

# YESHIVA UNIVERSITY UNDERGRADUATE LAW REVIEW

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## LETTER FROM THE EDITORS

Dear Reader,

Welcome to the third edition of the Yeshiva University Undergraduate Law Review, the university's primary publication of legal thought and analysis from undergraduate students. The incredible papers that comprise this edition carry on the tradition we established in the first two: thoughtful and rigorous treatment of complex and compelling subjects written by authors of diverse backgrounds and political leanings. We are incredibly proud of the work done by all of our authors and editors as well as the space we have created for all of Yeshiva University's undergraduate students to engage with legal analysis in a serious manner.

This edition features unprecedented diversity amongst our writers' topics of choice. Our writers ranged widely in their topics—from the legality of flag burning and the breaching of national sovereignty to eliminate WMDs, to theoretical treatments of principled positivism and early religious legal canon—branching off in directions that together make this our best YUULR yet. Equally impressive is the consistent, tireless effort put forth by our editorial team, who devoted countless hours and many long nights to meticulously checking grammar, style, and citations. We are deeply grateful for their help and could not have continued this publication without them.

That being said, the most important group we need to thank is you, our readers. Without your commitment to learning about the law and its many applications and giving our students a space to present their research and passion for legal analysis, this publication would not be possible. Thank you for your time, your interest, and your consistency in supporting us on this journey.

It is a privilege to help foster legal scholarship among YU undergraduates, and we hope this journal continues to be a meaningful stepping stone for students as they prepare to engage with the legal world beyond these pages.

Kayla Kramer - Editor-in-Chief

Aiden Harow - Managing Editor

*(Important note: All views expressed in the following papers are those of the writers alone. They do not indicate the beliefs or thoughts of the editors, senior editors, or Yeshiva University, administratively or institutionally. Additionally, because this is the Review's third year of publication, this issue is designated Edition 3.1, with the first number reflecting the publication year and the second number reflecting the issue within that year.)*

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## TABLE OF CONTENTS

“Flag Burning and the First Amendment: Why Executive Action Cannot Overcome Supreme Court Precedent”	1
“The Case for a Concrete WMD Definition: Studying the Legality of Breaching National Sovereignty”	24
“Between Shapiro and Berman: Reformulating Principled Positivism”	42
“Gospelic Legalism: A Re-Evaluation of the Pharisee-Christian Debate in the Canonical Gospels”	55
“The Right to Practice Religion as They Please”	71
“Cox Communications, Inc. v. Sony Music Entertainment”	81
“Emergency Powers, Tariffs, and Judicial Review After the Supreme Court’s Tariff Decisions”	90
“The Caracas Precedent: Narco-Terrorism as an Exception to Customary Head-of-State Immunity”	104

FLAG BURNING AND THE FIRST AMENDMENT: WHY EXECUTIVE ACTION CANNOT OVERCOME SUPREME COURT PRECEDENT

*Elizabeth Kohl*<sup>1</sup>

*This paper examines the constitutional barriers to criminalizing flag burning in the United States, particularly with regard to President Trump’s August 2025 executive order seeking to prosecute flag desecration. Beginning with the historical development of flag protection laws, the paper analyzes how Texas v. Johnson (1989) and United States v. Eichman (1990) established flag burning as protected speech under the First Amendment. It then evaluates the repeated congressional failures to pass a constitutional amendment overturning Johnson and explains why the Trump administration’s reliance on the imminent lawless action and fighting doctrines cannot survive constitutional scrutiny. The article concludes that, absent an amendment, flag burning will remain protected expression regardless of executive proclamations, and that the current Supreme Court is unlikely to alter that precedent.*

INTRODUCTION..... 2  
I. FLAG PROTECTION LAWS BEFORE 1989..... 3  
II. TEXAS V. JOHNSON..... 6  
III. THE FLAG PROTECTION ACT OF 1989..... 9  
IV. THE CONSTITUTIONAL AMENDMENT EFFORTS..... 10  
V. TRUMP’S POSITION AND EXECUTIVE POWER LIMITATIONS..... 13  
VI. COULD THE CURRENT SUPREME COURT OVERTURN JOHNSON?. 19  
CONCLUSION..... 21

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## INTRODUCTION

Starting in August 2025, President Donald Trump has proposed outlawing flag burning and imposing severe punishments on those who damage or destroy the American flag.<sup>2</sup> This reignited a debate that has been quietly circulating within American political discourse for decades: What is the scope of First Amendment protections? Flag burning remains one of the most inflammatory forms of political protest, as it almost always provokes immediate reaction and calls for legal action.

Yet despite its appeal to many Americans' sense of patriotism, the constitutional barriers to criminalizing flag burning are formidable and, under current Supreme Court precedent, appear nearly insurmountable. This article argues that barring a constitutional amendment, flag burning will remain protected speech under the First Amendment regardless of executive proclamations.

This article proceeds in seven parts. Part I examines the historical development of flag protection laws and the relevant Supreme Court precedent prior to 1989. Part II analyzes *Texas v. Johnson* and its constitutional significance, particularly the way this case establishes the modern First Amendment framework protecting flag burning as a symbolic action. Part III discusses Congress's response to *Johnson* and the ensuing legal *conflict*, focusing on the Flag Protection Act of 1989 and the Supreme Court's decision in *United States v. Eichman*. Part IV traces the repeated efforts to overturn *Johnson* through constitutional amendment and explains why those efforts have consistently failed. Part V evaluates President Trump's recent executive actions and arguments seeking to circumvent *Johnson*, explaining why they conflict with established First

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<sup>2</sup> Nik Popli, *Trump Signs Executive Order on Flag Burning, Which the Supreme Court Considers Protected Speech*, TIME (Aug. 25, 2025, 3:55 PM), <https://time.com/7312047/trump-burning-american-flag-supreme-court/>.

Amendment rulings. Part VI considers whether the current Supreme Court is likely to overturn *Johnson*, concluding that such a reversal is not likely. Part VII concludes the discussion by assessing the broader constitutional and practical barriers to criminalizing flag burning.

### I. FLAG PROTECTION LAWS BEFORE 1989

President Donald Trump is not the first American with the impulse to protect the American flag from desecration. Beginning in the late nineteenth century, states enacted laws designed to prevent the flag's use in advertising and to prohibit acts that would physically damage or deface the flag.<sup>3</sup> One Nebraska law prohibited the use of the American flag in commercial advertising. In 1907, two businessmen who had been selling beer with the American flag printed on the label challenged the law, bringing the case to the Supreme Court in *Halter v. Nebraska*. Nebraska won, and Harlan penned the majority opinion defending them. Justice Harlan emphasized the symbolic importance of the flag, stating that "it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot." Due to the sacred nature of what the flag symbolizes, the Court reasoned that it is worthy of protections beyond the strict interpretation of the First Amendment.<sup>4</sup>

Beginning in 1897, individual states began adopting their own flag-desecration statutes. The first few states to enact such laws were Illinois, Pennsylvania, and South Dakota.<sup>5</sup> By 1932, all the states had adopted their own laws. These laws prohibited using the flag in any type of advertisement and defiling it in any way.<sup>6</sup>

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<sup>3</sup> *Timeline of Flag Desecration Issues*, USHISTORY.ORG, <https://www.ushistory.org/betsy/more/desecration.htm>.

<sup>4</sup> *Halter v. Nebraska*, 205 U.S. 34 (1907).

<sup>5</sup> *Timeline of Flag Desecration Issues*, *supra* note 3.

<sup>6</sup> *Id.*

Following the implementation of these laws, during World War I, over a dozen people were legally punished for violating state laws that prohibited insulting the American flag. Moreover, at the federal level, through the Sedition Act of 1918, Congress prohibited writing anything with “disloyal” language about the American flag, but specified that this only applies if the intent is to harm the flag.<sup>7</sup> In 1919, in *Abrams v. United States*, the Supreme Court ruled that the Sedition Act was lawful and did not violate the First Amendment. Thus, through the First World War, both state and federal laws prohibited the desecration of the flag.<sup>8</sup>

However, following World War I, the Court gradually shifted its position. In 1931, in *Stromberg v. California*, the Court determined that a state law prohibiting red flags, which symbolized communism, infringed on the First Amendment right to protest the government.<sup>9</sup> This case marked the first time the First Amendment was invoked to protect not only speech but also symbolic actions.

In 1943, in *West Virginia Board of Education v. Barnette*, the Court revisited a case from 3 years earlier and ruled that children could not be forced to salute the American flag during the Pledge of Allegiance. Justice Jackson famously wrote, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.”<sup>10</sup>

The Vietnam War era marked the real turning point in the constitutional treatment of symbolic flag burning. As opposition to the war intensified, flag burning was used as a form of antiwar protest. Images of

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<sup>7</sup>Jonathan W. White, Daniel Glenn & Rachel Wagner, *We Didn't Start the Fire: The Unknown History of Flag Desecration in America*, FED. LAW., Oct./Nov. 2017, <https://www.fedbar.org/wp-content/uploads/2017/10/Unknown-History-of-Flag-Desecration-pdf-1.pdf>.

<sup>8</sup> *Abrams v. United States*, 250 U.S. 616 (1919).

<sup>9</sup> *Stromberg v. California*, 283 U.S. 359 (1931).

<sup>10</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

protestors setting American flags on fire became one of the defining symbols of the era.<sup>11</sup> Flag burning prosecutions increased, but so did constitutional challenges to flag desecration laws.

In 1967, over 200,000 protesters gathered in Central Park to protest the Vietnam War, where they also burned flags. The protest triggered a large media response and public anger about the desecration. This anger was made worse by the fact that the police did not make any arrests at the protest. Congress responded by passing the Flag Protection Act of 1968, expanding the ability of federal agencies to imprison and/or punish flag desecrators. The statute made it a crime to “knowingly cast contempt” on the American flag.<sup>12</sup>

Several pre-*Johnson* cases began to chip away at the foundations of flag protection laws, albeit without establishing clear precedent. In *Street v. New York* (1969), the Supreme Court overturned a conviction for flag burning on narrow grounds, ruling that the defendant could not be punished for his verbal disrespect toward the flag, though the Court declined to address whether the burning itself was protected.<sup>13</sup> In *Spence v. Washington* (1974), the Court ruled that displaying a peace symbol on an American flag was considered protected symbolic speech, arguing that the defendant’s conduct was in essence communication and not actual destruction of the flag.<sup>14</sup>

For around two decades following the passing of the first federal flag protection statute in 1968, lower courts consistently upheld the constitutionality of flag desecration laws, and the Supreme Court declined to review these decisions. However, the Supreme Court’s decisions in cases

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<sup>11</sup> Dave Roos, *The Volatile History of Flag Burning in the US*, HISTORY (Sept. 2, 2025), <https://www.history.com/articles/flag-burning-first-amendment>.

<sup>12</sup> *Id.*

<sup>13</sup> *Street v. New York*, 394 U.S. 576 (1969).

<sup>14</sup> *Spence v. Washington*, 418 U.S. 405 (1974).

like *Spence* suggested that a resolution of the flag burning question would soon follow.<sup>15</sup>

## II. TEXAS V. JOHNSON

The Supreme Court addressed the question of flag burning directly in *Texas v. Johnson*,<sup>16</sup> a case arising from events at the 1984 Republican National Convention in Dallas. Gregory Lee Johnson, a member of the Revolutionary Communist Youth Brigade, participated in a political demonstration protesting the policies of the Reagan administration. As the protest was ending, Johnson burned an American flag while protesters chanted. No one was physically injured, though several witnesses testified that they were seriously offended.<sup>17</sup>

Texas prosecuted Johnson under a state law that prohibited desecration of esteemed objects, including the national flag. The prosecution argued that Texas had a legitimate interest in preventing breaches of the peace and preserving the flag as a symbol of national unity. Johnson was convicted and sentenced to one year in prison, a \$2,000 fine, or both. However, the Texas Court of Criminal Appeals reversed the conviction, ruling that the state law violated the First Amendment.<sup>18</sup>

In a 5-4 decision penned by Justice William Brennan, the Supreme Court sided with Johnson.<sup>19</sup> The majority held that flag burning constitutes symbolic action protected by the First Amendment, which Texas's interests did not justify suppressing.

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<sup>15</sup> John R. Luckey, *Flag Desecration and the First Amendment*, CRS Rep. No. 95-709 (1995), <https://www.everycrsreport.com/reports/95-709.html>.

<sup>16</sup> *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* Justice Brennan's majority opinion was joined by Justices Marshall, Blackmun, Scalia, and Kennedy.

Justice Brennan's opinion established several crucial principles. First, the Court confirmed that conduct may constitute speech and thereby be protected by the First Amendment when the conduct is "sufficiently imbued with elements of communication."<sup>20</sup> The Court found that Johnson's flag burning was clearly intended to convey a particular message and that there was a strong likelihood that the message would be understood by those who viewed it. Because of this, Johnson's conduct was entitled to First Amendment protection.

Second, the Court applied a heightened standard of review to Texas's law because it restricted expression specifically because of the political message it conveyed, rather than regulating the conduct itself in a neutral way. While Texas claimed the law existed to prevent breaches of the peace, the Court found no evidence that Johnson's flag burning created any imminent threat of violence or disorder.<sup>21</sup> Therefore, the Court noted, the flag desecration statute was not aimed at preventing "breaches of the peace" generally, but rather at suppressing expression that would offend those who witnessed it.

Third, the Court rejected Texas's argument that the state had a compelling interest in preserving the flag as a symbol of national unity. The majority opinion acknowledged the flag's special place in American culture but held that this status could not justify prohibiting expression simply because it offends observers. In the Court's most frequently quoted passage, Justice Brennan wrote: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>22</sup>

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<sup>20</sup> *Johnson*, 491 U.S. at 404.

<sup>21</sup> *Id.* at 407-10.

<sup>22</sup> *Id.* at 414.

Thus, the Court recognized that the flag serves as a symbol of national unity but concluded that the government cannot ensure respect for that symbol by punishing those who treat it disrespectfully. On the contrary, compelling respect for the flag would dilute the very freedom that makes the symbol worth protecting. The majority opinion therefore reflected a fundamental First Amendment principle: the government may not suppress speech simply to avoid offense to the public or to enforce “proper respect” for national symbols.

However, Chief Justice Rehnquist wrote a dissent along with Justices White and O’Connor, while Justice Stevens authored a separate dissent.<sup>23</sup> To argue that flag desecration is indeed unprotected, they emphasized the flag’s unique position in American history and its role as the nation’s visible symbol. Chief Justice Rehnquist recounted the flag’s presence at key moments in American history and argued that the flag occupies such a unique position as a national symbol that the government should be permitted to prohibit its desecration.

The dissent distinguished flag burning from other forms of symbolic speech, arguing that the flag’s special nature justified treating it differently from other objects. While the government cannot prohibit criticism of the flag or disagreement with what it represents, the dissent argued that the government should be permitted to protect the symbol’s physical integrity without violating the First Amendment.

The public and political reaction to *Johnson* was swift and negative. Polls indicated that a substantial majority of Americans disagreed with the Court’s decision and supported outlawing flag burning.<sup>24</sup> Members of

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<sup>23</sup> *Id.* at 421 (Rehnquist, C.J., dissenting); *id.* at 436 (Stevens, J., dissenting).

<sup>24</sup> Joseph Carroll, *Public Support for Constitutional Amendment on Flag Burning*, GALLUP (June 29, 2006), <https://news.gallup.com/poll/23524/public-support-constitutional-amendment-flag-burning.aspx>.

Congress from both parties condemned the decision, and President George H.W. Bush called for a constitutional amendment to overturn it.<sup>25</sup> The decision became a rallying point for conservatives who framed it as an example of judicial overreach and an offense to national symbols. It also put defenders of the ruling in the uncomfortable position of appearing to condone flag burning, even though what they supported was the constitutional principle underlying the Court's holding.

### III. THE FLAG PROTECTION ACT OF 1989

Rather than immediately trying to amend the Constitution, Congress first attempted to enact a statute that could satisfy the Supreme Court's constitutional concerns while still prohibiting flag burning. The result was the Flag Protection Act of 1989, which was enacted just months after the *Johnson* decision.<sup>26</sup>

Instead of prohibiting flag burning based on the content or viewpoint of the message conveyed, the Act prohibited anyone from knowingly mutilating or defiling any flag of the United States, regardless of the person's motivation or message. The theory was that a content-neutral prohibition banning flag destruction for any purpose might survive constitutional scrutiny where Texas's statute had failed. As opposed to the 1968 Act, this statute removed the "casting contempt" requirement and focused only on the physical destruction of the flag.<sup>27</sup>

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<sup>25</sup> American Civil Liberties Union, *ACLU Calls Bush Stance on Flag Amendment Misguided*, ACLU (June 22, 1989), <https://www.aclu.org/press-releases/aclu-calls-bush-stance-flag-amendment-misguided-say-s-constitution-must-be-protected>.

<sup>26</sup> Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (codified at 18 U.S.C. § 700).

<sup>27</sup> Mitzi Ramos, *Flag Protection Acts of 1968 and 1989*, FIRST AMENDMENT ENCYCLOPEDIA (Jan. 1, 2009), <https://firstamendment.mtsu.edu/article/flag-protection-acts-of-1968-and-1989/>.

However, Congress's hopes were quickly disappointed. In *United States v. Eichman* (1990), the Supreme Court struck down the Flag Protection Act by the same 5-4 vote.<sup>28</sup> Justice Brennan again wrote for the majority, explaining that although the Act did not explicitly target expression based on its content, it still suffered from the same fundamental flaw as the Texas statute: it suppressed expression based on the content of the message.

The Court explained that the government's interest in protecting the physical integrity of the flag as a symbol was inherently related to the suppression of free expression.<sup>29</sup> The Act criminalized conduct that would damage the flag's physical integrity precisely because such damage would get in the way of the flag's function as a symbol. Merely eliminating explicit reference to the message conveyed did not transform the statute into a permissible content-neutral regulation.

*Eichman* made clear that as long as the government's interest in prohibiting flag desecration rested on protecting the flag's symbolic value, any such prohibition would be unconstitutional regardless of how it was drafted.

#### IV. THE CONSTITUTIONAL AMENDMENT EFFORTS

Following *United States v. Eichman*, proponents of flag protection laws recognized that only a constitutional amendment could overcome the Supreme Court's First Amendment analysis. Beginning in 1989, lawmakers proposed a series of amendments that would grant Congress the power to prohibit physical desecration of the American flag.<sup>30</sup>

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<sup>28</sup> *United States v. Eichman*, 496 U.S. 310 (1990).

<sup>29</sup> *Eichman*, 496 U.S. at 317-18.

<sup>30</sup> S.J. Res. 12, 109th Cong. (2005).

While the exact language varied across different proposals, most granted Congress the power “to prohibit the physical desecration of the flag of the United States.”<sup>31</sup> This language was carefully crafted to grant authority without mandating specific penalties or defining precisely what conduct would be prohibited, leaving those determinations to future legislation.

Flag desecration amendments came remarkably close to passing several times. The House of Representatives passed these amendments multiple times, sometimes by overwhelming margins exceeding the required two-thirds supermajority. The real battleground was the Senate, where the amendment repeatedly fell just short of the 67 votes needed.<sup>32</sup>

The closest attempt occurred in 2006, when the Senate voted 66-34 in favor of the amendment. This was one vote away from the two-thirds majority required to send it to the states to be ratified.<sup>33</sup> Earlier attempts in 1989, 1995, and 2000 also came within a handful of votes of passing.<sup>34</sup> Each time, supporters mobilized veterans’ groups and appealed to patriotic sentiment, while opponents warned against tampering with the First Amendment for the first time in history to restrict, rather than expand, freedom.<sup>35</sup>

Several factors contributed to the repeated failure of flag desecration amendments to clear the Senate. First, a core group of senators remained committed to protecting the First Amendment even

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<sup>31</sup> S.J. Res. 12, 109th Cong. (2005).

<sup>32</sup> American Civil Liberties Union, *Background on the Flag Desecration Amendment*, ACLU (Mar. 4, 2004), <https://www.aclu.org/documents/background-flag-desecration-amendment>.

<sup>33</sup> Roll Call Vote 189, 109th Cong., 2d Sess. (June 27, 2006), [https://www.senate.gov/legislative/LIS/roll\\_call\\_votes/vote1092/vote\\_109\\_2\\_00189.htm](https://www.senate.gov/legislative/LIS/roll_call_votes/vote1092/vote_109_2_00189.htm).

<sup>34</sup> *Flag Desecration Amendment Fails by One Vote in Senate*, JURIST (June 27, 2006), <https://www.jurist.org/news/2006/06/flag-desecration-amendment-fails-by/>.

<sup>35</sup> *Flag-Burning Amendment Fails*, CQ ALMANAC (1995), <https://library.cqpress.com/cqalmanac/document.php?id=cqal95-1100498>.

when doing so was politically unpopular. These senators argued that the Bill of Rights should not be amended to restrict freedoms. They thus treated the First Amendment as a firm boundary that even widespread public sentiment could not override.<sup>36</sup>

Second, opponents used versions of the slippery slope argument. If the government could prohibit flag desecration, what other symbols might it protect next? Could it prohibit burning the Constitution, defacing images of the Founding Fathers, or desecrating religious symbols? These concerns resonated with senators worried about opening the door to broader restrictions on political expression.

Third, practical questions about enforcement complicated the debate. What exactly constitutes a flag? Would the amendment apply to flag imagery on clothing, napkins, or commercial products? These definitional problems suggested that implementing any legislation would create significant practical challenges.

The difficulty of amending the Constitution, evident here, reflects the Founders' design. Article V of the Constitution requires that amendments be proposed by two-thirds of both houses of Congress and ratified by three-fourths of state legislatures.<sup>37</sup> This high bar ensures that only amendments with overwhelming national support can alter the American government.

In the case of flag desecration amendments, the requirement that three-fourths of states ratify any amendment Congress proposed created additional uncertainty. While polls suggested public support for flag protection, translating that support into action by thirty-eight state legislatures was far from guaranteed.

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<sup>36</sup> *Why the Flag-Burning Ban Failed*, TIME (Oct. 22, 1989), <https://time.com/archive/6919725/why-the-flag-burning-ban-failed/>.

<sup>37</sup> U.S. Const. art. V.

## V. TRUMP'S POSITION AND EXECUTIVE POWER LIMITATIONS

Donald Trump has repeatedly expressed support for criminalizing flag burning, both as a candidate and as president. In 2016, he tweeted that anyone who burns the American flag should face consequences, including possibly loss of citizenship or a year in jail.<sup>38</sup> In August 2025, President Trump escalated these efforts by issuing an executive order titled “Prosecuting Burning of the American Flag.”<sup>39</sup>

The executive order invokes an interesting legal strategy by attempting to circumvent *Johnson* without directly challenging it. Rather than seeking an overall prohibition on flag burning, the order instructs the Attorney General to prosecute such conduct under existing federal laws on property damage, discrimination, hate crimes, and violence only when the flag burning causes “harm unrelated to expression, consistent with the First Amendment.”<sup>40</sup> This framing attempts to sidestep *Johnson* by targeting the physical act rather than the message, but in practice it may be difficult to disentangle the two, since the expressive and physical dimensions of flag burning are inseparable. More controversially, the order claims that “the Court has never held that American Flag desecration conducted in a manner that is likely to incite imminent lawless action or that is an action amounting to ‘fighting words’ is constitutionally protected.”<sup>41</sup>

This argument attempts to exploit two established exceptions to First Amendment protection. The first is the “imminent lawless action” test articulated in *Brandenburg v. Ohio* (1969), which held that speech may be

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<sup>38</sup> Luckey, *supra* note 15.

