protection of small businesses and market competition in favor of economic efficiency and consumer benefits, emphasizing that market concentration alone is not a problem as long as it does not harm consumers. The consumer welfare standard, while dominant, is now under scrutiny due to concerns over the power of tech giants, with figures like Lina Khan, former chair of the Federal Trade Commision, advocating for a return to stricter antitrust regulations to prevent monopolistic abuses. [18] It is in this legal context that Epic Games filed a lawsuit against Apple for anti-competitive practices.

Facts of the Case: Epic Games v. Apple

In this section, I will provide an overview of the most relevant facts of the case as well as the context surrounding the legal dispute.

Apple is a multi-trillion-dollar technology company that produces desktop and laptop computers (Macs), smartphones (iPhones), and tablets (iPads). In 2007, Apple revolutionized the smartphone market with the introduction of the iPhone and decided to open the iPhone's operating system (iOS) to third-party apps. This approach created a symbiotic relationship, by which Apple provides app developers with a substantial consumer base, and Apple benefits from increased consumer appeal given the ever-expanding pool of iOS apps. Apple now has about 1 billion iPhone users over the world, accounting for a 15% market share in the global smartphone market. [19]

But the system created by Apple is not an open ecosystem but a walled-garden. Developers have to propose their apps through the App Store and have to agree to a contract of adhesion —Developer Program Licensing Agreement (DPLA)— to be accessible by iOS users. One clause of this contract requires developers to use Apple's in-app payment processor (IAP) for any purchases that occur within their apps. In the vast majority of cases, Apple collects a 30% commission on initial app purchases and subsequent in-app purchases. [20] This contract is the same for all registered iOS developers, and only a handful have convinced Apple to modify its terms. [21]

Epic Games is a leading video game company and the parent company of a gaming-software developer, Epic International, which licenses Unreal Engine, a suite of tools to create three-dimensional content. Although Unreal Engine is not on the App Store, Epic International does offer several complementary apps which are affected by Apple's policies. [22] Epic Games has also created the Epic Games Store which is a game-transaction platform on PC computers and Mac. Epic makes games available for download on the Epic Games Store and covers the direct costs of distribution in exchange for a 12% commission. Even though its market share is less significant than Apple as of today (180 million registered accounts as of 2023), Epic Games Store could become a competitor of Apple. [23]

Fortnite, the key source of revenue of Epic Games, is based on a "freemium model": the game is free to download, but a user can purchase certain content within the game such as game modes or cosmetic upgrades for the user's character. [24] Inside the game, users can purchase V-bucks, a fictitious money used to buy such content. On August 13, 2020, Epic Games released a new payment method to buy V-Bucks, without the commission planned by the DPLA, bypassing Apple's payment processor. In response, Apple removed Fortnite from the App Store, preventing new Apple users from downloading the game, and the ones who already had the game from updating it [25]. Epic Games complained to Apple, without success.

Epic Games decided to sue Apple in front of the US District Court Northern District of California, pursuant to the Sherman Act, 15 U.S.C §§ 1–2, and California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. [26] Both parties raised several legal arguments, of which I will explain the most relevant ones for this analysis.

On one hand, Epic Games complained to the Court that Apple prevents iOS users from downloading any apps from any source other than Apple's App Store. The result is that developers are prevented from selling or distributing iOS apps unless they use the App Store and accede to Apple's terms and conditions. It is worth noting that iOS devices represent a large market share, proving Apple with important market power. Epic Games claimed that Apple imposes unreasonable and unlawful restraints to completely monopolize the market. This monopoly allows Apple to construct oppressive terms and conditions, including the 30% tax when using the IAP. The developer contends that it is an unfair restriction on competition, and that Apple's rules against directing users to other options, also called anti-steering provisions, are anti-competitive. [27] Epic Games ascertains that it can provide a competing app store on iOS devices, which would allow iOS users to download app in an innovative way, giving to users the choice of an additional payment processing option alongside Apple's, creating competition.

On the other hand, Apple adopted a different approach, arguing that the App Store is a single-brand market, not a monopoly. The App Store is in competition with other platforms, such as Google Play Store, as users can choose to switch from an iOS device to an Android one for example. Apple is not necessarily a monopolist but rather a platform with a unique business model competing against others. Apple argued that the walled-garden approach to app distribution is justified to protect consumers from security risks. Governments and consumers increasingly demand stronger data protection. Finally, Apple explained that the 30% commission is standard across digital platforms, and justified by the value Apple provides. Apple guarantees access to a large number of potential customers, and provides developers with additional assistance which is accounted for by this commission.

The main debate here therefore revolves around the relevant market to assess whether or not Apple is in a monopoly situation. Most monopoly cases depend on the definition of the relevant market. To assess whether a company is in a situation of monopoly, the Court needs to determine on which market the firm is competing in. This is the ground on which Apple's and Epic Games' arguments differ the most. Epic Games defines the relevant market as the iOS devices, in which Apple does not have any competitor because of the walled-garden approach. It claims that Apple's App Store is a separate market, narrowing down the definition and strengthening the monopoly claim.

In contrast, Apple defines the relevant market as all of the possible devices, because Apple's users can easily switch to another device using, for example, an Android system. Therefore, Apple defines the relevant market as broader by including all electronic devices' users, and not only iOS ones. This weakens the monopoly claim by increasing the number of competitors.

This case is very explicit about the limitations of the Sherman Act and the application of the consumer welfare standard. Both were developed in periods of traditional monopolies, concerned for example with railroads and oil companies. But the digital economy has brought new forms of markets, which do not revolve around physical goods but a new kind of platform-based businesses, complicating monopoly definitions. Especially, the price charged to consumers for the product might not be its actual value in a digital world.

In a digital world, the price is not the product, the consumer is. Companies use human experience as "free raw material", for translation into behavioral data which are used to predict and modify behaviors. [28] This challenges the account of the consumer welfare standard, as digital values extract value from users way beyond the claimed price, by selling their data to third parties. [29] All of these evolutions complicate the traditional approach to antitrust law and the Sherman Act. The decision made in Epic Games v. Apple provides one of the first answers by the Court to apply this old framework to modern monopoly issues.

The Court's Ruling in Epic Games v. Apple: Monopoly in the Digital Dra

In 2021, the District Court ruled in favor of Apple, deciding that Apple was not a monopoly. This case still redefined antitrust law by addressing platform control, market definition and competition in closed ecosystems.

The 2021 decision can be differentiated into three main outcomes. First, the Court found that Apple was not a monopoly. Epic Games failed to prove unlawful market power under the Sherman Act Section 2. The Court ruled that Apple's 30% commission and App Store restrictions were not anti-competitive.

The Court retained the definition of the relevant market as the one provided by Apple. It ruled that Apple is in competition with Android and that iOS is not the only platform, accounting for the broader digital gaming market. In addition, the Court considered PC, consoles, web-based games, and cloud gaming as competitors. This argument is consistent with the Supreme Court's ruling in Ohio v. American Express Co. In this 2018 case, the Supreme Court established a redefinition of the relevant market, by considering that two-sided markets, like Apple's platform, require a broader competitive analysis. The case concerned anti-steering provisions that prevented merchants from directing customers toward lower-fee credit cards, and the Court emphasized the need to weigh harms and benefits on both sides of the platform. The Supreme Court accounted for the net value of anticompetitive effects and decided that benefits were exceeding disadvantages. [30] For the first time, a Court applied this reasoning to a big tech company. A broader competitive analysis should be undertaken, by assessing the net worth of the benefits and opposing them to its disadvantages, ruling in favor of a costs and benefits analysis at the expense of market structure. Therefore, Apple's App Store should be analyzed in the broader market of gaming devices, and Epic Games failed to prove monopolistic intentions.

This ruling is in favor of the "single-brand market" principle established in United States v. Eastman Kodak Co. [31] This principle refers to situations where a company's control over its own product ecosystem does not necessarily constitute monopolization. The Court ruled in the Kodak case that a single-brand market can be a relevant market if customers are locked in due to high switching costs. [32] In Epic's case, the Court rejected this argument because the switching costs were not too high. Relying on the consumer welfare standard, control over a product ecosystem does not inherently mean monopoly power unless there is proof of consumer harm and market foreclosure. This benefits companies like Apple which operate closed platforms and ecosystems with controlled aftermarkets. Future cases against Big Tech must provide stronger evidence that these ecosystems suppress competition unlawfully, rather than simply being successful business models.

If the Court sided with Apple on the relevant market under Sherman Act Section 2, it does not mean that Epic Games' claims were completely set aside. The District Court additionally ruled that Apple's anti-steering policies did violate California's Unfair Competition Law (UCL). Unlike federal antitrust law, the UCL does not require proof of monopoly power, only that a practice is unfair or restrictive to consumers. The Court ruled that Apple's anti-steering policy harmed consumer choice by preventing them from accessing potentially lower prices or alternative payment methods. Therefore, while Apple was not found to be a monopoly under the Sherman Act, it still violated California's consumer protection laws.

As a key consequence of this ruling, it means that Apple must allow developers to communicate with users about alternative payment options, like external websites or direct credit card purchases. However, Apple can still charge commission fees on transactions that originate from within iOS apps. This means that Apple retains some control over revenue, even if purchases occur outside of the App Store. The ruling set a precedent for using state laws, like California's UCL, as an alternative to federal antitrust enforcement. This approach could circumvent the high burden of proof required in federal antitrust cases.

Regarding the final claim of Epic games, the Court ruled against any requirement for third-party App Store. Epic sought to force Apple to give users the choice to install apps from outside of the App Store and use third-party app stores, similar to Android's open system. The Court validated Apple's walled-garden approach, ruling that Apple had valid and procompetitive justifications for maintaining exclusive control over iOS distribution, accounting for security, user experience and quality control, as well as platform monetization and ecosystem integrity. This ruling strengthens Apple's ability to defend its closed ecosystem, reinforcing that companies do not have to open their platforms to third parties unless there is clear anticompetitive harm.

As a result of the ruling, Apple adjusted anti-steering policies to comply with the UCL, allowing developers to link to outside payment options. Apple still charges commissions on external transactions and no changes to third-party app store policies have been made, Apple retaining full control over iOS distribution.

This ruling has greatly influenced the modern interpretation of the Sherman Act in the digital age. It shows first the challenges when it comes to applying this century-old legislation to modern platform ecosystems.

The 2021 decision sets a precedent to account for big tech companies as side-by-side markets which need to be considered altogether. Epic Games v. Apple confirms that big tech is not automatically a monopoly, as a case-by-case definition of the relevant market proves to be critical. [33] It also elevates the role of consumer harm tests, disregarding any return to an Alcoa era, and enforcing a stricter interpretation of the consumer-welfare standard. Market structure is not considered, and ultimate costs and benefits analysis remains the critical criterion. This ruling proves how Courts remain reluctant to impose structural changes, and sets a higher burden of proof for monopoly claims against Big Tech.

Epic Games appealed this decision in front of the Ninth Circuit Court of Appeals. In a 2023 decision, the Court of Appeals largely upheld the same conclusions as the District Court. The ruling made it clearer that dominance is different from monopoly under federal antitrust law.

Epic Games v. Google: Why a different outcome?

In parallel with Apple's case, Epic Games sued Google for similar claims against Play Store's payment policies. But this time, the Court ruled in favor of Epic Games, accounting for a new distinction regarding monopoly in the digital markets. Both cases highlight key differences in Google's and Apple's business models and approaches to ecosystem control and competition, leading to significantly diverging outcomes.

In 2020, Epic Games sued Google, accusing the company of engaging in anticompetitive practices within the Google Play Store ecosystem. Epic Games challenged Google's monopoly on similar grounds to what it did with Apple. [34] Epic Games pointed out that Google monopolized the Android app distribution market, despite Android being marketed as an open platform. It also claimed that Google restricted competition through agreements and secret deals with developers, such as Activision Blizzard, to discourage the use of alternative app stores. Finally, similarly to Apple, Epic Games reproached Google for its high fees (around 30% commission for transactions made through the Google Play Store).

This time, the District Court of Northern California found Google to be a monopoly in its 2024 decision. Unlike Apple, Google allows third-party app stores and sideloading. However, evidence showed that Google engaged in anticompetitive practices such as paying developers billions of dollars to prioritize Play Store over alternatives. The Court found that these actions did violate the Sherman Act by maintaining Google's dominance in app distribution on Android.

Why such different outcomes? In the end, it is Google's open-platform policy which led the Court to find it illegal. If Apple openly revendicates a closed ecosystem by maintaining full control over iOS app distribution, the District Court estimated that Google markets itself as an open ecosystem, while it uses secret agreements and payments to disincentivize developers from distributing apps outside the Play Store. For example, Google paid Activision Blizzard approximately $360 million to prevent the publisher from competing directly with the Play Store. [35] Therefore, Google's actions to suppress competition contradicted its open-platform philosophy, undermining its legal defense, while Apple's security and quality control arguments successfully justified its walled-garden approach as a procompetitive feature rather than anticompetitive behavior.

Both of these cases highlight the growing tension between traditional antitrust principles and the unique dynamics of the digital economy, where ecosystems and platforms dominate. Google has appealed the District Court decision in front of the Ninth Circuit Court of Appeals, and the case is still pending as of today.

Across the Atlantic: The Digital Markets Act and the European Adaptation to Digital Era Monopolies

So far, I have explained the U.S. perspective on antitrust law. But on the other side of the Atlantic, the European Union has taken a completely different approach with the adoption of the Digital Markets Act (DMA).

The European Union has always approached the Big Tech revolution in a different way than the United States. WhileU.S. Courts continue to apply 1890 legislation, the European Union has taken a more interventionist approach to regulating digital markets. Concerns over Big Tech's dominance, data privacy and fair competition have led the EU to propose a new piece of legislation. In December 2020, the DMA was proposed by the European Commission and approved, entering into force in November 2022. Its aim is to regulate "gatekeepers", namely dominant digital platforms that control access to online markets. [36]

This legislation falls under the broader EU competition law and internal market regulation with Article 114 of the Treaty on the Functioning of the European Union (TFEU). Unlike traditional case-by-case antitrust enforcement, as can be seen in the United States, the DMA preemptively imposes obligations on Big Tech firms without requiring proof of harm or any similar metric as the consumer welfare standard.

The DMA specifically designates Apple and Google as "gatekeepers" under its criteria. The law imposes strict obligations on both companies. Under the DMA, Apple must allow third-party app stores and alternative payments in Europe on iOS, a direct challenge to its walled-garden model. [37] Developers can now distribute apps without using Apple's App Store, bypassing the 30% commission fee. Apple must allow external payment options, ensuring developers can direct users to cheaper alternatives without penalties. Regarding Google's actions, the DMA prohibits practices discouraging sideloading, such as excessive security warnings or restrictions in Play Store policies. Similarly to Apple, Google must remove restrictions on alternative payment systems, meaning that developers can bypass Google's transaction fees. This prevents Google from contractually or technically favor its own payment processing tools.

The DMA's approach clashes with U.S. rulings. U.S. Courts treat Apple and Google differently due to their different structures, unlike the EU. Apple and Google are regulated similarly under the DMA, and are both regarded as gatekeepers controlling app distribution. In the U.S., Apple largely won its antitrust battle, while Google was found guilty. The EU sees both companies as engaging in similar anti-competitive behavior, justifying equal regulation. Practically, it means that Apple has been forced to open iOS in Europe, but not in the U.S. European iPhone users now have alternative app stores, while U.S. users remain locked into Apple's ecosystem. This shows how the EU prioritizes structural regulation over case-by-case litigation.

This approach can explain the outcome of a 2019 case in the EU that was brought about by Spotify and joined by Epic Games against Apple which applied a U.S. approach Similar to Epic Games v. Apple or Epic Games v. Google, complainants argued against Apple's 20% commission fee on in-app payments because they unfairly increase costs. Anti-steering rules and Apple's favoritism in promoting its own apps were also challenged as anti-competitive practices. [38]

Raising similar arguments as in the U.S., Epic Games and Spotify obtained a slightly different outcome. The European Commission ruled in 2023 that Apple violated EU competition law by imposing unfair restrictions on rival music services. It decided to impose a €1.8 billion fine on Apple for restricting fair competition and reinforced the DMA's mandate against anti-steering rules and self-preferencing. [39] This case forced Apple to remove its anti-steering restrictions across all digital content services and strengthened enforcement mechanisms for third-party app stores and alternative payment systems. [40] In a broader view, the European Commission's decision sets a European precedent for future digital market cases, with a new framework specifically designed to account for the modern challenges posed by digital era giants.

Conclusion: Adapting U.S. Antitrust Law

The comparison of the Epic Games v. Apple in a global perspective raises the question: how can U.S. antitrust law adapt to the new challenges of the digital age? Antitrust law in the United States has evolved to address monopolistic practices in industrial and financial markets. However, the rise of digital platforms has exposed the limitations of existing laws, particularly the Sherman Act, which was designed for traditional monopolies based on price-fixing and market control rather than ecosystem dominance and network effects.

While older antitrust cases, such as the Standard Oil or Alcoa cases, established precedents for breaking up monopolies, modern cases like Epic Games v. Apple illustrate how digital markets challenge traditional definitions of monopoly power. The problems with the Sherman Act mostly revolve around two axes. The first one is that traditional antitrust law focuses on price-based monopolies. In manufacturing industries, Courts historically relied on price manipulation and exclusionary tactics to determine monopoly power. However, big tech firms often offer free services like Google or Facebook do, or act as intermediaries such as how Apple's App Store allows you to engage with outside developers. This means traditional price-based antitrust analysis is insufficient, leading to court reluctance to regulate digital platforms under the Sherman Act. The second most important issue is the market definition as exemplified by Epic Games' cases. In the case against Apple, the Court rejected Epic's argument that the iOS App Store is a monopoly, instead defining the market as all gaming transactions across platforms and not just iOS. Courts remain hesitant to apply older single-brand market principles to tech firms as set by the United States v. Eastman Kodak Co. precedent.

These issues show avenues for possible reforms for U.S. antitrust law in three main domains. First, the federal government could create stronger regulations on digital platforms. The EU's DMA imposes ex-ante regulations on gatekeepers like Apple and Google, while the U.S. still relies on litigation.

Possible reforms through a revised Sherman Act could include requiring third-party app stores, banning self-preferencing in search results, and mandating platform interoperability. A second reform could be directed towards a redefinition of market power in the era of closed ecosystems. In Epic Games v. Apple, the Court ruled that Apple's walled-garden business model is lawful. However, under a modernized antitrust framework, control over an ecosystem could be evidence of market power, even without traditional monopoly pricing. A possible legal shift could define ecosystems as an indicator of monopoly power, rather than relying on narrow market definitions, therefore extending the control granted to antitrust law. Finally, a revised Sherman Act could shift towards a proactive model for the U.S., giving up on lawsuits to move towards preemptive regulation with a dedicated digital market regulator and a standardized list of prohibited anti-competitive practices, reducing litigation uncertainty. This does not mean that the traditional Common Law system should be set aside, but that it could be completed by preemptive measures in an era where digital markets are new.

As a closing note, it is worth noting that these evolutions have already been ongoing, but face the influence of lobbying and industry resistance. Two acts, the Open App Markets Act and the American Innovation and Choice Online Act, are currently discussed by Congress. But they prove difficult to be passed, especially because Big Tech companies spend billions lobbying against antitrust reform. They argue that regulation would harm innovation and competition. In a historical perspective, cases proved that either public or governmental proved to be decisive in creating such shifts.

In conclusion, Epic Games v. Apple along with the Google case show U.S. antitrust law struggles with digital markets. If the U.S. fails to modernize its antitrust approach, companies might face different rules, creating a fragmented global tech landscape.

[1] Posner, Antitrust Law.
[2] Active Player, « Fortnite Live Player Count and Statistics (2025) ».
[3] Paterson, « walled-gardens ».
[4] Ambrasaitė et Smagurauskaitė, « Epic Games v. Apple ».
[5] De Carvalho, « The Roots of Antitrust Policy in the United States' Sherman Act ».
[6] Sherman Act, §§15 U.S.C. 1.
[7] Sherman Act, §§15 U.S.C. 2.
[8] Thornton, A Treatise on the Sherman Anti-Trust Act. By W. W. Thornton. (Cincinnati), 369.
[9] United States v. E.I. du Pont de Nemours & Co.
[10] Tampa Electric Co. v. Nashville Coal Co.
[11] United States v. Philadelphia National Bank.
[12] Thornton, A Treatise on the Sherman Anti-Trust Act. By W. W. Thornton. (Cincinnati), at. 62.
[13] United States v. American Tobacco Co., at. 179.
[14] Nachbar, The Antitrust Constitution.
[15] Alcoa Steamship Co., Inc. v. United States.
[16] Brown Shoe Co., Inc. v. United States.
[17] United States v. General Dynamics Corp.
[18] William H. Rooney et Timothy G. Fleming, « Time for a New Sherman Act? »
[19] Epic Games v. Apple sur 11.
[20] Apple, « Developer Program License Agreement ».
[21] Epic Games v. Apple sur 14.
[22] Unreal Engine.
[23] Epic Games v. Apple sur 13.
[24] Epic Games v. Apple sur 12.
[25] Ambrasaitė et Smagurauskaitė, « Epic Games v. Apple ».
[26] Epic Games v. Apple sur 10.
[27] Ambrasaitė et Smagurauskaitė, « Epic Games v. Apple ».
[28] Zuboff, The Age of Surveillance Capitalism : The Fight for a Human Future at the New Frontier of Power.
[29] Ibid.
[30] Ohio v. American Express Co.
[31] United States v. Eastman Kodak Co.
[32] Ibid.
[33] William H. Rooney et Timothy G. Fleming, « Time for a New Sherman Act? »
[34] Ambrasaitė et Smagurauskaitė, « Epic Games v. Apple ».
[35] Paresh, « Google struck $360-mln Activision deal to block rival app store, lawsuit says ».
[36] European Union, Digital Markets Acts.
[37] Ibid.
[38] European Commission, « Commission fines Apple over €1.8 billion over abusive App store rules for music streaming providers ».
[40] Ibid.

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Creating Courts that Defend Democracy: A Commitment Theory of Judicial Appointment

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Abstract:
In contrast to many other established democracies, the judiciary in the United States has long held extensive power of judicial review over legislative decisions. Though such design is meant to protect constitutional rights against majoritarian abuses, the courts were far from reliable defenders of democratic rights in past constitutional crises. Given that the United States has once again entered a period of democratic backsliding, it is important to consider the type of judicial design most conducive to creating courts with strong democratic commitments. The paper will focus on two components of judicial selection: the problem of what kind of judges should serve on the federal judiciary and the problem of what mechanism should be used for selecting judges. The paper will argue that the selection standard of judges should account not only for legal competence but also whether their previous career experience reflects a commitment to advocate for the civil liberties of the disadvantaged against state infringement. Finally, the paper will argue that the most effective mechanism for selecting such judges is not the current system of executive-dominated appointments but rather a selection committee that incorporates balanced and diverse political representation.

Introduction

Compared to other established democracies, the United States stands out for its long history of granting the courts the power of judicial review over executive and legislative decisions. For many defenders of judicial review, the courts serve as a necessary check on political majorities' ability to erode minority rights or entrench themselves in power. However, political science literature suggests that courts often fail to live up to the ideal of being defenders of constitutional values against popular pressure. In many constitutional crises throughout US history, such as the persecution against journalists during the Adams presidency, the struggle over slavery, and the entrenchment of racial segregation, the Supreme Court judges aligned themselves with the powerful forces that sought to suppress democratic rights over the citizens that fought for political equality. [1] The judiciary has thus often fallen short of defending constitutional protections for political participation at critical moments of history.

In the present period, the constitutional stakes are once again high as the United States has become part of the global trend of democratic backsliding, which is the weakening of democratic institutions often through the means of incremental political change. [2] The performance of the US on the major cross-country measures of democracy has declined greatly over the last decade due to issues like the increased influence of wealth in politics, electoral malapportionment, discrimination in criminal justice, and reduced constraints on executive power. [3] While the judiciary is not the only institution shaping democratic quality, its rulings can either exacerbate or mitigate democratic erosion. Therefore, one important problem for political theory is to assess the type of judicial design most conducive to creating a judiciary with strong democratic commitments. While there is significant contestation over the procedural and substantive conditions requisite for a functioning democracy, a judiciary with democratic commitments is one that is at least committed to protecting the right of all to participate in the public sphere without undue state coercion and to prevent elected officials from subverting rules to perpetuate their political control. This paper will focus on two components of judicial selection: the problem of what kind of judges should serve on the federal judiciary and the problem of what mechanism should be used for selecting judges. The paper will argue that the selection standard of judges should account not only for legal competence but also whether their previous career experience reflects a commitment to advocate for the civil liberties of the disadvantaged against state infringement. Finally, the paper will argue that the most effective mechanism for selecting such judges is not the current system of executive-dominated appointments but rather a selection committee that incorporates balanced and diverse political representation.

The first section of this paper will focus on the selection standard for judges. I will first draw on Christopher Eisgruber's argument about the importance of assessing judicial philosophy in the selection process. I will next discuss Tom Ginsburg and Aziz Huq's work about the institutional ties between the federal judiciary and the executive branch and how the professional backgrounds of judges affect their value commitments on important constitutional issues. I will argue that judges who have past experiences of advocating for the disadvantaged against the state can be expected to rule differently in core constitutional issues such as accountability rules for executive officials, protections for political speech, and due process rights in criminal procedures.

Finally, I will discuss the advantages of having these judges both in terms of their willingness to substantiate constitutional protections for the less powerful and their ability to check against elected officials who engage in systematic attempts at democratic erosion to entrench their power.

The second section of this paper will focus on the mechanism for selecting judges. I will first describe the current selection process for the Supreme Court and how it leads to the selection of judges that are aligned with the preferences of the executive branch. I will then draw on David Strauss and Cass Sunstein's interpretation of the Senate's power in the selection process and argue that it is constitutionally plausible for the Senate to acquire a formal role in the nomination of judges rather than just their confirmation. I will develop the proposal for a nomination advisory committee of diverse legal representatives appointed equally by both parties. I will argue that while appeals to a reform-minded executive might be a more plausible short-run solution, the proposal is a worthwhile long-term solution because it reduces the risk of partisan appointments and is conducive to a professionally diverse judiciary.

The Standard for Selecting Judges

The Importance of Judicial Philosophy

A central problem of judicial selection is the standard that should be used for selecting judges. It is sometimes assumed that the selection of judges should be based on the merit principle, which is the selection of the most qualified candidates in terms of legal skills. However, in his book The Next Justice, Christopher Eisgruber argues that there cannot be a truly depoliticized standard for selecting Supreme Court justices. He begins with the observation that judges with preeminent legal experience can nevertheless disagree on the most important constitutional issues. He explains that this results from the nature of the Constitution itself, which is written in abstract language that is broad enough to accommodate competing interpretations. [4] For Eisgruber, there is not an objective method of legal interpretation that can overcome the need for difficult political judgments. When interpreting constitutional provisions like the Equal Protection Clause, one cannot expect judges to come up with an objective theory of equality that exists apart from the competing theories in political thought. [5] Instead, all judges have distinct judicial philosophies, which include their substantive interpretation of constitutional values and their procedural understanding of the judicial role. [6] They use their judicial philosophy to decide which constitutional issues should be left to the elected branches and which require judicial intervention.

According to Eisgruber, given its influence on the decisions of judges, those involved in selecting judges not only have to evaluate their legal skills but also their judicial philosophy. He argues against judicial extremists that seek to advance unbending legal doctrines and advocates for judicial moderates, which are judges that are open to novel claims of constitutional justice from disadvantaged groups and understand the procedural limits of the judicial role. [7] He writes that judicial moderates value judicial review as "a way to make the country more inclusive and more responsive to the claims of disadvantaged groups who have suffered through prejudice, misunderstanding, malice, or neglect," but nevertheless understand that there needs to be an active partnership between the judiciary and the elected branches. [8]

Eisgruber's concept of judicial moderation thus requires judges to maintain the balance between pursuing the constitutional ideal of political equality and exercising judicial discipline.

However, the standard that Eisgruber proposes is too abstract to be practically implementable. The requirement of judicial discipline is not particularly useful since almost all schools of legal interpretation can claim that they act within their understanding of the proper limits of judicial authority. The requirement that judges be open to novel claims of constitutional justice seems to be more substantive, but most judges are receptive to at least some novel legal arguments from certain minority groups. It is not clear what constitutes a sufficient level of open-mindedness or how to measure it in judicial candidates. Thus, while Eisgruber's account highlights the importance of judicial philosophy, his proposed standard proves insufficient for effectively evaluating judges.

Professional Experiences and Value Commitments

Instead of relying on abstract theories of judicial philosophy, another strategy is to look at the current composition of the federal judiciary and evaluate whether the value commitments of judges are conducive to the protection of constitutional rights. Eisgruber recognizes that judicial philosophy plays an important role in the decisions of judges due to the abstract nature of many legal provisions. Yet, judicial philosophy does not exist arbitrarily but is rather the product of the life experiences of each judge. Many studies have shown that the background of judges exerts a significant influence on the way that they decide on legal issues. [9] The experiences that judges had as they interacted with different social groups in the past will shape both how they interpret the law and how they weigh the facts of the specific case. Thus, it is important to examine the judiciary's composition and its influence on judges' constitutional commitments.

As Tom Ginsburg and Aziz Huq point out, a defining feature of the current federal judiciary is the close professional affiliation between federal judges and executive agencies. The majority of Supreme Court justices formerly worked for the executive branch, while only one worked for Congress. [10] Moreover, while several justices on the Supreme Court were former prosecutors, there was not a single justice on the current Court with defense-side experience prior to the recent appointment of Ketanji Brown Jackson. [11] In the broader federal judiciary, there is a similar pattern of disproportionate representation. As of 2021, 80.2% of federal judges had at least two years of experience as government advocates, but only 6.6% of judges had at least two years of experience as public defenders and 2.3% of judges as civil liberties litigators. [12] In the federal appellate courts, 53.2% of judges spent the majority of their career as corporate lawyers or prosecutors, while only 7.1% of judges worked mainly as public defenders, civil rights lawyers, or labor lawyers. [13] The federal judiciary is thus primarily composed of those that formerly worked for executive agencies rather than those that represented individuals in need of constitutional protections.

The composition of the federal judiciary raise concerns for the court's capacity to check against democratic backsliding. Given the influence of judges' experiences on their judicial philosophy, their prior relationship with the state shapes their attitudes toward governmental infringement of constitutional liberties. Ginsburg and Huq point out that the current federal judiciary is "extraordinarily state-oriented, and has produced a body of doctrine that makes state power very easy to misuse." [14]

The courts have created many legal barriers that prevent individuals from challenging constitutional violations by coercive state agencies. These include strict standing requirements, limits on the termination of unlawful detention, and legal doctrines that protect executive officials from liability damages for routine constitutional violations. [15] Even if the constitutional rights implicated in these cases are broadly recognized, there is limited substance to the constitutional protections because of the lack of legal consequences for their violations.

Reconstructing the Selection Standard

To create courts with greater democratic commitments, the selection standard for federal judges should not only account for their legal skills but also whether they have professional experiences of advocating for the civil liberties of the disadvantaged against state infringement. This means that those in charge of the selection process should make a greater effort to include judges with significant experiences as public-interest lawyers, public defenders, or private lawyers involved in providing legal representation to underserved communities.

There are several advantages to giving more preference to legal professionals with these experiences. Legal professionals who regularly represent vulnerable citizens better understand how constitutional guarantees often fail in practice. As Justice Sandra Day O' Connor remarked of Justice Thurgood Marshall, who spent decades as a civil rights lawyer before joining the bench, he "saw the deepest wound of the social fabric and used the law to heal them." [16] Judges with experiences working with disadvantaged individuals will have a keener awareness of the impact of legal institutions on their lives. They will thus be more effective in advocating for meaningful constitutional protections for people that do not have enough power to assert their interests. Moreover, compared to legal professionals that only have experience as government advocates, they have to more frequently engage in legal confrontations with state officials on behalf of the people they represent. They are thus more likely to distrust government actions that affect civil liberties and more willing to challenge abuses of power by elected officials. Therefore, the selection of these judges will lead to a judiciary that is more committed to the defense of constitutional rights.

Substantiating Constitutional Rights

One might object that judges who have these professional experiences will not necessarily agree with each other on important constitutional issues. A progressive public-interest lawyer and a libertarian public-interest lawyer will likely have many legal disagreements even if they both have extensive experience of advocating for people that are not in positions of power. Even if they both support the broad concept of civil liberties, they will have different understandings of what civil liberties mean and what institutions can be entrusted to protect these rights. One can thus argue that there is as much disagreement among legal professionals that advocate for the disadvantaged as in the current judiciary. Thus, the inclusion of these judges will not make a difference to the way that the judiciary resolves legal problems.

However, this objection only captures part of the reality. It is true that many constitutional issues involve competing claims of civil liberties from opposing interest groups.

The consideration of the professional backgrounds of judges is not likely to bring a resolution to these difficult problems. Nevertheless, there are also legal challenges that are raised because people are deprived of broadly recognized constitutional rights either due to state concerns about efficiency and security or the identities of people involved. When it comes to these issues, the relationship that the judges have to the state during their professional careers will matter for the decisions that they make. In many cases, judges with experiences advocating for the disadvantaged are more likely to rule in a way that promotes constitutional liberties essential for meaningful political participation.

The first of these issues is accountability rules for executive officials that commit constitutional violations while performing official duties. The Supreme Court's current doctrine of qualified immunity protects ordinary executive officials from liability damages unless they are found to be in violation of clearly established law. [17] In practice, the determination of clearly established law is contingent upon the existence of factually similar precedents. [18] As John Jeffries points out, this means that executive officials receive liability protections for actions that are "both unconstitutional and unreasonable, simply because it has not been specifically declared so in a prior decision." [19] For instance, in Robles v Prince George's County, a panel of appellate judges decided that police officers are protected from liability damages from their action of tying a detainee to a metal pole in a parking lot at night and leaving him there because there are no prior cases that address similar actions. [20] As demonstrated in this case, the range of state actions protected by the courts has extended far beyond the need to protect the officials' abilities to take immediate action in truly difficult situations. As a result, constitutional protections are rendered inconsequential for many people in their interactions with the state because executive officials are often not held accountable for clear constitutional violations.

In contrast to the position of the current federal judiciary, legal professionals in many public-interest organizations have pushed for greater accountability for executive officials that commit constitutional violations. Joanna Schwartz points out that legal advocacy organizations across the political spectrum have petitioned the courts to implement stricter liability standards for executive action. [21] The American Civil Liberties Union has filed many cases against the excessive use of force by state agencies. [22] The Institute for Justice, one of the most prominent libertarian public-interest law groups, also has a project centered on the promotion of executive accountability. [23] If more legal professionals with experiences of advocating for the disadvantaged become part of the federal judiciary, one can expect that they will apply greater scrutiny on executive actions that violate basic constitutional liberties. This will lead the judiciary to move towards a legal interpretation that more reasonably balances concerns of overdeterrence and the need to check against abuses of state power.

The second issue is protections for the right to political speech. Even though there are significant controversies surrounding the regulation of some forms of speech, such as hate speech, there is a broad agreement that the right to political speech is at the core of First Amendment protections. However, in practice, elected officials have employed various strategies to suppress political expressions that they believe to threaten the public order.

These include the use of tax and regulatory requirements to target advocacy groups, the punishment of government whistleblowers, and the use of excessive violence on peaceful assemblies. [24] Moreover, in recent years, some Republican states have banned thousands of books from public schools due to concerns about their content. [25]

In contrast, public-interest law groups that work on civil liberties issues are much more determined and consistent in their advocacy of free speech rights for individuals regardless of their specific political positions. The ACLU has challenged free speech restrictions imposed by officials from both parties. The Foundation for Individual Rights and Expression, a right-leaning civil liberties organization, has defended pro-Palestinian speech and access to controversial books even as right-wing policymakers stood against these measures. [26] At a time of eroding free speech norms, judges with these backgrounds are needed to defend constitutional principles against partisan efforts to impose political orthodoxy.

The third issue is due process rights in criminal procedures. The professional background of judges exerts a significant influence on their rulings in criminal cases. Stuart Nagel finds that judges that are former prosecutors are 14 percent less likely to vote in favor of defendants in criminal cases than judges with no prosecutorial experience. [27] Since the federal judiciary is dominated by former prosecutors, it will be more difficult for criminal defendants to launch legal challenges in the current legal system compared to a judiciary with more proportional representation.

This creates a concern because the criminal justice system is already falling short of securing due process rights for the most vulnerable defendants. Even though the Supreme Court has affirmed the constitutional right to counsel under the Sixth Amendment, indigent defendants around the country are regularly deprived of effective representation either because they cannot pay the court-imposed registration fees or because they are assigned vastly overworked public defenders. [28] Despite these inequities, the Court has imposed great restrictions on the ability of defendants to challenge sentences on the basis of due process violations. In Strickland v Washington, the Court rules that a defendant can only allege a violation of the right to counsel if there is a “reasonable probability” that the counsel’s unprofessional conduct has affected the outcome of the case. [29] Given the vast discretion given to judges in evaluating the extent of due process violations, it becomes important to have judges with experiences of working with indigent defendants to provide knowledge of the legal barriers that they encounter while navigating criminal procedures. Their knowledge will be an important counterweight to those provided by former prosecutors, who are likely familiar with the concerns of law enforcement agencies but have less knowledge about the experiences of the defendants. Their representation in the judiciary will thus bring about a more serious consideration of the due process violations in the criminal justice system.

As these concrete examples demonstrate, a central reason for the need to select judges with experiences of advocating for the disadvantaged is their commitment to substantiating constitutional protections for the less powerful. The right to legal redress for undue state coercion, the right to political speech, and the right to a fair trial are not controversial rights but rather basic liberal values firmly embedded in the Constitution.

These rights are necessary to ensure that all citizens can meaningfully participate in the political sphere. Conversely, the erosion of these constitutional guarantees places a disproportionate burden on vulnerable individuals that do not have the resources to protect themselves and thus undermines the ideal of political equality. However, in practice, these rights are often curtailed due to governmental objectives of promoting efficiency or public security. Even if one thinks that these rights must be considered alongside other legitimate state interests, the institutional ties between the judiciary and executive agencies still create the concern that judges will be deferential to the state when there exists a range of plausible legal interpretations. If more judges with experiences of advocating for the disadvantaged become part of the judiciary, they can bring to attention the difficulties faced by many ordinary citizens in their attempts to assert their constitutional rights. The representation of these judges will thus be conducive to creating a judiciary that is committed to ensuring concrete constitutional protections for all people.

Constraining Executive Power

On top of their contributions to the regular legal process, these judges will also serve as a more reliable check on power in the more extreme situation where a president seeks to systematically subvert democratic procedures to entrench their power. Corey Brettschneider stresses that the United States political system is vulnerable to the threat of a "criminal presidency." [30] As exemplified by the Nixon presidency, a criminal president defies the law to persecute political opponents and uses the office as protection against legal accountability. [31] Brettschneider observes that there is a lack of robust mechanisms to constrain such a president since there is legal uncertainty over whether a president can be criminally indicted and the impeachment power of the Senate has never been successfully exercised. [32]

Even though the possibility of a criminal presidency might be small in a country with strong democratic norms, such a presidency can result in an unprecedented political crisis. Thus, it is important to have a judiciary that is prepared to check against a president that undermines democratic principles to advance specific political objectives. If the courts are filled with judges that are former executive branch officials, they might be more sympathetic to broad claims of executive power and provide the president with the instruments needed to achieve institutional change. In recent decades, many prominent judges across the ideological spectrum have advocated for an expansion of presidential authority. Some liberal jurists advocated for greater presidential control over regulatory decisions, while some conservative jurists supported the unitary executive theory that gave the president full control over the hiring and firing of executive officials, including those charged with investigating presidential abuses. [33] While these interpretations of presidential authority have constitutional plausibility, they will also make it easier for an autocratic president to evade legal accountability. In contrast, the legal professionals that regularly represent disadvantaged individuals against the state are likely to be more concerned with abuses of presidential power given their clear stance on the broader issue of executive accountability. While these judges may be equally fallible, the risk of unduly constraining a responsible president is much less serious compared to the risk of enabling a criminal presidency amid global threats to democracies from populist movements. Thus, the need to strengthen the judiciary as a check on power is another reason to select judges that are committed to advocating for the civil liberties of the disadvantaged against state coercion.

The Mechanism for Selecting Judges

The Current Selection Process

To change the composition of the federal judiciary, there needs to be a reassessment of the mechanism used for selecting judges. Currently, the selection process for the federal judges involves appointment by the president and confirmation by the Senate. At the Supreme Court level, given the growing power of the judiciary in national politics, the executive has increasingly asserted its ideological preferences in the selection of justices. According to Eisgruber, starting in the 1970s and 1980s, presidential administrations began to more systematically examine the prior judicial rulings of potential Supreme Court nominees to find those with aligned judicial philosophy. [34] The Justice Department under the Reagan administration recommended the selection of judges committed to political principles such as deference to the states, respect for the free market, and respect for traditional values. [35]

Over time, the politicization of the appointment process further increased. Since conservative presidents had more opportunities to appoint justices, the Supreme Court has moved steadily to the right over the past decade. For the lower federal courts, even though there was a tradition of presidential consultation with the senators from the relevant states, the executive branch also gradually instituted an evaluation system to find politically compatible judges. [36] While the Senate held the power of judicial confirmation, the norm of senatorial deference meant that presidents could sometimes push through nominees even at times of divided government. [37] Thus, in practice, the selection process for the Supreme Court is largely influenced by executive preferences.

There are several problems with this executive-dominated appointment process. The structure of the selection process creates the risk that a highly ideological president can take advantage of judicial appointments to advance a particular political agenda. Furthermore, the power of the president over the selection process gives advantage to judges with ties to the executive branch. As the politicization of the appointment process increases, the executive officials involved in the nomination process have a greater incentive to suggest judicial nominees with former executive branch experience. This is because it is much easier for the executive officials to gain confidence about the judicial philosophy of these candidates through informal inquiries. [38] In contrast, legal professionals that spend their careers outside of state agencies often lack the necessary connections to be considered for these important positions. As a result, the current selection process increases the risk of ideological appointments and hinders professional diversity in the judiciary.

Reinterpreting the Role of the Senate

To reform the selection process, David Strauss and Cass Sunstein argue that the Senate should insist on its constitutional power to play a more independent role in the nomination of judges. The Appointment Clause of the Constitution specifies that the president shall “nominate, and by and with the Advice and Consent of the Senate, shall appoint” judges to the Supreme Court. [39] They argue that whereas the power of consent refers to the Senate’s authority to confirm judges once they have been nominated, the power of advice refers to its authority to offer advice during the nomination of judges. In their interpretation, the Senate is not just reacting to the nominations of the president but rather an equal partner in the deliberations about the selection of judges. [40]

They argue that their interpretation is consistent with the constitutional ideal of checks and balances. While the president has the right to expect senatorial deference for executive branch appointments, the judiciary is an independent institution charged with adjudicating disputes between various branches. [41] Thus, it is difficult to justify the structural advantage of the president over the Senate in the selection of judges. Instead, they propose a process in which the Senate plays an independent advisory role. They propose that the Senate leadership should meet with the president to offer a list of acceptable candidates. They will then have the opportunity to review the president's selection before the nominee is sent to the Senate for confirmation. [42] In this system, the appointment of judges would no longer be dominated by executive preferences but rather incorporate the concerns of both the president and legislative representatives.

However, the creation of an independent role for the Senate only solves part of the problem. It is true that when the Senate is controlled by a different party, the involvement of the Senate in the nomination process can constrain the president's ability to make partisan appointments. Yet, while this can bring greater ideological balance to judicial selection, the senators are not necessarily more committed than the president at finding judges that will contribute to the quality of the judiciary. In particular, the involvement of the Senate alone will not increase the representation of judges with professional experiences of advocating for disadvantaged people. For the lower federal courts, the president is already expected to defer to the recommendations of the home state senators for district court nominees and pay some attention to their concerns when deciding on appeals court nominees. [43] However, even with greater senatorial involvement, the lower federal judiciary is equally lacking in professional diversity. Thus, increasing the participation of Senate leaders in the nomination process is not sufficient alone for the objective of creating a robust judiciary.

The Creation of a Selection Committee

A more effective structure that leverages the Senate's power of advice is a formal nomination advisory committee that incorporates balanced and diverse political representation. There are many democracies that use a judicial council to select judges for high courts. One example is the Constitutional Court of South Africa, which is known for its independence and its record of checking executive corruption. [44] The judicial council that selects constitutional judges is composed of 23 members, including 3 judges, 5 legal professionals, 11 policymakers from the incumbent and opposition parties, and 4 additional members selected from a political process. [45] The council proposes a binding set of nominees from which the president has to make appointments. [46]

Even though there are many constitutional constraints governing the judicial appointment process in the United States, such an independent structure can still be constructed. For Supreme Court nominations, the advisory committee would have an equal number of members appointed by Senate leaders from both political parties. The committee members will include legal association officials, academics, and representatives from public-interest organizations. For federal appeals court nominations, in keeping with the tradition of deference to home state senators, these representatives can appoint additional members that will serve on the committee for the relevant nominations.

The committee will not be involved in federal district court nominations as the appointments are too numerous, and these courts are usually constrained by the legal doctrines from higher courts. After a period of internal deliberations, the committee will publish a set of its preferred candidates and send it to the president. The Senate can set a rule that its consent will be conditioned upon whether the president has properly considered the advice from the advisory committee. In other words, the president has the right to nominate a candidate that is not recommended by the advisory committee, but these nominees will be subject to greater scrutiny in the confirmation process.

The Constitutionality and Desirability of the Selection Committee

This structure is constitutionally plausible because it is an extension of the Senate's power of advice and consent. The advisory committee can be constitutionally justified on the basis of the Senate's authority to provide advice to the president. The structure does not create an undue interference with the president's power to nominate judges because the president still has the right to nominate any candidate. However, since the president can only appoint judges with the advice and consent of the Senate, it will be appropriate for the Senate to condition its consent on whether the president has meaningfully considered its advice. Thus, the structure will give meaningful power to the advisory committee without raising problems about its constitutionality.

The creation of a selection committee with balanced and diverse political representation will go a long way to improving the quality of the judiciary. First, the committee structure systematically incorporates opposition voices. Regardless of the party that controls the presidency and the Senate at the time of a judicial nomination, the committee will have an equal number of members appointed by both parties. The inclusion of opposition representatives constrains the incumbent party's ability to make purely partisan appointments. The opposition representatives have an incentive to push back judicial extremists because it is in their interest to maintain the integrity of democratic institutions. It is true that the president can choose to not take up the suggestions of the selection committee. However, in practice, the president will have a strong incentive to accept its advice because the president will otherwise have to prove to the Senate that the nominee is better than those proposed by the selection committee. Therefore, just like the Strauss and Sunstein plan, this selection structure will achieve the objective of reducing the risk of partisan appointments.

More importantly, the selection committee offers the further advantage of incorporating diverse sources of professional knowledge. If the committee is only composed of senators, it will be much less well-equipped in finding candidates from underrepresented legal backgrounds. The majority of senators worked in government, private law, or business prior to joining the Senate, thus they are likely more familiar with candidates that followed traditional career trajectories as government or corporate advocates. [47] However, since the selection committee is composed of diverse legal professionals, these members can offer deeper knowledge of the qualified candidates from their respective fields. They can leverage their professional connections to make informal inquiries about the judicial philosophy of these candidates.

Candidates from underrepresented backgrounds will not be put at a disadvantage because of information gaps in the selection process. Thus, such a selection structure will be conducive to finding judges with experiences of advocating for disadvantaged communities.

Addressing the Feasibility Concerns

One objection to this proposal is that the Senate might not have the political incentive to take on such a reform. Contrary to this assumption, there are some compelling reasons for the Senate to consider such a selection structure. First, the senators can transfer some of their responsibilities to the members of the selection committee. This will significantly reduce the time and resources that the Senate spends on the confirmation process since the nominations will already incorporate concerns from both parties. Moreover, the selection structure will reduce the political uncertainty associated with the timing of judicial appointments. The reform will ensure that both parties have a consistent stake in the judicial appointment process regardless of when the appointments occur. Finally, the selection of professionally diverse judges has received support from an increasingly broad political coalition. Many policymakers and judges have expressed the belief that professional diversity is important to judicial legitimacy. [48] The Biden administration's decision to appoint a historic number of professionally diverse judges likely reflected these concerns among his political bases. [49] Even though support for professional diversity is less consistent among conservative policymakers, some influential right-wing think tanks have openly endorsed such position. [50] While substantive changes to the judicial selection structure are unlikely to occur in the immediate future due to the inherent difficulty of structural reform, it at least remains plausible in the long-term because it is aligned with the interests of many policymakers and civil society organizations.

Another objection is that such a selection structure is likely to lead to political stalemate. Given the increase in political polarization in recent years, one might argue that it is unlikely for the committee members appointed by the two parties to agree on any candidates, which will mean that they will not be able to make any collective suggestions to the president. However, there are factors that will significantly reduce the likelihood of such a stalemate. First, the members of the committee are not the senators themselves but rather the legal professionals appointed by the senators. These legal professionals are not under electoral pressure to maintain a strict ideological line and thus will be more open to meaningful deliberations about the quality of the candidates. More importantly, the committee is not suggesting a single nominee but rather a set of nominees for the president. This opens up the possibility of compromises in the selection process, where the committee might suggest some candidates that are preferable to incumbent party appointees and some candidates that are preferable to opposition party appointees. While this structure gives the president some meaningful power over the final decision, it does not undermine the purpose of the selection committee. The members of the committee appointed by the opposition party will still have the incentive to reject the extremist candidates and compromise only on the moderate candidates. More importantly, the committee's diverse composition is likely to lead to greater professional diversity among nominees. Therefore, the proposed selection structure can operate effectively to strengthen the judiciary.

Nevertheless, given these potential political challenges, one can argue that a more practical short-run solution would be to appeal to a reform-minded executive.

Judicial reform groups have long advocated for presidents to appoint professionally diverse judges, which likely contributed to Biden's decision to make far more of these appointments than his predecessors. However, the problem with this strategy is that it relies on the political will of administrations. It will no longer be effective when the president lacks democratic commitments, but it is precisely during these times that judges committed to the defense of constitutional values are the most needed. The advantage of a formal selection committee is that it creates durable institutional rules for future governments. A president would have to contend with legal barriers when seeking to dismantle the process for political purposes. Thus, a selection committee that incorporates balanced and diverse representation is a necessary long-term solution to creating a judiciary that can act as a reliable check against the abuse of political power.

Conclusion

The United States is distinct among democratic regimes for its long history of giving the judiciary the power to reverse executive and legislative decisions. However, the courts have fallen short as defenders of constitutional rights in many constitutional crises in history. Therefore, as the country enters another period of democratic backsliding, it is important to establish a judicial selection process that fosters strong democratic commitments. To achieve this purpose, those in charge of selecting federal judges need to not only consider their legal skills but also whether they have professional experiences of advocating for the civil liberties of the disadvantaged against state infringement. The inclusion of these judges will make the courts more willing to substantiate core constitutional rights for the less powerful and check against systematic abuses of executive power. To improve the quality of the judiciary, there also needs to be a different mechanism for selecting judges. The Senate should invoke its constitutional power to create a nomination advisory committee composed of diverse legal professionals equally appointed by both parties. The committee will have the advantage of formally securing opposition representation and incorporating diverse sources of professional knowledge. As a result, the selection process will be less vulnerable to partisan exploitation and more likely to produce professionally diverse appointments. These reforms to the judicial selection process will create a judiciary better-equipped to resist democratic erosion and safeguard constitutional principles.

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The Intellectual Foundations of Computational Law

NICHOLAS RUSSO

Abstract:
Computational law, the application of digital systems to automate legal reasoning, holds immense potential to revolutionize legal practice. This paper provides a historical analysis of its development, tracing the evolution from early epistemological inquiries to modern implementations of domain-specific legal programming languages. Beginning with John Dewey's 1924 critique of formal logic in legal reasoning, the paper explores the intellectual landscape that shaped early discourse on legal formalism. It examines the contributions of key figures like Layman Allen, whose work on symbolic logic laid the groundwork for later computational approaches. It additionally highlights the role of "The British Nationality Act as a Logic Program" in demonstrating the practical application of legal logic programming and its subsequent influence. It further explores the development of contemporary legal programming languages like Catala, Ergo, and Orlando, emphasizing their significance in advancing automated legal reasoning.

A novel aspect of this analysis is the application of bibliometrics. By examining citation patterns, the paper illuminates the intellectual lineage of computational law in a novel light, revealing how early, sometimes esoteric, ideas have influenced modern developments. This approach demonstrates the increasing engagement with foundational works, such as Dewey's, alongside the growing impact of practical demonstrations and the emergence of new legal programming languages. Ultimately, this historical perspective informs the development of more robust, ethical, and accessible legal technologies, offering valuable insights into the future trajectory of computational law and its potential to reshape legal practice.

Introduction

Advanced software has revolutionized numerous professions: accountants use spreadsheets, photographers use Photoshop, and architects use computer-aided design. Lawyers, meanwhile, use Microsoft Word and little beyond it— their workflows often augmented by legal research and case management software, but lacking a comparable tool for qualitative legal reasoning. [1] However, recent years have seen tremendous advances in computational law—the development and use of digital systems to automate legal reasoning—and its subfield, legal logic programming—the use of domain-specific computer programming languages to precisely capture and automate various types of legal reasoning. [2] Numerous programming languages created explicitly for this purpose have been devised—Orlando, for future interests in property law, [3] Ergo, for smart legal contracts, [4] and the broadly-applicable Catala, [5] among others. Although these specialized tools are in their infancy, ideas of using formal logic to mathematically mechanize legal reasoning and analysis were being explored during the twentieth century. [6] However, these inquiries, including those led by notable scholars, remained rather esoteric until the 1980s.

While computational law has the potential to revolutionize legal practice worldwide, there is a relative dearth of scholarship providing a longitudinal historical analysis of its development. Understanding the evolution of these ideas, from early theoretical inquiries to modern implementations, is essential for navigating the complex landscape of legal tech and anticipating its future impact. By examining the historical underpinnings of computational law, this paper aims to illuminate the key intellectual shifts that have facilitated its current trajectory, ultimately informing the development of more robust, ethical, and accessible legal technologies. Throughout subsequent pages, I explore the history of computational law and its underpinnings in logical formalism with a roughly chronological approach. I describe several key twentieth-century publications that established the ideological frameworks in which modern scholars of computational law explicitly embed their contributions. While doing so, I further explore their respective historical contexts to better elucidate how their ideas emerged in light of contemporary discourses. This analysis leverages citation data—a novel application of bibliometrics and scientometrics to this field—to demonstrate the initial esoteric nature of these foundational ideas.

Pre-Computational Legal Logic: Dewey's 1924 Contribution

Why Dewey?

Merigoux et al., in their publication introducing the Catala legal programming language, suggest that Catala builds upon a tradition of scholarship dedicated to extracting the logical essence of legal statutes, a tradition they trace back to 1924. [7] However, their analysis focuses primarily on a subsequent work from 1956, omitting further discussion of this earlier contribution. Nonetheless, I posit that this 1924 piece is, in fact, a pivotal text in the history of legal logic. While not necessarily the first relevant work—as it engages with pre-existing discourse on legal formalism—it represents the earliest point of reference commonly invoked by contemporary scholars and developers of computational law when situating their contributions within a broader intellectual framework. Thus, I utilize this piece as an anchor point for my further inquiry.

This century-old work is "Logical Method and the Law" by John Dewey—one of the most prominent early twentieth-century American scholars. [8] Dewey's publication understandably has little to do with computation as it predated both the development of digital computers in the 1940s and the formulation of computability theory by the likes of Gödel, Péter, Church, and Turing in the 1930s. [9] Dewey, a logician, was instead concerned with exploring the viability of mathematical logic as a tool for legal reasoning; his piece is rather foundational in this regard.