<sup>39</sup> Exec. Order No. 14,341, *Prosecuting Burning of the American Flag*, 90 Fed. Reg. 42,127 (Aug. 28, 2025), <https://www.federalregister.gov/documents/2025/08/28/2025-16616/prosecuting-burning-of-the-american-flag>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

prohibited only if it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>42</sup> The second is the “fighting words” doctrine from *Chaplinsky v. New Hampshire* (1942), which excludes from First Amendment protection words that “by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>43</sup>

It is worth noting that the Brandenburg incitement test has been interpreted narrowly: speech is only unprotected if it is both directed to produce imminent lawless action and likely to do so — an exceptionally high threshold that the Court has been reluctant to expand beyond classic speech. Applying this exception to flag burning would be a doctrinal stretch, as flag burning is typically a symbolic act rather than speech directed at provoking immediate violence or inflicting injury on a specific person. Similarly, modern First Amendment law treats fighting words as a very narrow doctrine that applies almost exclusively to direct, personal insults likely to provoke an immediate breach of the peace; it has never been successfully extended to symbolic political conduct of the kind at issue in flag burning cases.

The order also directs immigration authorities to “deny, prohibit, terminate, or revoke visas, residence permits, naturalization proceedings, and other immigration benefits” for foreign nationals who engage in flag desecration.<sup>44</sup>

These statements and executive actions resonate with Trump’s political base and reflect genuine frustration among many Americans who view flag burning as beyond the limits of acceptable protest. However, the theory underlying the order faces substantial constitutional obstacles and

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<sup>42</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>43</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>44</sup> Exec. Order No. 14,341, *supra* note 39.

reflects a misunderstanding of how First Amendment exceptions actually operate.

The president cannot criminalize conduct. The constitutional separation of powers reserves lawmaking authority for Congress, and even Congress may not enact a law that violates the First Amendment as interpreted by the Supreme Court. A presidential executive order purporting to impose criminal penalties for flag burning would be void and unenforceable.

Moreover, the president cannot override Supreme Court precedent through executive action. The *Johnson* and *Eichman* decisions remain binding precedent until either the Supreme Court overturns them or a constitutional amendment supersedes them. No executive order can alter this reality. The Department of Justice is bound by the Constitution and cannot prosecute conduct that the Supreme Court has held to be constitutionally protected.

Trump's suggestion that flag burners should lose their citizenship raises additional constitutional problems. The Supreme Court held in *Afroyim v. Rusk* (1967) that Congress cannot revoke citizenship without a citizen's consent.<sup>45</sup> Denaturalizing flag burners would violate this established principle independent of any First Amendment concerns.

The Trump administration's legal strategy rests on the claim that flag burning can be prosecuted when it either incites imminent lawless action or constitutes fighting words. This theory faces several problems that motivated legal experts to quickly dismiss the executive order as constitutionally invalid.

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<sup>45</sup> *Afroyim v. Rusk*, 387 U.S. 253 (1967).

First, the Supreme Court already addressed and rejected the “breach of peace” argument in *Johnson* itself. Texas had argued that Johnson’s flag burning threatened to provoke violence, but the Court found no evidence of imminent disturbance. Justice Brennan wrote that the state’s interest in preventing breaches of the peace was not in question here because “no disturbance of the peace actually occurred or threatened to occur.”<sup>46</sup> The Court further held that the mere possibility that others might react violently to offensive expression cannot justify suppressing that expression. If it were otherwise, hostile audiences would be able to silence speakers simply by threatening violence.<sup>47</sup>

Second, the Brandenburg test requires both that speech be “directed to inciting” lawless action and that such action be “likely” to occur “imminently.”<sup>48</sup> Flag burning as a political protest usually satisfies neither requirement. In *Brandenburg*, the Court protected even a Ku Klux Klan leader’s inflammatory rhetoric because it was conditional and not an immediate call to violence.<sup>49</sup> If the conditional racist threats in *Brandenburg* were protected, then flag burning, which communicates political disagreement but does not call for violence, should certainly be protected. Flag burners are expressing opposition to government policies, not directing anyone to take immediate unlawful action.

Third, the fighting words doctrine has been substantially narrowed since *Chaplinsky* and has never been successfully applied to symbolic political protest. In *Cohen v. California* (1971), the Court rejected a fighting words argument to punish someone wearing a jacket reading “F— the Draft” in a courthouse, holding that the doctrine applies only to “personally abusive epithets” directed at specific individuals in face-to-face

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<sup>46</sup> *Texas v. Johnson*, 491 U.S. 397, 408 (1989).

<sup>47</sup> *Id.*

<sup>48</sup> *Brandenburg*, 395 U.S. at 447.

<sup>49</sup> *Id.*

confrontations.<sup>50</sup> Flag burning is not directed at any particular person; rather, it is a symbolic political statement directed at government policy. The Court in *Johnson* essentially rejected the fighting words theory by protecting flag burning even though observers testified to being “seriously offended.”

Fourth, in *Virginia v. Black* (2003), the Court clarified that cross burning may be prohibited only when done with the intent to intimidate.<sup>51</sup> The Court struck down a provision that treated cross burning itself as evidence of such intent, holding that some instances of cross burning are protected expressions of “a statement of ideology” or “group solidarity.”<sup>52</sup> If even cross burning, which is sometimes associated with terrorist violence, receives First Amendment protection without proof of specific intent to intimidate identified victims, flag burning must likewise be protected when done as political protest.

Fifth, selective enforcement of neutral laws based on the expressive content of conduct violates the First Amendment just as much as a direct prohibition on expression. The executive order instructs officials to “prioritize” enforcement of property damage and public safety laws against flag burners, which constitutes viewpoint discrimination. As legal scholar Eugene Volokh noted, this amounts to targeting protected speech through selective prosecution. Trump wants to prosecute flag burners under laws that would not be enforced against others who light fires for non-expressive purposes.<sup>53</sup>

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<sup>50</sup> *Cohen v. California*, 403 U.S. 15, 20 (1971).

<sup>51</sup> *Virginia v. Black*, 538 U.S. 343, 360 (2003).

<sup>52</sup> *Id.*

<sup>53</sup> Eugene Volokh, *Prosecutions Under New “Prosecuting Burning of the American Flag” Executive Order Would Violate First Amendment*, REASON: VOLOKH CONSPIRACY (Aug. 25, 2025, 4:05 PM), <https://reason.com/volokh/2025/08/25/prosecutions-under-new-prosecuting-burning-of-the-american-flag-order-would-violate-first-amendment/>.

The Supreme Court has historically recognized that viewpoint discrimination is “an egregious form of content discrimination.” This was verbalized in this way in *Rosenberger v. Rector & Visitors of the University of Virginia* (1995), where the Court declared that when “the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”<sup>54</sup> This principle applies with equal force whether viewpoint discrimination occurs through legislation or through selective enforcement of facially neutral laws which are.

A recent case, *Frederick Douglass Foundation v. District of Columbia* (2023), illustrates why the Trump order’s selective enforcement strategy is unlikely to be successful in aligning with the Constitution.<sup>55</sup> In that case, the D.C. Circuit ruled that the District of Columbia violated the First Amendment by selectively enforcing its defacement rule by arresting pro-life protestors for writing “Black Pre-Born Lives Matter” on sidewalks while permitting Black Lives Matter protesters to paint messages on streets and public property with no consequences.<sup>56</sup> The court emphasized that “the government may not enforce the laws in a manner that picks winners and losers in public debates,” as that would go against the First Amendment.<sup>57</sup>

Critically, the D.C. Circuit held that discriminatory motive is not an element of this question. The government violates the First Amendment when it discriminates based on viewpoint, whether or not that was their intention.<sup>58</sup> Thus, even when officials believe they are pursuing legitimate

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<sup>54</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

<sup>55</sup> *Frederick Douglass Found., Inc. v. District of Columbia*, 82 F.4th 1122, 1129 (D.C. Cir. 2023).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

objectives, selective enforcement based on the content or viewpoint of expression remains unconstitutional.<sup>59</sup>

The Trump order creates a problem of selective enforcement: by instructing officials to prioritize enforcement against flag burners, it targets expressive conduct based on its message. A person who lights a fire in a park for a cookout would not face prosecution, but someone burning a flag in a political protest might. This differential treatment based on the expressive nature of the conduct constitutes viewpoint discrimination, even if framed in the language of natural law enforcement.<sup>60</sup>

While President Trump cannot criminalize flag burning, he is not entirely powerless on the issue. As president, Trump could advocate for a constitutional amendment by mobilizing public support and pressuring Congress to act. He could also shape the judiciary through his appointment power. By nominating justices and judges who share his views on flag protection, he could influence future judicial interpretation of the First Amendment in favor of flag protection. Finally, the administration could encourage states to pass their own flag desecration statutes, knowing they would be challenged in court. This strategy could create vehicles for bringing new flag burning cases to the Supreme Court, potentially providing an opportunity for the Court to revisit *Johnson*.

#### VI. COULD THE CURRENT SUPREME COURT OVERTURN JOHNSON?

The composition of the Supreme Court has changed dramatically since *Johnson* was decided in 1989. All five justices in the *Johnson* majority have left the Court, as have three of the four dissenters. The current Court includes six justices appointed by Republican presidents, leading some to speculate that *Johnson* could be reconsidered if revisited.

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<sup>59</sup> *Id.*

<sup>60</sup> *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

However, predicting that a conservative Supreme Court would overturn *Johnson* misunderstands contemporary conservative thought on free speech. Conservative justices have generally been strongly protective of First Amendment rights, often more so than their liberal colleagues in certain contexts. Justices who embrace textualist and originalist methodologies take the text of the First Amendment seriously, and that text contains no exception for flag burning or other offensive symbolic speech.

Recent conservative jurisprudence has emphasized protecting unpopular or offensive speech against government restriction. For example, in *United States v. Stevens*, a conservative-majority Court struck down a broad criminal prohibition on depictions of animal cruelty for being overbroad under the First Amendment.<sup>61</sup> This reflects a broader doctrinal pattern in which the Court, including its conservative members, has been hesitant to uphold speech restrictions absent of established doctrinal categories that justify such limits.

The doctrine of stare decisis creates additional obstacles to overturning *Johnson*. While the current Court has demonstrated a willingness to overturn precedent in some areas, *Johnson* has achieved a status approaching super-precedent. The decision has stood for more than three decades, Congress has repeatedly failed to overturn it through constitutional amendment, and the legal community has largely accepted its reasoning even when disagreeing with its result.<sup>62</sup>

Moreover, overturning *Johnson* would require the Court to articulate a new First Amendment framework capable of distinguishing flag burning from other forms of offensive symbolic speech. What principle would allow

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<sup>61</sup> *United States v. Stevens*, 559 U.S. 460 (2010).

<sup>62</sup> See *supra* Section IV.

the government to prohibit flag burning while still protecting other forms of political protest that many find offensive? The absence of a clear limiting principle makes revisiting *Johnson* particularly unattractive from a doctrinal perspective.

Taking these factors together, a reversal of *Texas v. Johnson* appears unlikely despite the Court's conservative majority. First Amendment principles transcend conventional categories, and the current Court has shown no desire to create new categories of unprotected speech. The originalist case for flag protection is weak, as the Founders gave no indication that they intended to permit government censorship of political protest, even protest that disrespects national symbols. Furthermore, any justice considering a vote to overturn *Johnson* would need to grapple with the slippery-slope problems that the decision itself identified. These reasons suggest that *Johnson* is an important and immovable wall against broader government control of political expression, and so even conservative justices would be hesitant to dismantle it.

#### CONCLUSION

The constitutional barriers to criminalizing flag burning are formidable, and under current Supreme Court precedent, they are effectively insurmountable. *Texas v. Johnson* established that flag burning constitutes protected symbolic speech under the First Amendment, and *United States v. Eichman* confirmed that even content-neutral prohibitions on flag destruction violate the Constitution. These decisions rest on bedrock First Amendment principles that prohibit the government from suppressing expression simply because the public finds it offensive.

Efforts to overturn *Johnson* through legislation have failed because they cannot address the fundamental constitutional problem identified by the Court. Attempts to amend the Constitution to permit flag protection

have repeatedly fallen short, coming within a handful of votes of passage but never succeeding in achieving the required supermajority. Presidential pronouncements threatening flag burners with criminal penalties or loss of citizenship, while politically resonant with some audiences, remain legally ineffective given the separation of powers and existing Supreme Court precedent.

The Trump administration's August 2025 executive order represents the most sophisticated attempt yet to circumvent *Johnson* without directly overturning it by arguing that flag burning can be prosecuted when it incites imminent lawless action or constitutes fighting words. Yet this strategy fails for multiple reasons: the Court already rejected the breach-of-peace rationale in *Johnson* itself; the Brandenburg test requires speech directed at producing imminent lawless action, which flag burning does not satisfy; the fighting words doctrine only applies to face-to-face confrontations, not symbolic political statements; and selective enforcement of neutral laws constitutes viewpoint discrimination. Put simply, the First Amendment's narrow exceptions have historically been applied sparingly, making it implausible that a broad set of flag burning prosecutions could be sustained under these tests.

Beyond the constitutional analysis, the persistence of this debate reveals important truths about American political culture. Proponents of flag protection emphasize the flag's unique status as a unifying national symbol and the emotional harm flag burning causes to veterans who served under it. These concerns are genuine and reflect deeply held values about patriotism. Yet the constitutional doctrine that protects flag burning embodies an equally important American value: the principle that the government cannot compel respect for national symbols through criminal penalties. Forced patriotism is not patriotism at all.

This debate reflects fundamental tensions in American political culture. Americans value patriotism and respect for national symbols, yet also cherish freedom of expression and distrust government-imposed orthodoxy. Perhaps the most patriotic act American citizens can perform is to protect flag burning, even as some find it offensive and hurtful. In doing so, the United States can demonstrate its commitment to the freedoms the flag represents.

THE CASE FOR A CONCRETE WMD DEFINITION: STUDYING THE  
LEGALITY OF BREACHING NATIONAL SOVEREIGNTY

*Zachy Gross<sup>1</sup>*

*Weapons of mass destruction occupy a uniquely powerful position in international law, shaping arms control regimes, deterrence strategies, and debates over the lawful use of force. Despite this central role, the term “weapon of mass destruction” lacks an authoritative definition in treaty law or customary international law. Historically, nuclear, chemical, and biological weapons were regulated through distinct legal frameworks focused on nonproliferation and disarmament, not discussing potential authorization of force. In recent decades, however, the concept of WMDs has increasingly migrated into use-of-force discourse, raising critical questions about how an undefined legal category can influence national sovereignty and justify intervention.*

*This paper argues that the absence of a concrete definition of weapons of mass destruction has enabled the expansion of the term beyond its traditional boundaries, lowering perceived legal thresholds for military action. Through case studies involving Iraq, Iran, and Venezuela, it demonstrates how WMD designation has come to function as a justificatory shortcut rather than a legally constrained category. This paper concludes that definitional discipline is necessary not to authorize force, but to preserve the limits imposed by the United Nations Charter and prevent further erosion of state sovereignty.*

I. WHAT IS A WEAPON OF MASS DESTRUCTION?.....	25
A. Introduction.....	25
B. WMDs: A Brief History.....	26
C. Defining WMDs.....	28
II. WMDs AND United States USE OF FORCE: THREE CASE STUDIES....	29
A. Iraq.....	29
B. Iran.....	30

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C. Venezuela.....	32
III. CAN WMDs ALONE LEGALLY JUSTIFY INVASION?.....	33
IV. THE CONSEQUENCES OF DEFINING WMDs TOO BROADLY.....	37
A. Expansion of the Term WMD.....	37
B. From Arms Control to Force Justification.....	38
C. The Modern-Day Issue.....	38
CONCLUSION: THE CASE FOR A CONCRETE WMD DEFINITION.....	39
AFTERWORD.....	41

## I. WHAT IS A WEAPON OF MASS DESTRUCTION?

### A. *Introduction*

In a resolution adopted by the Security Council on August 12, 1948, the United Nations defined Weapons of Mass Destruction (WMDs) as “atomic explosive weapons, radioactive material weapons, lethal chemical and biological weapons, and any weapons developed in the future that have characteristics comparable in destructive effect to those of the atomic bomb or other weapons mentioned above.”<sup>2</sup> The United States, in 18 U.S.C. § 2332a, codifies it “as any of the following: (1) a destructive device, such as an explosive or incendiary bomb, rocket, or grenade, (2) a weapon that is designed to cause death or serious injury through toxic or poisonous chemicals, (3) a weapon that contains a biological agent or toxin, or (4) a weapon that is designed to release dangerous levels of radiation or radioactivity.”<sup>3</sup>

Most recently, in an executive order on December 15, 2025, President Donald Trump expanded the United States’ definition by “designat[ing] illicit fentanyl and its core precursor chemicals as Weapons

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<sup>2</sup> Comm. for Conventional Armaments, Res. Adopted by the Commission at Its Thirteenth Meeting, Aug. 12, 1948, U.N. Doc. S/C.3/32/Rev.1.

<sup>3</sup> *Weapons of Mass Destruction*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/investigate/wmd>.

of Mass Destruction.”<sup>4</sup> The administration’s core claim was that “[i]llicit fentanyl is closer to a chemical weapon than a narcotic,”<sup>3</sup> placing this drug in the same legal category as nuclear weapons. While the United Nations’ baseline definition exists, the absence of binding universal adoption has left it vulnerable to unilateral expansion by individual states—raising the question of how far that malleability can stretch before the term loses its legal meaning entirely.

## B. *WMDs: A Brief History*

The phrase “mass destruction” carries considerable weight in public consciousness. Most people immediately associate it with the Manhattan Project, where a group of scientists led by J. Robert Oppenheimer produced the first atomic bomb,<sup>5</sup>—leading to the dropping of “Little Boy” on August 6, 1945, in Hiroshima, Japan, and followed by “Fat Man” in Nagasaki on August 9—resulting in a minimum of 200,000 deaths.<sup>6</sup> However, the history of weapons of mass destruction extends far beyond the atomic age.

Though “the bomb” was invented in the twentieth century, the current definition of Weapons of Mass Destruction includes biological and chemical weapons, both possessing far longer histories. The first recorded use of a bioweapon dates to the 6th century BCE, when “Assyrians poisoned enemy water supplies with [a fungus called] rye ergot,”<sup>7</sup> compromising the former in ways that “caused delusions, paranoia,

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<sup>4</sup> Exec. Order No. 14,367, *Designating Fentanyl as a Weapon of Mass Destruction* (Dec. 15, 2025), <https://www.whitehouse.gov/presidential-actions/2025/12/designating-fentanyl-as-a-weapon-of-mass-destruction/>.

<sup>5</sup> *Manhattan Project*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Manhattan-Project>.

<sup>6</sup> *Atomic Bombing of Hiroshima and Nagasaki*, NAT’L ARCHIVES, <https://visit.archives.gov/whats-on/explore-exhibits/atomic-bombing-hiroshima-and-nagasaki>.

<sup>7</sup> *First Use of Biological Warfare*, UCLA CTR. FOR NEAR EASTERN STUD., <https://www.international.ucla.edu/cnes/article/1352>.

seizures, twitching, and cardiovascular problems that can lead to death.”<sup>8</sup> Use of chemical weapons can be dated even earlier, in the 5th century BCE, “during the Peloponnesian War, when the Spartans used smoke from burning coal, sulfur, and pitch to temporarily incapacitate and confuse occupants of Athenian strongholds.”<sup>9</sup> Under both the United Nations and United States definitions, weapons of mass destruction have been employed for over a millennium.

In the 20th century, and specifically starting with World War I, Weapons of Mass Destruction truly saw military use on a *massive* scale, as Germans (and other powers) deployed both biological and chemical weapons. Bioweapons included glanders to infect horses, mules, and livestock destined for Allied forces, aimed to paralyze Allied transport, artillery, and cavalry.<sup>10</sup> Chemical weapons included mustard gas, with “wave[s] of asphyxiating gas released from cylinders embedded in the ground by German specialist troops.”<sup>11</sup>

Despite international agreements to prohibit WMD use—beginning with the 1925 Geneva Protocol<sup>12</sup>—actors have continued to proliferate and deploy them against civilian populations. In 2001, following the 9/11 attacks, an American named Bruce Ivins carried out “anthrax letter attacks [that] killed five people and sickened 17 others.”<sup>13</sup> In 2013, the Assad regime

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<sup>8</sup> *First Use of Biological Warfare*, GUINNESS WORLD RECORDS, <https://www.guinnessworldrecords.com/world-records/first-use-of-biological-warfare>.

<sup>9</sup> Ramesh C. Gupta, *Introduction*, in HANDBOOK OF TOXICOLOGY OF CHEMICAL WARFARE AGENTS (Ramesh C. Gupta ed., 2d ed. 2015), <https://www.sciencedirect.com/science/chapter/edited-volume/abs/pii/B9780128001592000014>.

<sup>10</sup> *Tony's Lab: Biological Warfare in WWI*, NAT'L ARCHIVES, <https://www.archives.gov/publications/prologue/2017/fall/tonys-lab>.

<sup>11</sup> *First Usage of Poison Gas*, NAT'L WWI MUSEUM AND MEMORIAL, <https://www.theworldwar.org/learn/about-wwi/spotlight-first-usage-poison-gas>.

<sup>12</sup> Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

<sup>13</sup> U.S. DEPT OF JUSTICE, AMERITHRAX INVESTIGATIVE SUMMARY (2010), <https://www.justice.gov/archive/amerithrax/docs/amx-investigative-summary2.pdf>.

used “toxic gas chemical weapons in the Syrian war” against innocent civilians.<sup>14</sup> Nuclear weapons may have been used only twice in the history of warfare, but the proliferation and deployment of weapons of mass destruction have continued into the present day.

### C. *Defining WMDs*

There is a reason that Weapons of Mass Destruction typically evoke images of nuclear weapons and mushroom clouds rather than masks worn to prevent death by asphyxiation. Yet under modern definitions, both fit within the same legal category, and the definition only continues to expand.

Some scholars, such as political scientists Philip Morrison and Kosta Tsipis, advocate for a more exclusive definition. They argue that chemical and biological weapons, compared to nuclear weapons, “are fundamentally different in terms of lethality, in the area they cover and over time; in the availability of measures that can protect against them; and in their potential tactical, strategic, and terrorist uses.”<sup>15</sup> Therefore, when considering the term “mass destruction,” they argue, the definition should be limited to nuclear weapons alone.

Nuclear weapons possess world-altering capabilities, as “several nuclear explosions over modern cities would kill tens of millions of people.”<sup>16</sup> This observation does not diminish the catastrophic and brutal effects of chemical and bioweapons, but their more limited potential scale and scope of destruction in comparison to nuclear weapons present a compelling argument for why the definition should be limited.

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<sup>14</sup> *The Use of Chemical Weapons in the Syrian Conflict*, 94 POSTGRAD. MED. J. 293 (2018), <https://pmc.ncbi.nlm.nih.gov/articles/PMC5901879/>.

<sup>15</sup> Philip Morrison & Kosta Tsipis, *Weapons of Mass Destruction: New Perspectives*, 59 BULL. ATOM. SCIENTISTS 43, 77 (2003).