Dewey's Skepticism

Dewey initiates his analysis by categorizing all decision-making processes into two primary types: instinctive, routine-based decisions and deliberative, inquiry-driven decisions. [10] He observes that the latter relies on reasoning and premises to arrive at conclusions, thus embodying what he terms "logical theory." Dewey then proceeds to critique the applicability of formal logic to legal reasoning. He argues that traditional logic, particularly its reliance on syllogistic reasoning, is too rigid to effectively model the context-sensitive nature of legal judgements. [11] He emphasizes the continual re-interpretation of legal principles in response to evolving societal conditions, suggesting that this necessary evolution—which he believes formal logic would impede—is crucial for preventing injustice. [12] Dewey proceeds to propose an alternative, "experimental logic:" a fluid system that centers reasoning on practical experience rather than abstract principles, treats legal principles as hypotheses requiring continuous validation and refinement—rather than presupposing their veracity when analyzing novel facts—and is fundamentally iterative. [13] Dewey's "experimental logic," in many respects, reflects the qualitative, fluid thought processes employed by contemporary legal professionals in reaching conclusions. This perspective, however, appears fundamentally at odds with the philosophical underpinnings required to justify the application of computational methods to automate legal reasoning. Dewey's early work thus raises two key questions: what intellectual influences shaped his perspective, and how were his arguments received and subsequently developed?

Antecedents to Dewey: Logic, Law, and Epistemology

Dewey's critiques of applying logical formalism to legal reasoning did not arise in isolation. Rather, they engaged with existing theories and discourses, notably those concerning logic, the legal philosophy of United States Supreme Court Justice Oliver Wendell Holmes, and contemporary debates surrounding legal epistemology.

From Aristotle to Modern Logic

Considering Dewey's invocation of logical concepts throughout his arguments, this aspect of the history of computational law is, in essence, the history of logic itself. The following discussion will focus on identifying key associations between concepts referenced by Dewey and their origins. For example, Dewey frequently refers to the syllogism: the logical form through which conclusions are rigidly derived from presupposed premises. [14] In critiquing the applicability of formalism to law, Dewey explicitly cites the classic syllogism: "All men are mortal; Socrates is a man; therefore Socrates is a mortal". [15] Although Aristotle himself did not coin that particular example, [16] he is widely credited with devising and popularizing syllogisms as a logical form and as the basis of a logical system. [17] Furthermore, Aristotle established logic as an independent area of inquiry, distinct from any specific argument. [18]

Aristotelian logic underwent refinement by his successor, Theophrastus, and was subsequently expanded upon by several late third-century B.C.E. Stoic philosophers, including Chrysippus, whose contributions are noteworthy despite the loss of many of their works. [19] For the subsequent two millennia, advancements in this logical system—transforming Aristotle's comparatively rudimentary formulation into the system engaged by Dewey (and, by extension, computational law)—proceeded at a more gradual pace. Refinements and incremental additions were made by figures such as the second-century C.E. logician Galen, the sixth-century philosopher Boethius, the twelfth-century medieval French philosopher Peter Abelard, and the fourteenth-century English friar William of Ockham. [20] These thinkers primarily refined and modernized the ideas of Aristotle and Chrysippus. Significant forward developments in this logical system did not occur until the nineteenth century, with the development of mathematical-style symbolic logic by Augustus DeMorgan and George Boole. [21] In the decades preceding Dewey's work, efforts to understand logic, broaden its scope, and enhance its epistemological value were accelerating. For instance, during the late 1800s, German philosopher and logician Gottlob Frege explored the discipline beyond traditional propositions, positing that it enabled systematic inquiries more fundamental than mathematics itself. [22] He notably introduced Begriffsschrift, a “concept-script” offering a symbolic language for logical reasoning. [23] Following the turn of the twentieth century, Bertrand Russell made further significant contributions, demonstrating how logical methods could serve as a principal epistemological tool for discovering—or, arguably, constructing—truth from comparatively simple axioms, surpassing the complexity of Aristotle's initial syllogisms.

Leibniz and the Characteristica Universalis

An intriguing development in the history of computational law occurred in 1903: French mathematician Louis Couturat published the logical works of 17th-century German polymath Gottfried Wilhelm Leibniz, which hitherto remained hidden in the Archive of the Royal Library in Hanover. [24] In doing so, Couturat revealed that Leibniz—among other contributions to logic, some imperfect—undertook an ambitious project to create a 'universal philosophical language.' [25] His aim was to develop a “characteristica universalis,” a system of notation capable of representing all human knowledge mathematically, thereby enabling philosophical reasoning to be conducted through calculation. [26] Leibniz's endeavor can be viewed as an early analogue to modern legal logic programming, albeit one that sought to achieve its aims through pure mathematics rather than digital systems. However, scholarly opinion regarding the influence of Leibniz's ideas on the development of logic remains divided. Some scholars suggest that his impact on pre-20th-century logic was negligible, arguing that figures such as De Morgan and Boole developed their contributions independently of any Leibnizian influence. [27] Others contend that, while Leibniz's work remained largely unpublished during his lifetime and thus did not exert a direct influence, it nonetheless anticipated crucial concepts of modern logic and served as a significant source of inspiration following its rediscovery by Couturat. [28]

Holmes's Influence on Dewey's Legal Thought

Returning to Dewey, it is clear that the logical systems available to him—which he deemed inadequate for ethically capturing legal reasoning due to their rigidity—represented the culmination of millennia of development upon originally Aristotelian logic. This system, in turn, was a product of the particular intellectual climate and societal context of classical Greece. [29] Beyond the history of logic, Dewey was also significantly influenced by the legal philosophy of his contemporary, Justice Oliver Wendell Holmes. Dewey extensively engages with Holmes' emphasis on the role of experience, moral theories, and public policy in shaping law, quoting Holmes' proclamation that "the actual life of the law has not been logic: it has been experience." [30] Dewey proceeds to draw upon this perspective in formulating his own "experimental logic," with its corresponding emphasis on pragmatism and adaptability in legal reasoning.

Mechanical Jurisprudence: From Pollock and Pound to Dewey

In his critique of legal formalism, Dewey addresses the concept of "mechanical jurisprudence," a term coined by his contemporary, legal scholar Roscoe Pound. [31] Pound introduced this term to describe and subsequently critique a perspective advocated by the English jurist Sir Frederick Pollock. Pollock championed a strict, formalistic approach to law, emphasizing internal consistency, objectivity, and adherence to established rules and principles. [32] Legal scholar Dewi Setyowati characterizes Pound and Pollock as engaged in a dichotomous debate concerning legal epistemology. Pollock, building upon the ideas of the earlier American jurist Christopher Columbus Langdell, argued that values such as equality, certainty, and justice were best achieved through a rigid formalistic framework. [33] Pound, conversely, argued that such an approach reduced law to an inflexible mechanism, detached from its social functions and moral foundations. [34] While Dewey's ideological alignment with Pound on this matter is clear, he only briefly references him in his "Logical Method and Law." [35] Nevertheless, within this historical context, "mechanical jurisprudence" can be understood as an early precursor to modern computational law—one that Dewey, in his critique of legal formalism, helped to coalesce into a more cohesive ideology receptive to the application of logical methodologies.

William James: A Bridge Between Dewey, Pound, and Holmes

The American philosopher and psychologist William James serves as a significant intellectual link between Dewey, Pound, and Justice Holmes. Each of these figures was among the most influential American legal thinkers of their era. Notably, both Pound and Justice Holmes were deeply influenced and initially mentored by James, while Dewey was a follower of James's philosophical tradition. [36] This connection offers valuable insight into Dewey's perspectives, particularly his critique of “mechanical jurisprudence.” However, its significance extends beyond this, especially concerning the recognition of James's influence. Legal scholar Edwin W. Patterson, in a 1950 honorary review of Dewey's work commemorating his ninetieth birthday, highlighted the implicit role of William James in Dewey's "Logical Method and Law.” [37] Despite at least 45 citations of Dewey's piece since its publication, [38] none occurred during the quarter-century between its publication and Patterson's review.

This absence underscores the initially esoteric reception of this intersection of law, epistemology, and mathematics, and provides a foundation for subsequent discussion of the post-Dewey trajectory of computational law and legal logic programming.

From Dewey's Skepticism to Allen's Vision

It appears that the views of nineteenth- and early-twentieth-century proponents of legal formalism, such as the respected jurists Pollock and Langdell, were, for a time, eclipsed by the skepticism of their legal pragmatist contemporaries, including Pound, Justice Holmes, and Dewey. While scholarship specifically addressing legal formalism remained limited in the decades following Dewey's work, the subsequent emergence and development of computational law and legal logic programming demonstrate the enduring relevance of these earlier formalist ideas. Although perhaps not achieving immediate dominance, these perspectives have certainly not been forgotten. This historical trajectory prompts the question: How did the discourse surrounding legal logic and computational law evolve in the period following Dewey's contributions and Patterson's reappraisal of his work?

Allen's Symbolic Logic and 'Systematic Pulverization'

In 1957, the American logician and legal scholar Layman E. Allen presented a visionary framework for legal formalism grounded in mathematical logic in his work “Symbolic Logic: A Razor-Edged Tool for Drafting and Interpreting Legal Documents.” Building upon the advancements in logical theory developed over millennia, Allen's work brought the "legal formalism" critiqued by Dewey and the "mechanized jurisprudence" challenged by Pound into practical demonstration. He introduced a "systematically-pulverized" system for legal drafting and analysis, illustrating how specific legislative clauses written in English could be precisely represented and interpreted using symbolic logic. [39] Notably, by constructing a truth table, Allen demonstrated the logical equivalence of two sections of the United States' Internal Revenue Code. [40] However, Allen's system remained a proof-of-concept; while groundbreaking, it did not constitute an operational tool. [41] Furthermore, Allen explicitly acknowledged the limitations of his approach, asserting that legal logic "cannot and should not [fill gaps of legislation by courts]." [42] Although Allen's publication coincided with the early development of programmable digital computers, these machines were still in their nascent stages. Consequently, his work makes no mention of "computing," suggesting that while the relevant discourse in the 1950s remained situated at the intersection of law, philosophy, and mathematics, the integration of computing and related technologies into these discussions had not yet fully materialized. [43]

Inspiring Allen: Pfeiffer and Tamello's Contributions

Allen's publication, which stands in contrast to the skepticism expressed by Dewey, Pound, and Justice Holmes, does not reference their work. However, similar to Dewey's own contributions, Allen's system of symbolic legal logic emerged from pre-existing scholarship and discourse. Allen acknowledges the potential of symbolic logic in legal contexts, citing John Pfeiffer's 1950 Scientific American article—published just four months after Patterson's reaffirmation of Dewey's reservations regarding legal formalism—as setting forth these potential merits and providing an early example of its application. [44]

Pfeiffer's article describes how the first practical use of symbolic logic in a legal context was not undertaken by a legal professional, but rather by the mathematician Edmund C. Berkeley in 1936, then working for the Prudential Life Insurance Company, to address a practical business need: the restructuring of premium payments by policyholders. [45] In addition to Pfeiffer, Allen cites the linguist and legal scholar Ilmar Tamello, whom he credits with establishing the conceptual groundwork for employing symbolic logic as a broadly applicable and generalizable tool for legal analysis. [46] While Allen notes that Tamello "commits some important technical errors," he nevertheless argues that Tamello's ideas merit further investigation (an investigation that Allen undertakes through his "systematic pulverization" system) and characterizes them as an epistemological advancement. [47]

Beyond Allen, Into the Digital Age

In the decades following Allen's work, computers evolved from massive mainframes used primarily for national defense and academic research into smaller, more affordable, increasingly powerful, and more widely accessible machines whose enthusiasts were constantly eager to discover new applications for them. As computing became increasingly integrated into both academic and everyday life, the conditions were established for the rapid growth of computational law and legal logic programming.

Building on Allen: Sergot et al. and the Advent of Legal Programming

A pivotal moment occurred in 1986 with the publication of "The British Nationality Act as a Logic Program" by Marek Sergot, a professor of computational logic, and his five co-authors. While earlier scholars, including Allen (whose work they cite and engage with), explored the potential of legal formalism through the lens of mathematical logic and epistemology, Sergot et al. were the first to introduce computer science and technology into this domain. Notably, they empirically demonstrated how computer programming can accurately and faithfully automate a component of legal reasoning. [48] To achieve this, they utilized the established Prolog programming language, which had been developed over a decade prior for the efficient manipulation of symbolic information and logical reasoning. [49] Prolog served as a foundation for many early artificial intelligence systems, which Sergot et al. suggested could be more effectively developed and tested through the logical formalization of legislation. [50] Later scholars, including the creators of the legal domain-specific Catala language, recognize this work as a key refinement of Allen's vision and a crucial baseline for their own research, as they seek to retain Prolog's strengths while addressing its limitations in the context of legal logic programming. [51] Beyond demonstrating the potential of legal logic programming, Sergot et al. also clarified its inherent limitations and, consequently, its future direction. Specifically, they restricted the scope of their formalization to statutory (civil) law, explicitly excluding case law and the common law system prevalent in the United States, the United Kingdom, and Commonwealth nations. [52]

The Post-Sergot et al. Rise and Fall of the Legal Expert System

"The British Nationality Act as a Logic Program" prompted a surge of interest in legal expert systems, positioning logic programming as the primary methodology for computational legal reasoning. [53]

The broader artificial intelligence community, already experiencing optimism surrounding expert systems in fields like medicine (e.g., Mycin), saw Sergot et al.'s success as an indication that legal reasoning could be similarly automated. [54] Government and academic institutions, particularly in the UK under the Alvey Programme, provided an influx of funding to researchers seeking to generalize this approach to other areas of law. [55] Legal expert systems were envisioned as tools to democratize legal expertise, offering laypeople access to automated legal advice while reducing reliance on human lawyers. [56]

However, as scholar Philip Leith critically observes, the legal expert system movement was ultimately undermined by fundamental conceptual and practical limitations. A primary issue was the assumption that legal reasoning could be fully formalized within a rigid, rule-based framework, mirroring the earlier efforts of Allen and Leibniz. Leith echoes much of Dewey's early skepticism, emphasizing that law is inherently dynamic, interpretative, and adversarial—shaped by precedent, judicial discretion, and argumentative reasoning. [57] Unlike medical expert systems, which operate within domains governed by empirical observation and probabilistic reasoning, legal expert systems struggled to account for the complexities of case law, statutory interpretation, and procedural flexibility. [58] While Sergot et al. acknowledged these challenges, noting that computational legal systems are best suited for more 'algorithmic' areas of law, subsequent efforts to enhance their applicability [59] ultimately fell short of achieving widespread practical utility. By the 1990s, enthusiasm for legal expert systems had waned, and the field largely transitioned to developing more modest decision-support tools rather than fully autonomous legal reasoning systems. [60] Further compounding the movement's decline was the inability of expert systems to gain meaningful traction among legal practitioners, many of whom found them impractical or overly rigid. [61]

Tracing the Maturation of Computational Law Through Citation Patterns

Eugene Garfield, a key founder of bibliometrics and scientometrics, [62] demonstrated how the progression of modern scientific developments can be represented as a network of published papers with references and citations acting as the connections between these works. [63] He presented citation analysis as a valuable method for historical research in science, emphasizing its quantitative and systematic nature while acknowledging its limitations, particularly when analyzing works published before citations became standard practice in academic and scientific discourse. [64] Leveraging Garfield's framework and collected citation data, [65] this analysis investigates the role of "The British Nationality Act as a Logic Program" as a pivotal work in the field. Following its publication, a notable increase in related research emerged, accompanied by renewed scholarly interest in the earlier works of Dewey and Allen. This renewed attention suggests that subsequent researchers sought to clarify the intellectual lineage upon which their own contributions were built. Furthermore, to enhance the contextualization of contemporary advancements in computational law, this analysis additionally investigates the citation frequencies of scholarly articles that introduced the aforementioned novel domain-specific legal programming languages.

Citation Patterns of Key Texts

John Dewey's 1924 publication, "Logical Method and Law," has received 45 citations, excluding the aforementioned review by Patterson. [66]

Of these, only one predates 1986. While the number of citations did not dramatically increase immediately following the publication of Sergot et al.'s work, this may be attributable to the fact that neither Allen nor Sergot et al. cited Dewey, possibly due to its limited dissemination or its ideological divergence from their research Nevertheless, Dewey's work has experienced a notable increase in citations as its centenary approaches: it was cited three times in each of the 1990s and 2000s, 11 times in the 2010s, and 25 times in the first half of the 2020s alone. It is important to note, however, that while many of these citing works are related to computational law and logic, a substantial portion are primarily focused on broader philosophical inquiries.

Allen's piece has garnered comparatively more citations since its publication. Similar to Dewey's work, Allen's publication initially received limited attention, with only five citations between its 1957 publication and 1985 (excluding a subsequent self-citation by Allen). [67] It received two citations in 1986, including the aforementioned "The British Nationality Act as a Logic Program." [68] Subsequently, it was cited seven times between 1987 and 1989, 14 times during the 1990s, 16 times in the 2000s, 28 times in the 2010s, and 20 times in the first half of the 2020s. [69]

Exploring citation counts for recent publications introducing novel domain-specific programming languages for legal applications provides further insight. A notable degree of variation exists in the citation rates for these languages. For example, Ergo, designed for smart legal contracts, [70] has received five citations since its 2021 publication. [71] Orlando, tailored for computing future interests in property law, has been cited 11 times since its 2022 publication. [72] Catala, a language developed for the precise expression and execution of statutory law, stands as a prominent example; the introductory paper by Merigoux et al. has garnered 79 citations since its 2021 publication. [73] This strong interest in Catala is further evidenced by the citation counts of subsequent publications that expand upon and develop the language. One such work, co-authored by Merigoux, has accumulated 20 citations since its 2022 publication, [74] while another published that same year has received 9 citations. [75] The substantial number of citations accrued by these contributions to computational law, including those introducing and developing domain-specific languages, suggests a robust and active scholarly discourse within the field.

Illuminating the Trajectory of Computational Law

Citation analysis illuminates computational law's intellectual lineage by contextualizing early theoretical inquiries that, although once considered esoteric, have laid the groundwork for modern implementations. For instance, Dewey's early skepticism regarding the application of formal logic to legal reasoning, while initially influential, gradually receded into relative obscurity during the mid-20th century—a trend evidenced by the low citation frequency of his work until Patterson's later reappraisal. However, the recent resurgence of scholarly engagement with Dewey's contributions, concurrent with the ascendance of computational law, suggests a renewed appreciation for his foundational insights, even if primarily as a counterpoint to contemporary approaches. Conversely, Allen's work, which directly addressed the application of formal logic within legal contexts, exhibits a more linear trajectory of increasing citations, albeit with a notable inflection point following Sergot et al.'s seminal demonstration of legal logic programming.

In effect, Sergot et al.'s practical implementation appears to have catalyzed renewed interest in the theoretical underpinnings of computational law, thereby contributing to the post-1986 surge in citations for Allen's work and exemplifying how practical advancements can revitalize previously under-explored theoretical frameworks.

The substantial citation counts accrued by introductory publications on these languages reflect a rapidly expanding area of inquiry. Consequently, analyzing the citation networks surrounding these emerging tools provides valuable insights into their impact and informs the future trajectory of computational law. Likewise, by systematically examining the sources these tools reference and, in turn, identifying the works that cite them, scholars can develop a deeper understanding of the evolution of relevant theoretical frameworks as the discipline continues to mature. This approach highlights the intricate interplay between theoretical inquiry and practical implementation—an essential dynamic in computational law—while further contextualizing the field's intellectual history and ongoing development.

Conclusion

The trajectory of computational law, from John Dewey's early skepticism towards rigid legal formalism to the contemporary advancements in automated legal reasoning, represents a significant intellectual evolution. Early critiques of mechanical jurisprudence—such as those by Dewey and Pound—were rooted in the belief that law's inherent adaptability and context-driven application defy rigid formalization. The critiques of "mechanical jurisprudence" articulated by Dewey and Pound, grounded in the perceived incompatibility of law's inherent adaptability and context-sensitive application with formalistic rigidity, have been substantially addressed by subsequent developments. The intervening century has witnessed transformative progress across multiple domains, including logic, mathematics, epistemology, and, crucially, computation.

Layman Allen's pioneering work demonstrated the potential of symbolic logic for precise and rigorous legal drafting, establishing a foundational framework for later proof-of-concept studies, such as that undertaken by Sergot et al. The subsequent rise and fall of legal expert systems, while ultimately hindered by conceptual and practical limitations, serves as both a cautionary tale and a valuable insight to future endeavors. Despite failing to achieve widespread market penetration, these endeavors provided crucial insights that have informed the development of contemporary, domain-specific legal programming languages like Catala, Ergo, and Orlando. [76] The present era of computational law, therefore, represents not merely a technological triumph, but a nuanced reconciliation of enduring intellectual ideals. Far from undermining the fluidity and pragmatism championed by Dewey, our modern systems strive to complement human judgment, using formal logic to enhance precision while leaving room for interpretation and moral reasoning. Computational law and legal logic programming thus offer a promising avenue for addressing the legal field's persistent challenges with efficiency, consistency, and accessibility, with the potential to transform how our society can understand, interact with, and apply our laws.

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HATE IN THE LAW: Looking at Racist Speech Through R. A. V. v. St. Paul and Wisconsin v. Mitchell

BY AJANI STELLA

Abstract:
In R. A. V. v. St. Paul, the Supreme Court overturned St. Paul, Minnesota's hate crimes ordinance because it discriminated against "expressive conduct." A year later, the Court upheld Wisconsin's sentencing enhancement for hate-motivated assault, on the grounds that it targeted only pure conduct. This content-speech distinction has stifled hate crimes statutes by ensuring they can only target visible forms of racist conduct, effectively negating the reality of violent racism experienced by millions of Americans. This article argues the Court's holding in Mitchell provides a basis for regulating virulent racism based on the intrinsic and physical harm of racist conduct beyond motivated assault. Scholarship on R. A. V. has been largely silent since the early 1990s, and critics were generally pacified by the Court's allowance in Mitchell. This article revives that legal conversation by advocating for a much-needed shift in how the Court addresses hate crimes in First Amendment jurisprudence. This article critically analyzes the conduct-speech distinction and posits it is insufficient and dangerous given the reality of racism in the United States. The article condemns Justice Scalia's race-blind approach in R. A. V. by demonstrating racism's discrete harms. The article argues extreme racist speech, which degrades or incites hatred based on race, should be treated as proscribable conduct that is unprotected by the First Amendment. The argument looks at the history of how the Supreme Court has treated the harms of racism in Brown v. Board of Education and ultimately shows hate crimes measures are both necessary and constitutional.

I. Introduction

In the early hours of June 21, 1990, in St. Paul, Minnesota, Robert A. Viktora and a group of fellow teenagers made a makeshift cross out of household materials, took it across the street to the home of a Black family, and lit it on fire in their front yard. [1] The residents, Russ and Laura Jones and their five children, were the only Black citizens on the block. [2] They awoke to the blaze in their yard—the fiery symbol of white supremacy and hate. Out of fear for themselves and their children, the two adults called the police while Viktora and his friends hid across the street. But the teenagers, who were heavily under the influence, waited patiently for the police to leave before lighting two more crosses, one across from the Jones household and another in front of an apartment complex where several Black families lived. [3] Viktora was subsequently prosecuted under St. Paul's hate crimes ordinance, only to have the Supreme Court overturn it in 1992 in R. A. V. v. St. Paul, which upended the city's anti-hate crime endeavors. [4]

The Supreme Court was presented with another hate crimes case one year later that challenged Wisconsin's hate-motivated conduct sentencing enhancement statute. In Wisconsin v. Mitchell, the court upheld that statute, distinguishing it from R. A. V. by saying it targeted conduct, not expression. [5] This paper examines how certain classes of racist speech —defined here as that which vilifies, degrades, or incites hatred against individuals or a group based on race [6] —can be considered proscribable conduct and will criticize the distinction the Supreme Court drew in the early 1990s between "expressive conduct" and pure conduct. Part II summarizes the majority and concurring opinions in R. A. V. v. St. Paul, as well as how the holding was clarified by the subsequent Wisconsin v. Mitchell. Part III will analyze those rulings, critiquing the race-blind approach in R. A. V. and vindicating the concurrences. This part will also explain how the conduct-speech distinction codified in Mitchell actually repudiates the understanding of R. A. V. since conduct is made powerful by the speech elements. Part IV considers how legal theory designates racist speech as a form of conduct, and how that understanding has been put into practice in constitutional law. Finally, Part V will raise the question of what speech is akin to conduct, and how future advocates and theorists can grapple with this issue.

II. R. A. V. and Mitchell

A. Cross-Burning in R. A. V.

1. Opinion of the Court

In June 1992, the Supreme Court released its opinion in R. A. V. v. St. Paul, establishing that no matter how heinous and hateful speech is, it cannot be regulated by the government. The case concerned a group of teenagers who burned a "crudely made cross" in the yard of a Black family in St. Paul, Minnesota. [7] The teenagers were then prosecuted under the St. Paul Bias-Motivated Crime Ordinance, which proscribed symbols that attacked certain groups based on protected characterizations. [8] The statute reads:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor. [9]

The petitioner, Robert A. Viktora (known as R. A. V. since he was a minor during prosecution), challenged the statute as overbroad and content-based in violation of the First Amendment. [10] He appealed based on the Minnesota Supreme Court's narrowing construction of the statute to only apply to "fighting words," or constitutionally proscribable "conduct that itself inflicts injury or tends to incite immediate violence." [11] The Court accepted that narrowing construction and considered whether or not the restriction was impermissibly content-based. [12] Justice Scalia, who delivered the opinion of the Court, said that it was, and therefore could not fall outside First Amendment protection based on the "fighting words" doctrine, rendering the ordinance unconstitutional.

The Court recognized that there are categories of speech that are "of such slight social value" that they may be restricted, namely obscenity, fighting words, and defamation. [13] But the Court clarified that the categories' mere existence did not mean "that they are categories of speech entirely invisible to the Constitution." [14] As a result, the First Amendment still restricted legislative action within the realm of each category, such that the legislature could not engage in unfettered content-based proscription. [15] To establish the bounds of legislative action, the Court identified two types of content-based restriction. The first, which is valid, considers the degree of the speech. Consider the example of obscenity: a legislature may prohibit that which is the most offensive because of its sexual nature. However, regulation of content for content's sake—i.e. only obscenity with "offensive political messages"—is invalid. [16] The Court reasoned this distinction on the ground that if the legislature's underlying reason for prohibition could be reason enough for proscribing the entire category, then it can also form sub-categories within that class. [17]

To apply this construction of First Amendment jurisprudence to the St. Paul ordinance, the Court concluded that the restriction to "race, color, creed, religion, or gender" constituted content-based discrimination invalid under the second type of content-based regulation. The Court claimed that St. Paul engaged in "viewpoint discrimination" by only proscribing "fighting words" the legislature found to be particularly offensive based on the ideas they express, not their actual harm. The Court specifically argued that the ordinance's viewpoint discrimination granted advocates of racial tolerance an unfair position:

> One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules. [19]

In other words, the Court reasoned that the legislature did not engage with the mode of fighting words, but rather the views of the speaker, unconstitutionally endorsing one side of the "debate" over racism. As such, the Court argued that the St. Paul ordinance was yet another example of the majority asserting itself over the minority, no matter how detestable that minority is.

The Court also negated St. Paul's contention that the legislature designed the ordinance "'not to impact on [sic] the right of free expression of the accused,' but rather to 'protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against.'" [20]

The Court said that these "secondary effects" of speech were inapplicable because the ordinance was directed to protect the primary listeners, such as the family on whose lawn the petitioner burned the cross. As a whole, the Court's opinion characterized St. Paul's ordinance as viewpoint discrimination, based on the principle that the legislature cannot regulate speech simply because of how the expressed views harm the recipients.

2. Concurring Opinions

Justice White, whom Justices Blackmun and O'Connor joined and whom Justice Stevens joined in part, concurred in the judgment. White's rebuke of the majority was sharp: "The decision is mischievous at best and will surely confuse the lower courts. I join the judgment, but not the folly of the opinion." White would have overturned the ordinance solely on overbreadth grounds, pointing out that while the ordinance did prohibit fighting words, "it also criminalize[d] a substantial amount of expression that — however repugnant — is shielded by the First Amendment." But White took issue with Scalia's entire holding, characterizing it as a rejection of the "firmly entrenched" categorical approach of the First Amendment. White argued that the nature of a category is that the government may regulate within that category; the Court cannot require a government to criminalize all fighting words merely to criminalize some. Instead, White found the interest of the St. Paul ordinance to pass muster under strict scrutiny based on the city's judgment of necessity and "in light of our Nation's long and painful experience with discrimination." [27] Furthermore, White found that Viktora himself was rightfully prosecuted; his issue with the statute was not its application in the present case, but rather the potential for future applications violating other speakers' rights, as is the nature of many overbreadth rulings.