<sup>16</sup> *Catastrophic Harm of Nuclear Weapons*, INT’L CAMPAIGN TO ABOLISH NUCLEAR WEAPONS, [https://www.icanw.org/catastrophic\\_harm](https://www.icanw.org/catastrophic_harm).

The definitional ambiguity surrounding WMDs carries significant consequences beyond academic classification. An undefined category can serve as a catalyst for states to override another nation's sovereignty under the justification of maintaining international peace and security. Three contemporary examples involving the United States—the invasion of Iraq, Operation Midnight Hammer in Iran, and the recent detention of Maduro in Venezuela—demonstrate how WMD classification has been invoked, and at times stretched, to justify breaches of sovereignty.

## II. WMDs AND United States USE OF FORCE: THREE CASE STUDIES

### A. *Iraq*

Resolution 1441, adopted by the United Nations Security Council on November 8, 2002, found Iraq to be in continued noncompliance with its disarmament obligations. It declared that Iraq had failed to provide a “full, final, and complete disclosure...of all aspects of its programmes to develop weapons of mass destruction and ballistic missiles” and demanded “immediate, unimpeded, unconditional, and unrestricted access”<sup>17</sup> for inspectors. While the Resolution declared Iraq to be in material breach of its disarmament obligations and warned of “serious consequences,” it did not expressly authorize the use of force, instead requiring any further Iraqi noncompliance to be reported to the Security Council for assessment.

Despite the absence of explicit authorization, less than four months later, on March 19, 2003, the United States invaded Iraq. President Bush proclaimed in laying the strategic groundwork for the invasion that “the United States of America will not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons,”<sup>18</sup>

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<sup>17</sup> S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

<sup>18</sup> George W. Bush, Address Before a Joint Session of the Congress on the State of the Union, 1 Pub. Papers 129, 131 (Jan. 29, 2002).

framing the invasion as a necessary response to the inherent danger that is posed by the alleged Iraqi possession of Weapons of Mass Destruction.

Regardless of the accuracy of the underlying intelligence, the pretext for the United States invasion rested on the grounds of Iraqi possession of Weapons of Mass Destruction, which violated international law. Notably, Iraq had been a signatory to the Nuclear Non-Proliferation Treaty since 1968,<sup>19</sup> meaning that suspected possession was not merely a general violation of international law, but a breach of a specific treaty obligation—one that the United States invoked as further justification for intervention. The mere (suspected) possession of weapons of mass destruction—a violation of international law<sup>20</sup>—was therefore treated as sufficient justification to breach Iraqi sovereignty.

The fear of WMDs as a potential threat to civilian populations served as justification for the United States to enter a war in which even greater casualties occurred. After the conclusion of major combat operations, “[m]ore than half a million Iraqi people...died from violent causes since the March 2003 invasion,”<sup>21</sup> yet investigators found a “failure to find [any] weapons stocks or active production lines.”<sup>22</sup> The Iraq case clearly illustrates how classification alone—even untethered from physical evidence—may be utilized as a justifiable trigger for military intervention against a sovereign state.

## B. *Iran*

In 2015, President Obama announced the Joint Comprehensive Plan of Action (JCPOA), a multilateral deal with Iran designed to “permanently

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<sup>19</sup> Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

<sup>20</sup> S.C. Res. 1441, *supra* note 17.

<sup>21</sup> *Iraq WMD Investigation Report*, NAT'L SEC. ARCHIVE, <https://nsarchive2.gwu.edu/NSAE/BB/NSAE/BB80/>.

<sup>22</sup> *Id.*

prohibit...Iran from obtaining a nuclear weapon.”<sup>23</sup> The agreement aimed to resolve concerns about potential Iranian nuclear proliferation and establish greater regional stability in the Middle East. However, upon assuming office, President Donald Trump characterized “[t]he Iran Deal [as] one of the worst and most one-sided transactions the United States has ever entered into” and withdrew from the agreement, reimposing and intensifying sanctions on Iran.<sup>24</sup>

Without diplomatic progress toward a revised agreement, Iran’s nuclear activities accelerated. It’s “stock of uranium enriched to up to 60% purity, close to weapons grade,” raising alarm among regional and international observers.<sup>25</sup> When Israel launched military operations against Iran in what has been termed the Twelve-Day War, the United States faced a decision regarding its level of involvement. On June 22, 2025, “Operation Midnight Hammer successfully struck nuclear sites deep inside Iran.”<sup>26</sup>

Five months after the conclusion of the conflict, the Institute for Science and International Security assessed Iranian nuclear facilities and found that “the main nuclear sites at Fordow, Natanz, and Esfahan were largely destroyed and have seen little significant activity since the war.”<sup>27</sup>

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<sup>23</sup> President Barack Obama, Remarks on the Iran Nuclear Deal (Aug. 5, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/08/05/remarks-President-iran-nuclear-deal>.

<sup>24</sup> President Donald J. Trump, Statement on the Iran Deal (May 8, 2018), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-endin-g-united-states-participation-unacceptable-iran-deal/>.

<sup>25</sup> *Iran’s Near Bomb-Grade Uranium Stock Grew Before Israeli Attack, IAEA Says*, REUTERS (Sept. 3, 2025), <https://www.reuters.com/business/energy/irans-near-bomb-grade-uranium-stock-grew-befo-re-israeli-attack-iaea-says-2025-09-03/>.

<sup>26</sup> 388th Fighter Wing, *Operation Midnight Hammer Strike*, U.S.AIR FORCE (2025), <https://www.388fw.acc.af.mil/News/Article-Display/Article/4341061/388th-fw-pilots-f-35s-paved-the-way-for-midnight-hammer-strike/>.

<sup>27</sup> David Albright, Sarah Burkhard, Spencer Faragasso & the Good ISIS Team, *Comprehensive Updated Assessment of Iranian Nuclear Sites Five Months After the 12-Day War*, INST. FOR SCI. & INT’L SEC.. (Nov. 21, 2025), <https://isis-online.org/isis-reports/comprehensive-updated-assessment-of-iranian-nuclear-sites-five-months-after-the-12-day-war>.

The Iran case represents another instance in which the United States utilized military force against a sovereign nation in response to feared WMD proliferation. Once the term “weapons of mass destruction”—in this instance, the nuclear bomb, which fits under any scholar’s definition—became associated with Iranian capabilities, the United States took action to prevent proliferation.

### C. *Venezuela*

On December 15, 2025, the United States expanded its use of weapons of mass destruction terminology beyond its traditional scope. President Donald Trump issued an executive order that “designat[ed] illicit fentanyl...as Weapons of Mass Destruction,”<sup>28</sup> a classification that departed sharply from the nuclear, chemical, and biological weapons traditionally associated with the term. During this same period, United States military forces increased operations in the Caribbean, conducting “military strikes on alleged drug-trafficking boats”<sup>29</sup> in the region as part of broader counter-narcotics and security initiatives. These developments culminated on January 3, 2026, when “a surgical law enforcement operation facilitated by the United States military”<sup>30</sup> resulted in the capture of President Nicolás Maduro in Venezuela.

Correlation does not establish causation. Nevertheless, when examined alongside prior U.S. uses of force in Iraq and Iran, the invocation of WMD terminology once again appeared in proximity to military and coercive action. Venezuela had been identified in the United Nations Office on Drugs and Crime’s 2025 World Drug Report “as a key trafficking route in

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<sup>28</sup> Exec. Order No. 14,367, *supra* note 4.

<sup>29</sup> *Instability in Venezuela*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/global-conflict-tracker/conflict/instability-venezuela>.

<sup>30</sup> U.S. MISSION TO THE UNITED NATIONS, Remarks on Venezuela (2026), <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-venezuela-2/>.

the Western Hemisphere.”<sup>31</sup> Shortly thereafter, the substances most closely associated with that trafficking were designated by the United States as weapons of mass destruction—this definitional expansion placing Venezuela within a security framework historically reserved for the most exceptional threats.

While other legal and policy justifications existed for U.S. actions in and around Venezuela, the episode illustrates how WMD designation can function as a powerful justificatory mechanism. Military operations involving Venezuelan targets were framed in part around preventing the proliferation of substances newly categorized as WMDs. This case represents the most significant departure from traditional WMD scenarios in the two aforementioned case studies, and it most clearly demonstrates how expansive definitions can lower perceived barriers to coercive action against a sovereign state, in contexts far removed from nuclear or chemical weapons.

### III. CAN WMDs ALONE LEGALLY JUSTIFY INVASION?

Article 2(4) of the United Nations Charter provides that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>32</sup> This provision establishes a broad prohibition on the use of force by one sovereign state against another. The critical question, however, is not whether WMDs are dangerous—they plainly are—but whether the Charter permits force in response to their suspected possession or development. Under the text of Article 2(4), force is unlawful unless it falls within one of the Charter’s recognized exceptions. Notably, possession or development of weapons of mass destruction is not listed

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<sup>31</sup> *Id.*

<sup>32</sup> U.N. CHARTER art. 2, ¶ 4.

anywhere in the Charter as an independent justification for breaching another state's sovereignty.

Article 51 of the United Nations Charter permits "individual or collective self-defence if an armed attack occurs against a Member of the United Nations."<sup>33</sup> When the Security Council determines that a threat to international peace exists, it may first impose non-forcible measures under Article 41, such as "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."<sup>34</sup> Only if those measures prove inadequate, the Security Council may authorize force under Article 42. The Charter's structure, therefore, vests the authorization of force in the Security Council, not in individual member states acting on their own threat assessments.

The language of Article 51 specifically refers to "armed attack."<sup>35</sup> Possession, development, or suspected stockpiling of WMDs does not meet this threshold. As written, Article 51 does not extend to situations where a state fears that another state might *someday* use such weapons; without Security Council authorization under Chapter VII, intervention based solely on WMD ownership does not fit comfortably within the Charter's text.

Yet the Charter's clarity has not ended the debate. As concerns over nuclear proliferation and long-range missile systems intensified, policymakers and scholars began to question whether waiting for an actual armed attack remained viable in an age of WMDs. Once the subject of deterrence is introduced as a defensive strategy, states have increasingly questioned whether the Charter's existing self-defense framework adequately addresses the risks posed by weapons of mass destruction.

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<sup>33</sup> U.N. CHARTER art. 51.

<sup>34</sup> U.N. CHARTER arts. 41–42.

<sup>35</sup> U.N. CHARTER art. 2, ¶ 4.

Thomas Graham Jr., a United States diplomat and expert in arms control, argues that “weapons of mass destruction and long-range ballistic missile systems might make waiting for an actual armed attack exceedingly dangerous.” According to this view, traditional self-defense doctrine may prove inadequate as a framework for addressing developing WMD threats.

Graham distinguishes between Cold War-era deterrence strategies and contemporary proliferation concerns. He contends that “a Cold War-style nuclear deterrence strategy with a secure second-strike capability is the only practical policy in dealing with a modern nuclear weapon state,” meaning that “a threatened preemptive strike in anticipatory self-defense would be a viable option only against states that have not [yet] become modern nuclear weapon states.”<sup>36</sup> Under this theory, preventing WMD proliferation preemptively may constitute lawful self-defense, particularly where the window for effective defensive action is narrow. Given that Article 51’s text does not explicitly address nuclear capabilities or the timing of defensive actions, there is a potential interpretation under which preemptively preventing WMD proliferation falls within the scope of self-defense.

Graham brings the case of Israel’s 1981 attack on Iraq’s Osiraq nuclear reactor shortly before the facility would have become operational. He argues that Israel could plausibly characterize the attack as self-defense, reasoning that Iraq’s refusal “to recognize Israel’s right to exist and endorse[ments of] violence against Israel” created a credible threat that “[t]hose nuclear weapons could be used against Israel.”<sup>37</sup> Using this logic, the attack could constitute lawful self-defense, given that waiting for an actual armed attack would render responsive defensive action ineffective once such weapons had already been acquired.

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<sup>36</sup> Thomas Graham, Jr., *National Self-Defense, International Law, and Weapons of Mass Destruction*, 4 Chi. J. Int’l L. 1, 10 (2003).

<sup>37</sup> *Id.*

As discussed previously, Resolution 1441 addressed Iraq's noncompliance with its disarmament and transparency obligations concerning weapons of mass destruction (it should be noted that the 2002 resolution was an additional attempt at curtailing Iraqi nuclear ambitions, some two decades after the Israeli strike of 1981). The resolution warned that Iraq "will face serious consequences as a result of its continued violations."<sup>38</sup> This language deliberately stopped short of expressly authorizing the use of force, but nonetheless its (tacit) ambiguity became central to later legal arguments—most notably exploited by the United States—which treated continued WMD noncompliance as sufficient to justify military action.

President Bush's invoked what became known as the "Bush Doctrine"—"affirming the legitimacy of an American preventive strike and emphasize[ing] the notion that 'If you are not with us, you are against us'"<sup>39</sup>—led scholars such as James Lindsay of the Brookings Institution's Foreign Policy Studies Program to characterize this approach as representing "preventive war" rather than legitimate self-defense under the Charter.<sup>40</sup> The distinction matters: self-defense responds to an imminent or actual attack; preventive war targets a threat that may materialize at some future point. By treating the potential existence of WMDs as sufficient justification for invasion—without Security Council authorization—the United States effectively substituted unilateral threat assessment for the multilateral framework the UN Charter was designed to require.

This pattern reflects a broader reality of international relations: historically, great powers have made decisions regarding the use of force based on self-interest, rather than Security Council authorization or lack

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<sup>38</sup> S.C. Res. 1441, *supra* note 17.

<sup>39</sup> *The Bush Doctrine*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 2002), <https://carnegieendowment.org/russia-eurasia/posts/2002/10/the-bush-doctrine>.

<sup>40</sup> *Id.*

thereof. The Charter, drafted in a pre-WMD proliferation era, lacks the enforcement mechanisms necessary to constrain such behavior, meaning that its framework, however legally sound, has proven difficult to enforce against states willing to act unilaterally.

#### IV. THE CONSEQUENCES OF DEFINING WMDs TOO BROADLY

##### A. *Expansion of the Term WMD*

Despite decades of definitional efforts, “neither treaty law nor customary international law contains an authoritative definition of WMD.”<sup>41</sup> Most states continue to define WMDs within the three traditional categories of chemical, biological, and nuclear weapons, but the absence of a universally adopted binding definition permits individual states to stretch or narrow the term at will, opening the door to interpretive abuse. As W. Seth Carus, Emeritus Distinguished Professor of National Security Policy at the National Defense University’s Center for the Study of Weapons of Mass Destruction, observes, any attempt to redefine or exclude categories creates complications because, despite the lack of a concrete definition, the term “appears in several arms control treaties.”<sup>42</sup>

Carus “identified more than 40 different definitions of WMD”<sup>43</sup> in his research, noting that “[a]ll suffer from flaws, either conceptual or in the implications of their use to guide policy.”<sup>44</sup> This finding reveals a troubling pattern: as time passes, definitions multiply, increasing opportunities for

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<sup>41</sup> David P. Fidler, *Weapons of Mass Destruction and International Law*, AM. SOC’Y INT’L L. (Feb. 2003), <https://www.asil.org/insights/volume/8/issue/5/weapons-mass-destruction-and-international-law>.

<sup>42</sup> W. SETH CARUS, *DEFINING “WEAPONS OF MASS DESTRUCTION”* 2 (Nat’l Def. Univ., Occasional Paper No. 4, 2012), [https://wmdcenter.ndu.edu/Portals/97/Documents/Publications/Occasional%20Papers/OP4\\_Carus.pdf](https://wmdcenter.ndu.edu/Portals/97/Documents/Publications/Occasional%20Papers/OP4_Carus.pdf).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

interpretive divergence and potential misapplication. Each new definition carries with it new legal implications and new possibilities for exploitation.

B. *From Arms Control to Force Justification*

During the Cold War, international efforts to limit WMDs focused primarily on deterrence and arms control. These concerns remain relevant, but the post-September 11 environment and the Bush Doctrine have produced an increasing emphasis on preemption and enforcement. As David P. Fidler, an international law scholar at the University of Indiana, argues, “[t]he traditional arms control approach no longer monopolizes the international legal strategy against WMD [sic]” due to “United States interpretations of international law [used] to justify military action against Iraq.”<sup>45</sup> In this new environment, military action has become a more prominent policy response.

C. *The Modern-Day Issue*

Contemporary state practice suggests that WMD possession can justify military action, yet significant concerns surround the definition itself and its expanding scope. The December 2025 designation of fentanyl as a WMD by the United States, followed within weeks by the detention of a head of state on his own territory, exemplifies this concern. The absence of clear definitional boundaries means that such acts of defining or redefining itself becomes justificatory.

The need for a definition is not primarily about determining what is considered “mass” enough. Rather, the need for a definition is to establish clear, predictable boundaries governing when one nation may lawfully employ force against another state. As Carus observes, “[d]epending on the

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<sup>45</sup> Fidler, *supra* note 41.

definition adopted, the scope of the combating WMD mission could change substantially.”<sup>46</sup>

Fentanyl is not a nuclear, chemical, or biological threat in the traditional sense. Yet the factual pattern is nevertheless straightforward: less than one month after fentanyl was classified as a WMD, the United States employed force within another country’s territory. WMD designation currently functions, in state practice, as a mechanism for providing legal justification for interventions against other sovereign states. As the definition continues to expand, more states may find themselves subject to such interventions—with corresponding increases in human costs.

#### CONCLUSION: THE CASE FOR A CONCRETE WMD DEFINITION

International law requires a concrete definition of WMDs. The three case studies examined in this paper—Iraq, Iran, and Venezuela—collectively illustrate a consistent pattern: WMD designation has preceded and accompanied U.S. military action against sovereign states, regardless of whether the underlying threat was verified, traditional, or even coherent within the term’s traditional scope. Without clear thresholds, undefined categories inevitably become subject to expansive interpretations that erode the protections of sovereignty. The current state of international relations demands a definition not in order to authorize the broader use of force, but rather to establish limits on when force may lawfully be employed. The landscape of WMDs has shifted from one of containment to one of the authorization of force, a transformation that has occurred without formal recognition by the United Nations or the development of corresponding legal frameworks.

The proposition that fentanyl is not comparable to a nuclear bomb is relatively uncontroversial. There is a reason why Morrison and Tsipis

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<sup>46</sup> Carus, *supra* note 42.

argued for only nuclear weapons to be considered WMDs. Had their restrictive approach been adopted historically, some military interventions might not have occurred—potentially preventing associated casualties. However, the contrary argument deserves serious consideration: that an overly narrow definition could prove inadequate, and that the absence of international enforcement mechanisms for chemical and biological weapons could produce greater harm to civilian populations in the long run. Perhaps fentanyl’s lethality and potential for mass casualties warrant its classification as a WMD, requiring international cooperation to prevent its proliferation.

This ongoing debate illustrates the fundamental challenge: without a concrete definition, no consensus exists regarding appropriate limits. It remains possible that “mass harm” and “mass destruction” should occupy the same legal category—but no authoritative mechanism currently exists to make that determination authoritatively. The United Nations’ 1948 definition included language permitting the inclusion of “any weapons developed in the future that have characteristics comparable in destructive effect,”<sup>47</sup> but this ambiguity generates the same questions regarding fentanyl that it raises about emerging threats.

A concrete definition is required not to weaken international security, but to clarify which legal tools are appropriate for which threats. So long as no universally adopted binding definition exists, individual states retain the ability to expand or narrow the category at will, invoking WMD designation as a justificatory mechanism for intervention against sovereign states and eroding the very protections of sovereignty that international law was designed to uphold. Without definitional discipline, clarity regarding national sovereignty will remain elusive. Without knowing

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<sup>47</sup> Comm. for Conventional Armaments, *supra* note 2.

the scope of what WMDs truly encompass, the term risks becoming not a warning but a warrant.

#### AFTERWORD

This paper was written in early 2026, before the situation in Iran had developed. On February 28, 2026, the United States and Israel launched coordinated military strikes against Iran under Operation Epic Fury, targeting nuclear infrastructure and military facilities. The stated justification centered on Iran's nuclear program and the threat of weapons of mass destruction proliferation.

This development is entirely consistent with the arguments advanced above. The association of a state with weapons of mass destruction—in this instance, a well-documented nuclear program—once again preceded significant military action. Regardless of the merits of the intervention, the episode further underscores the importance of clear, universally adopted definitional boundaries around weapons of mass destruction, and the serious consequences that follow when those boundaries remain contested. The three case studies in this paper, alongside Operation Epic Fury, suggest that the pattern is not coincidental: WMD classification functions, in contemporary state practice, as a predicate for force. Establishing a concrete definition is therefore not merely an academic exercise. It is a prerequisite for the meaningful enforcement of sovereign equality under international law.

# BETWEEN SHAPIRO AND BERMAN: REFORMULATING PRINCIPLED POSITIVISM

*Liev Markovich*<sup>1</sup>

*This paper analyzes two particularly illuminating defenses of legal positivism: Scott Shapiro’s “The Hart-Dworkin Debate: A Short Guide For The Perplexed” and Mitchell Berman’s “How Practices Make Principles And How Principles Make Rules.” First, a general overview of the debate between positivists and non-positivists establishes the context, followed by an examination of the three strongest objections posed by non-positivists to positivists. An analysis of how Shapiro and Berman answer these objections leads to the proposition that Shapiro’s article acted as a philosophical precursor to Berman’s “principled positivism.” Finally, two original questions are posed regarding Berman’s article and addressed utilizing concepts from Shapiro’s paper. These supplemental concepts from Shapiro’s paper yield a fuller picture of principled positivism—one that better explains judicial behavior and more effectively defends itself against challenges.*

I. POSITIVISTS VS. NON-POSITIVISTS.....	42
II. CHALLENGES TO POSITIVISM.....	44
III. PRINCIPLED POSITIVISM.....	47
IV. BERMAN AND SHAPIRO.....	49
V. REFORMULATING PRINCIPLED POSITIVISM.....	50
CONCLUSION.....	53

## I. POSITIVISTS VS. NON-POSITIVISTS

This debate between positivists and non-positivists centers on the grounds of law—that is, the source from which legal content is derived. Positivists, following the work of H.L.A. Hart in *The Concept of the Law*, argue that the content of the law is entirely grounded in social facts such as written constitutions, statutes, and judicial decisions, without relying on

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moral considerations. Near-consensus judicial acceptance of—called the “ultimate rule of recognition”—grounds fundamental legal norms, which combine with legally relevant phenomena to produce legal norms.<sup>2</sup> In contrast, non-positivists, following Ronald Dworkin in *Law’s Empire*, believe that moral factors also play a role in grounding the law, and perhaps an even more authoritative role than social factors. As Shapiro puts it: “Should law be understood to consist in those standards socially designated as authoritative? Or is it constituted by those standards morally designated as authoritative?”<sup>3</sup> At the center of the debate between positivists and non-positivists lies the question of how to explain judicial decision-making: How do we make sense of judicial decision-makers’ decisions and explanations? The primary critiques that non-positivists bring against positivists derive from judicial decisions that apparently cannot be explained without morality grounding the law, such as *Riggs v. Palmer*,<sup>4</sup> *Henningsen v. Bloomfield Motors, Inc.*,<sup>5</sup> and *TVA v. Hill*.<sup>6</sup> <sup>7</sup> Moreover, the debate bears on questions of legal interpretation: Should the law be interpreted in its best moral light (non-positivists), or should it be interpreted primarily according to social factors (positivists)?