Justices Blackmun and Stevens each wrote separate concurrences. Blackmun argued that the Court "manipulated doctrine" to make its case by transforming the categorical approach into the two types of content-based discrimination. [28] Stevens, meanwhile, disavowed the entire categorical approach, arguing instead for a context-based assessment. [29] They both recognized the harms of racism: Blackmun vindicated St. Paul's mission in specifically preventing "race-based fighting words," [30] while Stevens recognized that "[n]ot all content-based regulations are alike." [31]

B. Bias-Motivated Conduct in Mitchell

In 1988, the Wisconsin state legislature enacted an amendment to its criminal code that included a sentence enhancement for assault crimes motivated by the perpetrator's "belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property." [32] The Wisconsin Supreme Court held the statute to be unconstitutional based on R. A. V., arguing it "violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought." [33] The Court, in Wisconsin v. Mitchell, unanimously reversed the state's ruling, upholding the statute. [34]

The Court distinguished between the "expressive conduct" that St. Paul attempted to proscribe and the "physical assault" targeted by Wisconsin. [35] The Court held that, while R. A. V. dealt with targeted expression, based on the principle that expression is inherent in cross-burning, assault is purely conduct. The respondent argued that the statute discriminated against his motive, [36] but the Court clarified that the law did not consider "abstract beliefs," but only that which was relevant to the crime committed. [37] The Court also justified Wisconsin's singling out of hate-motivated crimes because they were "thought to inflict greater individual and societal harm." [38] Furthermore, the Court negated the respondent's overbreadth claim by noting the implausible proposition that an individual would suppress their bigoted beliefs for fear of them being used against them in a future assault. [39] In doing so, the Court attempted to give greater leeway to legislatures to regulate hate-motivated conduct, but still keep R. A. V. intact; indeed, the Court has considered the entirety of R. A. V.'s holding as remaining good law after Mitchell.

III. Analysis of Case Law

A. The Role of Race in R. A. V.

When looking at Justice Scalia's majority opinion and Justice White's concurrence, one might assume that they are discussing different cases. Scalia's opinion revolved around a complex analysis of content-based discrimination, treating the bias-motivated distinction the same as any distinction. Scalia specifically engaged in non-racial examples, such as invoking prejudice against "anti-Catholic bigots" versus that against "papists." White's argument, meanwhile, opined at length on the compelling interest St. Paul has in regulating hate-based action and expression. White acknowledged the government's interest in regulating and proscribing Viktora's actions based on the nature of racism.

Scalia's outlook makes sense when considering the overall nature of the ordinance, but not the facts of the case at hand. Viktora's cross-burning was specifically a racial and white supremacist activity, designed to harass and intimidate. But for Scalia, the specificity of racism was irrelevant. Indeed, as the advocate for the petitioner, Edward J. Cleary, declared in an article after the decision, "[t]o say that a 'burning cross' or a 'Nazi swastika' is an inherently different type of symbol than a red communist flag, a black arm band or the burning of the U.S. flag is to betray a political bias as to what is offensive and what is not." [40] But this interpretation is a complete distortion of the reality of racism in the United States, which the White opinion recognized. First, the irony of comparing an anti-war symbol to those of white supremacy and Nazism should be apparent. But besides that, a black armband carries none of the communicative violence implied or demanded by burning crosses or swastikas. Indeed, their "inherent" nature is one of violence. Similarly, the communist flag, though certainly associated with global violence, has not been used nearly to the extent as the two other examples to call for, threaten, or endorse hateful violence. The notion from Cleary that these symbols were equally "unacceptably offensive to the majority of the American public" perverts how racism affects the lives of Americans. [41] It is clear from this analysis, therefore, that a burning cross or Nazi swastika are different from simply unpopular symbols.

The advocate for the City of St. Paul attempted to make this point in oral argument, stating that "this bias-motivated conduct and violence is much more harmful and has more harmful impacts to its citizens—" before he was cut off by Scalia. [42] The justice interjected:

> That's a political judgment. I mean, you may feel strongest about race, color, creed, religion, or gender. Somebody else may feel strong as to about philosophy, about economic philosophy, about whatever. You picked out five reasons for causing somebody to breach the peace. But there are a lot of other ones. [43]

Scalia endorsed the same logic that Cleary later did, a preview of the nonracial opinion he would write. By reducing the harm of racism to a mere "political judgment," Scalia tossed it in with every other political issue—like ideology, war policy, or, as he mentioned, economics. Though he was certainly correct that one may "breach the peace" for many reasons, that did not answer the fundamental concern that a racist breach of the peace is essentially different; as the advocate mentioned, it is "much more harmful."

Scalia considered cross-burning without any of the historical context associated with it. It is well-established that burning crosses is a universal terror symbol used to intimidate and preview violence. [44] Cross-burning has been used by the Ku Klux Klan to subjugate its victims or warn them of impending attacks; it has been used to advocate against civil rights by threatening violence. It is not simply akin to other political expressions, but rather a manifestation of the specific nature of racism. Indeed, the Court refused to acknowledge that racism is its own brand of prejudice; the notion that the oppression of minorities is all the same is a concerning precedent. Rather, the "special hostility" Scalia railed against in R. A. V. [45] was necessary because there is a special hostility toward Black people and minorities. Correspondingly, content-based discrimination is sometimes necessary because some content is more harmful—is more of a "fighting word"—than others. Furthermore, even if one accepts, arguendo, the Court's claim that degrees of fighting words can be punished, that logic proves the constitutionality of St. Paul's objective. Just as the government may prohibit specific fighting words directed against the President based on their unique harm (Scalia's example), the government should be able to prohibit specific fighting words directed against protected classes because of their unique harm.

Moreover, Scalia's characterization of the suppression of hate as the majority suppressing a minority is problematized by the prevalence of hate crimes. The St. Paul legislature did not venture to punish speakers with whom they disagree on a whim, which is what Scalia implied with his statement that "the politicians of St. Paul are entitled to express that hostility — but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree." Rather, the legislature found the issue of violent racism and racist threats so urgent and dangerous that it necessitated regulation. Indeed, the ordinance came about during a time of growing awareness of the prevalence, power, and uptick in racial hate crimes. Rather than recognizing this reality, or the simple evidence from the record that the Jones family had been subjected to repeated injury and assault, the Court instead emphasized that the cross was "crudely made," as if that was somehow the important detail. In his effort to redefine the racist actions of Viktora and others as an oppressed minority, Scalia once again warped reality in favor of a convoluted First Amendment analysis.

B. Ruling on Overbreadth

The concurring opinions in R. A. V., which argued the statute should be overturned due to its overbreadth, not the interest, were the correct holding. Scalia's investigation within each category of unprotected speech, holding that certain elemental modes of expression are proscribable though the content is not, invented a new type of free speech jurisprudence that unnecessarily confounded and complicated First Amendment analysis. The majority rejected the categorical analysis that had guided the Supreme Court since the mid-twentieth century and supplanted it with this approach which requires a legislature to prohibit all of a category or none at all.

An overbreadth ruling, as the concurrences urged, would have decided this case on established First Amendment principles. The ordinance prohibited prejudiced speech that would arouse "anger, alarm or resentment." [50] These broad words went far beyond what could be reasonably classified as inflicting harm or threatening or actualizing violence. [51] Mere "resentment" was not grounds for proscription, despite the Minnesota Supreme Court's narrowing construction. Prosecutions of cross-burning are not, of course, prompted by resentment, or even anger or alarm; they are pursued because of the hate attached to it: hate that causes injury. Thus, the way that the St. Paul legislature wrote their ordinance, not the underlying reasons for writing it, was facially overbroad and thus unconstitutional.

C. Expression Versus Conduct in Mitchell

In the Supreme Court's next term, it was quick to limit and clarify R. A. V. through the distinction between expression and conduct in Wisconsin v. Mitchell. The former, expression, is supposedly what was proscribed by St. Paul since cross-burning was characterized as expressive conduct. The latter, conduct, was tackled by Wisconsin since it only applied to purely physical action motivated by expression. But Mitchell did not touch Scalia's problematic majority logic, and the Court's simple (if anything about R. A. V. jurisprudence could be called simple) formula here for circumscribing regulation to "conduct" rather than "expressive conduct" was at odds with the reality of the case.

The regulation of race-motivated conduct exists because of the compelling state interest in preventing racism from affecting minorities. [52] Wisconsin's endeavor with Sec. 939.645 was twofold: a) to punish racist violence, and b) to deter future racist violence. In this sense, Mitchell was not merely about conduct in the abstract, but about preventing or deterring future racist acts, providing a legal recognition that a racist crime is worse than a normal one. As such, the state inherently attempted to suppress racial views with its legislation.

The Supreme Court admitted the validity of this claim through its message that racist crimes "inflict greater individual and societal harm." [53] An assault victim is not more physically battered because the crime was hate-motivated; the greater harm of which the Court spoke was the harm of racism, the actualization of the horrors of intolerance. Therefore, the state—and now the Supreme Court—recognizes that conduct which harms an individual or group because of their race can be prosecuted. Furthermore, that greater harm is itself a speech act by virtue of it being intangible; the additional injury inflicted is from the racist thought.

The Court's acceptance of Wisconsin's motivation had double significance: it a) recognized that racism is a cognizable harm that needs to be remediated and b) affirmed that racist conduct has, embedded within it, expression that is harmful and can constitutionally be remediated. On its face, then, Mitchell seems like an implicit rejection of R. A. V. since it acknowledges that racist speech within some actions can be regulated against. Looking at St. Paul's interest in R. A. V. as completely separate from that of Wisconsin's in Mitchell (as the former majority did by endorsing the latter decision) ignored the social interest and obligation of a society embracing diversity and ending racism. Still, it is true that the Court has held that conduct is not without expression because it is an action and, correspondingly, expression is not devoid of conduct because it is not physical. [54] To answer the resulting question of when does expression become conduct, First Amendment jurisprudence requires us to consider the harm speech has.

IV. Extreme Racist Speech as Conduct

The distinction between expression and conduct rests on the Supreme Court's understanding that words are just words; though deplorable, they are not physically harmful and thus not regulable (unless, of course, they are inciting or fighting words). But this part looks to prove that extreme racist speech, including that by Viktora, can have the same or similar deleterious effect as traditional conduct, and thus fulfills the same rationale that the Supreme Court endorsed in Mitchell, namely preventing race-motivated conduct from seriously harming minorities.

A. Racism's Harms

Social scientists, psychologists, and legal theorists have recognized that expressively racist symbols can cause individual harm. Systemic and targeted racism leads to a psychological death of sorts by contributing to both the actual and self-perceived devaluation of minorities. [55] Racism is not just something an individual experiences once; it is a reality of life. The constant degradation, oppression, and fear instilled by the perpetrators of racist actions are wearing and harmful on any human being. Furthermore, there are tangible harms that are reminiscent of familiar tort claims, including emotional distress, difficulty in forming relationships or mental illness, higher blood pressure levels, and handicapped career pursuits. [56]

But beyond these severe injuries, theorists have alleged that racism has an intrinsic harm, called a deontic harm, meaning that racism has an "elemental wrongness" by its very nature, regardless of the individual harm it causes. [57] These theorists argue that racist expression offends the principle of equality codified into the Constitution by the Fourteenth Amendment, superseding any theoretical claim to ultimate freedom under the First Amendment. [58] The argument posits that society's commitment to equality must be active and requires that it "issue unequivocal expressions of solidarity with vulnerable minority groups and make positive statements affirming its commitment to those ideals," of which anti-hate laws are a part. [59] This argument in favor of regulation focuses on how a government can symbolically support oppressed minorities.

This abstract harm also gives rise to another powerful argument against the notion of equating racism to mere expression.

As critical theorist and professor Patricia Williams has eloquently articulated, racism is a form of "spirit-murder" by which minorities, especially Black people, have their existences "obliterat[ed]." [60] Williams argued that spirit-murder comes from "formalized distortions of thought," which in turn "produces social structures centered around fear and hate." [61] In other words, the warped speech in which racists engage results in individual spirit-murder and systemic marginalization and oppression.

The reality of spirit-murder means, Williams argued, that society needs to consider as a crime "no less than the equivalent of body murder." [62] Spirit-murder can have the same practical effect on a group, on an individual and on a generation that body murder does, and it demands a proportional response:

> We need to see it as a cultural cancer; we need to open our eyes to the spiritual genocide it is wreaking on blacks, whites, and the abandoned and abused of all races and ages. We need to eradicate its numbing pathology before it wipes out what precious little humanity we have left. [63]

Notably, Williams' spirit-murder focuses on racist conduct and how that affects minorities; criminalizing spirit-murder does not seek to proscribe the thought of racism, but rather its manifestation. Indeed, the harms of racism described in this section are given life and power through conduct like Viktora's.

Racist conduct, therefore, is a tool of white supremacy that seeks to destroy, devalue, and subjugate. It is not just speech; it is part of an oppressive system of conduct. Furthermore, racist acts are intentional. One does not accidentally burn a cross on a Black family's front yard; one does not mistakenly send bomb threats to civil rights activists. This purpose is key, since it demonstrates that racist conduct is not merely a byproduct of the marketplace of ideas, but rather a specific tool used to devastate the livelihoods of minorities in America.

When these arguments are considered together, a vastly incomplete and insufficient but workable picture of how racism affects minorities emerges. These notions collectively serve as a reminder that the principles of free speech, though first in the Bill of Rights, do not supplant the commitment to equality and safety that the Constitution also demands of us. In light of these connections, it is not a radical concept that ideas and speech are essential to white supremacy. As one theorist notably put it, "[t]he goal of white supremacy is not achieved by individual acts or even the cumulative acts of a group, but rather it is achieved by the institutionalization of the ideas of white supremacy." [64] Speech like Viktora's furthers that institutionalization; it is then the job of the institutions to help prevent it.

B. Racist Harm in Constitutional Law

During oral argument for R. A. V., the justices appeared extremely concerned with identifying how "harm" applied to constitutional law. The justices questioned the advocate for St. Paul on why these specific words could be said to "inflict injury" in a manner unique with respect to other fighting words. [65] They attempted to identify why fighting words could ever be different from each other purely because of content, something which Scalia could not fathom and which premised his opinion. By considering R. A. V. only through the lens of the majority-minority protections of the First Amendment, and by failing to account for the implications of racism, the Court looked at free speech from a detached, borderline inhuman, perspective.

To say that racist acts are the same as any minority viewpoint is to ignore what racism is. But, despite Scalia's insistence on a race-neutral approach to R. A. V., the harms of racism have found, and should continue to find, some redress in constitutional law.

Brown v. Board of Education is typically not analyzed as a speech case, but it certainly has bearing on how the Supreme Court considers the matter of racism in the country. When the Warren Court overturned the "separate but equal" doctrine, they did so on the grounds of the intrinsic and measurable harms of racism. In the decade preceding the case, the Court had begun to recognize that "separate but equal" often meant separate and unequal, including by ruling in favor of a Black student who was forced to attend a subpar Texan law school in Sweatt v. Painter. [66] The Court engaged in a detailed comparison of the two schools, demonstrating the disparity in education that Sweatt would have as a result of the separation. [67] The Court's logic rested on the recognition of the harm to the petitioner: that he would not receive a "substantially equal" education. [68] To overturn Plessy v. Ferguson, the Court would have to engage in a very different kind of analysis, one that acknowledged that even schools with exactly identical education would still be invalid under the nation's commitment to equality.

The Court acknowledged in Brown that the schools in Topeka, Kansas, were generally equal, separating the case from Sweatt v. Painter. [69] Instead, the Court said it had to rely on a holistic analysis of the relevance of public schools in American life and the effect that separation would have on individuals. The result was conclusive: "To separate them [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." [70] Perhaps one of the most consequential sentences in American constitutional history, the Warren Court recognized that segregation is harmful not because of the different opportunities it created, but because of how it affected Black children on a deeper level; it was a deontic harm. Moreover, the Court demonstrated that segregation itself was a speech act; the attitudes, prejudices, and ideas that segregation communicated were what the Warren Court sought to eliminate, similar to my analysis above of the Mitchell case. The Brown decision cemented into constitutional law the principle that legislatures can and must respond to the deleterious effects that white supremacy has on minorities by ending systemic oppression through proscribing individual acts of racism in schools. Racism, as established in the preceding section, generates that same "feeling of inferiority" that the Warren Court sought to mitigate with desegregation; it follows that courts can engage in similar analysis.

The First Amendment should be considered in the context of this coexisting and equal interest. It could be contended that the Supreme Court has done so, affording enough protection against these harms through Wisconsin v. Mitchell. After all, considering my analysis of the deterrence implications of Wisconsin's statute, could it not be said that proscribing conduct is sufficient for stopping racism? But society has a fundamental interest, expressed in American jurisprudence, to prevent the advocacy of violence insofar as it relates to a plausible actualization of that violence, especially regarding racism. [71] Punishing acts of violence never sufficiently redresses the violent act; the victim of a hate crime is not vindicated by the perpetrator serving a longer sentence. That victim still experienced and is affected by the racist act and will continue to be affected by future acts.

A government need not wait until murder has been committed to stamp out the impacts of racism. Indeed, the distinction that Wisconsin and R. A. V. drew was a gift to violent white supremacists; it carved out an area in which they could operate, free of government supervision. Under the First Amendment, a person is entitled to be racist, however reprehensible that is; but a person is not entitled to let that racism destroy the lives of others in their nation.

V. Conclusion

Racist speech has been a constitutional conundrum since R. A. V. v. St. Paul forced the distinction between "conduct" and "expression." In that case, the Supreme Court considered racist speech to be akin to any other "minority" speech; it was the majority suppressing the minority, no matter how much all enlightened people may hate that minority. But the Court's opinion was written from an ahistorical lens that ignored that Black people are an oppressed minority subjugated by the constant reality of racist acts. The next year's Wisconsin v. Mitchell ruling gave legislatures more breadth to address that question, but in doing so, it recognized the intrinsic harm of racist conduct. The harm proscribed is racism, not assault, and just because the harm is easier to see when a racist person assaults someone does not mean it is invisible elsewhere. The plethora of research into racism supports that general statement, which the Supreme Court historically recognized before R. A. V. This analysis makes clear that, since racist conduct is made extra harmful because of its speech component, speech acts themselves can be regulated due to their same harm.

The question remains of where to draw the line: when is expression merely expression? It is true that proscribing racism, as attractive as it may sound to those of us abhorred by racists' actions, does little and in fact works against creating a non-racist or anti-racist society. But degrees of racist acts can still be distinguished: "To suggest, as some courts have, that the law cannot distinguish between political comments and racial defamation is akin to equating a Michelangelo nude to a piece of hard-core pornography." [72] While all racism is deplorable and harmful, there are some actions—such as burning a cross in a Black family's yard—that are so undoubtedly harmful that they must be regulated.

The duty of any nation committed to equality is to support, protect, and defend its minorities. A chief way is certainly through freedom of speech; it is that freedom that allowed abolitionists and civil rights activists to thrive, that brought the vote to Black people and women, that awoke America to its racist sins. But equally important, yet too often forgotten, is the affirmative commitment to mitigating the harms minority Americans face by virtue of this nation's past and present of racism. The stakes are high: it now falls on the law to realize that belief in justice.

[1] Brief for Respondent at 1, R. A. V. v. St. Paul, 505 U.S. 377 (1992) (No. 90-7675).
[2] Ruth Marcus, "Supreme Court Overturns Law Barring Hate Crimes," The Washington Post, June 22, 1992, https://www.washingtonpost.com/archive/politics/1992/06/23/supreme-court-overturns-law-barring-hate-crimes/5490cf61-9af3-461d-8862-d94c4e8c453e/.
[3] Brief for Respondent at 1.
[4] R. A. V. at 381.
[5] Wisconsin v. Mitchell, 508 U.S. 476 (1993).
[6] Definition borrowed from Kenneth Ward, "Free Speech and the Development of Liberal Virtues: An Examination of the Controversies Involving Flag-Burning and Hate Speech," University of Miami Law Review 52, no. 3 (1998): 765.
[7] R. A. V. v. St. Paul, 505 U.S. 377, 379 (1992).
[8] Id. at 380.
[9] St. Paul, Minn., Legis. Code § 292.02 (1990).
[10] R. A. V. at 380.
[11] In re Welfare of R. A. V., 464 N.W.2d 507, 510 (Minn. 1991) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).
[12] R. A. V. v. St. Paul at 381.
[13] Id. at 383 (quoting Chaplinsky at 572).
[14] Id.
[15] Id. at 387.
[16] Id. at 388.
[17] Id.
[18] Id. at 391.
[19] Id. at 391-92.
[20] Id. at 394 (quoting Brief for Respondent at 28, R. A. V., 505 U.S. 377 (No. 90-7675)).
[21] Id.
[22] Id. at 397 (White, J., concurring).
[23] Id. at 415.
[24] Id. at 413.
[25] Id. at 400.
[26] Id. at 401.
[27] Id. at 407.
[28] Id. at 415 (Blackmun, J., concurring).
[29] Id. at 428 (Stevens, J., concurring).
[30] Id. at 416 (Blackmun, J., concurring).
[31] Id. at 429 (Stevens, J., concurring).
[32] Wis. Stat § 939.645 (1988).
[33] Wisconsin v. Mitchell, 508 U.S. 476, 482 (1993) (quoting 169 Wis. 2d 153, 163, 485 N.W.2d 807, 811 (1992)).
[34] Id. at 479.
[35] Id. at 484.
[36] Id. at 485.
[37] Id. at 485-86.
[38] Id. at 487-88.
[39] Id. at 488-89.
[40] Edward J. Cleary, "Reflections on R.A.V.," William Mitchell Law Review 18, no. 4 (1992): 932.

[41] See Section IV.A ("Racism's Harms"); see generally Council of Economic Advisors, "Racial Discrimination in Contemporary America," White House Issue Brief, July 3, 2024, https://www.whitehouse.gov/cea/written-materials/2024/07/03/racial-discrimination-in-contemporary-america/.
[42] Transcript of Oral Argument at 30, R. A. V. v. St. Paul, 505 U.S. 377 (1992) (No. 90-7675).
[43] Id. at 30-31.
[44] See, e.g., "Burning Cross," Anti-Defamation League, https://www.adl.org/resources/hate-symbol/burning-cross.
[45] R. A. V. v. St. Paul, 505 U.S. 377, 396 (1992)
[46] Id. at 388.
[47] Id. at 396.
[48] Brief for the State of Minnesota et al. as Amici Curiae Supporting Respondents at 12-13, R. A. V. (No. 90-7675).
[49] R. A. V. at 379.
[50] St. Paul, Minn., Legis. Code § 292.02 (1990).
[51] Considering this analysis, the majority and concurrences essentially talked past each other in this case. The majority took issue with the second part of the statute, which clarified the motivations specifically targeted because of their especially harmful nature. The concurrences, meanwhile, accepted that as valid but took issue with the first part.
[52] It is important to note here that the violence committed was not actually against a minority. Mitchell was a Black man who assaulted a white man on the basis of race. Wisconsin v. Mitchell, 508 U.S. 476, 480 (1993). However, the intent of the statute was undoubtedly to regulate racist crimes, and the Supreme Court's holding reflects that purpose. Thus, the analysis here can focus on the harm to minorities as the justification for the statute, even if this specific application was not directly in service of that overarching goal.
[53] Id. at 487-88.
[54] Id. at 484 (referencing United States v. O'Brien, 391 U.S. 367, 376 (1968)).
[55] Richard Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling," in Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment (Westview Press, 1993; repr. Routledge, 2019), 91.
[56] Delgado, "Words that Wound," 91-92.
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[58] Post, "Racist Speech," 118.
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[60] Patricia Williams, "Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism," University of Miami Law Review 42 (September 1987): 151.
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[66] Sweatt v. Painter, 339 U.S. 629, 636 (1950).
[67] Id. at 632-33.
[68] Id. at 634.

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[70] Id. at 494.
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Public Law 117-169 Inflation Reduction Act: Implication for US Drug Pricing Framework in the Era of Personalized Medicine

JIAMIN (SUNNY) LI

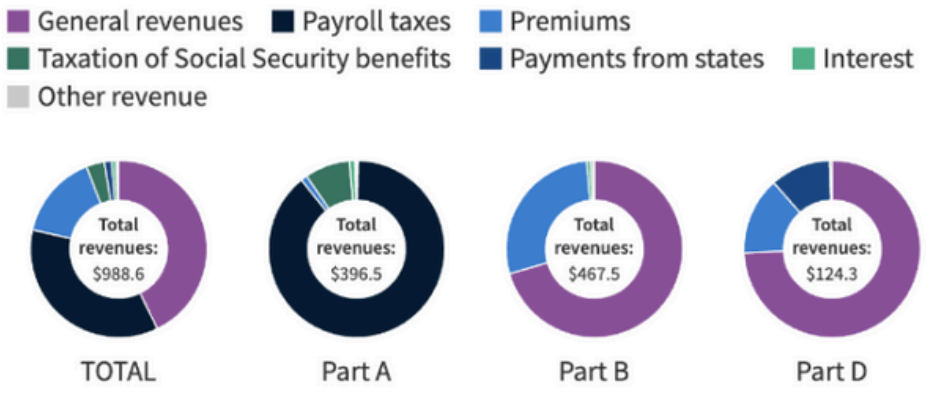
Abstract:
Enacted in August 2022 under the Biden Administration, the Inflation Reduction Act (Public Law 117-169) introduces groundbreaking reforms to the US healthcare system, particularly in prescription drug pricing and Medicare restructuring. Aimed at reducing federal expenditure while improving access to affordable healthcare, the IRA represents a dual-pronged approach to sustaining economic development. This article examines the implications of the IRA for the US healthcare system, situating its analysis within the broader context of the Biden Administration's overarching economic objectives.

Focusing specifically on Title I, Subtitle B: Prescription Drug Pricing Reform, the article delves into Medicare's newfound authority to negotiate drug prices directly with pharmaceutical manufacturers. In doing so, it highlights two pivotal factors that influence drug and therapy pricing. First, the analysis explores the role of key stakeholders in the drug pricing pipeline, with particular attention on the role of Pharmacy Benefit Managers (PBMs) and the global supply chain dynamics of finished dosage forms and Active Pharmaceutical Ingredients (APIs). Second, it examines the growing impact of personalized medicine, also known as precision medicine, which has altered treatment paradigms by tailoring therapies to individual patient profiles. Given that the United States continues to lead the world in prescription drug prices, the article also situates the IRA within a global context, comparing its drug price negotiation framework to established systems in other regions.

Inflation Reduction Act Background

The Biden Administration initially introduced the Build Back Better Plan, a proposed $3.5 trillion legislative package aimed at advancing public investments in social policy, infrastructure, and environmental initiatives. This comprehensive plan comprised three components: the American Rescue Plan for COVID-19 relief, the American Jobs Plan for infrastructure and climate change, and the American Families Plan for social policy. Together, these initiatives were designed to foster immediate economic growth while ensuring long-term sustainability. However, due to unified Republican opposition and inflation concerns voiced by moderate Democratic senators, both the Build Back Better Plan and its scaled-down versions failed to pass. Despite these setbacks, the Biden Administration successfully enacted four significant investment laws to address its core priorities, including the American Rescue Plan Act of 2021, the Infrastructure Investment and Jobs Act of 2021, the CHIPS and Science Act of 2022, and the Inflation Reduction Act of 2022.

The overarching goal of these legislative efforts is not to reduce the federal deficit but to enhance the competitiveness of US industries, particularly in infrastructure and renewable energy, while extending critical social benefits. The Inflation Reduction Act (IRA) emerges as a central legislative vehicle for achieving these objectives while keeping federal spending in check, combining climate change mitigation through renewable energy investment and deficit reduction through healthcare reform under one framework. The Biden Administration has specifically targeted the healthcare sector, with a particular emphasis on Medicare Part D prescription drug pricing, as a key source of budgetary savings due to two primary factors: the high federal expenditure in this field and the significant reliance on general revenues to fund Medicare Part D drug plans.