In the next portion, this paper will summarize the three most compelling arguments that non-positivists have leveled against positivists: the problem from theoretical disagreements, the problem from “too little law,” and the problem from “non-lexical determination.” Shapiro only

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<sup>2</sup> See Mitchell N. Berman, *How Practices Make Principles and How Principles Make Rules*, 19 LEGAL THEORY 307, 307 fig. 1 (2013).

<sup>3</sup> Scott J. Shapiro, *The Hart-Dworkin Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN 18 (Arthur Ripstein ed., 2007). My explanation of the debate between positivists and non-positivists is incredibly short for the purposes of this paper. For a more comprehensive explanation of the debate that deals more deeply with its nuances, see Shapiro, *id.* at 1-15.

<sup>4</sup> *Riggs v. Palmer*, 115 N.Y. 506 (1889).

<sup>5</sup> *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

<sup>6</sup> *TVA v. Hill*, 437 U.S. 153 (1978).

<sup>7</sup> These cases will be discussed below. *But see* LIAM MURPHY, WHAT MAKES LAW: AN INTRODUCTION TO THE PHILOSOPHY OF LAW 8–14 (2014) (attempting to separate adjudication questions from grounds-of-law questions).

addresses the first, while Berman both proposes and answers the latter two.

## II. CHALLENGES TO POSITIVISM

Since H.L.A. Hart's "The Concept of Law" was published, the default position in legal theory has been positivism. Positivists stand on a high ground, and non-positivists attack from below. Early critiques, such as those from Ronald Dworkin's "The Model of Rules I," were met with responses by defenders of legal positivism. For example, an early critique by Dworkin posits the fact that judges will sometimes invoke moral principles not grounded in past legal practice as if they were legally binding. For example, in *Henningsen*, the court ruled in favor of the plaintiff by introducing the novel legal principle that "in a society such as ours, the automobile manufacturer is under a special obligation in connection with the construction, promotion, and sale of its vehicles." Positivists answered this challenge in two ways:

1. Exclusive Legal Positivism: Where the law runs out, the rule of recognition leaves judges with the discretion to apply extralegal, moral standards in certain cases, and therefore "legislate."

2. Inclusive Legal Positivism: The rule of recognition can incorporate moral tests as a condition for legality. So morality can "internally" ground the law, but it can only do so via social acceptance, meaning that social facts still ultimately ground the law.

The problem of theoretical disagreements provides a tougher question to legal positivists. The non-positivist argument assumes that positivists adhere to the "plain-fact" view of law, where fundamental legal norms are established by consensus among legal officials through an ultimate rule of recognition. Thus, disputes about these norms would only involve

questions of historical consensus. If an ultimate rule of recognition establishes fundamental legal norms, judges who agree upon historical facts cannot disagree about these norms. However, judges do indeed disagree about fundamental legal norms while agreeing upon empirical facts, as shown in cases like *TVA v Hill*.<sup>8</sup> If the law is socially grounded, it is incoherent for judges to claim they are accessing legal fundamentals while disagreeing about those very fundamentals. For example, if the “plain-fact” view is correct, for it to be a fundamental legal norm that the “original public meaning” of the US Constitution dictates the law in hard cases, then almost every relevant legal actor would have to agree upon that norm. However, it is clear that not every legal actor is an originalist, yet originalists still believe that “original public meaning” dictates the law in hard cases. Therefore, positivism cannot be true, and something besides official judicial consensus must ground fundamental legal norms; namely, moral factors, especially those related to political morality. For non-positivists, when judges have theoretical disagreements, these are disagreements about which moral factors are relevant in grounding fundamental legal principles.

Berman, in his article, deflects the problem from theoretical disagreements. He argues that positivism can be true even though judges do not realize that fundamental legal norms must be grounded in judicial near-consensus, as positivists argue. Judges simply do not appreciate that their disagreements over fundamental legal norms mean neither side has valid legal grounds for their decision. (Berman, 314-315). However, this is a weak argument, as theoretical disagreements are not limited to judges but also extend to legal scholars; they pervade the field of legal theory. Perhaps judges, for political reasons, are shielding their attempts to legislate from the bench under the banner of theoretical disagreements. But can it really

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<sup>8</sup> See *infra* Part IV (discussing principled positivism in detail).

be true that the whole profession of law is so confused about its own field that its main debates are all incoherent?

Shapiro answers that fundamental legal principles are determined by the “purpose” of a given legal system rather than the “plain facts.” Positivists must construe this purpose not as grounded in moral reasoning, but in the legal system’s historical objective. He argues that the job of judges and legal theorists in setting out methods of legal interpretation is to “impute to legal practice the political objectives that the current designers of the legal system sought to achieve.”<sup>9</sup><sup>10</sup> Therefore, “theoretical disagreements would simply be a product of disputes over which purposes are in fact the objectives of the system or about which methodology best harmonizes with those objectives.”<sup>11</sup> The problem of theoretical disagreements has been blunted: Instead of an ultimate rule of recognition shaping fundamental legal principles, the purpose of the legal system fulfills this role, with said purpose grounded in the system's social facts. Theoretical disagreements are hermeneutical disagreements about what those purposes are, and can thus exist even when everyone agrees on the historical record.

Berman proposes other arguments against legal positivism. First is the problem of “non-lexical determination.” Positivists, even within Shapiro’s framework, believe that legal principles determine legal rules “lexically,” meaning that there is a clear hierarchy of principles and certain inputs of principles will always lead to the same result. For example, if there is a case where the legal principles of “freedom” and “equality” are at odds, then the social facts of the system must determine that either freedom always wins or equality always wins. However, Berman argues

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<sup>9</sup> The “current designers” of a legal system are not limited to the original designers. Shapiro, *supra* note 3, at 44.

<sup>10</sup> *Id.* at 44

<sup>11</sup> *Id.* at 43

that legal principles work “non-lexically”: different principles have certain weights, and those weights will sometimes combine in different ways to produce different outcomes.<sup>12</sup> Depending on the facts of the case, freedom will sometimes prevail over equality, and equality will sometimes prevail over freedom.

Another problem for positivists is the challenge from “too little law.” If the law is grounded in social facts—and especially if it is grounded in an ultimate rule of recognition—disagreements about fundamental legal principles mean that in many hard cases, judges may have to legislate new rules because there is no precedential law on which to base a ruling. This would go against the common intuition that in most cases, even difficult ones, a “correct” answer exists “out there” that can be determined by the objective principles of the legal system.<sup>13</sup> Shapiro’s rejection of the “plain-fact” view somewhat blunts this criticism, but it still remains in situations in which the social facts of a legal system do not clearly determine its purpose. For example, if we stipulate that the “purpose” of the American legal system, as determined by the political objectives of its designers, is to promote both freedom and equality, resorting to the system’s “purpose” will not provide a helpful answer in a case in which freedom and equality conflict.

### III. PRINCIPLED POSITIVISM

Berman’s answer to these challenges lies in a legal theory he calls “principled positivism.” In principled positivism, “taking-up behaviors”—such as legal decisions and prevailing scholarly opinions—determine legal principles and their weights. These principles are activated by the specific conditions of a case, guiding the decision in a

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<sup>12</sup> Berman, *supra* note 2, at 311–13.

<sup>13</sup> *Id.* at 316.

particular direction.<sup>14</sup> The introduction of activation solves the problem of non-lexical determination because even though one principle may be weightier than another, it is possible for the less weighty principle to be more activated in a given case and prevail over the weightier principle. For example, even if freedom is generally a weightier principle than equality, sometimes the facts of a case will “activate” equality to such an extent that the correct legal decision will be in favor of equality. It also solves the too-little law problem since the weights and activation of legal principles will always determine the proper legal decision. There is a mix of weights and activation “out there” that pushes the decision in one direction or another.

Berman applies his framework to the infamous “snail-darter” case, *TVA v. Hill*. The Tennessee Valley Authority had invested millions of dollars in a dam project that, nearing completion, was found to violate the Endangered Species Act (ESA) of 1973 because it threatened the snail darter, which had been placed on the federal endangered species list in 1975. The majority of the Supreme Court, in an opinion written by Chief Justice Warren Burger, ruled that construction must be halted on the dam, while Justice Lewis Powell dissented for the minority on the grounds that congressional statutes should not result in “absurd” implications. This seemed to be a theoretical disagreement about the authority of legislative enactments, but Berman understands it as a dispute over the weight and activation of three principles: “what the statutory text means matters; legal intentions of the enacting legislature have force; absurd results should be avoided.”<sup>15</sup> While Burger and Powell agreed that the first two principles are weightier than the final principle, Powell perhaps gave greater weight to avoiding absurd results than Burger. However, they disagreed most strongly on the

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<sup>14</sup> See Berman, *supra* note 2, at 320, 326 figs. 2–3.

<sup>15</sup> Berman, *supra* note 2, at 339.

activation of the first two principles. Burger viewed the meaning and intention of the ESA as clearly directing that the dam construction should cease, meaning that the first two principles were activated strongly enough to push the decision toward halting construction. In contrast, Powell did not think the statute's language clearly directed halting the dam's construction and maintained that it is unclear whether Congress intended to halt projects that are close to completion at the time a species is listed as endangered. Therefore, principle one was only mildly activated, principle two was neutral, and principle three was strongly activated, pushing the decision toward allowing construction.<sup>16</sup> Berman answered the "non-lexical determination" and "too-little law" problems, while demonstrating the ability of principled positivism to explain judicial behavior. The rest of this article will contribute more original ideas to the discussion.

#### IV. BERMAN AND SHAPIRO

Shapiro's defense of positivism against the problem of theoretical disagreements serves as an important precursor to principled positivism. First, and perhaps most importantly, Shapiro denies the "plain-fact" view of positivism, as does Berman. Positivism without an ultimate rule of recognition is a novel insight and provides the crux of both Shapiro's and Berman's arguments, allowing them to integrate positivism with the fact that judges often disagree about fundamental legal principles. Both replace the rule of recognition with concepts rooted in historical legal practice, with Shapiro's "objectives of legal designers" paralleling Berman's "taking-up behaviors." Moreover, Berman's "legal principles" can be seen as a more developed form of Shapiro's "purpose of a legal system." Both concepts are grounded in historical practice and intended to guide legal practitioners in interpreting the law. However, Berman, with his

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<sup>16</sup> *Id.* at 342.

introduction of weights and activation, does a better job of explaining how principles combine non-lexically to generate derivative legal norms.

Principled positivism also does a better job of hemming in potential excesses in interpretive methodologies. Since the “purpose” of a legal system is a broad and vague category, Shapiro’s theory gives legal interpreters more room to fashion their preferred methodology into whatever “purpose” they may extract from historical practice. In contrast, in principled positivism, a principle has either been “taken-up” or not “taken-up,” and is thereby either embedded or not embedded in the legal system. This is why Berman is comfortable criticizing Justice Clarence Thomas for his narrow originalism in *Obergefell v. Hodges*.<sup>17</sup> Thomas argued that the Constitution “contains no ‘dignity’ clause,”<sup>18</sup> but Berman retorts that “fundamental principles are extratextual, and the dignity principle that Justice Kennedy’s majority opinion rested upon was well embedded in our constitutional law by the time *Obergefell* rolled around.”<sup>19</sup> Principled positivism therefore gives a much clearer roadmap for adjudication than Shapiro’s “purpose-oriented” positivism.

Nevertheless, Berman’s picture of principled positivism has its flaws. In the remainder of this paper, it will propose and then answer two challenges to Berman: the first from “made-up principles,” and the second from “conflicting weights.” Both will be addressed by drawing on concepts from Shapiro’s article.

## V. REFORMULATING PRINCIPLED POSITIVISM

As a legal system evolves, new principles will be introduced and embedded into the system. For example, as stated earlier in this paper, *Henningsen* introduced the principle that automobile manufacturers have

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<sup>17</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>18</sup> *Id.*

<sup>19</sup> Berman, *supra* note 2, at 345.

special obligations in relation to the construction, sale, and operation of their vehicles. Since Bloomfield Motors produced a defective vehicle, this principle activated strongly enough that it outweighed the principle of freedom of contract, and the company was held liable even though the injured plaintiff signed a liability waiver. This would seem to fit into principled positivism, except that the presiding judge introduced such a principle not grounded in earlier taking-up behaviors. The crux of the issue is this: How does principled positivism account for evolution in a legal system if legal principles are meant to be grounded in historically recognized taking-up behaviors? Can principles be “made-up” by judges and legal theorists?

One answer would be that under principled positivism, judges do not have the authority to make up principles, but once created, the initially-illegitimate principles are embedded into the legal system and may be invoked in later cases. In the *Henningsen* case, the judge may have technically erred by deviating from previous legal practice, but the new principle introduced—if consistently adopted by legal actors—becomes embedded in the legal system over time. This would apply to any other novel legal principle, explaining legal evolution. However, this explanation comes with an unintuitive implication: Every time a judge invokes a new legal principle to decide a case, that case has technically been decided incorrectly. Is it so obvious that *Henningsen*, and any other case where a new principle is introduced, is wrong? Such an implication seems absurd, as then many cherished legal principles, such as “separate education facilities are *inherently* unequal” in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), would have been introduced “wrongly,” and therefore the case would have been decided “wrongly.”

Nevertheless, a concept from exclusive legal positivism offers an alternative explanation. Shapiro describes exclusive legal positivism as

providing judges with “strong discretion” to apply extralegal principles when the case calls for it, with such discretion being grounded in social agreement. A similar concept can be applied to principled positivism. The first time a judge introduces a novel legal principle, which is accepted and embedded in the system, a “meta-principle” that judges have the discretion to introduce novel principles also becomes embedded in the system. There are “taking-up behaviors” that recognize a judge’s discretion to introduce novel principles. While this discretion is limited, certain important social or moral factors, such as the evils of segregation, may allow a judge to introduce a novel principle, such as “separate education facilities are *inherently* unequal,” which carries less weight than previously established principles but could be activated to such an extent that it shifts the outcome of the case.

The second, and perhaps more difficult, challenge to Berman concerns judicial disagreement over weights. If the relative weights of legal principles are grounded in empirical facts about taking-up behaviors, then how is it possible that judges and legal theorists disagree so strongly about these weights? For example, a living-constitutionalist might admit that “original public meaning of the Constitution is important” is a legal principle, but will give it much less weight than an originalist would—so much so that their divergence cannot possibly be grounded in disagreement over historical taking-up behaviors. Therefore, when judges and legal theorists assign weights to legal principles, these judgments seem to stem not from empirical facts but from differing views on political morality.

Berman could perhaps dismiss this question the same way he dismissed the problem from theoretical disagreements: While judges and legal theorists are mistaken in their weighing of legal principles, the fact remains that legal principles’ weights are grounded in historical taking-up

behaviors. However, once again, such an answer would make the entire legal field look absurd and incoherent: How is it possible that the relevant legal actors are so wrong about how the law actually works?

Shapiro's solution to theoretical disagreements can also resolve the challenge of conflicting weights. When judges apply weights to certain principles, they do so not based on how often the principle is taken up, but rather how well it fits the "purpose" of the legal system, which, as Shapiro described, is grounded in the "political objectives that the current designers of the legal system sought to achieve."<sup>20</sup> For example, the weight of the principle "separate education facilities are *inherently* unequal" will depend on how much the purpose of a legal system is geared toward equality. Judicial disagreements about the weights of legal principles relate to the legal system's "purpose"—rooted in its historical facts rather than questions of political morality — which is more coherent than disagreements about taking-up behaviors: the former gives judges a broader range to interpret socio-historical facts, while the latter seems impossible to disagree over. Therefore, we must slightly alter principled positivism. Rather than the weight of a legal principle being determined by the prevalence of its being taken up, the principle's weight is determined by how well it fits a given legal system's purpose or purposes.

## CONCLUSION

Berman's principled positivism is analogous to Shapiro's "purpose" oriented positivism, as both scrap the ultimate rule of recognition in favor of social facts relating to historical legal practice, and both prefer an approach to positivism emphasizing broader goals or principles rather than determinate rules. However, Berman's approach is ultimately more

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<sup>20</sup> Shapiro *supra* note 3, at 44 addresses the challenges posed by "non-lexical determination" and "too-little law," whereas Shapiro's approach can- oriented positivism, as both scrap the ultimate rule of recognition in favor of social facts relating to historical legal practice, and both prefer an approach to positivism that emphasizes not.

developed, as it manages to answer the challenges from “non-lexical determination” and “too-little law,” while Shapiro’s approach cannot do so. Nevertheless, as Berman describes it, principled positivism is imperfect and faces challenges that must be addressed by applying concepts from Shapiro’s paper. First, the proposed challenge from “made-up principles” is addressed by arguing that principled positivism must incorporate a “meta-principle” that judges, when absolutely necessary, may introduce novel legal principles not grounded in prior legal practice. Next, the proposed challenge from “conflicting weights” is answered by employing Shapiro’s resolution to the problem of theoretical disagreements. Instead of the relative weights of legal principles being grounded in taking-up behaviors, they are grounded in a legal system’s purpose, allowing for judicial disagreement about said weights. This refined principled positivism closely aligns with Berman’s framework but introduces a different foundation for determining derivative legal norms non-lexically, thereby enhancing its coherence and applicability.

GOSPELIC LEGALISM: A RE-EVALUATION OF THE  
PHARISEE-CHRISTIAN DEBATE IN THE CANONICAL GOSPELS

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*It is often said that the debate between the early Christians and their Jewish forerunners is similar in type to the modern debate between Supreme Court Justices about how to read the Constitution. Namely, that the Jews insisted on literal, originalist interpretations, whereas the Christians advocated for a “spirit of the law” which guides the law’s interpretation beyond the letter of the law. Or, in other words, it is suggested that the first-century debate between Jewish Christ-followers and Jews who rejected Christ regarding the Scriptural Laws was a question of legal formalism versus legal functionalism: the letter of the law versus the spirit of the law.*

*In this essay, an evaluation of this thesis will be offered, exploring the various critiques of the Jewish Law found in the four canonical Gospels: Matthew, Mark, Luke, and John. The conclusion of this survey will yield that the aforementioned interpretation of the early Jewish-Christian debate holds in only the Gospel of Mark: for the other three, other explanations must be found (and are supplied) for the disagreements between the Pharisaic Jews and their Christ-following brethren with regard to the Law. John, it will be argued, believes the Law to be invalid in the post-Christ world, Luke has a complex relationship with the Law that cannot be summarized simply, and, on the other end of the chain, Matthew accepts the Law and the Pharisees’ interpretations wholeheartedly.*

INTRODUCTION.....	56
I. THE GOSPEL OF MARK.....	60
II. THE GOSPEL OF JOHN.....	62
III. THE GOSPEL OF LUKE.....	64

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IV. THE GOSPEL OF MATTHEW.....	67
CONCLUSION.....	69

## INTRODUCTION

While Constitutional theorists and Supreme Court Justices have long fallen into the twin camps of “Originalist” or “Textualist” and “Living Constitutionalist” or “Pragmatist,” this divide has come to the fore in recent years, particularly after the overturning of the notorious 1973 *Roe v. Wade*<sup>2</sup> decision in 2022.<sup>3</sup> Since then, this question has gained public appreciation, though, of course, for the Justices, it was always of great importance.

In attempting to define the “Originalist” view, Antonin Scalia—perhaps the most vociferous of the theory’s proponents—once said that “The Constitution is not a living organism. It’s a legal document. It says some things and doesn't say others... The starting point in any case involving the Constitution is the text of the Constitution and the meaning of that text to the people who ratified it.”<sup>4</sup> More recently, Amy Coney Barrett has argued that “The central premise of originalism is that the original public meaning of the enacted text... controls, and that it's a constraint... That was the law that the people ratified.”<sup>5</sup> The central claim of these justices—as well as, *inter alia*, Clarence Thomas and Brett Kavanaugh—is that the text, as defined by its original context, must determine the law, not our modern sensibilities, valid though those may be.

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<sup>2</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>3</sup> *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (overruling *Roe v. Wade*).

<sup>4</sup> Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 38–47 (Amy Gutmann ed., 1997).

<sup>5</sup> *The Nomination of Amy Coney Barrett to the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2020) (statement of Amy Coney Barrett, J.).

Those opposed may concur with William Brennan's view of Constitutionalism instead: "The genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."<sup>6</sup> For Brennan, as for all Living Constitutionalists, it is built into the document's structure that it must be updated with the times. In more theoretical terminology, we might call this a manifestation of the classic debate between legal formalism (as articulated by H.L.A. Hart<sup>7</sup>), the view that the law is a closed set which has to be interpreted only on its own terms, and legal functionalism (as per Oliver Wendell Holmes Jr.<sup>8</sup>), which sees the law as a set of tools by which to solve social problems.

This is, of course, a cursory overview of a very complicated and long-standing debate among legal theorists and Supreme Court Justices. However, it is sufficient to explain why this framework is often used to understand other legal debates in history. Most important—and oldest—of these, perhaps, is the disjunction between the early Christians (or Christ-following Jews) and Pharisaic Jews. The argument goes that the early Christians' objection to Pharisaism was that the latter were too literalist in their treatment of the Law (that is, of course, the laws of the Hebrew Scriptures or Halakhah), advocating instead for a softer "spirit of the law" approach to its interpretation. As Sanford Levinson puts it, "The 'living' constitution is, at its heart, a Pauline concept. It suggests that the 'Old' text is a dead letter unless it is brought to life by the spirit of the present community. This mirrors the early Christian break from the Pharisees: the belief that the Law must be 'fulfilled' by its underlying purpose rather than its literal, historical commands."<sup>9</sup> Similarly, Stephen M.

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<sup>6</sup> William J. Brennan, Jr., Address at the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), in *THE GREAT DEBATE* 11, 14–15 (FED. SOC'Y ed., 1986).

<sup>7</sup> H.L.A. HART, *THE CONCEPT OF LAW* (Oxford Univ. Press 1961).

<sup>8</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (Little, Brown & Co. 1881).

<sup>9</sup> SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 191 (Princeton Univ. Press 1988).

Feldman offers that “Originalists are often characterized by their critics as ‘Pharisaic’—implying a narrow, rigid, and ultimately soul-crushing adherence to the ‘dead letter’ of the 1787 text. This rhetoric draws directly from early Christian polemics, which sought to replace the ‘legalism’ of Jewish tradition with a more ‘dynamic’ and ‘spiritual’ interpretation of God’s will.”<sup>10</sup>

This article argues that this characterization is correct only when applied to the criticism of the Pharisees found in the Gospel of Mark.<sup>11</sup> However, the application of this theory more broadly leads to error. To demonstrate this, a brief study of the four canonical Gospels and their respective presentations of the Pharisee-Christian dispute over the purpose and interpretation of the Law will be necessary. Naturally, this is hardly a full assessment of early Christian thinkers: there were likely dozens of early Christ-following communities that either did not write Gospels or whose Gospels did not survive to the present day. The ever-elusive Q-community,<sup>12</sup> for example, almost certainly existed but left us no record of their beliefs beyond the fragments that are preserved in the Gospels of Matthew and Luke. And, of course, there are the Pauline, Pseudo-Pauline, and other various Epistles which make up the bulk of the New Testament, none of which have any bearing on the Gospels and many of which have

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<sup>10</sup> Stephen M. Feldman, *The New Christian Rhetoric of Originalism*, 23 CARDOZO L. REV. 759, 771 (2002).

<sup>11</sup> We do not allege—and have no evidence to assume—that either Levinson or Feldman believe that this particular debate is palpable in the Gospels themselves. We simply use them as figureheads for a broad thesis about the earliest conflicts between Christians and Pharisees (or Christ-following and non-Christ-following Jews).