Sources of Funding for Medicare: General revenues account for the majority of funding for Part D

Source: Kaiser Family Foundation (KFF) analysis of Medicare financing data from Centers for Medicare & Medicaid Services (CMS), 2023. Retrieved from https://www.kff.org/health-policy-101-medicare/?entry=table-of-contents-how-much-does-medicare-spend-and-how-is-the-program-financed

Medicare funding source consists of two independent trust funds: the Hospital Insurance (HI) Trust Fund and the Supplementary Medical Insurance (SMI) Trust Fund. The HI Trust Fund primarily finances Medicare Part A, which covers inpatient hospital care, skilled nursing facilities (SNF), and hospice services. It is funded through dedicated payroll taxes, with employees and employers each contributing 1.45% of wages, supplemented by an additional 0.9% tax on high-income earners. In contrast, the SMI Trust Fund supports Medicare Part B (outpatient services) and Part D (prescription drug coverage). Unlike the HI Trust Fund, SMI revenue comes primarily from beneficiary premiums and general fund transfers from the US Treasury. These transfers, which increase automatically with expenditures, make the SMI Trust Fund structurally solvent but deeply reliant on federal financing. SMI revenues are projected to grow faster than the economy, increasing the share of Medicare financed by general revenues from 43% in 2022 to a projected amount of 49% by 2040. [1] Given that Medicare Part D drug plans are funded through the SMI, reforming prescription drug pricing offers a direct opportunity to control Treasury outflows.

Table II.F2.—Average Annual Rates of Growth in SMI and the Economy

[In percent]

Calendar years	SMI			U.S. Economy			Growth differential[1]
	Beneficiary population	Per capita expenditures	Total expenditures	Total population	Per capita GDP	Total GDP	
Historical data:							
1968–2002	2.2%	11.0%	13.4%	1.0%	6.5%	7.5%	5.4%
2003–2012	2.0	8.4[2]	10.6[2]	0.8	3.2	4.0	6.3[2]
2013–2022	2.5	3.7	6.3	0.5	4.0	4.6	1.7
Intermediate estimates:							
2023–2032	2.0	5.9	8.0	0.6	3.6	4.2	3.6
2033–2047	0.6	4.7	5.3	0.5	3.5	4.0	1.2
2048–2072	0.7	3.7	4.4	0.4	3.6	4.1	0.3
2073–2097	0.4	3.7	4.1	0.4	3.7	4.1	0.0

[1]Excess of total SMI expenditure growth above total GDP growth, calculated as a multiplicative differential.
[2]Includes the addition of the prescription drug benefit to the SMI program in 2006. Excluding 2006, the average annual per capita expenditure increase is 5.6 percent, the total expenditure increase is 7.8 percent, and the growth differential is 3.8 percent.

Past and Projected Growth in SMI and the Economy

Fiscal year	Percentage of income taxes[1]
Historical data:	
1970	0.8%
1980	2.2
1990	5.9
2000	5.4
2010	19.6
2015	14.0
2016	16.2
2017	16.4
2018	16.8
2019	17.0
2020	19.6
2021	18.5
2022	13.3
Intermediate estimates:	
2030	22.0
2040	26.9
2050	28.0
2060	29.1
2070	30.1
2080	30.5
2090	30.0
2097	29.9

[1]Includes the Part D prescription drug benefit beginning in 2006.

SMI Government Contribution as a Percentage of Personal and Corporate Federal Income Taxes

Source: "2023 Medicare Trustees Report," CMS, 2023, Retrieved from https://www.cms.gov/oact/tr/2023

IRA's Title I—Committee on Finance serves as the backbone of the act, with subtitles reflecting the legislative priorities of key Congressional committees. [2] Subtitle A—Deficit Reduction centers on tax reforms and enhanced IRS funding to generate revenue and improve tax compliance. It introduces a corporate alternative minimum tax of 15% on adjusted financial statement income for corporations earning over $1 billion annually and a 1% excise tax on the fair market value of stock repurchases by publicly traded corporations. Additionally, it allocates $80 billion to the IRS over ten years, broken into four main categories—enforcement, operations support, business system modernization, and taxpayer services—with $45.6 billion dedicated to enforcement activities aimed at ensuring equitable contributions from corporations and high-income individuals. [3]

Subtitle B—Prescription Drug Pricing Reform addresses the high costs of prescription medications through transformative healthcare reforms. This subtitle grants Medicare the authority to negotiate prices for drugs, introduces inflation rebates for manufacturers, and establishes a $35 monthly cap on insulin copayments. Additionally, it focuses on redesigning the Medicare Part D benefit structure by capping annual out-of-pocket expenses and limiting premium growth to a maximum of 6% per year. Collectively, these measures are designed to reduce federal healthcare expenditures while alleviating the financial strain on Medicare beneficiaries' out-of-pocket costs . Subtitle C—Affordable Care Act Subsidies focuses on expanding healthcare accessibility. It extends enhanced Affordable Care Act (ACA) subsidies through 2025, eliminating the "subsidy cliff" for households earning over 400% of the federal poverty level. By ensuring continued affordability of health insurance premiums, this provision enhances the accessibility of healthcare, particularly middle-income Americans.

Subtitle D—Energy Security prioritizes renewable energy and climate initiatives to align with the administration's clean energy objectives. It includes tax incentives and funding to accelerate the deployment of renewable technologies, support domestic manufacturing of clean energy components, and promote innovative solutions. Key measures include extended tax credits for wind and solar energy, new credits for clean hydrogen production and carbon capture, incentives for electric vehicle purchases, and investments in climate-resilient infrastructure. Collectively, these provisions aim to reduce greenhouse gas emissions by approximately 40% by 2030, strengthen energy security, and drive economic growth in the renewable energy sector.

Within the IRA's framework, revenue-generating measures such as corporate taxes, environmental fees, and prescription drug pricing reforms are pivotal to funding its investments and achieving fiscal responsibility. Drug Pricing related provision are projected to yield substantial savings by 2031, which include:

- Drug Price Negotiation (Sections 11001–11003): Medicare gains the authority to negotiate prices with manufacturers for single-source, high-cost brand-name drugs, projected to save $98.5 billion. [4]
- Inflation Rebates (Sections 11101–11108): Manufacturers must issue rebates to Medicare if drug prices increase faster than inflation, projected to save $56.3 billion. [5]
- Delay of the Trump Administration's Rebate Rule (Section 11401): Extends the suspension of the Trump Administration Rule Relating to Eliminating the Anti-Kick-Back Statute Safe Harbor Protection for Prescription Drug Rebates, projected to save $122 billion. [6]

These prescription drug pricing reforms are central to the IRA's strategy for generating revenue and reducing federal spending, combined with taxes on corporations and environmental fees, they collectively aim to reduce the federal deficit by over $300 billion over ten years, after offsetting the costs of climate and energy investments. Building upon the framework of the initially proposed Build Back Better Act, the IRA places additional emphasis on accounting for the potential inflationary impacts of its provisions by introducing groundbreaking changes in the healthcare sector. To fully comprehend the implications of these reforms in the healthcare industry, it is essential to examine the historical landscape of the US public health system, which transitioned from a private sector focus to increased public involvement, and the future trajectory of regulation.

US Healthcare Policy

Government-initiated examinations of the healthcare system date back to the 1920s. Active from 1927 to 1932, the Committee on the Cost of Medical Care investigated the rising costs of healthcare and published key findings deemed necessary: organized medical practice, universal public health services, group payment systems through insurance or taxation, urban-rural healthcare coordination, and improved professional education. [7] This study elevated healthcare issues to the forefront of public and governmental attention. By bringing up organized, universal access to public health services under group payment systems for medical costs, the Committee's findings laid important groundwork for the concept of public health insurance programs.

Despite this early recognition, the shift from private to public involvement in healthcare was gradual . In 1929, Baylor Hospital pioneered the prepaid hospital insurance plan, prototyping for the Blue Cross system. Subsequent efforts to expand public healthcare, such as the National Health Bill of 1939 and the Wagner-Murray-Dingell Bill of 1943, proposed universal health insurance but faced opposition from the American Medical Association (AMA). Incremental progress continued through measures such as the Kerr-Mills Act of 1960, which provided federal grants to states to fund medical care for the elderly poor. The 1965 enactment of Medicare and Medicaid was a watershed moment that institutionalised the federal government's role in healthcare and significantly expanded coverage for vulnerable populations.

Healthcare reforms accelerated in recent years with the passage of the Patient Protection and Affordable Care Act (ACA) in 2010, which expanded Medicaid eligibility, mandated individual insurance coverage, established Health Insurance Marketplaces for insurance plan comparison and purchase, and offered premium tax credits and cost-sharing reductions for lower-income individuals. [8] More recently, the American Rescue Plan Act (ARPA) of 2021 temporarily increased ACA subsidies by removing the 400% federal poverty level income cap and ensuring that no household pays more than 8.5% of its income for benchmark plans. [9] These measures reflect the federal government's growing commitment to expanding healthcare access, particularly in response to the COVID-19 pandemic.

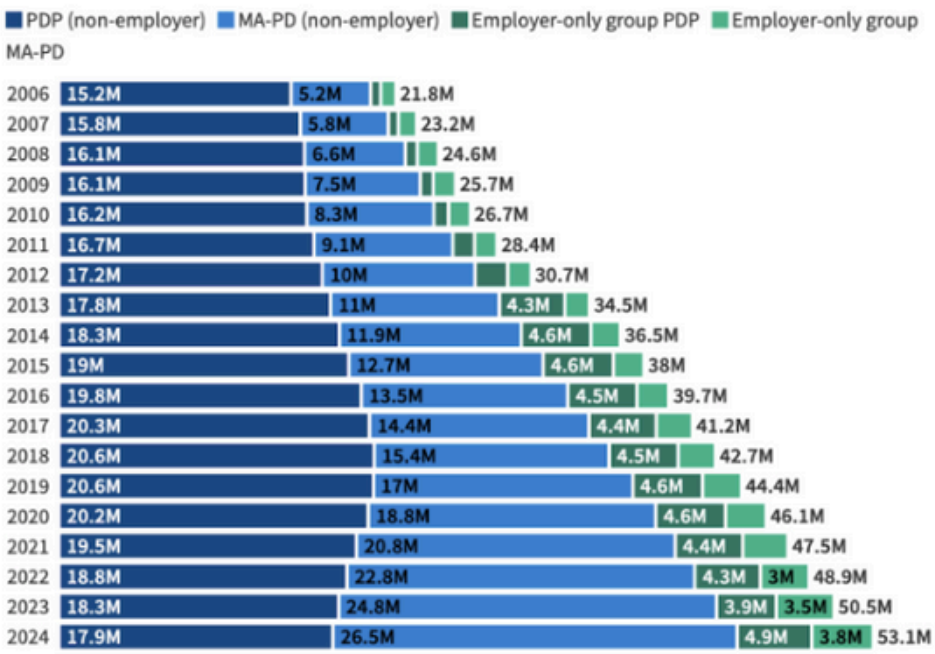
As the evolution of public healthcare insurance continued, legislative acts also addressed the critical issue of medical costs, specifically prescription drug pricing. The Medicare Prescription Drug, Improvement, and Modernization Act (MMA) of 2003 introduced Medicare Part D in 2006, and this voluntary prescription drug benefit provides subsidized access for seniors and individuals with disabilities. Beneficiaries could enroll in stand-alone Prescription Drug Plans (PDPs) or Medicare Advantage Plans with Prescription Drug Coverage (MA-PDs). Notably, the act included a non-interference clause, which stated that the Health and Human Services (HHS):

> may not interfere with the negotiations between drug manufacturers and pharmacies and PDP [prescription drug plan] sponsors, and may not require a particular formulary or institute a price structure for the reimbursement of covered part D drugs. [10]

This provision starkly contrasts with centralized pricing models where government negotiation is the standard practice. The ACA of 2010 further exemplified the dual emphasis on healthcare expansion and drug pricing, by implementing provisions to close the Medicare Part D "donut hole," the phase following initial coverage during which beneficiaries pay increased shares of drug costs until reaching the threshold of catastrophic coverage. These reforms aimed to reduce out-of-pocket costs for beneficiaries, particularly for those with high prescription drug needs, but still worked within the same existing framework.

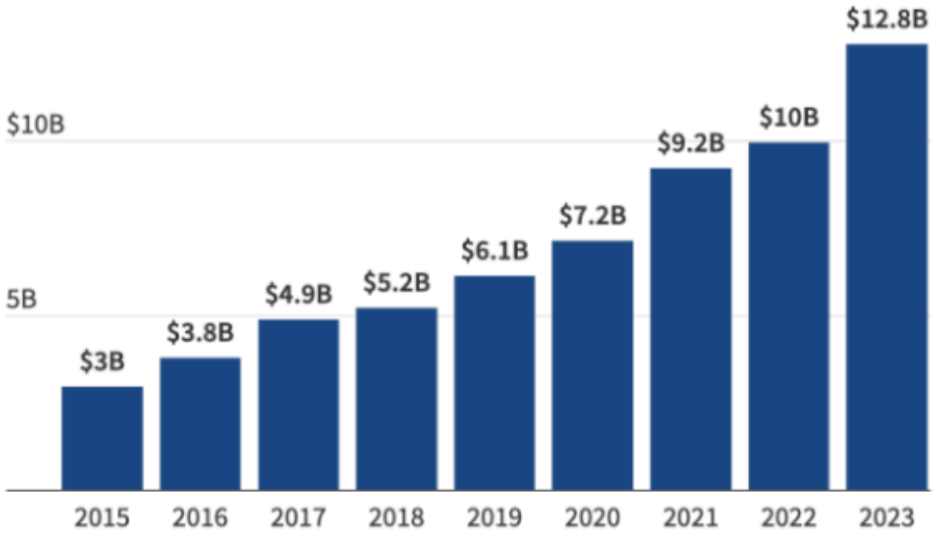
Prior to these recent developments, earlier legislation that laid the groundwork for pharmaceutical drug pricing was the Hatch–Waxman Act (Public Law 98-417) of 1984. This law simplified the approval process for generic drugs and established the Abbreviated New Drug Application (ANDA) pathway, allowing generic manufacturers to demonstrate bioequivalence to brand-name drugs without duplicating costly clinical trials. Its aim was to increase competition in the pharmaceutical industry and reduce drug costs in the market.

These legislative milestones culminated in the present Medicare framework. By November 2024, Medicare served 67.7 million beneficiaries, with 53 million enrolled in Medicare Part D plans. [11] Among these, 57% participate in MD-PD plans, while 43% are enrolled in stand-alone PDPs. [12] The evident trend of growing enrollment in MA-PD plans compared to other alternatives, especially PDPs, can be attributed to two factors: first, many subsidized MA-PD plans offer low premiums, often as low as $0 (with 70% of enrollees in plans that charged no additional premium); second, the number of PDPs offered is set to drop by 26% in 2025. [13] The low premiums of MA-PD plans are primarily attributable to the excess funds from HI and SMI after covering Part A and Part B services, which enables additional supplemental benefits such as lower cost-sharing, additional services, and rebates applied to Part B and/or Part D premiums. [14]



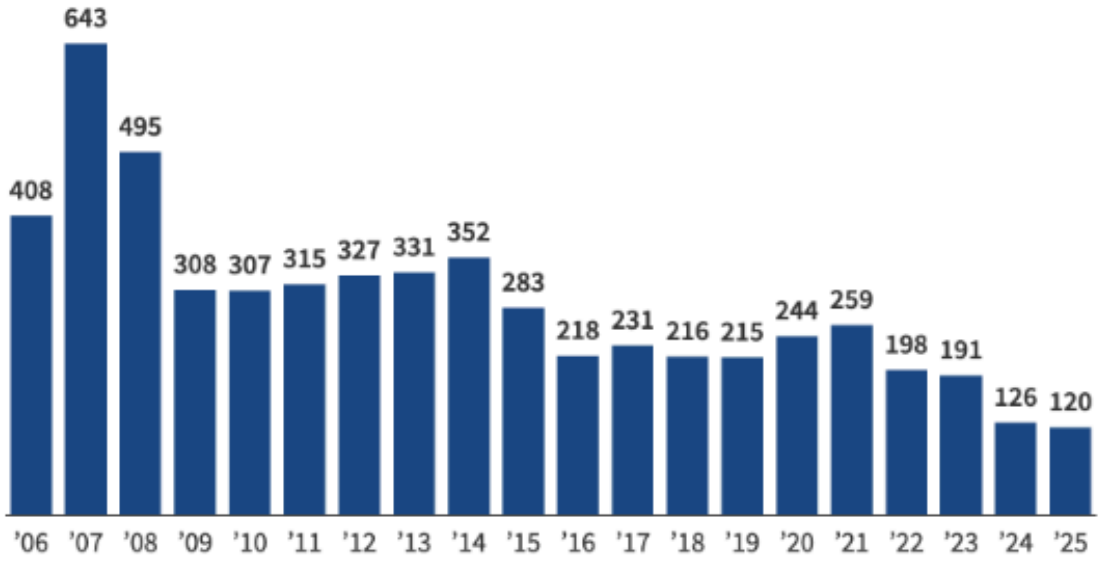
Enrollment trends of significant rise in Medicare Advantage Prescription Drug Plans (MA-PDs)

Source: Kaiser Family Foundation (KFF) analysis of Medicare Part D enrollment data from Centers for Medicare & Medicaid Services (CMS), 2006-2024. Retrieved from https://www.kff.org/medicare/issue-brief/a-current-snapshot-of-the-medicare-part-d-prescription-drug-benefit/



Spending on Medicare Advantage Plan (MA-PD) more than doubled in the last five years from 2019-2023.

Source: Kaiser Family Foundation (KFF) analysis of Medicare Advantage Plan spending trends from Centers for Medicare & Medicaid Services (CMS), 2015–2023. Retrieved from https://www.kff.org/health-policy-101-medicare/?entry=table-of-contents-how-does-medicare-pay-private-plans-in-medicare-advantage-and-medicare-part-d.



Availability of Medicare Part D stand-alone drug plans without premiums for beneficiaries receiving benchmark

Source: Kaiser Family Foundation (KFF) analysis of Medicare Part D stand-alone drug plans without a premium for beneficiaries receiving benchmark plans, based on Centers for Medicare & Medicaid Services (CMS) data, 2006–2025. Retrieved from https://www.kff.org/medicare/issue-brief/a-current-snapshot-of-the-medicare-part-d-prescription-drug-benefit/#:~:text=For%202025%2C%20under%20the%20standard,of%2Dpocket%20spending%20totals%20%242%2C000.

Similarly to the expansion of governmental efforts to enhance healthcare accessibility, public involvement in Medicare Part D is poised to grow, shifting from reliance on rebates between private companies to more direct federal oversight. In 2023, approximately 11% of Medicare beneficiaries lack creditable drug coverage, defined as coverage equivalent to the standard Medicare Part D plan. [15] The persistent gap in prescription drug accessibility underscores the need for public oversight of pharmaceutical pricing and requires tackling two integrated challenges: accessibility and federal spending.

Both the Biden and Trump administrations regard issues of healthcare accessibility and federal spending as significant, though they differ in their approaches and emphasis on which stakeholders to target for reform. The Trump Administration's Anti-Kickback Statute, finalized in November 2020, aimed to change how drug rebates function in Medicare Part D and Medicaid managed care by removing the existing safe harbor protection for rebates paid by pharmaceutical manufacturers to Pharmacy Benefit Managers (PBMs) and Medicare Part D plans. It introduced new safe harbors for discounts provided directly to patients at the point of sale and for certain fixed-fee arrangements between manufacturers and PBMs. However, the Congressional Budget Office (CBO) estimated that eliminating safe harbor protections for pharmaceutical rebates would increase federal spending by approximately $177 billion over the 2020–2029 period. [16] In contrast, the Biden Administration has focused on empowering Medicare to negotiate drug prices directly with pharmaceutical manufacturers, as outlined in the IRA.

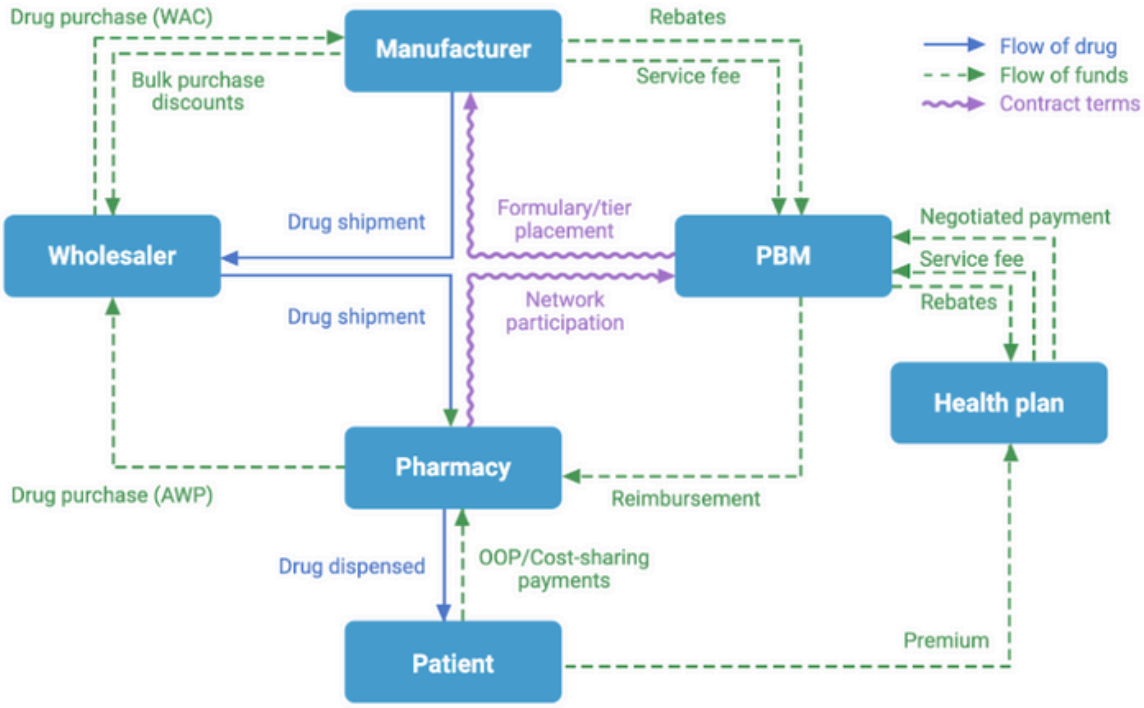
These differing strategies highlight both parties' commitment to reducing healthcare costs but divergence in method: the Trump Administration's modification of the rebate system within the drug pricing pipeline that affects PBMs and insurers, and the Biden Administration's emphasis on direct price negotiations with manufacturers.

The prescription drug pipeline connects manufacturers on one end to consumers on the other and plays a pivotal role in drug pricing. While the federal government is beginning to adopt a more active supervisory and negotiating role under the IRA, the process of determining prescription drug prices remains highly complex, involving numerous stakeholders and multifaceted factors. Commonly, the term "drug price" refers to the list price, formally known as the Wholesale Acquisition Cost (WAC) set by manufacturers for wholesalers. However, the final net price paid by insured patients reflects a series of markups and adjustments throughout the supply chain, including rebates, service fees, and pharmacy reimbursements. To fully grasp the prices ultimately paid by consumers, it is critical to examine the interplay of these stakeholders and the external factors influencing the pricing process, in addition to federal oversight and Medicare structuring.

Prescription Drug Pipeline

Drug pricing analysis focuses on two aspects: first, the flow of money within the US drug pricing pipeline, spanning from manufacturers to insurance plans to pharmacies; second, the impact of import for finished dosage forms and Active Pharmaceutical Ingredients (APIs) on pricing dynamics.

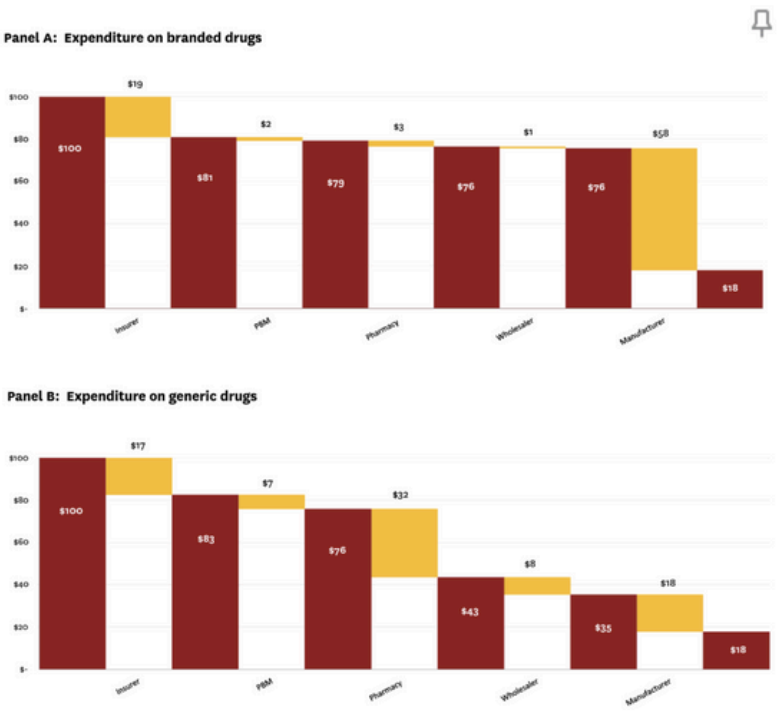
The US prescription drug pricing pipeline involves five main interconnected stakeholders, each influencing the final cost of medications. The process begins with pharmaceutical manufacturers, who set a list price known as the Wholesale Acquisition Cost (WAC) at which wholesalers purchase drugs. Wholesalers then distribute these drugs to pharmacies or healthcare providers, typically at a markup above the WAC to cover operational costs and profit margins. Pharmacy Benefit Managers (PBMs) then negotiate rebates and discounts with manufacturers by leveraging their influence over formulary placement. For pricing benchmarks, Average Wholesale Price (AWP) is commonly used for brand-name drugs, though it often diverges from actual market prices. For generic drugs, alternative benchmarks like Maximum Allowable Cost (MAC) schedules or the National Average Drug Acquisition Cost (NADAC) are typically employed. PBMs also negotiate directly with pharmacies, setting reimbursement rates and determining which pharmacies will be part of their in-network arrangements under various health insurance plans. These negotiations, combined with manufacturer rebates, significantly affect the final out-of-pocket costs for patients. Additionally, health plans and PBMs manage premiums, reimbursements, and negotiated payments, ensuring financial flows align with coverage policies. Together, these complex interactions between stakeholders determine the prices patients pay and the financial dynamics within the broader US healthcare ecosystem .