<sup>12</sup> Q (short for *Quelle*, the German word for ‘source’) is a hypothetical list of Jesus-sayings that New Testament scholars have speculated was the source for the Jesus-sayings common to Matthew and Luke but missing from Mark (their other source). See, e.g., JOHN S. KLOPPENBORG, *THE FORMATION OF Q: TRAJECTORIES IN ANCIENT CHRISTOLOGY* (Fortress Press 1987); JAMES M. ROBINSON ET AL., *THE CRITICAL EDITION OF Q* (Fortress Press 2000). For an opposing viewpoint, see MARK GOODACRE, *THE CASE AGAINST Q* (Trinity Press Int’l 2002).

strong views on the Law.<sup>13</sup> Unlike the first group, these may be analyzed, but require another medium by which to do so: the Gospels are plentiful material for one essay.

Before turning to the Gospels themselves, a brief overview of the scholarly literature on their ordering and composition is in order. Though there are ongoing debates about virtually everything in this field, what is presented here represents the basic consensus of New Testament scholars. It is generally believed that Mark was written first, probably just after the destruction of the Jerusalem Temple. Its composition is thus dated to sometimes around 70-75 CE.<sup>14</sup> Matthew and Luke each used Mark (or some sort of proto-Mark) as a source in the composition of their Gospels, which they wrote some ten years after his (80-85 CE). They were probably unaware of each other and likely had another shared source (the aforementioned Q) as well as other individual sources (often termed M for Matthew's unique source and L for Luke's). The fourth Gospel, John, was likely written some ten years after that, sometime between 90 and 95 CE, and likely did not know of the other three.<sup>15</sup> Since this is the case, any shared material between Matthew Mark and Luke (the Synoptic Gospels) must be set aside for our discussion as it fails to teach us anything about any particular Gospel-author's views.

The order of our analysis of the Gospels will not follow their historical chronology or their traditional arrangement in Christian Bibles,

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<sup>13</sup> The Epistle to the Hebrews, for example, is vehement in its opposition to the Law's literal application. The apocryphal Epistle of James, however, is adamantly supportive of the same.

<sup>14</sup> Though some have expanded this range to as early as 65 CE, see, e.g., R.A. GUELICH, WORD BIBLICAL COMMENTARY, VOL. 34A, MARK 1-8:26 xxxi-xxxii (Word Books 1989).

<sup>15</sup> See, e.g., BART D. EHRMAN, THE NEW TESTAMENT: A HISTORICAL INTRODUCTION TO THE EARLY CHRISTIAN WRITINGS (8th ed. 2023); RAYMOND E. BROWN, AN INTRODUCTION TO THE NEW TESTAMENT (Yale Univ. Press 1997); W.D. DAVIES & DALE C. ALLISON JR., A CRITICAL AND EXEGETICAL COMMENTARY ON THE GOSPEL ACCORDING TO SAINT MATTHEW (T&T Clark 1988); GRAHAM STANTON, THE GOSPELS AND JESUS (2d ed. 2002).

but their attitudes toward the Law, from simplest to most complex. We will thus begin with Mark—about whom Levinson and Feldman are surely correct—and John—about whom they are surely incorrect—and then proceed to the more complicated views of the antinomian Luke and, lastly, the pseudo-rabbinic Matthew.<sup>16</sup>

## I. THE GOSPEL OF MARK

It is evident that, according to Mark, the primary error of the Pharisees was their hyperlegalist—or originalist—approach to the Law, which, in his view, came at the cost of the Law's spirit.

The primary text for identifying Mark's attitude towards the Law is from the seventh chapter of his Gospel. There, in a passage that was not copied by either Matthew or Luke, Mark lays out a thorough and condemnatory criticism of the legalistic attitudes of the Pharisees through the means of the following story:

The Pharisees and some of the teachers of the law who had come from Jerusalem gathered around Jesus and saw some of his disciples eating food with hands that were defiled, that is, unwashed. ... So the Pharisees and teachers of the law asked Jesus, "Why don't your disciples live according to the tradition of the elders instead of eating their food with defiled hands?" He replied, "Isaiah was right when he prophesied about you hypocrites; as it is written, 'These people honor me with their lips, but their hearts are far from me. They worship me in vain; their teachings are merely human rules.' ... Again, Jesus called the crowd to him and said, "Listen to me, everyone, and understand this. Nothing outside a

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<sup>16</sup> These characterizations are, of course, my own. Much more could be said to demonstrate Luke's disdain for rabbinism and Matthew's fondness for it than the scope of this article permits.

person can defile them by going into them. Rather, it is what comes out of a person that defiles them.”<sup>17</sup>

There are three things of note in this passage. The first is the Pharisees’ scrupulous insistence on following the most minute dicta of the Law in a literal fashion. Against this, Jesus complains that the Pharisees have lost their sense of the spirit of the Law in their insistence upon its literal implementation. This culminates in the famous declaration of all foods clean, for only “what comes out of a person” can “defile them.” Thus, it is correct to argue that Markan Christianity saw itself as proponents of a “living Law” or functionalist theory, in contrast to the more “originalist” or formalist Pharisees.

This makes itself evident in another, shorter exchange between Jesus and a delegation of Sadducees (another Jewish sectarian group). A timid group of Sadducees approach Jesus with the following question:

“Teacher,” they said “Moses wrote for us that if a man’s brother dies and leaves a wife but no children, the man must marry the widow and raise up offspring for his brother. Now there were seven brothers. The first one married and died without leaving any children. The second one married the widow, but he also died, leaving no child. It was the same with the third. In fact, none of the seven left any children. Last of all, the woman died too. At the resurrection whose wife will she be, since the seven were married to her?”<sup>18</sup>

Given the reverence with which the question was introduced, it was surely intended to be a serious legal query. However, Jesus’ response—as

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<sup>17</sup> Mark 7:1–2, 5–7, 14–15 (New International Version).

<sup>18</sup> Mark 12:19–23.

recorded by Mark; again, this passage is not recorded by any other Gospel—is almost vindictive:

Are you not in error because you do not know the Scriptures or the power of God? When the dead rise, they will neither marry nor be given in marriage; they will be like the angels in heaven. Now about the dead rising—have you not read in the Book of Moses, in the account of the burning bush, how God said to him, ‘I am the God of Abraham, the God of Isaac, and the God of Jacob’ [Exod. 3:6]? He is not the God of the dead, but of the living. You are badly mistaken!<sup>19</sup>

Instead of responding to their question on their terms, he rejects their premise, rebuking them for considering it a matter of legality rather than theology. In other words, he refuses to deal with the minutiae of the Law, preferring to deal only with the grand values to which the Law points.

Thus, Mark demonstrates a disinterest in the particulars of the Law, stressing through Jesus’ mouth in speeches that no other Evangelist<sup>20</sup> records (and thus are probably non-historical) the short-sightedness of the Jewish sectarians (broadly speaking, the Pharisees and Sadducees) who insist on living by a literal interpretation of the Law.<sup>21</sup>

## II. THE GOSPEL OF JOHN

If the case for Mark’s beliefs about the Law had to be teased out from his unique Jesus-sayings about the Law, John’s are much more plainly and explicitly stated. In his opening chapter, he remarks that though “the law was given through Moses; grace and truth came through Jesus Christ.”<sup>22</sup> Whereas Mark understood the values which Christ preached to be

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<sup>19</sup> Mark 12:24–27

<sup>20</sup> As the Gospel-authors are traditionally called.

<sup>21</sup> Obviously, these are not Mark’s only statements about the Law. For brevity’s sake, our discussion of Mark must close here, but much more could be said.

<sup>22</sup> John 1:17.

latent in the Law, John perceives it to be something external to the Law. Thus, whereas Mark criticized the Pharisees for misinterpreting the Law, John complains about their continued use of the Law in a post-Christ world. He concedes fully to the Pharisee interpretation of the Law; he simply rejects their assertion of its continued authority.

When a stunned Temple-worshipper (his sect is not mentioned) wonders from whence Jesus derived his wisdom without having been instructed by a rabbi, John records a response that would have been unthinkable in any other Gospel:

Jesus answered, "My teaching is not my own. It comes from the one who sent me. Anyone who chooses to do the will of God will find out whether my teaching comes from God or whether I speak on my own... I did one miracle, and you are all amazed. Yet, because Moses gave you circumcision (though actually it did not come from Moses, but from the patriarchs), you circumcise a boy on the Sabbath. Now if a boy can be circumcised on the Sabbath so that the law of Moses may not be broken, why are you angry with me for healing a man's whole body on the Sabbath?"<sup>23</sup>

In this remarkable statement, Jesus effectively declares himself to be a second Moses; by comparing his teachings to Moses, he implies that he has equal authority (at least) with the latter. Thus, his teachings are not a rediscovery of the spirit of the Law, but a new covenant which supersedes the Law. It is no wonder that the very next verses record the Jews plotting to kill him: this is utter blasphemy.<sup>24</sup>

In perhaps the most famous episode of John's Gospel, Jesus interrupts the stoning ceremony of a woman caught in an act of adultery.

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<sup>23</sup> John 7:16–17, 21–23.

<sup>24</sup> John 7:25–32.

Turning to the surrounding Pharisees, he calmly remarks, “Let any one of you who is without sin be the first to throw a stone at her.”<sup>25</sup> This is not merely an act of mercy; it is a clear example of Jesus applying his own values above the Law. He does not offer any justification for his actions on the basis of the Law; he simply negates the Law’s ability to execute punishment on the basis of just deserts, one of the fundamental principles of any functioning legal system. By doing so, he was not amending the Law, but replacing it.

In case this is not explicit enough, Jesus once refers to the Law as “your law” (νόμῳ [...] τοῦ υμετέρου<sup>26</sup>; νόμῳ υμῶν<sup>27</sup>) and once as “their law” (νόμῳ αὐτῶν)<sup>28</sup> with the clear implication that the Law belongs to the Pharisees and not to his own followers. The dichotomy consistently set up by John’s Jesus between the Law of Moses and his own revelation forbids the application of Levinson and Feldman’s conclusions to his Gospel: the debate between the Pharisees and the early Christ-followers in John’s Gospel is not between different approaches to interpreting the law, but about the veracity of Jesus as a second covenant and revelation.

### III. THE GOSPEL OF LUKE

Like his predecessor and primary source, Mark, Luke believed in the continued authority of Scriptural Law. Luke (and Matthew) happily quotes from Mark Jesus’ instruction to a leper to show himself to the priest, “as Moses commanded.”<sup>29</sup> When Jesus is approached by “an expert in the law” (presumably a Pharisee) and asked how to achieve eternal life, Luke’s Jesus responds by directing him towards the Law.<sup>30</sup> Indeed, in Luke’s rendition of the Birth Narrative, the fulfillment of the various laws

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<sup>25</sup> John 8:7b.

<sup>26</sup> John 8:17.

<sup>27</sup> John 10:34.

<sup>28</sup> John 15:25.

<sup>29</sup> Luke 5:14. *See also* Mark. 1:44; Matt. 8:4.

<sup>30</sup> Luke 10:25–26.

pertaining to childbirth is mentioned on numerous occasions.<sup>31</sup> Thus, Luke clearly demonstrates his normative acquiescence to the Law, at least in principle.

Yet, a number of key passages in his Gospel push in the other direction. When a simple question about inheritance is asked to Jesus, he responds not with the answer normatively prescribed by the Law, but with a warning against the dangers of greed.<sup>32</sup> However, the following short, contextless speech Jesus gives in the sixteenth chapter of the Gospel is even more explicit:

“The Law and the Prophets were proclaimed until John. Since that time, the good news of the kingdom of God is being preached, and everyone is forcing their way into it. It is easier for heaven and earth to disappear than for the least stroke of a pen to drop out of the Law.”<sup>33</sup>

Despite his general deference to the Law’s authority, he here declares it null since the coming of John the Baptizer. Immediately following this, he issues a rebuttal against the permissive laws of divorce found in the Mosaic Law (Deut. 24:1–4): “Anyone who divorces his wife and marries another woman commits adultery, and the man who marries a divorced woman commits adultery.”<sup>34</sup> This passage appears to represent a shift in Jesus’ thought, as presented by Luke. Until now, by and large, he acknowledged the authority of the Law; at this point, he rejects it wholesale and immediately begins making his own judgments.

It is for this reason that Luke’s attitude towards the Law is more difficult to ascertain than Mark’s or John’s: his views are less consistent

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<sup>31</sup> *E.g.*, Luke 2:21 (circumcision); 2:22–24 (purification rites for a new mother); 2:39.

<sup>32</sup> Luke 12:13–15.

<sup>33</sup> Luke 16:16–17.

<sup>34</sup> Luke 16:18.

than theirs are.<sup>35</sup> What can be said, however, is that his critique is not based on legal theory; he was not criticizing the Pharisees for using the wrong tools in the interpretation of their law or for being legal formalists; he was rather admonishing the legal system writ large, eventually concluding that it was not worth maintaining. This can be demonstrated by looking at an earlier passage in the Gospel, where Luke lays out seven complaints against the Pharisees (often called the “seven woes”). We need not go through them all, but the very first one is sufficient to get the general sense of the cause of Luke’s displeasure:

“Woe to you Pharisees, because you give God a tenth of your mint, rue and all other kinds of garden herbs, but you neglect justice and the love of God. You should have practiced the latter without leaving the former undone.”<sup>36</sup>

Unlike Matthew’s rendition of the woes (Matt. 23:7ff), in Luke’s version, Jesus’ ire is directed towards the Pharisaic system or the Pharisees writ large, not merely against their leaders. Thus, even before rejecting the Law outright, Luke’s Jesus already had hesitations about the Jewish Law as interpreted by the Pharisees. And his arguments against them are not against the method of interpretation—formalism versus functionalism—but against the very structure of the Law.<sup>37</sup>

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<sup>35</sup> My own view, for what it’s worth, is that Luke ought to be grouped with John on this matter. It seems to me that most of the pro-Law material in Luke’s Gospel is, in truth, polemical material against the Nazarenes (the residents of Jesus’ hometown) who, as Bruce Chilton has artfully dramatized in *RABBI JESUS: AN INTIMATE BIOGRAPHY* (Doubleday: 2002), regarded Jesus an outcast. By associating the Law with them, Luke is establishing the break between Jesus and his community—who deny him (Luke 4:14ff)—along legal grounds. The somewhat unpalatable—but, to my mind, demonstrably true—consequence of this theory is the negative light it casts Mary and Joseph in, though to pursue this would require a lengthier study than is appropriate for this venue.

<sup>36</sup> Luke 11:42.

<sup>37</sup> Another iteration of this dissatisfaction with the Pharisaic legal structure, and not just their methods of interpretation, can be seen in Luke 13:10ff, when Jesus is confronted about healing a crippled woman on the Sabbath. Despite this being a common motif in the Gospels, the answer Luke provides for Jesus is not found anywhere else (vv. 15b–16): “You hypocrites! Doesn’t each of you on the Sabbath untie your ox or donkey

## IV. THE GOSPEL OF MATTHEW

Though Matthew's attitude towards the Jews is much disputed,<sup>38</sup> his treatment of their Law is unquestionably softer than that of the other Evangelists. His—and only his—Jesus declares that he has not only “come to abolish the Law... but to fulfill them.”<sup>39</sup> He continues:

For truly I tell you, until heaven and earth disappear, not the smallest letter, not the least stroke of a pen, will by any means disappear from the Law until everything is accomplished. Therefore anyone who sets aside one of the least of these commands and teaches others accordingly will be called least in the kingdom of heaven, but whoever practices and teaches these commands will be called great in the kingdom of heaven. For I tell you that unless your righteousness surpasses that of the Pharisees and the teachers of the law, you will certainly not enter the kingdom of heaven.<sup>40</sup>

He thus not only acknowledges the ineffability of the Law, but the binding authority of the Pharisee leaders (the early rabbis). In this vein, he says that “the teachers of the Law and the Pharisees sit in Moses' seat,”<sup>41</sup> once again affirming their right to interpret Scripture and decide the Law.

Indeed, Matthew's Jesus doesn't only affirm the Law, he insists that his own teachings are the natural conclusion of the Law's ethos. Twice, he

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from the stall and lead it out to give it water? Then should not this woman, a daughter of Abraham, whom Satan has kept bound for eighteen long years, be set free on the Sabbath day from what bound her?”

<sup>38</sup> For scholars who interpret his view of Jews negatively, see, e.g., PAULA FREDRIKSEN, *FROM JESUS TO CHRIST* (2d ed. 2000); JOHN DOMINIC CROSSAN, *WHO KILLED JESUS?* (HarperCollins 1995). For scholars who interpret it more positively, see, e.g., Ernst von Dobschütz, *Matthäus als Rabbi und Katechet*, 27 *ZEITSCHRIFT FÜR DIE NEUTESTAMENTLICHE WISSENSCHAFT* 338 (1928).

<sup>39</sup> Matt 5:17.

<sup>40</sup> Matt 5:18–20.

<sup>41</sup> Matt 23:2.

refers to the Christian ethic of altruistic charity (which is often considered Jesus' greatest innovation) as the "sum of the Law and the Prophets,"<sup>42</sup> something no other Evangelist ever does. Not only this, but on numerous occasions, he quotes the early rabbinic tradition as the source of his ethical statements.<sup>43</sup> This displayed affinity for the rabbinic tradition demonstrates not only a fondness for the Scriptural Law, but even for the Pharisaic interpretations layered upon it.

However, even Matthew has some complaints against the Pharisees. His, however, is not systematic, but personal. Meaning that he never levies any real critique against the Pharisaic system, only against the Pharisee leaders. To appreciate Matthew's unique polemics, compare his iteration of the "seven woes" to Luke's. Recall that Luke opened his woes with "Woe to you, Pharisees."<sup>44</sup> Matthew, by contrast, opens most of his woes with "Woe to you, teachers of the law and Pharisees, you hypocrites...",<sup>45</sup> focusing on the leaders, not the nation or the legal system.

Jewishness or lack thereof of the Matthean Gospel aside, what emerges from this brief analysis is that Matthew's complaint was not against the legalisms of the Pharisees, but against the personal conduct of their leaders. Thus, the conclusion that early Christians critiqued the Jews for their hyper-literalism in interpreting the Law, as opposed to the "spirit

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<sup>42</sup> Matt 7:12; 22:37–40.

<sup>43</sup> For example, Matthew's version of the prohibition against divorce (Matt. 5:31–32; 19:1–12), in contrast to Luke's and Mark's iterations of the prohibition, Matthew permits divorce in the case of adultery (5:32). The only other source among first century Jews from which Matthew could have drawn this dicta is from the early tannaic rabbi, Shammai (c. 50 BCE – 30 CE), who says "A man may not divorce his wife unless he finds in her a perverse matter (i.e., she committed adultery or is suspected of having done so), as it says (Deut. 24:1): 'Because he has found some unseemliness in her...'" (m.Gitt. 9:10). Many such examples exist in Matthew's Gospel, but not one can be found in any of the other canonical Gospels.

<sup>44</sup> Luke 11:42–43. After this, he switches to the generic "Woe is you," as in vv. 44, 45, 47, and 49.

<sup>45</sup> Matt 23:13, 15, 23, 25, 27, 29.

of the Law” they favored, does not hold for Matthew’s Gospel either, just as it did not hold for Luke’s or John’s.

### CONCLUSION

We have thus concluded our survey of the legal disputes in the canonical Gospels. At its close, we raise the question with which we began: is it fair to assert that the legal disagreements between the Pharisees and the early Christians are of the same type as the current (and perennial) debate between Supreme Court Justices about Constitutional Originalism versus the “Living Constitution” or between legal scholars about legal formalism versus legal functionalism? Certain scholars, certainly, are of the view that they are; we cited from Levinson and Feldman, though there are several others of note. However, upon the conclusion of our analysis of the Gospels themselves, we are left puzzled by this thesis: it holds in only one of the four Gospels.<sup>46</sup> The Markan Gospel, the first and most a priori reliable of the Gospels, presents the Jesus-Pharisee debate as one of formalism versus functionalism: the Pharisees, he alleges, were hyperfocused on the literal interpretation and implementation of the Law, in contrast to Jesus who was far more interested in the spirit of the Law. However, that is only Mark. None of the other Gospels give any indication that they agree with Mark’s assessment of the debate. John, for example, clearly believed that they disagreed about the continued application of the Law in a post-Christ world, with Jesus arguing that his coming dethrones the Law and removes its authority, and the Pharisees objecting that the Law is eternally binding. On the other end of the chain, Matthew explicitly writes that Jesus believed in both the continued authority of the Law and the rabbinic interpretation. He argued with the Pharisees only because he thought their leadership was corrupt. And, though Luke’s view of the Law

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<sup>46</sup> Space does not permit a full analysis of the non-Gospel works (i.e., the Epistles that make up the majority of the New Testament), so I will simply assert that they do not support this theory.

is deeply complicated, what is certain, at least, is that his presentation of Jesus' objections to the Pharisees is not in line with Mark's.

Thus, we conclude that the theory that Jesus and the Pharisees differed on the same grounds as our modern Supreme Court Justices and legal scholars holds only for Mark's Gospel. It would be incorrect to assert such a thesis for Jesus as he is presented by the other three Gospels. Hence, it seems unlikely that this is, historically, the divide between the Christ-following Jews and the Pharisees.

# THE RIGHT TO PRACTICE RELIGION AS THEY PLEASE

Atarah Mandel<sup>1</sup>

*This paper examines Friedman v. State of New York, a 1963 case in which a sixteen-year-old Orthodox Jewish girl jumped off a moving ski lift to avoid violating the Jichud, a prohibition of Jewish law.<sup>2</sup> It analyzes the court's application of the Free Exercise Clause of the First Amendment, which requires the court to respect Friedman's individual interpretation of her religion, regardless of whether others in her community agree. It further examines the State's negligence in failing to adequately warn passengers of the ski lift's shutdown time and how that negligence compelled Friedman to risk her life to uphold her religious convictions. The case ultimately stands for a broader principle: courts must defer to an individual's own understanding of their religion, not the majority view within that religion.*

INTRODUCTION.....	71
I. THE STORY.....	72
II. RELIGIOUS FREEDOM AS A LEGAL DEFENSE.....	74
A. Case Background.....	74
B. Religion As A Legal Basis.....	74
C. The Free Exercise Clause.....	75
III. STATE LIABILITY.....	76
A. Common Carriers.....	76
B. Negligence.....	77
C. Case Conclusion.....	78
CONCLUSION.....	78

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<sup>2</sup> *Friedman v. State*, 54 Misc. 2d 448, 282 N.Y.S.2d 858 (Ct. Cl. 1967), *modified*, 31 A.D.2d 992, 297 N.Y.S.2d 850 (3d Dep't 1969).

## INTRODUCTION

August 22, 1963. On a summer day in Belleayre Mountain Ski Center in Highmount, Ulster County, New York, a sixteen-year-old Orthodox Jewish girl jumped off a moving ski lift to avoid what she believed was a violation of Jewish law. This is the ski lift *Jichud* case that has made its way around social circles in the Orthodox Jewish community. How could she not have known that she would be alone on a ski lift with a man? Was she really correct in jumping off the ski lift, or was she just overzealous? And if it was in fact reasonable for her to jump, did the court have to respect this decision when other reasonable interpretations of Jewish law would not require her to do so?

## I. THE STORY

The *Jichud* (known colloquially as “yichud”) is an Orthodox Jewish law that prohibits an unmarried man and woman from being alone in a place that is inaccessible or unobserved by a third or fourth person, an issue that arises more often at night. In Orthodox Jewish law, there are few instances where risking one’s life would be required to avoid the violation of a religious prohibition. On August 22, 1963, Ruth Friedman legitimately believed that as a member of an Orthodox Jewish community and as an individual who strictly followed the laws and traditions of her Orthodox community, she had to avoid violation of the *Jichud* at all costs. Friedman was 16 years old on the date of the incident and had attended Yeshiva day schools her whole life. At the time, she was employed as a lifeguard in Camp Shiroh, an ultra-Orthodox camp in New York. She had one day off per week, which she usually spent with her friend, Jack Katz. On the date of the incident, Friedman and Katz visited Belleayre Mountain Ski Center, a recreational area owned by the State of New York, to spend their day off sightseeing.

The ski center's summer operations consisted of running the ski lift up and down Belleayre Mountain. The ski lift spanned 2,950 feet in length and was 783 feet in height. Each car on the lift had two chairs, allowing for two people in a car at a time, and each individual chair was equipped with a safety bar and a footrest. At the time, the ski lift was staffed by three State employees: one at the bottom and two at the top. Friedman and Katz arrived at the ski center in the early afternoon and took the ski lift up the mountain. When they made it to the top of the mountain, they walked out of sight of the ski lift terminal for a while. Eventually, Friedman looked at her watch and realized it was getting late. Katz believed that they started heading back to the mountain at around 5:30 PM, a walk that took about 10 to 15 minutes.

When they got to the terminal, it was deserted, but the ski lift was still operating. Not seeing any barriers or signs preventing them from boarding the car, they mounted the ski lift and began their descent down the mountain. A few minutes after their car started to go down, it stopped operating, leaving them about 20 to 25 feet in the air. For 15 minutes, they yelled for help, but no one came. Friedman began to panic and reached a near-hysterical state at the thought of being stuck 25 feet in the air overnight. As was later explained in court, part of this near-hysteria could have been due to the religious obligation that Friedman felt she was under not to spend the night alone with a man.

To avoid violating the *Jichud*, Friedman crawled out of her chair and held onto the bottom of the car. The next thing she recalled was finding herself on the ground, in pain and covered in blood. She managed to go back up the mountain and break into the terminal lodge to use the telephone, but the phone was dead. She continued down the mountain, while in immense pain, to the intermediate cabin where she again forcibly gained access and tried to use the phone. That one was dead as well. She

struggled down the rest of the mountain before breaking into the base lodge, where, finally, the telephone was working. She called the State Police, who sent personnel to rescue Katz and transport Friedman for medical assistance.

## II. RELIGIOUS FREEDOM AS A LEGAL DEFENSE

### A. *Case Background*

Friedman subsequently sued the State of New York for the injuries she sustained, related medical expenses, and loss of services sustained by her father. The State attempted to dismiss Friedman's claims on the grounds of negligence, arguing that jumping off the ski lift unnecessarily endangered her, thereby making her responsible for all injuries sustained.

The plaintiff had to prove that the State was responsible for failing to warn her in advance that the ski lift would be shut off at 5:50 PM, and that it was legitimate for her to jump off the lift, thereby risking her life, to avoid violating the religious prohibition of *Jichud*. But to connect these dots, the plaintiff first had to demonstrate that the State was responsible for putting her in a situation where she had to risk her life in order to keep her religious practices.

### B. *Religion As A Legal Basis*

In court, Rabbi Herschel Stahl was called upon to testify as an expert witness on the Orthodox interpretation and observance of Jewish law. Rabbi Stahl knew the plaintiff and her family and was therefore aware that she was raised with strictly Orthodox observance of Judaism. In this instance, as Rabbi Stahl testified, not only would violating the *Jichud* be a violation of a serious religious prohibition, it would also likely ruin Friedman's and her parents' reputations in their community. Rabbi Stahl noted that a girl who was educated and raised as Friedman would possibly

go as far as to even jump to her death to avoid this violation of the *Jichud*. After an extensive cross-examination in court, it was shown that although individual members of Orthodox Judaism might disagree, it was possible that a strictly Orthodox member of Judaism would practice Friedman's interpretation of Jewish law in this case.

This point was pivotal. The court is obligated to respect religious freedoms, with no authority to judge a religious law or to determine which interpretation of the law a member of that religion must follow. The court found that there was a valid interpretation of the religious law that would lead the plaintiff to jump off the ski lift, thus negating any negligence on her part. It was not whether Rabbi Stahl gave an absolutely correct interpretation of the Jewish law, but rather whether there is a branch of Judaism that subscribes to the interpretation that he gave, and if Friedman fit under this branch of Judaism at the time of the incident. Rabbi Stahl's testimony ultimately established that there was a legitimate basis for the moral compulsion that Friedman felt she was bound by.

### C. *The Free Exercise Clause*

Freedom of religion is protected under the First Amendment to the Constitution, where, in the Free Exercise Clause, it "protects citizens' right to *practice their religion as they please*."<sup>3</sup> This means that when there are different understandings of a religious text and practices, even within the same religious community, people have the right to practice their faith according to their own understanding. Freedom of religion, thus, is not just about having the right to practice (or not to practice) any specific religion, but also one's legal right to practice their religion according to how they understand it.

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<sup>3</sup> U.S. CONST. amend. I.

This clause is essential to the case of *Friedman v. State*. After Rabbi Stahl established that Friedman acted reasonably within her understanding of her religion when she jumped off the ski lift in order to avoid violating the *Jichud*, the court was thus *legally* obligated under the First Amendment to respect her actions, removing the State’s claims of “negligence” on her part. Although even individual members inside the Orthodox Jewish community might disagree with people who believe they have to risk their life to avoid the *Jichud*, it is irrelevant to that person’s legal rights. The court is obligated to respect people’s *valid understanding* of their religious texts, even if others disagree.

### III. STATE LIABILITY

#### A. *Common Carriers*

After Friedman’s actions were deemed reasonable under the First Amendment, her counsel proceeded with the second part of the trial, which was to prove the ski center’s negligence, which led Friedman to risk her life and subsequently suffer damages. Plaintiff’s counsel first tried establishing Belleayre Mountain Ski Center as a “common carrier” under the common carrier doctrine. This doctrine holds common carriers to a higher standard of safety and care for the goods and people they transport, since common carriers serve the public.<sup>4</sup> In previous cases, such as *Grauer v. State* and *Battalla v. State*,<sup>5</sup> ski lifts were established as common carriers. However, as of April 23, 1963—121 days before the incident—an amendment to subdivision 9 of section 2 of the Public Service Law was put into effect, limiting common carriers to “any such agency for public use in the conveyance of persons or property within this state *other than by use of ski*

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<sup>4</sup> Common Carrier Duties, SCMEDU, <https://scmedu.org/commoncarrierduties/>

<sup>5</sup> *Grauer v. State*, 9 A.D.2d 829, 192 N.Y.S.2d 647 (3d Dep’t 1959); *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

*tows and other passenger tramways operated at ski centers.*"<sup>6</sup> Because of this, the State could not be deemed a common carrier in operating the ski lift. However, as referenced earlier, in *Grauer v. State of New York*, it was stated that "[i]n view of the fact however that the lift was a constantly moving device it is obvious on the face of it that the State owed a duty to use every reasonable care to see to it that each passenger was seated safely; and this duty existed *whether the State is technically classified as a common carrier or not.*"<sup>7</sup> Because of this, the State did have an obligation to exercise reasonable care in the operation of the ski lift, regardless of "common carrier" designation or not.

B. *Negligence*

Once the State's responsibility was thus established, the plaintiff's counsel proceeded to prove that the State was negligent in its operation of the ski lift. Simply put, they did not adequately warn Friedman and Katz that the ski lift would stop operating at 5:50, which left Friedman in a situation where she was ultimately injured. In court, it was shown that there was no substantial sign indicating the time that the ski lift would cease to transport tourists down the mountain (although there was a sign that signified the time that the ski lift would cease to transport tourists up the mountain), nor did any attendants tell Friedman or Katz about the ski lift's shutdown time. There was a small sign at the start of the ski lift that stated "Last Passenger Down 5:50 P.M." However, this sign was deemed insignificant in court because it was placed on a tree that was easily missed. There was another sign at the top of the mountain that stated the same message, but it was only visible if a tourist chose to sign the guest book in the attendants' shed, an action neither required nor carried out by Friedman or Katz. The ski lift was also arguably the most negligent that

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<sup>6</sup> N.Y. PUB. SERV. LAW § 2(9) (McKinney 1963).

<sup>7</sup> *Grauer*, 9 A.D.2d at 830.

day, failing to carry out its closing procedure, which included not allowing passengers onto the lift and checking the top of the mountain for remaining tourists. Attendants regularly boarded the lift to descend the mountain at the end of the day, turning off the lift once they reached the bottom, which left a blind spot where people could potentially board the ski lift while it was still running without an attendant's detection—exactly what happened to Friedman and Katz.

C.      *Case Conclusion*

Since the State was found to be so overwhelmingly negligent, especially due to the lack of an attendant's presence at the boarding site of a moving lift, the plaintiff was found free from any contributory negligence. The plaintiff suffered from many injuries—including fractures, lacerations, whiplash, trauma, and deformities—due to the incident, and she had to undergo many expensive and lengthy procedures. Her doctor stated that the procedures helped bring her to 75% improvement from the condition she was in after the incident, but some of her injuries were permanent. The State was found liable, and the plaintiff and her father were awarded the joint sum of \$37,231.53.

## CONCLUSION

Aside from the other findings of this case, such as whether the ski lift was considered a common carrier or if the park substantially warned the plaintiff about the ski lift's closing time, the most striking and novel part of this case concerns the Free Exercise Clause. It may seem surprising to many Orthodox Jews that the Court respected Friedman's understanding of the *Jichud* prohibition, when Jewish law never explicitly requires one to risk their life to avoid it. What these people do not understand, however, is the true nature of the Free Exercise Clause and the manner in which Jewish law can overlap with U.S law.

Jewish oral law is originally recorded in the *Mishnah*, which is then elaborated and debated in the *Talmud*. The Talmud—one of the earliest texts of Jewish law—includes disagreements and arguments on its exact parameters, yet the extent of Jewish law does not end there. Numerous legal books have been written on the Talmud, and additional books have been written on those books. It is because of this that there are a vast number of understandings of the exact conditions of a particular Jewish law, with different communities within the Orthodox Jewish community practicing different interpretations of that law. Regardless of whether there is even one theologically correct way to practice a given law, the community accepts that there are multiple legitimate ways to practice it.

It would be unreasonable to suppose that the U.S. Court should find *the one* correct way to practice a particular Jewish law, and doing so would require going back to the original Talmudic debates. Furthermore, it would need to assume that the Court has the capacity to decide a Jewish theological debate. This level of involvement with a religion's practices would be inappropriate and would impede one's religious freedom. If the Court decided on one correct way to practice a contested Jewish law, but an American Rabbi and community wholeheartedly believed that their religious understanding led them to a different conclusion than that of the Court, they would now have to forgo their religious understanding for that of the law.

Because religious law admits many interpretations, the Free Exercise Clause protects all legitimate understandings of any particular religious law. This is the essence and backbone of religious freedom, and if the Free Exercise Clause did not exist, or, namely, if the Court had the right to tell a citizen how to practice their religion, religious freedom would cease to exist. Thus, the Court had to respect Friedman's legitimate

understanding of her religion's prohibition, setting a precedent that each citizen has the right to practice their religion as they please.

# COX COMMUNICATIONS, INC. V. SONY MUSIC ENTERTAINMENT<sup>1</sup>

*Emmit DeHart*<sup>2</sup>

*In March, the United States Supreme Court is expected to rule on Cox Communications, Inc. v. Sony Music Entertainment, which involves numerous record companies suing Cox, an internet service provider, for failing to stop repeat copyright infringement by users on its network. This case could fundamentally change the way Internet service providers (ISPs) operate and create tensions with First Amendment rights. A federal jury in 2019 found Cox liable for both contributory and vicarious copyright infringement and awarded Sony Music Entertainment and the other plaintiffs over 1 billion dollars in damages. However, in 2024, the Fourth Circuit appellate court overturned the lower court's finding of Vicarious liability. Despite agreeing with the claim of Contributory liability, the court overturned the 1 billion settlement. Cox has now appealed the appeals court's ruling on contributory Copyright Infringement, and the Supreme Court will hear oral arguments for the case in December 2025 and will address the fundamental question of whether Internet service providers are liable for their users' copyright infringement.*

I. CASE BACKGROUND AND PROCEDURAL HISTORY.....	82
II. THE FOURTH CIRCUIT'S DECISION.....	84
III. SUPREME COURT REVIEW AND THE SCOPE OF CONTRIBUTORY LIABILITY.....	86
IV. FIRST AMENDMENT CONCERNS AND BROADER IMPLICATIONS....	88

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<sup>1</sup> Editor's Note: This article was written in December 2025, before the Supreme Court decided Cox Communications, Inc. v. Sony Music Entertainment. On March 25, 2026, the Court reversed the Fourth Circuit's ruling on contributory liability, holding that Cox could not be held contributorily liable on the theory before the Court because it neither induced users' infringement nor provided a service tailored to infringement. The article has been left substantially in its original form to preserve the author's pre-decision analysis; as a result, some portions refer to the case in future tense.

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## I. CASE BACKGROUND AND PROCEDURAL HISTORY

In 2018, Sony Music Entertainment, along with 50 other music labels and publishers, sued Cox Communications, the largest private internet provider in the country. The plaintiffs alleged that Cox knew of, and financially benefited from, users' illegal pirating of copyrighted music. Sony claimed that Cox was liable for copyright infringement under the doctrine of secondary liability, which states that a party can be held legally responsible for a crime they did not personally commit if they partook in “encouraging, facilitating or profiting”<sup>3</sup> it. The case was heard in the U.S. District Court in the Eastern District of Virginia. The lawsuit alleged that Cox failed to address hundreds of thousands of copyright infringement notices by Cox internet subscribers. through peer-to-peer file sharing services, to illegally share and download over 10,000 individual copyrighted pieces of music<sup>4</sup>. Furthermore, the plaintiffs claim that Cox was liable for both contributory (the party knowingly causes, and contributes to another's direct infringement of a copyright) and Vicarious (materially benefited from another's direct infringement) Copyright Infringement. The contributory claim stemmed from the fact that Cox not only knew their platform was being used to facilitate copyright infringement, but they also knew of specific users who were violating copyright law, and allowed those users to continue utilizing their services. Thus, Cox contributed the necessary means for its users to commit repeated copyright infringements.<sup>5</sup> Cox was accused of vicarious copyright infringement because they could have stopped the continuous copyright infringement that was occurring on

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<sup>3</sup> DUKE UNIVERSITY SCHOOL OF LAW, *Secondary Liability for Copyright Infringement & Safe Harbors in the Digital Age*, in INTELLECTUAL PROPERTY CASEBOOK (2025).

<sup>4</sup> Blake Brittain, *Major Labels Ask U.S. Supreme Court to Reconsider \$1 Bln Cox Copyright Case*, REUTERS (Aug. 21, 2024), <https://www.reuters.com/legal/litigation/major-labels-ask-us-supreme-court-reconsider-1-bl-n-cox-copyright-case-2024-08-21/>.

<sup>5</sup> Joint Appendix Vol. 1 at 34, *Cox Commc'ns, Inc. v. Sony Music Entm't*, No. 24-171 (U.S. filed Oct. 29, 2025).

their network service, but failed to do so, since removing users from their services would result in a financial loss<sup>6</sup>.

Cox claimed to have a “13-strike policy,”<sup>7</sup> which stated that, after multiple warning notices, Cox would suspend users who engaged in copyright infringement. However, they seldom upheld the policy, and it was exceptionally rare for them to actually terminate users for repeat copyright infringement. The record reflected that “From early 2013 through March 2015 alone, Cox received more than 200,000 notices, provided under penalty of perjury, detailing specific instances of its subscribers using its network to infringe copyrighted music.”<sup>8</sup> Cox also placed an “arbitrary cap” on the number of copyright infringement notices it would accept, arguing that they couldn't be held responsible for terminating users for violation of Copyright. However, Cox routinely cut off customers' access for late payments and delinquency, suspending internet service for over 600,000 users and businesses from 2013-2014.<sup>9</sup>

The fundamental question the Jury was left to answer was: Is an internet service provider financially liable for what its users do online? In 2019, the federal jury seemed to think so, and found Cox liable for both contributory and vicarious copyright infringement.<sup>10</sup> The jury believed that Cox knew that they were enabling their users to access copyrighted music and also financially benefited from the infringement. They also found that Cox's infringement was willful, which under 17 USC 504: Remedies for infringement: Damages and profits increases the maximum financial penalty for statutory damages.<sup>11</sup> The Jury awarded almost 100,000 dollars per individual infringed piece of work, with the damages against Cox

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<sup>6</sup> *Id.* at 36.

<sup>7</sup> *Id.* at 5-6.

<sup>8</sup> *Id.* at 26.

<sup>9</sup> *Id.* at 367-68

<sup>10</sup> *Id.* at 91.

<sup>11</sup> 17 U.S.C. § 504(c).

totaling around 1 billion dollars. The jury believed that Cox did not take sufficient action to stop the repeat infringement and that Cox was benefiting financially from allowing users who were infringing copyright to continue using its services.

## II. THE FOURTH CIRCUIT'S DECISION

Cox appealed to the Fourth Circuit in 2024, and the court reversed the finding of **Vicarious** liability. The appeals court concluded that “Cox did not profit from its subscribers’ acts of infringement.”<sup>12</sup> They found that while Cox did financially benefit from users, the financial benefit was not sufficiently tied to the act of copyright infringement, as there must be a clear and direct financial benefit to prove vicarious liability. The court used the example of *Nelson-Salabes, Inc. v. Morningside Dev*, in which the defendant had “an obvious and direct financial interest in the [developer’s] infringing activities” because the owner “enjoyed the benefit of any increase in the Project’s value resulting from [the developer’s] infringement.”<sup>13</sup> In this case, the act of "infringement" was directly tied to more profit for the defendant. Similarly to Cox, in the case of *Fonovisa Inc. v. Cherry Auction Inc.*, it denotes Vicarious liability, because *Fonovisa* directly benefited from its vendors selling infringed copyrighted recordings through admission fees. In the case of Cox, by merely providing the network, they did not benefit financially from the act of copyright infringement more than a user who did not infringe on copyright. The users paying a “set-up fee and flat periodic payments” to Cox services would not constitute a financial benefit directly attributable to the infringing activity. Regarding the question of whether Cox financially benefited from not removing users who had been flagged for copyright infringement, the court

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<sup>12</sup> *Sony Music Entm’t v. Cox Commc’ns, Inc.*, No. 21-1168, slip op. at 4 (4th Cir. Feb. 20, 2024).

<sup>13</sup> *Id.* at 10-11.

ruled that Cox was liable. By not canceling services for users who engaged in illegal activity, Cox “profit[ed] directly from the sale of internet access” to users who were engaged in illegal activity.<sup>14</sup> Because Cox never directly benefited from the copyright infringement, this did not meet the standard for establishing vicarious liability.

The Appeals court, however, affirmed the lower court's contributory liability findings. They held that “supplying a product with knowledge that the recipient will use it to infringe copyrights is exactly the sort of culpable conduct sufficient for contributory infringement.”<sup>15</sup> By continuing to provide internet services to specific known users who had violated copyright infringement to avoid losing revenue, Cox knowingly allowed infringement, making their conduct culpable.<sup>16</sup> The Fourth Circuit Court of Appeals used the following case analogy to explain their ruling: if one were to hand a robber a hammer and the robber uses it to break open an ATM, the party that handed the robber the hammer would not be liable for robber's actions; however, if one does so knowing that the robber will rob the ATM, they would be liable for knowing, aiding, and abetting.<sup>17</sup> Cox knew that users with a history of copyright infringement were more likely to continue violating copyright laws, yet they continued to allow these repeat offenders to use their internet services.

The appeals Court vacated the \$1 billion that the federal jury had initially awarded to the plaintiffs and remanded the case for a new trial to determine damages based solely on contributory liability.

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<sup>14</sup> *Id.* at 14.

<sup>15</sup> *Id.* at 22.

<sup>16</sup> *Id.* at 23.

<sup>17</sup> *Id.* at 20-25.

### III. SUPREME COURT REVIEW AND THE SCOPE OF CONTRIBUTORY LIABILITY

After an initial failed attempt to appeal the verdict, Cox appealed to the Supreme Court, petitioning for review of the Fourth Circuit's decision, which upheld the lower court's findings of contributory damages. Cox argued that simply providing internet access should not automatically make internet service providers liable for their customers, even if those customers use it to engage in illegal activity. In 2025, the Supreme Court granted review on the question of what constitutes contributory liability under copyright law. The Supreme Court heard oral arguments from both parties in December 2025, and it is expected to deliver a decision in June 2026 as to whether Cox is culpable for contributory liability for the copyright infringement of their users.<sup>18</sup>

During the oral arguments, Cox's lawyer, Rosenkranz, argued that by applying contributory liability, the court opened the door to "no sure-fire way for an ISP to avoid liability," since anyone can use an ISP as a means for illegal activity.<sup>19</sup> Rosenkranz demanded that the court revise the Fourth Circuit's decision, lest internet companies become liable to police any/all tort cases that occur on the internet. Supreme Court Justices Roberts and Sotomayor pushed back on this point, asserting that Cox was capable of only cutting off the internet to specific users, but chose not to.<sup>20</sup>

Rosenkranz tried to establish a Supreme Court precedent that would absolve ISPs of culpability in cases of secondary liability. He invoked the logic of the 2023 Supreme Court case *Twitter, Inc. v. Taamneh*,<sup>21</sup> where the

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<sup>18</sup> *Cox Communications, Inc. v. Sony Music Entertainment*, SCOTUSBLOG, <https://www.scotusblog.com> (last visited Jan. 22, 2026)

<sup>19</sup> Transcript of Oral Argument at 4, *Cox Commc'ns, Inc. v. Sony Music Entm't*, No. 24-171 (U.S. Dec. 1, 2025), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2025/24-171\\_ap6c.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2025/24-171_ap6c.pdf).

<sup>20</sup> *Id.* at 11.

<sup>21</sup> *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023).

Supreme Court ruled unanimously that Twitter (now X) was not liable for content that terrorist group ISIS<sup>22</sup> posted on their platform, since Twitter did not "knowingly provid[e] substantial assistance" under the Anti-Terrorism Act.<sup>23</sup> Neither Justice Thomas nor Justice Kagan appeared convinced by Rosenkranz's argument that this case bore any resemblance to the case of *Twitter*; saying they "were dealing with a totally different matter in Twitter than we have here."<sup>24</sup>

However, several justices, including Justice Alito, questioned the music industry's position. Alito raised the hypothetical question of what would happen if an ISP were forced to shut down the internet for a university because of a copyright infringement report. Justice Gorsuch, on the other hand, called into question Sony's use of secondary liability, which is not clearly defined for companies that are providing a service to the public. Gorsuch stated, "In the Central Bank of Denver...the Court refused to imply any aiding-and-abetting liability under the Securities Exchange Act...so Sony sits in some tension with our law right there."<sup>25</sup>

The justices seemed relatively unconvinced by both parties' claims, but they wanted to find "a middle ground that would hold bad actors accountable without imposing impossible burdens on ISPs."<sup>26</sup> Justice Sotomayor notably characterized both sides as "extremes," and felt a

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<sup>22</sup> *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, <https://www.state.gov/foreign-terrorist-organizations/> (last visited Apr. 14, 2026).