Flow of Funds and Drugs in the US Prescription Drug Pipeline Between Manufacturers, PBMs, Wholesalers, Health Plans, Pharmacies, and Patients

Source: American Progress. "Following the Money: Untangling US Prescription Drug Financing." Retrieved from https://www.americanprogress.org/article/following-the-money-untangling-u-s-prescription-drug-financing/

In 2023, total pharmaceutical expenditures in the United States grew 13.6% to reach $722.5 billion. Of the total expenditures, retail pharmacies accounted for $307.8 billion (42.6%), while mail-order pharmacies contributed $206.6 billion (28.6%). The remaining 28.8% of expenditures were attributed to clinics, nonfederal hospitals, and other healthcare facilities. [17] An analysis of 2015 US Securities and Exchange Commission filings from major publicly traded companies found that manufacturers captured the largest share of gross (71%) and net (26%) profit margins, followed by insurers (22% gross, 3% net), pharmacies (20% gross, 4% net), pharmacy benefit managers (PBMs) (6% gross, 2% net), and wholesalers (4% gross, 0.5% net). [18] For every $100 spent at retail pharmacies, approximately $41 accrues to manufacturers (including $15 in net profit) and the rest is distributed among intermediaries, including wholesalers, pharmacies, PBMs, and insurers (with $8 in net profit shared among them). The allocation of profits also differs between branded and generic drugs: manufacturers capture higher gross margins on branded drugs (71%) compared to generic drugs (50%), while pharmacies see significantly higher gross margins on generics (43%). [19]

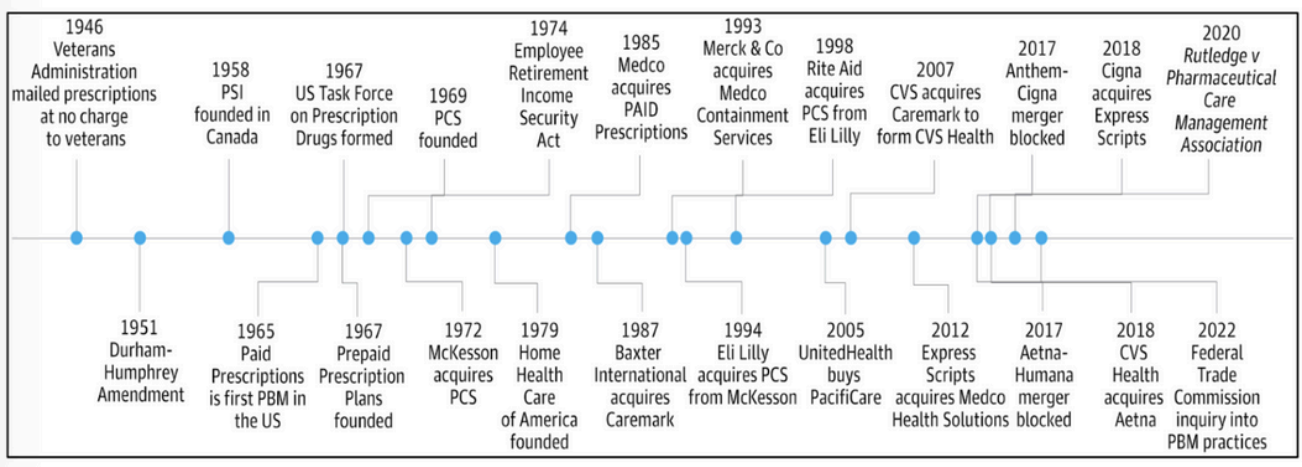


Flow of a Hypothetical $100 Expenditures on Drugs through the US Retail Distribution Channel

Source: USC Schaeffer. Flow of Money Through the Pharmaceutical Distribution System. Retrieved from https://healthpolicy.usc.edu/research/flow-of-money-through-the-pharmaceutical-distribution-system/

Despite their relatively low margins compared to other stakeholders who provide distinct services, PBMs are highly involved intermediaries between manufacturers, pharmacies, and health plans but play a more dispensable role in the prescription drug pipeline. By 2023, the PBM market had become highly concentrated, with CVS Caremark, Express Scripts, and OptumRx collectively controlling 79% of the market and serving 180 million enrollees. This concentration is particularly pronounced in the prescription drug market. 14 billion prescriptions processed by 91 PBMs in 2023 revealed a market concentration level of a Herfindahl-Hirschman Index (HHI) of 1972, with commercial insurance market scoring 1940 with 90 PBM participants and Medicare Part D scoring 2399 with only 21 PBM participants (HHI values between 1,500 and 2,500 indicative of moderate concentration and above 2,500 reflecting a highly concentrated market). [20]

Despite increasing integration over the past six decades, the core functions of Pharmacy Benefit Managers (PBMs) have remained consistent. PBMs acquire clients by competing in bids initiated by plan sponsors, such as employers or government entities, to assist with formulary development and pharmacy network management. PBMs negotiate substantial rebates and discounts from manufacturers by leveraging their influence over drug accessibility through formulary design. By placing drugs on preferred tiers, PBMs drive patient and provider preferences while ensuring greater accessibility for beneficiaries. They also manage contracts with network pharmacies, setting reimbursement rates and collecting service fees from health plans. Additionally, PBMs oversee utilization management—implementing restrictions on therapy types and quantities—and manage mail-order and specialty pharmacy operations.



PBM Industry Major Events Timeline

Source: JAMA Health Forum

Upstream in the domestic drug pricing pipeline, manufacturing costs are heavily influenced by the global supply chain. The global pharmaceutical supply chain exhibits a distinct division of labor, with Europe primarily producing Finished Dosage Forms (FDFs) and China and India leading in Active Pharmaceutical Ingredients (APIs). APIs are the active substances in medications responsible for their therapeutic effects, requiring complex chemical synthesis or extraction processes that involve multi-step reactions, purification, and strict impurity control. On the other hand, FDFs consist of tablets, capsules, or injectable solutions, ready for patient use by combining APIs with excipients—inactive substances that enhance stability, bioavailability, or drug delivery—through physical processes like blending, granulation, and tableting. Quality control in API production emphasizes chemical purity and potency, while FDF quality control focuses on dosage uniformity, dissolution, and stability. Europe's dominance in FDF exports is partly attributed to its pharmaceutical companies' emphasis on branded drugs and specialty products, which are often manufactured close to high-demand markets. Meanwhile, China and India leverage cost advantages and extensive chemical industries to dominate the production of APIs.

In Europe, Ireland stands out as a pivotal hub for pharmaceutical manufacturing, leveraging its low corporate tax rates, research and development tax credits, skilled workforce, and robust government incentives to attract some of the world's largest pharmaceutical companies. In 2023, Ireland emerged as the leading source of US pharmaceutical imports by value, accounting for $51.5 billion or 24.7% of total imports. [21] Ireland's prominence is reflected in its production of high-value branded drugs, including Humira, a top-selling treatment for autoimmune disorders, and Darzalex, a leading therapy for multiple myeloma. Other European nations such as Germany, Switzerland, and Italy also contribute significantly to US imports as they are also home to globally renowned pharmaceutical companies. The presence of these established companies underscores Europe's strength in producing high-margin products that meet the quality and regulatory standards demanded by the US market.

	Source	Import Value 2023	Share of Total Imports (%)
1	Ireland	$ 51,503,272,405	24.7%
2	Germany	$ 20,059,209,071	9.6%
3	Switzerland	$ 15,785,918,123	7.6%
4	India	$ 11,265,075,102	5.4%
5	Netherlands	$ 10,798,763,813	5.2%
6	Italy	$ 8,793,843,040	4.2%
7	China	$ 7,796,469,903	3.7%
8	United Kingdom	$ 7,708,937,686	3.7%
9	Canada	$ 6,251,182,079	3.0%
10	Denmark	$ 5,832,590,642	2.8%
	World Total	$ 208,546,915,612	100.0%

Top Ten US Sources for Pharmaceutical Imports by Value 2023

Source: Coalition for a Prosperous America. Surge in Pharmaceutical Imports Threatens US National Security as India, China Dominance Grows. Retrieved from https://prosperousamerica.org/surge-in-pharmaceutical-imports-threatens-u-s-national-security-as-india-china-dominance-grows/

India and China dominate the production of generic drugs and Active Pharmaceutical Ingredients (APIs), together accounting for 57.6% of US pharmaceutical imports by weight in 2023. [22] The share of contribution of APIs production from these two countries have risen significantly over the past decades. Based on Drug Master Files (DMFs) submitted by pharmaceutical companies to the US Food and Drug Administration (FDA), in 2000, China and India together accounted for approximately 25% of the global API filings. By 2021, this figure had surged, with India representing 62% of active filings and China 23%, collectively contributing 85% of the global API market. [23] The increasing concentration of API production highlights the growing dependence of global supply chains on these two countries for critical medicines.

Between these two countries, India supplies 45% of the generics consumed in the US However, its production is heavily reliant on Chinese Key Starting Materials (KSMs) further upstream, with 80% of India's pharmaceutical raw materials sourced from China. This dependence has created notable supply chain vulnerabilities, with over 100 essential drugs reliant on single-source manufacturing facilities in China. [24] Recognizing the risks associated with this reliance, India has launched the Production Linked Incentive (PLI) scheme to reduce its dependence on Chinese imports and establish greater manufacturing independence by providing financial incentives to domestic manufacturers. [25]

The pharmaceutical industry is witnessing a trend of striving towards manufacturing independence across various countries and regions. India's efforts to reduce dependence on Chinese APIs and KSMs are mirrored by similar initiatives in the US The IRA's provisions on drug pricing may potentially increase manufacturers' sensitivity to production costs. However, the situation is further complicated by the proposed tariffs on Chinese imports under the Trump administration. This could significantly impact the cost of KSMs and other raw materials critical to pharmaceutical production. The US pharmaceutical companies would face both ceilings capped on drug prices and increase in import costs. In response, the US proposed introducing measures such as the Producing Incentives for Long-term Production of Lifesaving Supply of Medicines Act (PILLS Act) in October 2023. This legislation proposes tax credits ranging from 25% to 35% for US-based production of APIs, finished drug products, and related components to reduce dependence on foreign suppliers and enhance supply chain resilience. [26] However, the effectiveness of these initiatives remains uncertain. The PILLS Act is currently under review by the House Committee on Ways and Means. Even if passed, its practical implementation could encounter significant challenges; the global pharmaceutical supply chain is deeply interconnected, with intricate dependencies that make swift changes to existing manufacturing capacities a formidable task.

IRA Provisions on Medicare Part D and Drug Price Reform

Looking ahead, the IRA is poised to significantly reshape the healthcare landscape through initiatives designed to achieve its dual objectives of expanding healthcare accessibility and limiting Medicare expenditures. A comparison of the existing and restructured Medicare Part D benefit framework provides context for understanding the IRA's provisions.

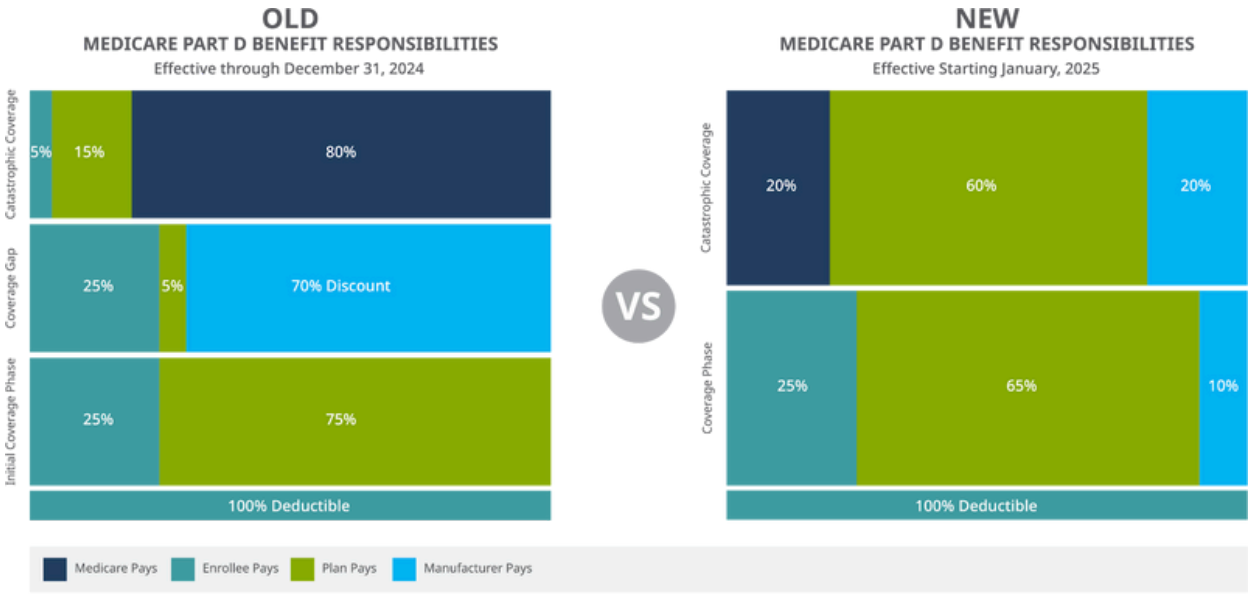
Cost Type	Part A	Part B	Part C (Medicare Advantage)	Part D
Monthly Premium	$0 for most beneficiaries	$174.70 (standard) $244.60-$594 (income-related)	Part B premium + Plan premium (70% have $0 premium)	Varies by plan ($40 avg for standalone PDP)
Deductibles	$1,632 / period	$240 annually	Varies by plan	Varies by plan
Copayment/ Coinsurance	- $408/day (days 61-90) - $816/day (days 91-150) - $204/day (SNF days 21-100) - $0 for home health	20% coinsurance for most services	Varies by plan and provider network	Varies by plan and drug tier

Medicare's cost structure across four parts: Part A with no premium but substantial deductibles for hospital stays ($1,632); Part B with a standard monthly premium with 20% coinsurance; Part C (Medicare Advantage) builds upon Part B with variable additional premiums (70% with $0 premium); Part D offers prescription drug coverage through either standalone plans ($40 monthly) or as part of Medicare Advantage plans ($10 monthly).

Source: Kaiser Family Foundation (KFF) analysis of Medicare coverage and cost data from Centers for Medicare & Medicaid Services (CMS), 2024. Retrieved from https://www.kff.org/health-policy-101-medicare/

Before the Inflation Reduction Act (IRA) begins implementation in January 2025, the Medicare Part D benefit structure consists of three distinct phases following a deductible of $545, each with varying cost-sharing responsibilities among beneficiaries, plans, and Medicare. In the initial coverage phase, beneficiaries bore 25% of prescription drug costs, while plans covered the remaining 75%. The subsequent coverage gap phase, often referred to as the "donut hole," required beneficiaries to pay 25% of brand-name drug costs, with manufacturers providing a 70% discount and plans covering the remaining 5%. Finally, during the catastrophic coverage phase, Medicare assumed the majority of costs at 80%, while plans contributed 15% and enrollees paid the remaining 5%. This structure imposed significant financial burdens on both Medicare and its beneficiaries, particularly in the catastrophic phase, where high-cost drugs constituted a substantial portion of expenditures.

Beginning in 2025, the IRA introduces a restructured Medicare Part D benefit design aimed at alleviating financial pressures on beneficiaries and promoting system sustainability. While the deductible phase expands, the new structure eliminates the coverage gap phase and redistributes cost-sharing responsibilities. During the initial coverage phase, beneficiaries will continue to pay 25% of drug costs, but plans will cover 65%, and manufacturers will contribute 10%. In the catastrophic coverage phase, beneficiaries will no longer face out-of-pocket costs —a critical relief for those with substantial prescription expenses. Instead, costs will be distributed among Medicare (20%), plans (60%), and manufacturers (20%). By shifting financial responsibilities, the IRA seeks to reduce federal expenditures while ensuring a more equitable and sustainable system for prescription drug pricing.



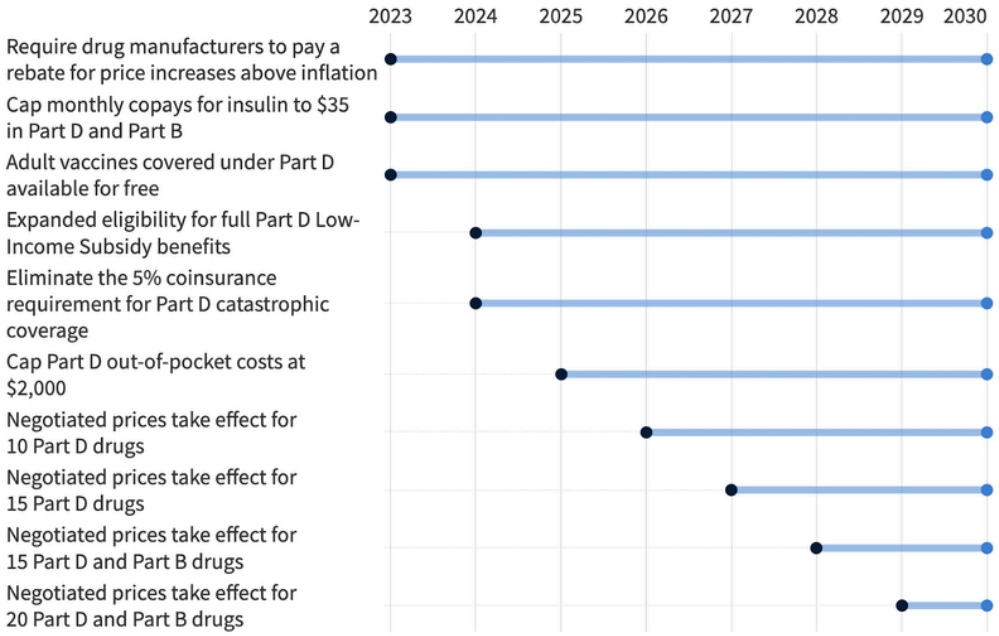
Pre and Post IRA Medicare Part D Structure Comparison:
Elimination of the Coverage Gap Phase and Revised Cost-sharing Responsibilities

Source: Prescription Analytics. Overview of the 2025 Medicare Part D Program Redesign: A Paradigm Shift for Pharma Manufacturers. Retrieved from https://prescriptionanalytics.com/blog/overview-of-the-2025-medicare-part-d-program-redesign-a-paradigm-shift-for-pharma-manufacturers/

The two objectives of the IRA—reducing federal spending and expanding beneficiaries' access to healthcare—are evident in its restructuring of Medicare Part D and additional provisions. One such measure, effective in 2023 under Section 1191, requires drug manufacturers to pay rebates to Medicare if the prices of their drugs increase faster than inflation. To enhance access, Section 11405 eliminates cost-sharing for adult vaccines covered under Medicare Part D and improves access to them under Medicaid and CHIP, ensuring broader immunization coverage. Furthermore, under Section 11406, the IRA caps monthly insulin costs at $35 for Medicare beneficiaries, providing crucial relief for those with chronic conditions.

Effective January 2024, the IRA expands the Low-Income Subsidy (LIS) program, known as "Extra Help," by increasing eligibility for full benefits to individuals with incomes up to 150% of the federal poverty level, or $22,590 for individuals and $30,660 for married couples in 2024, under Section 11404. Beneficiaries eligible for full LIS benefits will pay only modest copayments for prescription drugs and qualify for a full premium subsidy. However, the number of plans available for enrollment by LIS beneficiaries with no premium (benchmark plan) decreases from 120 in 2024 to 114 in 2025—5% reduction in options. [27]

Starting in 2026, Medicare will begin negotiating prices for high-cost single-source drugs, with the initial list of 10 drugs selected based on high Medicare spending volumes. These include Eliquis (apixaban), Jardiance (empagliflozin), Xarelto (rivaroxaban), Januvia (sitagliptin), Farxiga (dapagliflozin), Entresto (sacubitril/valsartan), Imbruvica (ibrutinib), Stelara (ustekinumab), Enbrel (etanercept), and Fiasp/NovoLog (insulin aspart). These medications treat conditions including diabetes, heart failure, rheumatoid arthritis, blood clots, and certain cancers.



IRA Provisions Implementation Timeline

Source: KFF analysis of provisions in the Inflation Reduction Act of 2022 (P.L. 117-169). Retrieved from https://www.kff.org/health-policy-101-medicare/?entry=table-of-contents-what-is-the-medicare-part-d-prescription-drug-benefit.

In 2023, Medicare Part D spending on these 10 drugs totaled approximately $56.2 billion, while beneficiaries paid $3.9 billion out-of-pocket, with several medications incurring particularly high total expenditures. [28] Eliquis, a blood thinner prescribed to 3.93 million Medicare Part D enrollees, was the most widely used and costliest drug, with total Medicare Part D spending exceeding $18 billion. Jardiance, prescribed for diabetes and heart failure, incurred $8.8 billion in spending and served 1.88 million beneficiaries, followed by Xarelto, another blood thinner that accounted for $6.3 billion in spending for 1.32 million enrollees. [29]

The negotiated prices under the IRA represent significant reductions from existing list prices, resulting in substantial projected savings for Medicare. The price of Januvia, a diabetes treatment, for instance, is set to decrease from $527 to $113—a dramatic 79% reduction. On average, the negotiated prices for these 10 drugs represent a 62.91% reduction from their original list prices. Had negotiated prices been in effect in 2023, Medicare would have saved an estimated $6 billion across the 10 selected drugs, reflecting a 22% decline in aggregate net spending on these medications. [30] With the current implementation of negotiated prices taking effect in 2026, beneficiaries with Medicare prescription drug coverage are projected to save approximately $1.5 billion in out-of-pocket costs. [31]

Future rounds of price negotiations will further expand Medicare's ability to reduce cost. By 2027, the negotiated list will include 15 additional Part D drugs, followed by another 15 drugs in 2028, encompassing both Part D and Part B medications. By 2029, 20 more drugs will be added to the list, with negotiations continuing annually thereafter. The selection of drugs for negotiation is determined by total Medicare spending on single-source drugs that lack generic or biosimilar competition. This iterative process is designed to bring substantial cost savings for the most expensive drugs covered under Medicare, reinforcing the IRA's two objectives of enhancing affordability and controlling federal expenditures. As HHS Secretary Xavier Becerra commented:

> For the first time ever, Medicare negotiated directly with drug companies and the American people are better off for it. ... Empowering Medicare to negotiate prices not only strengthens the program for generations to come, but also puts a check on skyrocketing drug prices. [32]

Drug Name	Participating Drug Company	Commonly Treated Conditions	Agreed to Negotiated Price for 30-day Supply for CY 2026	List Price for 30-day Supply, CY 2023	Discount of Negotiated Price from 2023 List Price	Total Part D Gross Covered Prescription Drug Costs, CY 2023	Number of Medicare Part D Enrollees Who Used the Drug, CY 2023
Januvia	Merck Sharp Dohme	Diabetes	$113.00	$527.00	79%	$4,091,399,000	843,000
Fiasp; Fiasp FlexTouch; Fiasp PenFill; NovoLog; NovoLog FlexPen; NovoLog PenFill	Novo Nordisk Inc	Diabetes	$119.00	$495.00	76%	$2,612,719,000	785,000
Farxiga	AstraZeneca AB	Diabetes; Heart failure; Chronic kidney disease	$178.50	$556.00	68%	$4,342,594,000	994,000
Enbrel	Immunex Corporation	Rheumatoid arthritis; Psoriasis; Psoriatic arthritis	$2,355.00	$7,106.00	67%	$2,951,778,000	48,000
Jardiance	Boehringer Ingelheim	Diabetes; Heart failure; Chronic kidney disease	$197.00	$573.00	66%	$8,840,947,000	1,883,000
Stelara	Janssen Biotech, Inc.	Psoriasis; Psoriatic arthritis; Crohn's disease; Ulcerative colitis	$4,695.00	$13,836.00	66%	$2,988,560,000	23,000
Xarelto	Janssen Pharms	Prevention and treatment of blood clots; Reduction of risk for patients with coronary or peripheral artery disease	$197.00	$517.00	62%	$6,309,766,000	1,324,000
Eliquis	Bristol Myers Squibb	Prevention and treatment of blood clots	$231.00	$521.00	56%	$18,275,108,000	3,928,000
Entresto	Novartis Pharms Corp	Heart failure	$295.00	$628.00	53%	$3,430,753,000	664,000
Imbruvica	Pharmacyclics LLC	Blood cancers	$9,319.00	$14,934.00	38%	$2,371,858,000	17,000

Note: Numbers other than prices are rounded to the nearest thousands. List prices are rounded to the nearest dollar and represent the Wholesale Acquisition Costs (WACs) for the selected drugs based on 30-day supply using CY 2022 prescription fills. Drug companies' participation in the Negotiation Program is voluntary; the figures above represent estimates based on continued drug company participation in the Medicare program.

First 10 Drugs Selected for Price Negotiation

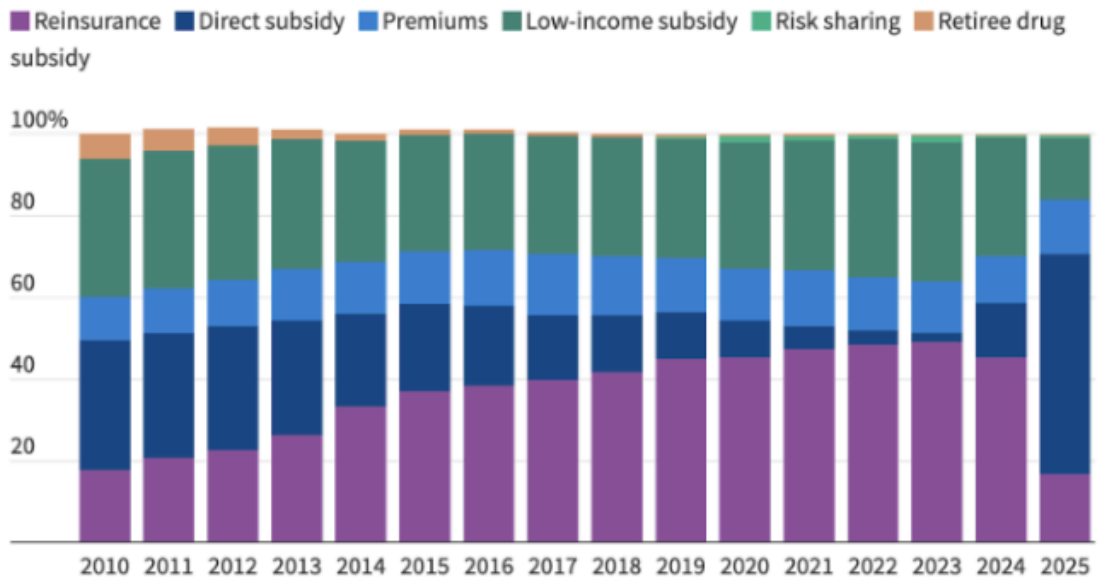
Source: Pharma Manufacturing. "US Reveals First 10 Negotiated Prices Under IRA." Retrieved from https://www.pharmamanufacturing.com/industry-news/news/55133261/us-reveals-first-10-negotiated-prices-under-ira

It is estimated that these provisions altogether will reduce the federal deficit by $237 billion over 10 years from 2022 to 2031. [33] While overall cost reduction remains the primary goal, further transformations in Medicare's spending structure aim to establish a more sustainable Medicare Part D by shifting a greater share of financial responsibility to drug plans and manufacturers and ensuring more predictable costs for beneficiaries.

A significant portion of current Medicare spending is allocated to reinsurance, which covers 80% of catastrophic drug expenses once beneficiaries surpass the catastrophic phase threshold. Another critical component of Medicare spending is direct subsidy, wherein Medicare pays a portion of drug plans' costs based on risk-adjusted calculations that account for beneficiaries' varying health needs. Beneficiaries themselves contribute to the program through premiums, while risk-sharing mechanisms between Medicare and Part D plans provide partial protection for plans against losses and gains that arise when actual costs deviate from the projected costs in their bids.

Medicare's Low-Income Subsidy (LIS) further supports vulnerable populations by reducing or eliminating premiums, deductibles, and copayments for low-income beneficiaries. For 2024, it is estimated that Part D plans will receive direct subsidy payments averaging $383 per enrollee overall, $2,588 per enrollee for those receiving the LIS, and $1,153 in reinsurance payments for very high-cost enrollees. By restructuring these financial dynamics, Medicare seeks to create a more balanced and sustainable system that alleviates cost burdens while preserving affordable access to prescription drugs for all beneficiaries. [34]

The IRA is projected to reshape Medicare's existing spending structure by reducing the federal government's share of catastrophic coverage, thereby significantly decreasing the proportion of total spending allocated to reinsurance. As payment responsibilities shift toward drug plans, Medicare's spending on direct subsidies to drug plans is expected to increase. In July 2024, the Centers for Medicare & Medicaid Services (CMS) announced the Part D Premium Stabilization Demonstration in response to anticipated increases in premium prices for stand-alone prescription drug plans (PDPs) following the IRA's implementation. CMS reported that the national average monthly bid amount (NAMBA) for 2025 PDPs is projected to be $179.45, representing a $115.17 increase compared to the 2024 NAMBA of $64.28. [35] These adjustments highlight a strategic move toward increasing the financial accountability of drug plans while maintaining a sustainable balance in Medicare's Part D program. By gradually shifting cost burdens, the IRA aims to preserve beneficiary access to prescription medications and ensure the long-term viability of the Medicare system.



Post-IRA Increase in Shares of Spending in Direct Subsidy and Decrease in Shares of Spending in Reinsurance.

Source: Kaiser Family Foundation (KFF) analysis of Medicare Part D financing data from Centers for Medicare & Medicaid Services (CMS), 2010–2025. Retrieved from https://www.kff.org/medicare/issue-brief/a-current-snapshot-of-the-medicare-part-d-prescription-drug-benefit/#:~:text=For%202025%2C%20under%20the%20standard,of%2Dpocket%20spending%20totals%20%242%2C000

Trend of Personalized Medicine

The rise of precision medicine, which emphasizes targeted therapies tailored to individual patient profiles, might reshape the direction of modern healthcare. This paradigm shift presents an opportunity to address challenges in the small-molecule drug sector by reimagining production strategies to align with personalized medicine principles. As biologics, gene therapies, and other targeted therapies gain prominence, the global pharmaceutical industry may experience a gradual advancement from its sole reliance on small molecule drugs. Additionally, the development of cell and gene therapies (CGTs) represents another facet of this transition. As of August 2024, 38 CGTs have been FDA-approved for use in the US, with 500 products currently in the pipeline. [36] This growth in CGTs, along with advancements in genomic technologies and personalized drug discovery, steers an evolution in pharmaceutical therapies beyond traditional small molecule drugs.