<sup>23</sup> 18 U.S.C. § 2333.

<sup>24</sup> Transcript of Oral Argument at 4, *Cox Commc'ns, Inc. v. Sony Music Entm't*, No. 24-171 (U.S. Dec. 1, 2025), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2025/24-171\\_ap6c.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2025/24-171_ap6c.pdf).

<sup>25</sup> *Id.* at 84.

<sup>26</sup> Kaufman & Canoles, *Cox v. Sony Supreme Court Case*, JD SUPRA (Dec. 3, 2025), <https://www.jdsupra.com/legalnews/cox-v-sony-supreme-court-case-3248289/>.

middle ground solution was preferable.<sup>27</sup> In terms of the actual ruling, the Supreme Court may side with Cox if it concludes that the Fourth Circuit's standard for contributory liability risks imposing an unworkable obligation on ISPs to monitor and police their users' online activity. Conversely, the Court may uphold the Fourth Circuit's decision if it determines that Cox's conduct amounted to willful blindness rather than just passive negligence. Evidence that Cox selectively declined to terminate repeat infringers, particularly with high-revenue subscribers, could lead the Court to reaffirm that contributory liability applies where an intermediary knowingly allows ongoing infringement.

#### IV. FIRST AMENDMENT CONCERNS AND BROADER IMPLICATIONS

The American Civil Liberties Union (ACLU), alongside the Center for Democracy and Technology, raised concerns with how this case could fundamentally change the way the internet is used, as it will determine whether an ISP is liable for its customers' online actions.<sup>28</sup> The ACLU urged the Supreme Court to limit the scope of contributory copyright liability for internet service providers, warning that expansive liability threatens free expression online. In an amicus brief, Evelyn Danforth-Scott, an attorney for the ACLU, argued that imposing secondary liability would incentivize ISPs to broadly terminate internet access based on yet unproven suspension or violation to avoid secondary liability for copyright infringement of an unidentified user.<sup>29</sup>

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<sup>27</sup> Transcript of Oral Argument at 84, *Cox Commc'ns, Inc. v. Sony Music Entm't*, No. 24-171 (U.S. Dec. 1, 2025), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2025/24-171\\_ap6c.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2025/24-171_ap6c.pdf).

<sup>28</sup> American Civil Liberties Union, *ACLU Urges Supreme Court to Protect Free Expression Online in Copyright Case*, ACLU (Dec. 1, 2025), <https://www.aclu.org/press-releases/aclu-urges-supreme-court-to-protect-free-expression-online-in-copyright-case>.

<sup>29</sup> Brief of Amici Curiae ACLU et al. in Support of Petitioners at 1, *Cox Commc'ns, Inc. v. Sony Music Entm't*, No. 24-171 (U.S. filed Sept. 5, 2025).

The ACLU's petition argues that such an approach by ISPs could risk cutting off entire households, businesses, and public institutions from the internet. The brief also notes that multiple users can be associated with a single IP address, making it difficult to identify exactly who is liable. Danforth-Scott wrote that “[c]ustomers accused of copyright infringement also transmit lawful, First Amendment-protected speech. Terminating internet access would interfere with that speech.”<sup>30</sup> Given how much the internet is relied upon in daily life and communication, if ISPs shut off tens of thousands of users' internet access based on fear of secondary liability, lawful speech could be imposed upon, and First Amendment protections could be undermined. The ACLU's Amicus brief urges the Court to adopt a narrower standard that still protects copyright enforcement without giving ISPs unprecedented power in controlling online speech and activity.

#### V. OUTCOME OF THE COURT'S RULING

The Supreme Court's decision in *Cox Communications, Inc. v. Sony Music Entertainment* will have significant implications for copyright enforcement and the future role of internet service providers. If the Supreme Court reverses the Fourth Circuit's decision upholding contributory liability, it could significantly narrow the scope of liability by requiring clearer evidence of ISPs' intent and facilitation, and limit ISPs' liability for their users' conduct. If the Supreme Court affirms the Fourth Circuit's ruling, it will reaffirm that ISPs are liable for users, especially when they knowingly tolerate repeated copyright infringement for economic gain. The outcome of *Cox Communications, Inc. v. Sony Music Entertainment* will clarify the boundaries of contributory and secondary liability in the digital age and shape how courts balance copyright protection with free expression and internet access in the years to come.

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<sup>30</sup> *Id.* at 4.

# EMERGENCY POWERS, TARIFFS, AND JUDICIAL REVIEW AFTER THE SUPREME COURT’S TARIFF DECISIONS

*Avi Tepler<sup>1</sup>*

*This paper examines the limits of presidential authority to impose tariffs under the International Emergency Economic Powers Act (IEEPA) following a Supreme Court decision invalidating tariffs imposed by Donald Trump through executive orders. The Court held that the tariffs exceeded the powers delegated to the executive branch under IEEPA, which permits the president to regulate commerce during a national emergency arising from a foreign threat. Although a majority concluded that the tariffs constituted executive overreach, the justices sharply disagreed over the legal reasoning, producing multiple competing majority opinions and a vigorous dissent.*

*This paper argues that when the President invokes IEEPA to impose tariffs, an authority which is historically and constitutionally vested in Congress, courts must engage in meaningful judicial review of the asserted “national emergency.” Treating emergency declarations as categorically beyond judicial scrutiny allows temporary statutory powers to evolve into permanent economic policy, undermining the separation of powers and Congress’s authority under Article I of the United States Constitution.<sup>2</sup> Judicial review of emergency declarations is, therefore, not only permissible but constitutionally required to preserve the balance between the political branches.*

INTRODUCTION.....	91
I. THE TARIFFS AND THE CASE BEFORE THE COURT.....	93
A. The “Trafficking” and “Reciprocal” Tariffs.....	93
B. Statutory Basis: IEEPA.....	93
C. Procedural History.....	94
II. THE SUPREME COURT’S FRACTURED DECISION.....	95
A. The Majority’s Holding.....	95

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<sup>2</sup> U.S. Const. art. I, § 8, cls. 1, 3.

B. Competing Majority Rationales.....	96
C. The Dissents.....	97
IV. THE DANGER OF UNREVIEWED EMERGENCY DECLARATIONS.....	97
A. The Problem of Indefinite Emergencies.....	97
B. Why Emergencies Cannot Be Categorically Nonjusticiable.....	98
V. A FRAMEWORK FOR MEANINGFUL JUDICIAL REVIEW.....	99
A. Judicial Review Without Policymaking.....	99
B. A Three-Part Standard for Emergency Tariffs.....	100
CONCLUSION.....	102

## INTRODUCTION

In a 6–3 decision, the Supreme Court of the United States struck down sweeping tariffs imposed by Donald Trump through a series of executive orders.<sup>3</sup> The dispute arose after the administration implemented two sets of tariffs on foreign goods. The first, deemed “trafficking tariffs,” targeted imports from China, Canada, and Mexico as part of an effort to stem the flow of fentanyl into the United States. The second, “reciprocal tariffs,” applied broadly to imports from numerous countries and were justified as a response to large trade deficits allegedly threatening the nation’s economy and national security.

The administration relied on the International Emergency Economic Powers Act (IEEPA) of 1977,<sup>4</sup> a statute that authorizes the president to regulate certain economic transactions during a national emergency involving a foreign threat. The Court concluded that the tariffs exceeded the authority delegated by the statute. Yet the decision revealed deep divisions among the justices. While a majority agreed that the tariffs were unlawful, the Court fractured over the reasoning, producing multiple

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<sup>3</sup> Amy Howe, *Supreme Court Strikes Down Tariffs*, SCOTUSBLOG (Feb. 20, 2026, 4:21 PM), <https://www.scotusblog.com/2026/02/supreme-court-strikes-down-tariffs/>.

<sup>4</sup> International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. §§ 1701–1708).

opinions reflecting competing views about statutory interpretation, executive power, and the scope of the major questions doctrine.

These disagreements highlight a broader constitutional problem: the increasing use of emergency authorities to justify significant economic policymaking. Tariffs historically fall within Congress's power to regulate commerce under Article I of the United States Constitution,<sup>5</sup> yet modern statutes have delegated limited emergency powers to the executive branch.<sup>6</sup> When presidents invoke those statutes expansively, courts must determine whether such actions fall within the statutory delegation or impermissibly displace congressional authority.

When the president invokes the IEEPA to impose tariffs, courts must engage in meaningful review of the asserted national emergency. Treating emergency declarations as categorically beyond judicial scrutiny allows temporary powers to evolve into permanent economic policy, undermining the separation of powers. Judicial review of emergency declarations is therefore not only permissible but constitutionally required.

This paper proceeds in four parts. Part I examines the constitutional allocation of tariff authority and the historical role of Congress in regulating foreign commerce. Part II analyzes the structure and purpose of IEEPA, as well as the limits of its emergency powers. Part III evaluates the Supreme Court's decision and the competing approaches taken by the justices. Part IV argues that courts must review the validity of emergency declarations when they are used to justify sweeping economic measures, such as tariffs.

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<sup>5</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>6</sup> Andres B. Schwarzenberg, Cong. Rsch. Serv., R45618, *The International Emergency Economic Powers Act: Origins, Evolution, and Use* (2025), <https://www.congress.gov/crs-product/R45618>.

## I. THE TARIFFS AND THE CASE BEFORE THE COURT

### A. *The “Trafficking” and “Reciprocal” Tariffs*

The dispute that culminated in the Supreme Court's decision began when Trump issued several executive orders imposing tariffs. The first set of tariffs, called "Trafficking Tariffs," was targeted at products that originated from China, Canada, and Mexico in an attempt to stop the flow of fentanyl into the United States. As a justification for these tariffs, Trump claimed that large trade deficits were an "unusual and extraordinary threat to national security and the economy of the United States."<sup>7</sup> This language is borrowed from the IEEPA.<sup>8</sup> The second set of tariffs, known as "Reciprocal Tariffs," imposed a 10% tariff on imports from all countries and an even higher rate on imports from many others. The tariffs were framed as "reciprocal" measures as they were intended to counter foreign tariffs.<sup>9</sup> Despite their different rationales, both measures relied on IEEPA's emergency powers. The legality of that reliance ultimately became the central issue before the Supreme Court.

### B. *Statutory Basis: IEEPA*

Congress enacted the International Emergency Economic Powers ACT (IEEPA) in 1977 to give the president authority to respond to extraordinary foreign threats.<sup>10</sup> The statute allows the president to regulate economic transactions after declaring a national emergency involving an "unusual and extraordinary threat" originating outside the United States. Historically, presidents have used the IEEPA to freeze assets, impose sanctions on foreign countries, and restrict financial transactions. However, tariffs have rarely been imposed under the IEEPA, as they are not

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<sup>7</sup> Exec. Order No. 14,257, 90 Fed. Reg. 15,625 (Apr. 2, 2025).

<sup>8</sup> 50 U.S.C. § 1701(a).

<sup>9</sup> Howe, *supra* note 3.

<sup>10</sup> 50 U.S.C. §§ 1701–1708.

fundamentally characterized as sanctions or restrictions and instead function primarily as taxes on imports. For example, in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Supreme Court upheld the Carter administration's decision to freeze Iranian assets in response to the 1979 Iranian Hostage Crisis, holding that such actions were authorized under the IEEPA. Importantly, the measures approved in *Dames & Moore* only allowed the president to utilize financial restrictions to address a specific national security emergency, rather than impose broad economic measures on imports. This limited authorization suggests that the IEEPA does not grant the president sweeping authority to impose tariffs, which normally falls under the jurisdiction of the legislative branch under Article I's power over taxation and foreign commerce.<sup>11</sup>

### C. *Procedural History*

Challenges to the tariffs quickly emerged from businesses and importers affected by the new duties. Several companies filed lawsuits in the Court of International Trade, arguing that the tariffs exceeded the authority granted under IEEPA and violated the constitutional allocation of Congress's ability to control tariffs. The plaintiffs argued that even if IEEPA permits the president to regulate economic transactions during emergencies, the statute does not authorize taxing imports.

The Court of International Trade agreed with the challengers and concluded that the tariffs were unlawful.<sup>12</sup> The court reasoned that Congress had not delegated tariff authority through the IEEPA and that allowing such a broad interpretation would dramatically expand presidential power over trade policy. The government appealed the

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<sup>11</sup> U.S. Const. art. I, § 8, cls. 1, 3.

<sup>12</sup> *V.O.S. Selections, Inc. v. United States*, No. 25-00066, slip op. at 1 (Ct. Int'l Trade May 28, 2025), *aff'd sub nom. Trump v. V.O.S. Selections, Inc.*, 149 F.4th 1312 (Fed. Cir. 2025).

decision to the United States Court of Appeals for the Federal Circuit, which affirmed the lower court's ruling. Given the economic significance of the tariffs and the constitutional questions presented, the Supreme Court granted certiorari to resolve the dispute.

The case thus presented two closely related issues. First, the Court was asked to determine whether the IEEPA authorizes the president to impose tariffs during a national emergency. Second, the Court confronted a broader question concerning the role of courts in reviewing presidential emergency declarations. These questions implicate fundamental principles of separation of powers and the proper allocation of economic authority between Congress and the executive branch.

## II. THE SUPREME COURT'S FRACTURED DECISION

### A. *The Majority's Holding*

In a 6–3 decision, the Supreme Court concluded that the tariffs exceeded the authority delegated to the president under IEEPA. Writing for the Court, the majority emphasized that although the statute allows the president to regulate certain economic transactions, it does not explicitly authorize the imposition of tariffs. Because tariffs have historically been enacted by Congress through legislation, the Court required clear statutory authorization before allowing the executive branch to impose such duties.

The majority's reasoning reflects a longstanding principle of constitutional law: presidential authority must ultimately derive from either the Constitution itself or from statutes enacted by Congress. When the president acts without clear statutory authorization, courts must examine whether the action intrudes upon powers assigned to Congress. This framework was famously articulated in *Youngstown Sheet & Tube Co. v.*

Sawyer,<sup>13</sup> in which the Court invalidated President Truman's attempt to seize steel mills during the Korean War. Justice Jackson's concurring opinion explained that presidential authority is at its lowest ebb when the executive acts without congressional authorization or contrary to congressional policy.

Applying this framework, the Court concluded that interpreting IEEPA to permit sweeping tariffs would represent a dramatic expansion of executive authority. Because Congress had enacted numerous statutes governing tariff policy but had not explicitly granted such authority through IEEPA, the Court declined to infer such a delegation.

#### B. *Competing Majority Rationales*

Although a majority agreed that the tariffs were unlawful, the justices disagreed about the reasoning underlying the decision. Some members of the Court emphasized traditional principles of statutory interpretation, arguing that the text and structure of IEEPA simply do not authorize tariffs. According to this view, the statute's focus on regulating transactions cannot reasonably be interpreted to include the imposition of duties on imports.

Other justices suggested that the case was instead subject to the major questions doctrine, a principle of administrative law requiring clear congressional authorization before agencies or the executive branch undertake actions with vast economic or political significance. In recent years the Court has invoked this doctrine in cases involving major regulatory initiatives, including *West Virginia v. EPA*.<sup>14</sup> Under this approach, the imposition of sweeping tariffs affecting the entire national economy would require explicit congressional approval.

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<sup>13</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

<sup>14</sup> *West Virginia v. EPA*, 597 U.S. 697 (2022).

These differing rationales reflect an ongoing debate within the Court about how aggressively courts should police the boundaries of executive power. Some justices prefer narrow statutory interpretations, while others rely on broader constitutional doctrines designed to protect the separation of powers.

### C. *The Dissents*

The dissenting justices took a markedly different view of the president's authority under IEEPA. In their view, the statute grants the president broad power to regulate economic transactions involving foreign actors during national emergencies. Because tariffs affect the conditions under which goods enter the United States, the dissent argued that they fall within the statute's broad grant of authority.

The dissenters also emphasized the need for judicial deference in matters involving national security and foreign policy. Courts, they argued, lack the institutional competence to evaluate complex economic threats or international crises. In previous cases, the Court has recognized the executive branch's comparative advantage in these areas. For example, in *Trump v. Hawaii*,<sup>15</sup> the Court deferred to the executive branch's national security determinations regarding immigration restrictions.

From this perspective, the majority's decision risks unduly constraining the president's ability to respond quickly to emerging threats. Nevertheless, the majority rejected this argument, concluding that even in the context of national emergencies, executive authority must remain grounded in statutory authorization.

## IV. THE DANGER OF UNREVIEWED EMERGENCY DECLARATIONS

### A. *The Problem of Indefinite Emergencies*

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<sup>15</sup> *Trump v. Hawaii*, 585 U.S. 667 (2018).

Modern emergency statutes raise a significant structural concern: national emergencies can persist indefinitely.<sup>16</sup> Once declared, emergencies often remain in effect for years or even decades, allowing presidents to exercise extraordinary powers long after the original crisis has subsided.<sup>17</sup> This phenomenon risks transforming emergency authorities into ordinary tools of governance.

IEEPA itself illustrates this problem. Numerous emergency declarations issued under the statute remain active long after their initial justification.<sup>18</sup> While Congress retains the ability to terminate emergencies through legislation, political realities often make such action difficult. As a result, emergency powers may persist without meaningful oversight.

This paper contends that allowing the executive branch to invoke such powers without judicial review would undermine the constitutional structure designed to prevent the concentration of authority in a single branch of government. Emergency powers are intended to address extraordinary situations, not to provide an alternative mechanism for implementing major economic policies.

#### B. *Why Emergencies Cannot Be Categorically Nonjusticiable*

Some defenders of broad executive authority argue that courts should not review the validity of presidential emergency declarations. According to this view, such determinations are inherently political and beyond the competence of the judiciary. Yet this argument misunderstands the nature of judicial review.

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<sup>16</sup> BRENNAN CTR. FOR JUSTICE, *A Guide to Emergency Powers and Their Use* (2021), <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use>.

<sup>17</sup> Schwarzenberg, *supra* note 6.

<sup>18</sup> *See* 50 U.S.C. § 1622.

Courts need not second-guess the wisdom of national security policy to review whether statutory conditions have been satisfied. Judicial review simply ensures that the executive branch acts within the limits established by Congress. The Supreme Court has long recognized the judiciary's responsibility to enforce constitutional and statutory boundaries. In *INS v. Chadha*<sup>19</sup> for example, the Court emphasized that separation of powers requires each branch of government to operate within its constitutionally assigned sphere.

For this reason, treating emergency declarations as categorically nonjusticiable would effectively eliminate an important safeguard against executive overreach. Judicial review is therefore necessary to preserve the balance between the political branches.

## V. A FRAMEWORK FOR MEANINGFUL JUDICIAL REVIEW

### A. *Judicial Review Without Policymaking*

The Supreme Court's decision, while correct in striking down the tariffs, left an important question unresolved: it told us what IEEPA does not authorize, but offered no guidance on how courts should evaluate emergency tariffs going forward. None of the opinions, majority or concurring, articulated a standard for reviewing the validity of the emergency declarations themselves. The majority focused narrowly on statutory interpretation, and the concurrences debated the major questions doctrine, but no justice squarely addressed the institutional question of how courts should conduct meaningful review without overstepping into policymaking. That gap is what this paper seeks to fill. The framework proposed here is therefore not derived from the Court's reasoning but is advanced as an independent argument for how courts ought to proceed when IEEPA is invoked to justify sweeping economic measures.

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<sup>19</sup> *INS v. Chadha*, 462 U.S. 919 (1983).

Allowing courts to review emergency tariffs does not mean that judges should decide trade policy. Courts are not equipped to determine the best tariff rate or evaluate complex economic policy choices. Those decisions belong to Congress and, within statutory limits, the executive branch. Instead, the role of courts is narrower: ensuring that when the president invokes IEEPA, the action actually falls within the authority Congress delegated.

When the executive imposes tariffs under an emergency statute, courts should ask whether the president is truly exercising emergency authority or whether the statute is being used to implement a broader trade policy. This type of review does not require courts to evaluate the wisdom of the policy. Rather, it requires courts to determine whether the executive action fits within the statutory limits set by Congress. Without some level of judicial review, the requirement of a “national emergency” risks becoming little more than a label that allows the executive to exercise powers that were meant to be temporary and limited.

Judicial review in this context, therefore, protects the constitutional balance between the branches. It allows the president to respond quickly to genuine foreign threats while ensuring that Congress retains its primary role in regulating foreign commerce.

B. *A Three-Part Standard for Emergency Tariffs*

To balance these concerns, courts should apply a limited three-part framework when evaluating tariffs imposed under IEEPA. This framework focuses on the relationship between the emergency declaration and the tariffs themselves. Rather than second-guessing economic policy, courts would examine whether the tariffs remain tied to the conditions that justify the exercise of emergency authority. Three factors are especially important: nexus, proportionality, and temporality.

First, courts should ask whether there is a meaningful nexus between the declared emergency and the tariffs. IEEPA allows the president to regulate economic activity only when an unusual foreign threat creates a national emergency.<sup>20</sup> The tariffs imposed in response should therefore be connected to the threat identified by the executive branch. If tariffs target industries or countries that have little relation to the emergency, the connection between the emergency declaration and the economic measure becomes weak. Requiring a nexus ensures that emergency powers remain tied to the situation that justified them in the first place.

Second, courts should consider proportionality, asking whether the tariffs are reasonably tailored to the threat or instead operate as sweeping economic measures. Emergency powers are meant to address specific crises, not to serve as a substitute for ordinary trade policy. When tariffs apply broadly across many countries or sectors of the economy, they begin to resemble general economic policymaking rather than a targeted emergency response. Proportionality review helps ensure that the scope of the tariffs reflects the scope of the emergency.

Finally, courts should consider temporality, ensuring that tariffs imposed under emergency authority remain temporary. Emergency powers are justified because they respond to extraordinary circumstances, but those circumstances are expected to change over time. If tariffs imposed under IEEPA remain in place indefinitely, they risk turning emergency authority into a permanent tool of trade policy. Requiring that such measures be time-limited or periodically reassessed helps preserve the temporary nature of emergency powers.

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<sup>20</sup> 50 U.S.C. § 1701(a).

Together, these three considerations—nexus, proportionality, and temporality—allow courts to review emergency tariffs without becoming policymakers themselves. The framework ensures that emergency powers remain connected to genuine threats while preventing them from evolving into long-term economic policy outside the ordinary legislative process.

### CONCLUSION

The Supreme Court's decision striking down the Trump administration's tariffs under IEEPA marks an important but incomplete victory for the separation of powers. The Court correctly recognized that tariff authority is constitutionally vested in Congress and that IEEPA cannot be stretched to authorize sweeping economic measures without clear statutory delegation. Yet the decision left unanswered a deeper question: when the president does invoke IEEPA, what role should courts play in reviewing the emergency declaration itself?

This paper has argued that the answer must be meaningful judicial review. Treating emergency declarations as categorically beyond judicial scrutiny would allow the executive branch to use the language of crisis to justify permanent economic policy, precisely the kind of institutional drift the Constitution was designed to prevent. The three-part framework proposed here, nexus, proportionality, and temporality, offers courts a principled path forward that enforces statutory limits without asking judges to second-guess trade policy.