Precision medicine, also known as personalized medicine, represents a transformative approach to healthcare by tailoring treatments to individual genetic factors. This methodology focuses on offering highly targeted and potentially curative therapies, exemplified in cell and gene therapies (CGTs). The US progress in approving CGTs has been fueled by initiatives like Section 3033 of the 21st Century Cures Act and the Regenerative Medicine Advanced Therapy Designation, which streamline the review process for innovative therapies. To further enhance the efficiency of therapy approvals, the FDA established the Office of Therapeutic Products (OTP) in February 2023 within the Center for Biologics Evaluation and Research (CBER), which aims to improve interactions between review staff and sponsors. Among the 38 FDA-approved CGTs, approximately 21% of those are derived from umbilical cord blood, while CAR-T therapies account for about 15.79%, underscoring the importance of regenerative medicine and immunotherapy in innovative therapies. The remaining therapies include a mix of gene-editing techniques and other cellular therapies, with applications ranging from cancer to rare genetic disorders. Gene editing technology has notably captured the attention of major pharmaceutical companies, as genomics tools remain a significant investment with substantial returns. [37]

Cutting-edge technologies are driving the development and delivery of gene therapies to the market. To illustrate, CRISPR-Cas9 has emerged as a groundbreaking tool to treat sickle cell disease, correcting the faulty gene responsible for abnormal red blood cell shapes and offering the possibility of a lifelong cure. In hemophilia B, the FDA-approved gene therapy Hemgenix delivers a functional gene to restore clotting factors, potentially eliminating the need for regular infusions. Developing these therapies involves novel technological advancements. Gene therapies like Hemgenix utilize viral vectors to deliver corrected genetic material into the patient's cells. Nanoparticles have also emerged as a versatile platform for delivering RNA and other genetic material to overcome biological barriers such as the blood-brain barrier, enhance cellular uptake, and improve therapeutic efficacy.

Most current gene and cell engineering technologies require isolating target cells, editing them in a controlled laboratory setting, and reintroducing them into the patient's body. The manufacturing process demands cutting-edge facilities, rigorous quality control, and compliance with stringent regulatory frameworks, which collectively drive the high costs of these therapies. The $3.5 million price tag of Hemgenix for Hemophilia B reflects multiple complex factors, including therapy's one-time administration for lifelong benefits, the small patient population of rare diseases, and the extensive research and development efforts to bring to market. The same factors that impact cost for small molecule drugs become more evident in CGTs but remain under two categories: the cost for delivery of the therapy and the size of the targeted market.

Unlike small molecule drugs, however, CGTs often come with much higher delivery costs and a significant portion of which target relatively rare diseases caused by specific genetic mutations. For most ex vivo treatments used in CGTs, like Casgevy for sickle cell disease, hematopoietic stem cells (HSCs) must be harvested from the patient, genetically edited using advanced CRISPR/Cas9 technology, and then reinfused after myeloablative conditioning. This process is highly personalized, with each therapy tailored specifically to the patient, requiring specialized equipment, transportation logistics, and strict cryopreservation protocols to ensure viability. Moreover, the small target population typical of rare diseases limits economies of scale, compelling manufacturers to price therapies higher to recoup development and manufacturing costs. Coupled with extensive clinical trials, regulatory approvals, and ongoing post-market surveillance, these factors contribute to the overall expense. Nonetheless, by potentially replacing decades of ongoing medical interventions, gene therapies like Casgevy offer a paradigm shift in treatment, positioning their cost as an investment in long-term health and economic sustainability once cost has been further lowered.

Part of CGTs' price justification lies in eliminating the need for continuous treatments and reducing the risk of complications . For example, in the case of sickle cell disease, an analysis of Casgevy reveals incremental cost-effectiveness ratios well within accepted thresholds for Value-Based Pricing (VBP), a value estimation by the Institute for Clinical and Economic Review (ICER) after assessing drug's clinical effectiveness and its economic cost. Under the health care sector perspective, Casgevy's incremental cost-effectiveness ratios ranged from $193,000 to $427,000 per quality-adjusted life year (QALY), while societal perspective incremental cost-effectiveness ratios were even more favorable, between $126,000 and $281,000 per QALY. [38] When viewed from a societal perspective, acceptable value-based prices for Casgevy range between $1 million and $2.5 million, reinforcing the idea that these therapies, while costly upfront, deliver lasting benefits.

Drug Name	Disease Treated	FDA Approval Year	Price (USD)
ZOLGENSMA	Spinal muscular atrophy	2019	$2,125,000
HEMGENIX	Hemophilia B	2022	$3,500,000
ZYNTEGLO	Beta-thalassemia	2022	$2,800,000
LIBMELDY	Metachromatic leukodystrophy	2024	$4,250,000

CASGEVY	Sickle Cell Disease	2023	$2,200,000
SKYSONA	Cerebral adrenoleukodystrophy	2022	$3,000,000
ROCTAVIAN	Hemophilia A	2023	$2,900,000
VYJUVEK	Dystrophic epidermolysis bullosa	2023	$25,545 per dose*
LUXTURNA	Inherited retinal disease	2017	$850,000

Gene therapies approved by the FDA for various genetic disorders

Drug Name	Disease Treated	FDA Approval Year	Drug Name
ABECMA	Multiple myeloma	2021	$419,500 per dose
BREYANZI	Large B-cell lymphoma	2021	$487,477 per dose
CARVYKTI	Multiple myeloma	2022	$465,000 per dose
KYMRIAH	B-cell acute lymphoblastic leukemia	2017	$475,000 per dose
YESCARTA	Large B-cell lymphoma	2017	$373,000 per dose

CAR T-cell therapies approved by the FDA for various blood cancers

Source: "Cellular & Gene Therapy Products," US Food and Drug Administration, https://www.fda.gov/vaccines-blood-biologics/cellular-gene-therapy-products.

Internationally, Japan has emerged as a hub for stem cell research, bolstered by its 2014 deregulation of cell therapies and a risk-based framework for classifying treatments. In Europe, the Advanced Therapy Medicinal Products (ATMP) framework provides a tailored regulatory pathway for gene and cell therapies, ensuring patient safety while fostering innovation. These policies, coupled with robust investments, have positioned these regions at the forefront of precision medicine. However, equitable access and pricing remain global challenges, particularly for low-and-middle-income countries.

In the United States, rebates for CGTs are commonly offered by manufacturers at regional or insurer levels and are tied to individual patient data (IPD). For instance, outcomes-based rebates are provided based on the therapy's effectiveness within a defined timeframe, as seen with therapies like Kymriah, Luxturna, and Zolgensma. Additionally, long-term rebate programs, combined with installment payments, allow manufacturers and payers to spread costs over multiple years, easing short-term financial burdens while ensuring therapy access. However, in contrast to some other markets, the US lacks a unified framework for long-term evidence development, which can limit structured follow-ups and real-world efficacy tracking.

In comparison, countries like France, Germany, and the UK adopt Coverage with Evidence Development (CED) schemes to align pricing with long-term data collection from clinical trials and real-world use. These frameworks integrate cohort-level data rather than focusing solely on IPD, providing a more contextualized understanding of therapy performance over time. While payments in installments are also employed in Italy and Spain, their application is less outcome-based than in the US, reflecting a broader budgetary approach rather than a strict link to therapeutic efficacy. By centralizing evidence collection and pricing negotiations, these countries ensure price transparency and accountability, a stark contrast to the more decentralized, market-driven strategies seen in the US.

Therapy	Access scheme used	Nature and source of data collected for access scheme
Kymriah® (tisagenlecleucel)	Outcomes-based payment offered to healthcare providers (e.g., hospitals) for ALL patients based on IPD	- No invoice for ALL patients who do not achieve response within 30 days - Data collected at hospital level
Luxturna® (voretigene neparvovec)	- Outcomes-based rebates (offered to payers) based on IPD - Pilot of payments in installments proposed to CMS	- Rebates informed by FST testing scores in the short (30–90 days) and longer term (30 months) - Payments in installments (as proposed to CMS) are not linked to outcomes, i.e., it is a purely financial measure to manage short-term budget impact
Zolgensma® (onasemnogene abeparvovec)	A variety of payment schemes offered to payers, including payments in installments and outcomes-based rebates based on IPD	- Outcomes-based agreement over 5 years (no further detail offered) - Payments in installments are not (necessarily) linked to outcomes, i.e., it can be a purely financial measure to manage short-term budget impact

Kymriah for Acute Lymphoblastic Leukemia (ALL), Luxturna for Inherited Retinal Dystrophy, Zolgensma for Spinal Muscular Atrophy (SMA)

Source: Taylor & Francis Online. A Review of Recent Advances in Regenerative Medicine: 3D Bioprinting and Stem Cells. Retrieved from https://www.tandfonline.com/doi/full/10.2217/rme-2020-0169#d1e967

Country	Innovative payment schemes employed
France	CED scheme on national level based on cohort data (from long-term follow-up of pivotal trials and real-world use)
Germany	CED scheme on national level based on cohort data (from long-term follow-up of pivotal trials) Rebates (on regional/insurer level) based on IPD
Italy	Payments in installments based on IPD
Spain	Payments in installments based on IPD
England	CED scheme on national level based on long-term cohort data (from follow-up of pivotal trials and real-world use)
USA	Rebates (on regional/insurer level) based on IPD Long-term rebate and payment schemes offered by manufacturers; confirmative data on implementation lacking

CED: Coverage with evidence development; IPD: Individual patient data.

Comparison of Innovative Payment Mechanisms Used for Gene Therapies across the Countries

Source: Taylor & Francis Online. Advances in Regenerative Medicine: 3D Bioprinting and Stem Cells. Retrieved from https://www.tandfonline.com/doi/full/10.2217/rme-2020-0169#d1e967

Conclusion

As the Inflation Reduction Act (IRA) represents a dual-purpose strategy of balancing the reduction of federal expenditures with the broader goal of funding renewable energy investments, it introduces groundbreaking reform in the healthcare industry, granting Medicare the authority to negotiate drug prices. This historic shift in US healthcare policy has significant impacts on Medicare structuring as this measure, combined with capping out-of-pocket expenses for beneficiaries, transitions cost burdens to insurers. However, while the IRA effectively alleviates financial pressures on patients and Medicare, it falls short of addressing the systemic inefficiencies in the drug pricing pipeline.

The market-driven characteristics of this pipeline, including the role of Pharmacy Benefit Managers (PBMs), remain intact, perpetuating a system where market-driven intermediaries profit without adding proportional value.

These same market-driven inefficiencies are evident in the pricing of more expensive innovative cell and gene therapies (CGTs). The decentralized and fragmented approach to drug pricing in the US results in disparities when compared to European frameworks. While the US relies on outcomes-based rebates tailored to individual patient data (IPD), Europe adopts centralized Coverage with Evidence Development (CED) schemes that align pricing with long-term clinical and real-world data. For CGTs, characterized by high costs due to complex manufacturing and small target populations, this fragmented pricing model might exacerbate affordability challenges. By leaving the existing drug pricing pipeline intact, the IRA leaves these systemic issues of high drug prices unaddressed, perpetuating the market-driven inefficiencies that now extend into the growing field of CGTs. Ultimately, while the IRA represents progress in Medicare reform, it highlights the urgent need for broader structural changes in the US drug pricing system to ensure sustainability and equitable access, especially in the era of precision medicine.

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As Nasty as You Wanna Be: The Threat Standard, Evidence, and The First Amendment's Implications on Music

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Abstract:
Rap lyrics are listened to every day in cars and commercials, as well as at political events, universities, and major sporting events. Despite this, artists who orate such lyrics are charged, and even convicted, based on evidence related to their art or, in this case, their lyrics. While the First Amendment remains the greatest bulwark for protecting such artists, many prosecutors utilize the threat intent standard element of the First Amendment as some justification for rap or hip-hop lyrics as evidence while equating the lyrics to unprotected First Amendment speech. The following article argues that the threat standard entails a more calculated mens rea, or intent standard, as well as imparts the unnecessary practice of incorporating lyrics as evidence. Part I will address the perceptions around the First Amendment. Part II articulates the rap genre's fortified challenges within the First Amendment while establishing the importance of the intent threat standard. Part III will delve deeper into the intent standard by comprehensively reviewing that the context of the speech must be a factor in the determination of whether the speech remains unprotected. Part IV focuses on the tenets of the Federal Rules of Evidence and provides an analytical perspective of rap to bolster the exclusion of lyric-based evidence. Part V establishes a new approach to understanding rap as an art form and the chilling effect that continuing to allow lyrics as evidence would produce. Part VI concludes by showcasing the effects of restricting the threat standard and protecting artists' speech.

Introduction

In the burgeoning United States, the founding fathers understood a day in the country's history where the federal government needed to establish a framework for a nation of civility and prominence. The founding fathers also wanted to bestow citizens with specific impregnable rights. This desire led to the construction of the Bill of Rights, or the first ten amendments to the United States Constitution, which still stands as the supreme framework of the US. James Madison established the United States Constitution and the Bill of Rights for the purpose of securing the proliferation of human rights. Madison articulated that a necessary requirement for the proliferation of these rights involved the right to property and the government's ability to protect that right. Madison equated "opinions and the free communication of them" to one's property and a "natural and unalienable right," which the government must consistently protect.[1] [2] Therefore, as Madison argues, free speech persists as fundamental a right as property and, thus, should be protected in the same way as society protects property. The First Amendment of the United States Constitution remains one of the consequential statements in the country, as it addresses the desires of the Framers of the Constitution in securing the proliferation of citizens' rights.

The First Amendment of the United States Constitution prohibits the government from the "establishment of religion" and from interfering with freedom "of the press," to peacefully "assemble," religious freedom, and to "petition the Government" to address or remedy "grievances."[3] Aside from government restrictions and the codification of rights, the First Amendment also prohibits the government from "abridging the freedom of speech."[4] The First Amendment remains essential in the United States Constitution due to its implications for granting US citizens an impenetrable right of speech.

The citizens of the United States need a country with the right to free speech, as a country with graceful respect for freedom of speech empowers all its citizens, regardless of social, political, economic, or academic status. As indicated by the Journal of Economic Behavior and Organization, the world can confidently conclude that individuals with "lower income and lower education levels benefit most from free speech."[5] Countries with limited personal freedom of speech tend to have citizens in a state of agitation, anxiety, and abhorrence toward their government and its actions. The 2024 World Happiness Report and Freedom House's Freedom in the World Report discovered a correlation between higher happiness-scoring countries and an elevated respect for free speech by their respective governments. [6] [7]

Despite all this empirical evidence supporting the promotion and safeguarding of free speech, society tends to overlook the implications of the First Amendment. The amendment enshrines the right to criticize the government or to remain silent without trepidations of government interference or persecution.

The First Amendment denies the US government the opportunity to be able to "pick and choose ideas" that deserve regulation, even if such an idea forms "universal" disdain or contains mass "opposition."[8] This amendment allows a person to peacefully condemn the actions of the government and proclaim disapproval through virtually any method of communication. Furthermore, it grants us the capability to engage in the "collective search for truth" within the government and check the "processes of our government" while distributing the capability to speak one's mind even when the communication remains futile for the communicator's cause, "advancing" the "collective search for truth," or checking the "processes of our government."[9] [10] This article will prove that the First Amendment must consistently protect artists during the expression of violent or morally repugnant content without the fear of prosecution based on the claims of communication of a true threat or the prosecution's utilization of such content as evidence.

Part I. I Can Always Say What I Want

In the United States of America, I can say whatever I want to whoever I want at whatever time I want. Wrong. I can say whatever I want to whoever I want. Still wrong. I can say whatever I want. Sorry, but wrong again.[11] To the chagrin of free speech absolutists, the American people ought to cherish some limitations on free speech because some forms of speech contain consequences extremely adverse to society. Speech with the potential to harm society should not be granted First Amendment protection because it can mislead or manipulate the public into something disparaging about another's reputation, livelihood, and opinions. In a world without protections on manipulative speech, the unfettered spread of misinformation would cause political chaos. Similarly, these types of speech encourage or promote the urgency of criminal activity, which tends to precede a criminal act. For instance, the National Domestic Violence Hotline's Power and Control Wheel delineates the use of "coercion and threats" as a precedent or pillar of physical or sexual abuse.[12] [13] Correspondingly, these types of speech produce or incite a reasonable fear or anger in the recipient of the speech. For most people, provocative speech incites violence, which makes the protection of this type of speech antithetical to a civilized society. The unprotected free speech types are typically categorized as defamation, incitement of imminent lawless action, obscenity, fighting words, and true threats.

Defamation generally involves any form of false information about a third party that specifically causes damage or harm to the reputation of the third party. Defamation occurs through one of two methods: libel or slander. Libel occurs when the form of harmful and false statements materializes as written statements, while slander occurs when the form of harmful and false statements materializes through oral communication. Society imposes restrictions on defamation due to the dramatic effects defamation inflicts on the members of society who are its target. Imagine a popular social media influencer makes a false video detailing crimes you never committed, things you never said, or demonstrating actions you never engaged in.

This one video, whether deleted immediately after or not, could introduce uncontrollable effects, including the destruction of one's career, the impalement of one's personal relationships, doxxing, and other irreversible drastic consequences.

Incitement of imminent lawless action refers to an unprotected category of speech in which advocates seek to induce or instigate illegal activity, and it typically occurs in the context of protests; however, it can happen in any context. Similarly, the expression refers to something that happens at a definite future time period involving an unacceptable context. Therefore, when a person states, "I will take the street later" during a political protest, they sustain protection under the First Amendment, as their speech did not convey a definite future time period and occurred during the acceptable context of a political protest. Society regulates the incitement of imminent lawless action to prevent the influence of others to commit crimes. Influencing another person or a large group of people to commit crimes is damaging to society. Celebrities and influential figures have an inherent platform providing them a strong influence over the masses. Thus, it is important that the ability to use speech that may incite violence be regulated to avoid events of mass panic or crime sprees.

Similar to the incitement of imminent lawless action, fighting words refers to an unprotected category of speech where the communicator of the speech galvanizes the target recipient to violence. Although fighting words are similar to the incitement of imminent lawless action, they typically occur in the context of face-to-face interactions or any interactions between two or more people. Such content or words of the face-to-face interactions seem, by the Supreme Court's standards, to require the words or context to "cause a reasonable person to respond with violence" as long as the words remain directed to the specific individual.[14] Fighting words must occur in a scenario where one party intentionally utilizes certain words against another party for the purpose of causing a fight to happen; however, the designation does not include actions such as burning the United States flag or criticizing a group or idea. While a reasonable person may perceive the flag burning and demeaning a group as "particularly hurtful" or "inflicting great pain" on those in attendance, fighting words require the statement to be a "direct personal insult," and one may receive protection when the speech "addresses matters of public import."[17] [18] For example, if one party refers to another party by a derogatory term while asking to fight with their neck veins clenched, the receiving party of the comment will likely interpret the derogatory term episode as a provocation to a fight. Fighting words do not include an individual's disapproval of an idea or group, but, rather, the intentional verbal provocation of another to cause physical harm.[19] [20] Fighting words used to incite violence breach any sense of civility in society and are, deservedly, beyond the realm of the First Amendment's protection.

The Peril of Music

Even though the Framers of the Constitution likely did not expect a world where music lyrics needed First Amendment protection, they ensured that political satire and any type of artistic expression always maintained protection. Music prevails as a form of art but has garnered contentious arguments over whether certain lyrics or words should not be protected communication of free speech and whether they can be admitted as evidence in court. While music acts as a "characteristic of expression" and receives "constitutional protection," it sometimes walks the line between protection of the First Amendment and exposure to criminal prosecution, with no remedy under the First Amendment.[21] When music walks this line between protection and exposure, it tends to fall under one of two unprotected forms of speech: obscenity or threats. Obscenity encapsulates some forms of vulgar, salacious, or sordid speech that remain restricted and, thus, do not warrant First Amendment protection. True threats encompass a type of speech where the original communicator seeks to impart their intention to inflict any form of illicit force.[22]

Obscenity can pertain to and range from the purveyance of obscene materials to the communication of something considered obscene under the law. Obscenity restrictions prove to be extremely contentious, as the definition of obscenity remains extremely subjective.[23] Society wants to limit obscenity to preserve the willful innocence of those who prefer to avoid or are too young to be exposed to explicit content. In other words, American society understands the need to protect children from being prematurely exposed to age-inappropriate, obscene content.[24] [25] Correspondingly, society necessitates the prohibition of obscenity to ensure extreme scenarios, such as the purveyance of child pornography, are vulnerable to prosecution and not granted constitutional protections when such would be grossly inappropriate.

Threats are unprotected because society wants to "protect individuals from the fear of violence" and from the fear a threat can induce.[26] A person does not need to make any attempt to carry out their intention to inflict illicit force to meet the standard of exposure to prosecution under the true threat doctrine.[27] Therefore, a mere intention to assert the threat leads to prosecution and results in a loss of First Amendment protection, as the authentic threat would be classified as a true threat. If one party exclaims, "I am going to kill you with a Colt King Cobra Target 22 LR," the party does not have to walk in the store and ask the gun store clerk for the gun to warrant prosecution. Rather, the attacking party must intend to communicate to the target or targets of the speech that they want to threaten the listener or listeners. In the case of the State of Virginia v. Barry Black et. al., the Supreme Court articulated that legislation reviewing the communication evidence in the case violates one's First Amendment rights.[28]

The Supreme Court also added that in order to avoid violating these First Amendment rights, courts must review the intent of the communicator.[29] Therefore, the intent of the communication acts as a critical element or function in determining whether one warrants First Amendment protection.

In the US justice system, currently, the threshold of one's intent behind a threat communication remains incredibly contested, with some requesting a recklessly criminal mindset, or mens rea, while others request a knowingly criminal mindset.[30] As per the Model Penal Code, a criminal mindset, or mens rea, classifies standards of "acting purposefully, knowingly, recklessly, or negligently."[31] "Negligently" refers to someone who should be aware they are acting in an ignorant manner, regardless of whether they actually are aware. Due to the standard of negligence usage in civil court cases, defendants rarely face prison sentences or jail time from their negligent communication of a threat. Therefore, this article will not focus on negligence because the severity of the punishment is less significant than a higher-level intentional threat; instead, this article will analyze the purposeful, knowing, and reckless standards. Classifying a threat as purposeful requires the greatest level of proof, as it must be shown to be intentional. One purposefully acts when one "consciously desires" a result of one's threats received as an authentic threat by another.[32] Knowingly refers to when the accused processes the act and recognizes the result of the criminal act. In the threat communication context, one party knowingly acts when they know, with practical certainty, that the result of their threat affects others, who take their "words as threats."[33] Recklessly remains the standard where prosecutors must provide the least level of proof in a criminal court case. When the reckless standard applies to true threat jurisprudence, one party recklessly acts when the party understands that others could potentially regard their speech words as a threat but "delivers them anyway."[34] State or federal laws that "punish" true threats typically run in tandem with some sort of intent standard.[35] In the US current jurisprudence, the Supreme Court of the United States opines the reckless standard to proffer "the right path forward," but the court stopped short of delineating an intent standard.[36] The recklessness standard of true threats stands as the good path forward, but the recklessness standard does not satisfy the standard that produces the greatest path forward. Therefore, the greatest path forward ought to result in a knowing standard for the purpose of encouraging speech and not chilling the free speech our founding fathers paid the ultimate price to establish.[37]

Part III. Context Matters

The First Amendment grants the people of the United States priceless freedoms while maintaining restrictions to ensure civility within the country. The restrictions of the First Amendment can range anywhere from the type of speech to the context of the speech communicated. A contextual restriction depends on whether the speech occurs online or through other forms of communication.

For instance, the current legislative and jurisprudential landscape currently perceives decisions and laws on internet hate speech, including what type of speech classifies as hate speech and whether hate speech should be allowed or proscribed. For instance, while a restriction currently depends on whether the speech occurs online, a contextual restriction can include and assess where exactly the accused communicated their speech. In Watts v. United States, Robert Watts asserted during a "political debate at a small public gathering" that if the United States Army drafted him and gave him a rifle, he would target President Lyndon B. Johnson.[38] Due to the context of Robert Watts asserting the words during a political debate and the context of how political speech may materialize as "often vituperative, abusive, and inexact," the speech of Robert Watts could not be taken as anything other than protected under the First Amendment as a political hyperbole.[39] [40]

Contextual restrictions also depend on whether the target of the speech acts as a public figure or a private individual. A public figure must endure unreasonable criticism or vehement attack because the public figure has access to remedy the attack in various ways, including therapy and independent security.[41] Due to the fame of public figures, the limit on free speech is typically relaxed to allow for the public to criticize their actions and comments. The limits on speech are relaxed for private individuals because one accepts "the risk of public scrutiny more than might otherwise be the case" if one were not a public figure.[42]

Another contextual restriction depends on whether the speech remains classified as artistic expression or not. Regarding artistic expression, a major sub-contextual factor remains dependent upon whether the artistic expression occurs throughout different genres of music, including jazz, country, rock, or hip-hop. The Supreme Court interpreted the First Amendment to protect artistic expression, regardless of whether the art galvanized offensive, insulting, or vicious reactions. If the Framers of the Constitution did not construct the First Amendment to protect artistic expression regardless of its offensive, insulting, or vicious context, shock artists and many other renowned artists would immediately become felons, incurring numerous prosecutions with no remedy under the law. This artistic expression applies to music lyrics, such as Johnny Cash's famous line: "But I shot a man in Reno just to watch him die." Therefore, the current landscape of prosecuting hip-hop artists through the utilization of their lyrics in court in the US remains one of the greatest forms of injustice regarding the protection of speech under the First Amendment.

Part IV. Will The Real Slim Evidence Please Stand Up?

The Federal Rules of Evidence codify the admissibility, definition, and objectionability of evidence in their application to the civil and criminal court systems. The laws exclude evidence if the probative value outweighs the danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[43] Probative value describes the likelihood that evidence will reach its relevance or purpose in court.

Imagine a seesaw with one side containing probative value and the other containing the danger categories. If the danger categories remain airborne, then the evidence will be inadmissible. If the probative value remains airborne, then the evidence will be admissible. For instance, a murder weapon with the accused's fingerprints or CCTV video of the accused leaving the house of the victim at the time of the murder warrants one to define such evidence as evidence of high probative value. Probative value refers to the likelihood that the evidence in the case will be integral to or have useful value to the decision in the case. Correspondingly, the Federal Rules of Evidence determine that evidence about the character of a defendant must be found inadmissible when employing the evidence to prove the defendant acted within the bounds of their character. Thus, a prosecutor cannot utilize evidence from the past for the purpose of proving the defendant acted within their normal "character." Nonetheless, the Federal Rules of Evidence also maintain that evidence about the character of a defendant may be admissible if the evidence about the character of a defendant seeks to highlight the defendant's "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[44] The greatest threat to music lyric utilization stems from this rule because prosecutors introduce the lyrics under this smoke screen to paint the defendant in a negative light while attempting to display the defendant's ability to authentically commit the accused crime.[45]

Lyrics cannot be an accurate determining factor in whether the defendant actually conducted the crime because lyrics, similar to all other artistic expressions, are subject to interpretation and rarely an admission of guilt. We do not need to file charges against Bob Marley's I Shot the Sheriff, as he intended for the lyrics to be known as a protest of law enforcement in 1970s Jamaica. Therefore, the lyrics should not be considered an admission of guilt, despite the candid appearance of the title, a protest of the 1970s Jamaican government as a whole, or a call for justice. Art must be subject to interpretation of the purveyor, viewer, listener, or any other type of viewer. The alarming tactics of deploying rap lyrics in court not only act as a baseless mechanism due to the interpretation of art, but the tactics also act as a danger to the integrity of art's protection under the First Amendment and can stereotypically clout the judgment of judges and juries within the legal system. In fact, the Supreme Court asserted that if the lyrics do not have relevance to the accused crime, then the utilization of them as evidence can violate a person's First Amendment protection.[46] Accordingly, the American Psychological Association (APA) found in their study on lyrics that people who read folk lyrics view the lyrics more negatively and more threateningly when they perceive them to derive from hip-hop music than those who were told the lyrics derived from country music.[47] This implicit bias serves as evidence that people perceive hip hop as threatening, which further impairs the judgment of juries if hip-hop lyrics are allowed to be entered as evidence. Consequently, this bias raises risks to rappers because artists must take further precautions to avoid persecution stemming from their lyrics.

Hip-hop defines the art form of rhythmic chanting or rapping to specialized rhythms or beats, which has transfixed society. Rappers often use their platform to reflect upon their life, like Grandmaster Flash's The Message, humble beginnings; Maxo Kream's Roaches, love interests; Lil Tjay's Calling My Phone, and motivations for success; and Kodak Black's Boss My Life Up. Another prevalent genre of hip hop showcases a view on social developments, as seen in Lil Baby's The Bigger Picture, an artistic response to the murder of George Floyd in 2020. Hip-hop functions as an outlet for artists to express their feelings through clever semantics and captivating rhythms. In line with the nature of rap music, sometimes songs contain expletives, descriptions of criminal activity, or forms of moral repugnance, just as is the case with country music, surrealist paintings, and many other art forms.

Asking rappers to quit sharing their authentic work or placing regulations on the genre would promote the dangerous tenet of limiting the freedom of speech vested by the First Amendment. The Supreme Court recognizes that limiting one type of speech can have an indirect effect on the willingness of others to fully express themselves for fear of further restrictions causing the communicator to be "unsure about the side of a line on which his speech falls."[48] Fortunately, this cast doubt when asked to limit the freedom of rappers to express their First Amendment rights, as evidenced by the State of New Jersey v. Vonte Skinner. In this case, the State of New Jersey charged Vonte Skinner with first-degree attempted murder and other related crimes based on the testimony of the victim. During the trial, the judge adjudicated that Vonte Skinner's rap lyrics were admissible with the provision that some lyrics be redacted, which led to a mistrial because "the jury was unable to reach a unanimous verdict."[49] After the case was affirmed by the Appellate Court, Skinner appealed a second time, and the case was accepted by the Supreme Court of New Jersey. During this second trial, the prosecution asked a detective to read lyrics that entailed "violence, bloodshed, death, and dismemberment."[50] To admit the evidence after the objection of Skinner, the prosecution argued that the lyrics displayed patterns of Skinner's motives, which is admissible under the Federal Rules of Evidence and the New Jersey Rules of Evidence. However, Skinner had authored these lyrics before the criminal event, and the specific details of the lyrics had no inextricable link to the crime. The Supreme Court of New Jersey consequently ruled that the lyrics contain no probative value and thus are not admissible because the lyrics did not accurately showcase Skinner's motive on the day of the crime or Skinner's "intent behind the attempted murder offense with which he was charged."[51]

Part V. One Man's Vulgarity is Another's Lyric

In the majority opinion regarding the landmark case of Paul Cohen v. State of California, Justice John Marshall Harlan imparted that an expletive-containing jacket could not be prohibited based on his famous sentence that "it is nevertheless often true that one man's vulgarity is another's lyric."[52]

This famous sentence rings true today, as someone with traditional views may find the expletives to be morally deplorable, while others may find the expletives to merely add an exclamatory effect to the intended message. Chief Justice Harlan's standard can be applied to the standard of threats because interpretations of threatening language vary from person to person.

Society needs the unambiguous authority of an elevated standard for threat communication, rather than the current recklessness standard. The recklessness standard requires the offender to understand that the listener could regard their speech as a threat. Combined with society's general feelings about hip hop as threatening, proven by the aforementioned APA study, hip hop music remains far more vulnerable to being used to prosecute artists than other forms of art. The jurisprudence of the United States needs to change to the knowingly standard to separate careless, impulsive, and ambiguous threats from threats where a person seeks to strike fear into the victim. The knowingly standard would require one to prove that the speaker communicated their speech with the conviction that the listener would perceive their words as a threat rather than communicating them with the possibility that the listener would perceive their words as a threat.

Many hip-hop lyrics could easily fit the standard of recklessness because recklessness does not require the same degree of proof as any other mens rea standard. The standard similarly has precedent in other forms of unprotected speech, and it does not allow rap to function with unfettered creativity, as there is the lingering fear of prosecution. Currently, almost no other mens rea precedent for any other unprotected forms of speech prompts the standard of recklessness. In a concurring opinion for Counterman v. Colorado, Justice Sonia Sotomayor held that the knowingly standard sufficed for obscenity due to Hamling v. United States, where the court called for the knowingly standard and authored that "not innocent but calculated purveyance of filth" received punishment.[53] Correspondingly, during the same concurring opinion, Justice Sotomayor articulated that if the justices did not apply the knowingly standard for incitement of imminent lawless action in NAACP v. Claiborne Hardware Co. and Brandenburg v. Ohio, the defendants would have been charged for the minor risk that reasonable residents felt when they engaged in their politically intense behaviors.[54] Hip-hop contains language that reasonable people could perceive as threatening due to its intense and shocking nature. While successful art does not need to contain a shock factor, many rap songs do deviate from reasonably accepted tones and messages for the purpose of illustrating a fictional story or applying emphasis on the artist's expressed feelings. In the hip-hop industry, there is no better example of this idea than Eminem: Eminem crafted one song detailing him killing his ex-wife and baby's mother for the purposes of demonstrating his disgust for her and another song fictionalizing the death of his producer and boss, Dr. Dre. In Eminem's case, the fictional storytelling or application of emphasis earned him immense acclaim, which resulted in 15 Grammy awards and other prominent awards for the aforementioned songs and other recklessly threatening music. A simple Google search of Eminem's criminal history reveals that he did not commit such a heinous crime, and his lyrics were simply meant to be an expression, not a threat.

During a trial, certain evidence can make or break a case. Therefore, the procedure for allowing evidence must be as fortified and organized as possible, or a trial could end in injustice. Due to the emotional element of jury trials, admitting rap lyrics as evidence could prejudice the jury because the lyrics themselves often do not contain accurate representations of the criminal activity on trial.

Prosecutors often move to admit rap lyrics as evidence to claim the lyrics are autobiographical representations of the rap artist's life and to implore the jury to consider the lyrics "in their simplest and most literal form."[55] This assertion by prosecutors of rap lyrics as autobiographical representations does not accurately define rap or any other art form. Artists create, manufacture, and design stories, poems, lyrics, paintings, melodies, and other forms of art as depictions of fiction—or even fictionalized reality—for the purposes of audience entertainment and captivation. To implore the jury to comprehend the lyrics "in their simplest and most literal form" removes emotion and poetic expression associated with the art form.[56] Jay-Z's lyrics in Brooklyn Go Hard provide an excellent example of this issue. When he writes, " 'cept when I run base, I dodge the pen," it contains a double entendre. The first meaning refers to Jay-Z running (another term for selling) base (freebase cocaine) with him dodging the pen (imprisonment). The second meaning refers to Jay-Z running (rapping) along the base (or, in this case, the bass of the beat) while dodging the pen (or reciting his rap lyrics without writing them down).[lvii] (Jay-Z 2008) If a jury is instructed to analyze this in its simplest form, they could easily conclude that Jay-Z was admitting to selling cocaine, despite the meaning of the lyrics being ambiguous by design. It would be grossly improper for these lyrics to act as evidence against Jay-Z, but, nonetheless, some prosecutors seek to convict based on evidence by entering lyrics into evidence. Since life encapsulates various different perceptions, intellects, and people in it, art will naturally never be simple or literal. Therefore, art forms ought to never be interpreted as simple or literal by the legal system.

Conclusion

Obscenity stands as one of the most difficult forms of unprotected speech to govern and regulate due to its ambiguous nature. Despite this regulatory dilemma, the case of Miller v. California offered one of the greatest tests for regulating unprotected forms of speech. Before Miller v. California, judges perceived content to be obscene based on Justice Potter Stewart's "I know it when I see it" standard.[58] This standard afforded judges unlimited and uncheckable power while alienating innocent citizens from knowing whether their conduct crossed the line. Miller v. California remained monumental because the test provided the framework utilized across a multitude of other cases. The Miller v. California test defines a work of some kind as being obscene if the work "appeals to the prurient interest," "depicts or describes, in a patently offensive way, sexual conduct," or "lacks serious literary, artistic, political, or scientific value."[59]

The Miller test was applied exceptionally well during the case of Luke Records, Inc. v. Sheriff Nick Navarro, where Sheriff Navarro provided the 2 Live Crew's rap lyrics as evidence of their lyrics being obscene. In a per curiam opinion, the United States Court of Appeals for the Eleventh Circuit decided that because the evidence only contained the As Nasty As They Wanna Be record, deemed initially obscene, and could not "contradict the testimony" of the defendant witness' claims of artistic value, the district judge could not determine that the work "had no artistic value."[60] [61] The Miller v. California test allows rap artists to confidently interpret when their art crosses the line of obscenity and denies their speech any First Amendment protection. Evidently, while the great pillar of this test involves its actual definition of obscenity, another pillar lies in its requirement to examine the work as a whole. Unequivocally, this pillar must be applied to the assessment of threats because cherry-picking lyrics synonymously relates to "gotcha journalism," or journalism done with the intention of entrapping a victim through incredulous communication tactics. It can be easier to understand 2 Live Crew's, Eminem's, or any other artist's lyrics when the entire context of their work, artistic genre, and career are all considered.

With the additional requirement of exploring the entire context of the artist's work, the knowingly standard regarding the intent the accused displayed during the communication must also be included. Precedent supports the adoption of a subjective intent standard, as some of the Supreme Court's decisions "have often insisted on protecting even some historically unprotected speech through the adoption of" such a subjective standard.[62] The adoption of a knowingly subjective intent standard comprehensively delineates innocent from guilty threats because a person does not communicate an actionable threat based on some risk of someone else regarding their speech as threatening, but, rather, they communicate an actionable threat based on the complete emphasis on the victim interpreting their speech as threatening. Similarly, the adoption of a knowingly subjective intent standard will cause the greatest promotion of speech as opposed to the consequences of a reckless standard, which typically results in the restriction of speech. According to the American Psychological Association study, society has an unambiguous bias toward perceiving rap music and its lyrics as threatening.[63] When the risk of society perceiving rap as threatening based on the APA study is coupled with the reckless standard, the rap industry as a whole is endangered because of its heightened exposure to prosecution. Therefore, the jurisprudence of the United States warrants the true threat standard to be elevated to knowingly for the purposes of encouraging rap and denying the lyrics to be utilized in criminal and civil courts.

Evidence stands, and will always prevail, as the most powerful aspect of any lawyer's case, while also serving as the most strategically important part of the case's procedures. While the utilization of music lyrics in court has been a tactic for various prosecuting attorneys, the tactic recently gained prominence as a powerful mechanism for swaying juries, as evidenced in Young Thug's YSL RICO trial.[64] [65] [66]

This alarming trend sparked outrage in legislators, prompting Representative Henry C. Johnson, Jr., to propose legislation that "limits the admissibility of evidence of a defendant's creative or artistic expression against the defendant in a federal criminal case."[67] This alarming trend sparked the outrage of Representative Johnson's fellow legislators, who co-sponsored the bill because of how powerful lyrics can be in altering the perception of jurors. These lyrics can frequently be explicit, obscene, and morally repugnant, so the introduction of them in court can easily damage jurors' perception of a defendant. This altered perception refers to what the Harvard School of Public Health addressed as the Horns Effect, or "the tendency to see one bad thing about a person and form a complete view of them" based on that one bad aspect.[68] In many situations, the "bad thing" the jury could be basing their complete view on could be something the defendant fictionalized, a lie that had no connection to their daily life, or, as was true in the case of Jay-Z, intended to have multiple interpretations. Therefore, rap lyrics must be severely limited in their utilization in courtrooms, as lyrics contain heavily prejudicial subject matter, which encompasses fictional and exaggerated statements for entertainment purposes.

Once federal and state courts adopt the subjective knowingly intent standard, rap artists will flourish, and the rap genre will be galvanized by the assurance of freedom of speech, which the founding fathers fought so desperately for. Despite precedent pointing towards a subjective intent standard, the knowledge standard must be implemented to limit the exposure of rap artists in their free expression. Rap defendants will receive fair trials only when the federal and state courts limit the use of rap lyrics as evidence, as currently biased trials are prevalent when the prosecution's evidence contains the defendant's lyrics. Proposed legislation limiting the use of rap lyrics as evidence must be codified to dispel any sense of suppressing speech. The United States and its jurisprudence have always served as a beacon of hope in encouraging the free expression of thought, and society must never dim this beacon; therefore, the court should elevate the threat standard to the knowingly standard and limit the utilization of rap lyrics in court.

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A Crossroads for Cross-Sex Hormones: United States v. Skrmetti and the Boundaries of Equal Protection for Transgender Individuals

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Abstract:
The U.S. Supreme Court's upcoming decision in United States v. Skrmetti represents a pivotal moment for transgender rights protections under the Equal Protection Clause of the Fourteenth Amendment. The case will determine whether laws targeting transgender individuals constitute sex-based classifications and, if so, whether they warrant heightened judicial scrutiny.

This article examines whether statutory transgender classifications qualify as sex-based classifications, tracing developments from Bostock v. Clayton County (2020), which recognized anti-transgender discrimination as sex discrimination under Title VII, to the Court's recent reliance on Geduldig v. Aiello (1974) to narrow the scope of sex-based protections. The Skrmetti decision will clarify whether Bostock's reasoning extends to equal protection claims or if the Court will permit states to regulate transgender status without heightened scrutiny. Additionally, this article explores whether transgender individuals should be recognized as a quasi-suspect class, which would afford them greater constitutional protections.
Given the Court's conservative majority, this article argues that Skrmetti will likely adopt a narrow interpretation of sex discrimination under Geduldig and decline to recognize transgender status as a quasi-suspect classification. Such a ruling would weaken legal protections for transgender individuals, allowing restrictive policies with minimal judicial oversight. By analyzing the case's legal arguments, potential judicial reasoning, and broader implications, this article situates Skrmetti within the ongoing struggle for transgender civil rights and constitutional protections in the United States.

Alongside a changing political landscape, the rights of transgender individuals have taken center stage in national debates. In the 2024 Presidential Election, a key Republican strategy was to cast the Democratic Party as pushing transgender rights too far. As a nonpartisan election analyst pointed out in an interview with NPR, anti-trans messaging by Republicans emphasized a cultural divide in a manner that appealed to men and suburban women. [1] Now, as President Trump has assumed office, he has issued a series of executive orders detailing federal bans on gender-affirming care for minors, transgender athletes, and transgender service members. At perhaps the most salient moment possible, this national debate over the rights that transgender individuals hold has reached the U.S. Supreme Court.

As the Court decides United States v. Skrmetti this summer, it must determine whether laws targeting transgender individuals constitute sex-based classifications under the Equal Protection Clause of the Fourteenth Amendment. With a conservative majority on the Court, a ruling that narrowly defines sex discrimination could significantly limit legal protections for transgender individuals. This will set a historic precedent for the legal treatment of transgender rights under the Equal Protection Clause and hold lasting impacts for the constitutionality of anti-trans policy on both the state and federal levels. The outcome of Skrmetti will not only shape the legal landscape for transgender rights but also determine this Court's trajectory for sex-discrimination jurisprudence in the United States.

Skrmetti follows years of silence from the Court on how the Equal Protection Clause applies to transgender people. After Obergefell v. Hodges (2015), the landmark Supreme Court case that effectively legalized same-sex marriage nationwide, there was a renewed hope among sympathetic activists and legal scholars that a national recognition of transgender rights by the Court might be next. [2] There were multiple proposed avenues through which this might have been accomplished. In a 2016 Boston College Law Review article exploring these avenues, the authors looked at the circumstances in which a transgender litigant might be able to challenge and strike down a facially discriminatory law under the Equal Protection Clause. Multiple overlapping constitutional questions not yet explored by federal courts came up in this exploration: whether statutory transgender classifications should be subject to "heightened scrutiny" under the Equal Protection Clause, whether these classifications are inherently sex-based and subjected to heightened scrutiny, and whether transgender people are a quasi-suspect class under the Constitution. [3] All of this was examined through the lens of a case in which a transwoman sought to sue her former employer through the Americans with Disabilities Act (ADA), even though the ADA expressly excludes "gender identity disorders" from its coverage. [4] She ultimately won a path forward in this case in a U.S. Eastern District court, which found she had a right to pursue the discrimination claim. The federal job discrimination suit was eventually settled between the woman and the employer without continuing into the appeals chain. [5] Since then, the issue of workplace discrimination based on transgender status finally reached the Court in the 2020 case, Bostock v. Clayton County, Georgia.

If there has been any progress made in the ability for a transgender litigant to federally dispute a law under the Equal Protection Clause, it was in the surprising outcome of Bostock. This case combined three cases from lower courts; two in which gay men argued that they were fired due to their sexual orientation, and one where a transgender woman argued that she was fired for being transgender. [6] Each sued due to sex discrimination under Title VII of the Civil Rights Act of 1964. In an opinion penned by Justice Neil Gorsuch, the Court affirmed in a 6-3 majority that these firings were on the basis of sex and, therefore, illegal and discriminatory, as established by Title VII. This was surprising to those casually following the actions of the Court, as Justice Gorsuch is generally known to be conservative, especially considering that he was appointed by republican President Trump. The fittingly titled Washington Post article, "Neil Gorsuch? The surprise behind the Supreme Court's surprising LGBTQ decision," explains how Justice Gorsuch's textualist approach to constitutional interpretation likely impacted his opinion in the case. In his published book, Justice Gorsuch made the case for prioritizing the words of the statute in question, rather than looking at the intentions of legislators or the consequences of the decision. [7] While Bostock can be interpreted to have implications for the law that reach beyond Title VII, especially when it comes to the Equal Protection Clause on which the statute rests, it becomes clear that Justice Gorsuch and Chief Justice John Roberts, who joined the majority, certainly did not intend it to.

Still, Bostock was a landmark decision for transgender rights in the U.S.; its reasoning warrants a closer look to contextualize the current term's Skrmetti case. When the Court used a textualist approach in navigating Title VII, it involved an analysis to find whether the discrimination in question was "because of sex" even though the employer's actions were supposedly due to the employees' sexual orientation or transgender identity. The Court asserts that the words "because of" in Title VII called for a "but-for" causation test in relation to the sex of the employees. [8] In this, the disputed events are reexamined to see if the outcome would have changed if the employee were the opposite sex. The employee's sex did not even have to be the primary cause of their firing; according to Title VII, "intentionally" firing an employee "based in part on sex" is sufficient to find that the employer violated the statute. [9] The majority opinion acknowledges that this may seem overly broad to some, but they insist that the text of Title VII requires this rule, especially when considering that Congress expanded the reach of Title VII in 1991, after the Act was initially passed in 1964. [10]

Where the opinion can be seen to reach beyond the scope of Title VII is in some of the reasoning's wording. One paragraph asserts that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." Again, a hypothetical illustrates this concept by replacing a discriminated individual's sex to change the outcome. An individual's transgender status is "inextricably bound up with sex," at least where Title VII is concerned. [11]

Those interested in expanding the rights of transgender individuals through litigation celebrated this repeated assertion in Bostock – it certainly does not take much effort to see how this reasoning builds on the Court's broader (and, so far, unlitigated) understanding of transgender status. If Title VII can be validly interpreted to protect transgender individuals, as the Court says that their treatment is "inextricably" reliant on their sex, then it seems to be more of a statement on how the law should treat transgender individuals as inherently linked to sex rather than something that is required only in the context of Title VII.

Utilizing this exact reasoning, the United States District Court for the Middle District of Tennessee found in favor of the transgender plaintiffs in the case that would eventually become United States v. Skrmetti. The court states when issuing a preliminary injunction preventing the questioned statute from going into effect that "although Bostock was a Title VII case… its rationale is applicable to Plaintiffs' equal protection claim" because "Justice Gorsuch's reasons for why discrimination based on transgender status is discrimination based on sex were not at all affected by or specific to the Title VII-related context implicated in Bostock." [12] The Sixth Circuit Court of Appeals reversed the district court's ruling by arguing the opposite. Although petitions to the U.S. Supreme Court in Skrmetti state the issue to be the constitutionality of Tennessee's SB1, the core of this conflict is familiar to those who have followed equal protection cases involving transgender litigants over the past decade. The fundamental question is whether laws targeting transgender individuals inherently create sex-based classifications, even if the language of the law appears to be sex-neutral.

United States v. Skrmetti concerns the constitutionality of Tennessee's Senate Bill 1, which effectively bans transgender minors from receiving gender affirming care in the state of Tennessee. The law prohibits medical procedures that "enable a minor to identify with, or live as, as purported identity inconsistent with the minor's sex" or "treat purported discomfort or distress from a discordance between the minor's sex and asserted identity." [13] The law is phrased this way to still allow hormone therapy and puberty blockers as medical treatments for minors in cases that do not involve treating gender dysphoria and aiding gender transition. Petitioners, among other arguments, say that this law warrants heightened scrutiny for drawing sex-based lines in those who have access to this treatment. [14] The state argues that the law functions by creating two groups that do not involve sex within its classification. These groups are "minors seeking drugs for gender transition and minors seeking drugs for other medical purposes." [15] This sort of argument utilizes the Court's reasoning in Geduldig v. Aiello (1974), where they found that excluding pregnancy-related disabilities from California's disability insurance program was not necessarily facial sex discrimination; this was because the program divided potential recipients into the groups of "pregnant women" and "nonpregnant persons," the latter of which included both sexes. Because the two groups implicated by the Tennessee law are minors seeking treatment for gender transition and those seeking treatment for other medical purposes, the two groups involve both sexes, making it so that heightened scrutiny due to facial sex classifications does not apply. [16]

Here, the Court reaches a divisive question: should Bostock or Geduldig hold more weight in deciding whether laws that effectively differentiate based on transgender status use facial sex classification? In Skrmetti, the Court will most likely have to confront this issue head-on, and either outcome has deep implications for transgender rights and sex-discrimination case law. It is clear from the oral arguments held for Skrmetti that conservatives on the Court likely favor the use of Geduldig's standard for identifying facial sex classification, even in laws implicating transgender individuals. Justice Samuel Alito asked U.S. Solicitor General Elizabeth Prelogar, who argued for the petitioners, why the Court should defer to Bostock rather than Geduldig, especially considering that "Bostock involved the interpretation of a particular language in a particular statute," and that the Geduldig standard was embraced by Dobbs when rejecting the Equal Protection argument for abortion rights. [17] Additionally, Justice Amy Coney Barrett said that "trying to make the Bostock-like argument... feels like an odd way to solve the problem." [18] Even the petitioners themselves, who obviously benefit from Bostock's reasoning, seem to understand that they are at a disadvantage if they fundamentally rely on Bostock to make their case. When questioned by Justice Alito, General Prelogar tried to distance their argument from Bostock by saying that it is not exactly based on Bostock-like reasoning (to which Justice Alito disagreed). [19]

If Geduldig is embraced and the petitioner's argument is rejected, then potential protections for transgender people under the law would be substantially limited. State and federal law would be able to draw lines based on transgender status without heightened scrutiny due to sex classifications. The creation of any two groups involving members of both sexes, even when designed to single out individuals whose gender does not align with their birth sex, could not be found to be sex discrimination. Transgender plaintiffs, in seeking relief, would have the more burdensome task of proving discriminatory intent when they assert that their equal protection rights were violated. [20] This is far less likely to provide relief in cases of discrimination against transgender individuals, and it becomes easier for governments to restrict these individuals' access to activities that would otherwise remain available to other members of society. Skrmetti involves the access of transgender minors to gender-affirming medical treatment, but litigation is likely to reach many other areas that touch on transgender rights. Geduldig, in its more significant consequences, could allow public entities to criminalize transgender adults undergoing gender-affirming care, bar those diagnosed with gender dysphoria from public employment, and apply systems of sex-segregation to transgender people without triggering heightened review.[21] For trans people across the country, this poses an impending threat to their civil liberties. On the coattails of 26 state-imposed bans, [22] similar to the one disputed in Skrmetti, the Trump administration has also issued an executive order defunding and restricting federal services that "fund, sponsor, promote, assist, or support the so-called transition of a child (defined as younger than 19) from one sex to another." [23]

Other executive orders promulgate policies that block new passports from identifying trans individuals as their preferred gender, ban trans girls and women from women's school sports, ban transgender people from serving openly in the military (also applying retroactively), and mandate that trans people in prisons be treated as their birth sex. [24] Regardless of the President's ability to legally implement these policies, they reflect the desires of Republican lawmakers to enact anti-trans policies on both the state and federal level. Under the Geduldig standard, these laws would be subject to nothing more but rational-basis review.

There remains an alternative legal argument to demanding heightened review for laws that implicate the rights of transgender people. Less emphasized by the Skrmetti petitioners in oral argument but a key component of their brief, trans individuals may be identified as a quasi-suspect class. The petitioners assert that they "satisfy all the hallmarks of a quasi-suspect class." This includes four factors: whether the class has historically been subjected to discrimination, whether they have a defining characteristic that bears no relation to the ability to perform or contribute to society, whether members have "obvious, immutable, or distinguishing characteristics" defining them as a "discrete group," and whether the class lacks political power. [25] However, respondents looked at this reasoning and denied transgender individuals quasi-suspect classification on all four factors. [26] This demonstrates that there is no single objective manner to satisfy the four factors and create a new quasi-suspect class; if anything, the respondents also point out that the Court tends to refrain from creating new quasi-suspect classes, having declined in past cases to expand protected characteristics to homosexual individuals, close relatives, the mentally disabled, and the aged. [27]

The possibility of this Court identifying trans individuals as a quasi-suspect class is nearly nonexistent, as further indicated by the petitioners' hesitance to orally argue for the expansion of quasi-suspect classification to transgender people. Still, this does not mean that the upcoming Skrmetti case involves no implications for the future of this legal argument. The Court can still decide to directly address and reject the idea of transgender individuals as a quasi-suspect class, solidifying how the Court sees transgender status as it relates to the four factors and making it an argument that lower courts can no longer use. Depending on how broad the opinion ends up being, the Court can also effectively shut down arguments for new quasi-suspect classes if they indicate that they will refrain from their creation in future cases.

The U.S. Supreme Court's decision in **United States v. Skrmetti** will have far-reaching consequences for transgender individuals in this country. Certainly, requiring heightened scrutiny for laws that classify individuals based on sex would not directly grant protections to transgender individuals. Instead, it would impose a higher standard for legislatures to justify such laws, making it more difficult for them to enact restrictions targeting transgender people. By determining whether laws that regulate based on transgender status inherently involve sex-based classifications, the Court may set a critical precedent that substantially weakens legal protections for transgender people under the Equal Protection Clause.

If the Court embraces a narrow interpretation of sex discrimination, as suggested by its reasoning in Geduldig and Dobbs, it will grant lawmakers the space to enact restrictions targeting transgender individuals with minimal judicial oversight. By shifting the burden of proof onto those seeking protection, such a ruling would make it significantly harder for transgender plaintiffs to challenge laws that limit their access to healthcare, employment, and public accommodations.

Beyond Skrmetti, the ruling will signal the Court's broader approach to sex-based classifications and the viability of future legal arguments for transgender rights. By closing these avenues for transgender individuals to seek protection and relief from discriminatory policies, the Court further limits the applicability of the Equal Protection Clause. It joins the other branches of government in signaling that transgender individuals cannot rely on the law or the Constitution to shield them from what they perceive as government overreach.

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[4] Ibid., 510.
[5] Weaver, Stephanie. 2017. “Pottsville Transgender Woman Settles Job Discrimination Suit against Cabela’s.” Reading Eagle. September 27, 2017. https://www.readingeagle.com/2017/09/27/pottsville-transgenderwomansettles-job-discrimination-suit-against-cabelas/.
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[9] Ibid., 9.
[10] Ibid., 6.
[11] Ibid., 9-10
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[16] Ibid., 23.
[17] Heritage Reporting Corporation, Dec. 2024. “United States, Petitioner, v. Jonathan Skrmetti, Attorney General and Reporter for Tennessee, et al., Respondents.: Oral Arguments Transcript.,” 21.
[18] Ibid., 59.
[19] Ibid., 20.
[20] Katie Eyer, "Transgender Equality and Geduldig 2.0," Arizona State Law Journal 55, no. 2 (Summer 2023): 489.
[21] Ibid., 479.
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