Emergency powers were designed to be exceptional. When they become routine, the constitutional structure that depends on their exceptionality begins to erode. Courts must be willing to enforce the boundaries of the statutes they interpret. Without that check, IEEPA risks becoming not a tool for responding to foreign crises but a standing invitation for unchecked executive economic policymaking by the other

branches. The Constitution does not permit that outcome, and courts should not either.

# THE CARACAS PRECEDENT: NARCO-TERRORISM AS AN EXCEPTION TO CUSTOMARY HEAD-OF-STATE IMMUNITY

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*On January 3, 2026, United States special forces captured Nicolás Maduro together with his wife, Cilia Adela Flores de Maduro, in Caracas, Venezuela to face narco-terrorism charges in the Southern District of New York.<sup>2</sup> This event sent shockwaves around the geopolitical arena on whether such an operation and potential departure from the custom of Head-of-State Immunity will ultimately disturb geopolitical balance.<sup>3</sup> This article examines whether the U.S. indictment of Nicolás Maduro for narco-terrorism establishes an exception to the customary international law principle of Head-of-State Immunity.<sup>4</sup> Using the United States v. Noriega as a blueprint, this paper examines the procedure and legal basis the United States uses to proceed with its questionable cases.<sup>5</sup> Additionally, by comparing the Maduro indictment to the United States v. Noriega precedent, this paper explores the policy of non-recognition by the U.S. to bypass the Head-of-State Immunity that every official is granted by the U.S. Supreme Court.<sup>6</sup> Moreover, this paper will explore the complex dynamic between official and personal acts, and how they affect the former Venezuelan leader's eligibility to be granted a Head-of-State Immunity by the court.<sup>7</sup> This analysis concludes that the U.S. has established a "narco-terrorism" exception that prioritizes internal safety and criminal accountability over established international custom.<sup>8</sup>*

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<sup>2</sup> Yonas Tesfa Sisay, *The Caracas Precedent: Unilateralism, Sovereignty, and the Future of International Order*, THE REPORTER ETHIOPIA (Jan. 17, 2026), <https://www.thereporterethiopia.com/48658/>.

<sup>3</sup> Michael Schmitt, Ryan Goodman & Tess Bridgeman, *International Law and the U.S. Military and Law Enforcement Operations in Venezuela*, JUST SECURITY (Jan. 5, 2026), <https://www.justsecurity.org/127981/international-law-venezuela-maduro/>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Sisay, *supra* note 2.

I. BACKGROUND.....	105
II. THE BARRIER.....	107
A. Nicolas Maduro’s Four Counts.....	107
1. Count One: Narco-Terrorism Conspiracy (21 U.S.C. § 960a).....	107
2. Count Two: Cocaine Importation Conspiracy (21 U.S.C. § 963)..	109
3. Counts Three and Four: Firearms Offenses 18 U.S.C. § 924).....	110
B. Maduro's Career-Long Involvement.....	111
C. Jurisdictional Basis: Extraterritorial Application.....	112
D. Two types of immunity.....	113
1. Ratione personae.....	113
2. Ratione Materiae.....	114
E. International courts.....	114
F. The U.S. Position: Non-Recognition.....	115
III. The Exception.....	116
A. (United States v. Noriega, 1990).....	116
1. The Power of Executive Recognition (Status-Based Immunity)..	116
2. The Private Act vs. Official Act Distinction (Conduct-Based Immunity).....	117
3. The Ker-Frisbie Doctrine: Legality of the Capture.....	118
4. Comparison Table: Noriega (1990) vs. Maduro (2026).....	119
CONCLUSION.....	119

## I. BACKGROUND

On Saturday, January 3, 2026, U.S. Army Special Forces, with support from the U.S. Air Force, captured Nicolas Maduro in Caracas, Venezuela, and transported him to the Southern District of New York to face federal criminal charges.<sup>9</sup> The operation executed a federal arrest warrant issued in connection with a March 2020 indictment charging Maduro with narco-terrorism conspiracy under 21 U.S.C § 960a, cocaine

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<sup>9</sup> Luc Cohen & Jack Queen, *Maduro Case to Test US Narcoterrorism Law that Has Had Limited Trial Success*, REUTERS (Mar. 26, 2026, 5:02 AM UTC), <https://www.reuters.com/world/americas/maduro-case-test-us-narcoterrorism-law-with-limited-trial-success-2026-03-26/>.

importation conspiracy, and related weapon offenses.<sup>10</sup> Maduro's arrest raises concerns about whether his indictment by the U.S. for narco-terrorism establishes an exception to the customary international law principle of Head-of-State Immunity.<sup>11</sup>

Nicolás Maduro was raised in Caracas<sup>12</sup> in a working-class household; his father was a trade unionist active in leftist politics.<sup>13</sup> Instead of attending university, Maduro's early interest in left-wing politics led him to train as an organizer in Cuba.<sup>14</sup> He subsequently became a bus driver in Caracas and ascended the ranks of the transit workers' union as a representative.<sup>15</sup> In 1992, after then-army officer Hugo Chávez was imprisoned for leading a failed coup attempt, Maduro and his future wife, Cilia Flores, a young lawyer at the time, successfully campaigned for Chávez's release in 1994.<sup>16</sup> Ultimately, Maduro was elected as Venezuela's president in April 2013,<sup>17</sup> following the death of Hugo Chavez, by a margin of approximately 1.5 percent – the narrowest result in modern Venezuelan electoral History.<sup>18</sup> Opposition candidate Henrique Capriles alleged irregularities and demanded a recount, which the National Electoral Council denied.<sup>19</sup> Maduro's subsequent re-election in May 2018, which the opposition largely boycotted, was rejected as illegitimate by the United

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<sup>10</sup> JURIST Staff, *The Charges Against Nicolás Maduro: What the Indictment Alleges*, JURIST (Jan. 5, 2026, 3:37 PM), <https://www.jurist.org/features/2026/01/05/the-charges-against-nicolas-maduro-what-the-indictment-alleges/>.

<sup>11</sup> Schmitt, Goodman & Bridgeman, *supra* note 3.

<sup>12</sup> *Nicolás Maduro*, ENCYCLOPÆDIA BRITANNICA (Jan. 19, 2026), <https://www.britannica.com/biography/Nicolas-Maduro>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Chavez Heir Maduro Wins Venezuela Presidential Election*, BBC NEWS (Apr. 14, 2013), <https://www.bbc.com/news/world-latin-america-22146214>.

<sup>19</sup> *Capriles Formally Contests Venezuelan Election Result*, BBC NEWS (May 2, 2013), <https://www.bbc.com/news/world-latin-america-22384620>.

States, the European Union, and the Organization of American States.<sup>20</sup> These contested elections form the factual predicate for the U.S. policy of non-recognition, examined in part II, under which the United States has declined to treat Nicolas Maduro as Venezuela's lawful head of state.

On March 26, 2020, the U.S. Department of Justice pressed charges against Maduro and 14 current and former Venezuelan officials in the Southern District of New York.<sup>21</sup> Maduro's indictment charges him with four federal counts: narco-terrorism conspiracy, conspiracy to import cocaine, using and carrying machine guns and destructive devices in furtherance of those drug-trafficking conspiracies, and conspiracy to do the same.<sup>22</sup> Each is explained in Part II.

## II. THE BARRIER

### A. *Nicolas Maduro's Four Counts*

#### 1. Count One: Narco-Terrorism Conspiracy (21 U.S.C. § 960a)

The first count from 2020 is for Narco-terrorism Conspiracy, the legal centerpiece of Maduro's indictment. Section 960a of Title 21 of the United States Code (U.S.C.)<sup>23</sup> asserts that any individual "knowing or intending to provide, directly or indirectly, anything of pecuniary value to

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<sup>20</sup> Reporting on Maduro's 2018 reelection states that the United States did not recognize him as Venezuela's president, the European Union rejected the result, and the Organization of American States treated the election as illegitimate. Tom Hals, *Maduro's Immunity Claim Tests US Power to Prosecute Foreign Leaders*, REUTERS (Jan. 6, 2026, 10:00 PM UTC), <https://www.reuters.com/world/americas/maduros-immunity-claim-tests-us-power-prosecute-foreign-leaders-2026-01-06/>.

<sup>21</sup> Press Release, U.S. ATTY'S OFF. S.D.N.Y., *Manhattan U.S. Attorney Announces Narco-Terrorism Charges Against Nicolas Maduro, Current and Former Venezuelan Officials, and FARC Leadership* (Mar. 26, 2020), <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-narco-terrorism-charges-against-nicolas-maduro-current>.

<sup>22</sup> Superseding Indictment at 14, *United States v. Maduro Moros*, No. S4 11 Cr. 205 (AKH) (S.D.N.Y. Jan. 3, 2026), <https://www.justice.gov/opa/media/1422326/dl>.

<sup>23</sup> 21 U.S.C. § 960a (2018).

any person or organization that has engaged or engages in terrorist activity.” The indictment claims that from at least 1999 up to, and including, 2025, Maduro and his co-defendants were directly involved in distributing five kilograms or more cocaine, knowing and intending that this would provide financial support to designated Foreign Terrorist Organizations (FTOs), such as the Revolutionary Armed Forces of Colombia FARC, FARCEP, Segunda Marquetalia, the National Liberation Army ELN, Tren de Aragua, the Sinaloa Cartel, and the Cartel del Noreste (formerly known as the Zetas).<sup>24</sup>

The U.S. State Department formally designated each of these organizations as a Foreign Terrorist Organization (FTO) under 8 U.S.C. § 1189, which authorizes the Secretary of State to designate any foreign organization that engages in terrorist activity threatening the security of United States nationals or the national security of the United States.<sup>25</sup> The Revolutionary Armed Forces of Colombia (FARC) was among the first to be designated, on October 8, 1997, based on its decades-long insurgency, including bombings, kidnappings, and assassinations carried out to finance its operations through cocaine trafficking. The National Liberation Army (ELN) was designated the same day for its parallel insurgent campaign in Colombia, marked by pipeline attacks and kidnappings of foreign nationals.<sup>26</sup> FARC-EP and Segunda Marquetalia represent dissident factions that rejected the 2016 Colombian peace accord and resumed armed trafficking and attacks under the FARC banner; both received separate

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<sup>24</sup> Press Release, U.S. ATTY'S OFF. S.D.N.Y., *Manhattan U.S. Attorney Announces Narco-Terrorism Charges Against Nicolas Maduro, Current and Former Venezuelan Officials, and FARC Leadership* (Mar. 26, 2020), <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-narco-terrorism-charges-against-nicolas-maduro-current>.

<sup>25</sup> 8 U.S.C. § 1189(a)(1) (2024).

<sup>26</sup> Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650 (Oct. 8, 1997), <https://www.federalregister.gov/documents/1997/10/08/97-27030/designation-of-foreign-terrorist-organizations>.

designations.<sup>27</sup> In February 2025, the Department designated the Sinaloa Cartel, the Cartel del Noreste, and Tren de Aragua as FTOs, citing their role in fentanyl and cocaine trafficking, armed assaults on Mexican and Venezuelan state forces, and transactional extortion and kidnapping operations.<sup>28</sup> Each designation supplies the statutory predicate that converts the underlying drug conspiracy into narco-terrorism under 21 U.S.C § 960a.<sup>29</sup>

## 2. Count Two: Cocaine Importation Conspiracy (21 U.S.C. § 963)

The second count charges six defendants: Nicolás Maduro Moros, his wife Cilia Adela Flores de Maduro, his son Nicolás Ernesto Maduro Guerra (known as “Nicolasito” or “The Prince”), Diosdado Cabello Rondón (Minister of the Interior, Justice and Peace), Ramón Rodríguez Chacín (former Minister of the Interior and Justice), and Hector Rusthenford Guerrero Flores (leader of the transnational gang Tren de Aragua).<sup>30</sup> All six defendants were charged with conspiracy to import controlled substances into the United States from around 1999 to 2025<sup>31</sup>. The indictments alleges three distinct objects of the conspiracy: (1) knowingly importing cocaine into the United States in violation of 21 U.S.C. §§ 952(a) and 960(a)(1);<sup>32</sup> 2) manufacturing, distributing, and possessing cocaine with intent to

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<sup>27</sup> Foreign Terrorist Organization Designations of FARC-EP and Segunda Marquetalia, 86 Fed. Reg. 68,294 (Dec. 1, 2021), <https://www.federalregister.gov/documents/2021/12/01/2021-26091/in-the-matter-of-the-designation-of-revolutionary-armed-forces-of-colombia-peoples-army-and-other>.

<sup>28</sup> Foreign Terrorist Organization Designations of Tren de Aragua, Mara Salvatrucha, Cartel de Sinaloa, Cartel de Jalisco Nueva Generacion, Carteles Unidos, Cartel del Noreste, Cartel del Golfo, and La Nueva Familia Michoacana, 90 Fed. Reg. 10,030 (Feb. 20, 2025), <https://www.federalregister.gov/documents/2025/02/20/2025-02873/foreign-terrorist-organization-designations-of-tren-de-aragua-mara-salvatrucha-cartel-de-sinaloa>.

<sup>29</sup> Fla. S. Comm. on Appropriations, Bill Analysis of CS/HM 167 (2023), <https://www.flsenate.gov/Session/Bill/2023/167/Analyses/h0167b.SAC.PDF>.

<sup>30</sup> Superseding Indictment at 14, *United States v. Maduro Moros*, No. S4 11 Cr. 205 (AKH) (S.D.N.Y. Jan. 3, 2026), <https://www.justice.gov/opa/media/1422326/dl>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

distribute, knowing it would be unlawfully imported into the United States or within 12 miles of U.S. coastal waters, in violation of 21 U.S.C. §§ 959(a) and 960(a)(3);<sup>33</sup> and 3) manufacturing, distributing, and possessing cocaine aboard aircraft registered in the United States, in violation of 21 U.S.C. §§ 959(c) and 960(a)(3).<sup>34</sup>

For quantities of five or more kilograms of cocaine, the threshold alleged, the mandatory minimum sentence is 10 years<sup>35</sup> with a maximum of life imprisonment.<sup>36</sup>

### 3. Counts Three and Four: Firearms Offenses 18 U.S.C. § 924)

Both are relatively alike yet distinguishable; the third count alleges that Maduro was in possession of machine guns and destructive weapons in relation to the drug trafficking crimes alleged in Counts One and Two.<sup>37</sup> At the same time, Count Four charges conspiracy to possess such weapons.<sup>38</sup> These charges stem from the alleged provision of military-grade weaponry, including machine guns, ammunition, rocket launchers, grenades, and grenade launchers, to FARC.<sup>39</sup>

Under 18 U.S.C. § 924(c)(1)(B)(ii), “Using or carrying machine guns during drug trafficking crimes carries a mandatory minimum sentence of 30

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *US Indicts Venezuelan Leader Nicolas Maduro, Offers \$15 Million Reward for His Capture*, CBS MIAMI (Mar. 26, 2020), <https://www.cbsnews.com/miami/news/sources-venezuela-to-be-designated-state-sponsor-of-terrorism-us-to-charge-maduro/>.

<sup>36</sup> *Id.*

<sup>37</sup> U.S. DEPT OF STATE, *Wanted: Nicolás Maduro Moros Reward Increase of Up to \$25 Million*, U.S. EMBASSY IN PANAMA (Jan. 10, 2025), <https://pa.usembassy.gov/wanted-nicolas-maduro-moros-reward-increase-of-up-to-25-million/>.

<sup>38</sup> *Id.*

<sup>39</sup> Jonathan Turley, *Why Capture of Maduro Didn't Require Approval from Congress*, FOX NEWS (Jan. 3, 2026), <https://www.foxnews.com/opinion/jonathan-turley-why-capture-maduro-didnt-require-approval-from-congress>.

years, consecutive to any other sentence.”<sup>40</sup> Combined with the drug charges, these offenses create a minimum compulsory aggregate sentence of 50 years with a maximum of life imprisonment.<sup>41</sup>

B. *Maduro's Career-Long Involvement*

Between the years 2000 and 2006, as a member of Venezuela’s National Assembly, Nicolas Maduro allegedly used his protection of Venezuelan law enforcement to move an immense amount of cocaine.<sup>42</sup> Or as the U.S. District court, Southern District of New York, puts it, “For over 25 years, leaders of Venezuela have abused their positions of public trust and corrupted once-legitimate institutions to import tons of cocaine into the United States.”<sup>43</sup>

While serving as Venezuelan Minister of Foreign Affairs between 2006 and 2013, Nicolas Maduro allegedly used his position to provide Venezuelan diplomatic passports to drug traffickers and provided diplomatic protection for aircrafts operated by money launderers to return drug profits to Venezuela from Mexico.<sup>44</sup> Moreover, the indictment describes specific incidents where Maduro called the Venezuelan embassy in Mexico to arrange for private planes to be loaded with drug proceeds under the guise of diplomatic missions.<sup>45</sup>

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<sup>40</sup> Geoffrey S. Berman, U.S. Att’y, S.D.N.Y., Remarks as Prepared for Delivery: *U.S. Attorney Geoffrey S. Berman Announces Charges in U.S. v. Maduro et al.* 3–4 (Mar. 26, 2020), <https://www.justice.gov/opa/page/file/1262756/dl>.

<sup>41</sup> *Id.*

<sup>42</sup> Bob Van Voris & Myles Miller, *Maduro Accused of 25 Years of Narco-Terrorism Crimes by DOJ*, BLOOMBERG LAW (Jan. 3, 2026), <https://news.bloomberglaw.com/us-law-week/doj-releases-maduro-indictment-alleges-narco-terrorism-scheme>.

<sup>43</sup> Amy Curtis, *Attorney General Pam Bondi Released the Maduro Indictment. Here’s What It Says*, TOWNHALL (Jan. 3, 2026, 1:15 PM), <https://townhall.com/tipsheet/amy-curtis/2026/01/03/maduro-indictment-n2668818>.

<sup>44</sup> Van Voris & Miller, *supra* note 42.

<sup>45</sup> *Id.*

Upon succeeding Hugo Chávez in 2013,<sup>46</sup> Nicolas Maduro, as Vice President and then President, allegedly continued and expanded the existing drug trafficking conspiracy. Months after his inauguration in September 2013, Venezuelan officials dispatched a shipment of approximately 1.3 tons of cocaine on a commercial flight from Maiquetia Airport to Paris.<sup>47</sup> Following the seizure of the shipment by French authorities, Maduro reportedly convened a meeting with co-defendants Cabello Rondon and Carvajal Barrios.<sup>48</sup> During this meeting, he is alleged to have criticized them for using Maiquetia Airport, citing a previous 5.5-ton cocaine seizure in Mexico in 2006<sup>49</sup>, and directed them to utilize alternative trafficking routes.<sup>50</sup> Maduro subsequently authorized the arrests of lower-level military officials to serve as a cover-up for the operation.<sup>51</sup>

C. *Jurisdictional Basis: Extraterritorial Application*

The substantive authority to prosecute Maduro for conduct occurring outside the United States derives from the narco-terrorism statute, which extends extraterritorially when “after the conduct required for the offense occurs an offender is brought into or found in the United States.”<sup>52</sup> Venue is supplied by the federal extraterritorial-venue statute, which provides that “[t]he trial of all offenses begun or committed... out of the jurisdiction of any particular State or district[ ] shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought.”<sup>53</sup> Together, these provisions allow the prosecution to

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<sup>46</sup> *Nicolás Maduro*, *supra* note 12.

<sup>47</sup> *US Attacks Venezuela, Captures President Maduro*, JURIST (Jan. 3, 2026), <https://www.jurist.org/news/2026/01/us-attacks-venezuela-captures-president-maduro/>.

<sup>48</sup> Superseding Indictment at 14, *United States v. Maduro Moros*, No. S4 11 Cr. 205 (AKH) (S.D.N.Y. Jan. 3, 2026), <https://www.justice.gov/opa/media/1422326/dl>.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> 21 U.S.C. § 960a(b)(5) (2018).

<sup>53</sup> 18 U.S.C. § 3238 (2018).

proceed in the Southern District of New York once at least one defendant is brought into that district.<sup>54</sup>

Section 960a is not a freestanding extraterritorial drug statute; it operates by incorporating the Controlled Substances Act's basic distribution offense as its predicate and adding a terrorism-financing element.<sup>55</sup> Specifically, § 960a reaches “conduct that would be punishable under section 841(a)” when the actor knows or intends to provide, directly or indirectly, anything of pecuniary value to a person or organization that has engaged in terrorist activity.<sup>56</sup> This construction is what allows the indictment to charge narco-terrorism (Count One) rather than only the underlying cocaine importation conspiracy (Count Two).<sup>57</sup>

#### D. *Two types of immunity*

International law recognizes two types of immunities given to state officials:<sup>58</sup>

##### 1. Ratione personae<sup>59</sup>

This status-based immunity is given to the official position itself.<sup>60</sup> Sitting heads of state, heads of government, and foreign ministers are granted absolute immunity from criminal and civil jurisdiction in foreign

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<sup>54</sup> See 21 U.S.C. § 960a(b)(5) (2018); 18 U.S.C. § 3238 (2018).

<sup>55</sup> 21 U.S.C. § 960a(a) (2018) (defining the offense by reference to the conduct described in 21 U.S.C. § 841(a)); see also 21 U.S.C. § 841(a) (2018) (the underlying Controlled Substances Act prohibition on manufacture, distribution, and possession with intent to distribute).

<sup>56</sup> 21 U.S.C. § 960a(a) (2018).

<sup>57</sup> Superseding Indictment ¶ 12, *United States v. Maduro Moros*, No. S4 11 Cr. 205 (AKH) (S.D.N.Y. Jan. 3, 2026), <https://www.justice.gov/opa/media/1422326/dl>.

<sup>58</sup> Magnus Mannerström, *Head of State Immunity and International Crimes* (2015) (Master's thesis, Lund University), <https://www.lunduniversity.lu.se/lup/publication/5435470>.

<sup>59</sup> Iskra Miralem, *Head of State Immunity and Immunity Claims Against Witness Subpoena Requests*, War Crimes Memos No. 1067 (Nov. 16, 2022), <https://scholarlycommons.law.case.edu/warcrimesmemos/1067/>.

<sup>60</sup> *Id.*

national courts for all acts.<sup>61</sup> Whether official or private, this doctrine grants full immunity for offenses committed before or during their time in office.<sup>62</sup> Consequently, this immunity allows officials to discharge their representative functions without interference from foreign jurisdictions.<sup>63</sup>

## 2. Ratione Materiae<sup>64</sup>

This is conduct-based immunity, which provides full immunity for officials acting in an official capacity in foreign national courts.<sup>65</sup> Former heads of state retain absolute immunity for acts committed during their time in office, yet not for private acts performed during that time.<sup>66</sup> The rationale is that prosecuting official state acts would violate principles of sovereign equality between nations.<sup>67</sup>

### E. *International courts*

These two doctrines do not apply in international courts due to the Nuremberg trials.<sup>68</sup> International law holds that no official of any state is immune from genocide, war crimes, crimes against humanity, homicide, torture, grave breaches of the Geneva Conventions, crimes against internationally protected persons under the Vienna Convention of 1961 on Diplomatic Relations.<sup>69</sup>

Article 7 of the Nuremberg Charter stated:

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

considered as freeing them from responsibility or mitigating punishment.<sup>70</sup>

This principle was codified as Nuremberg Principle III:

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State... does not relieve him from responsibility under international law.<sup>71</sup>

F. *The U.S. Position: Non-Recognition*

The U.S. has taken a different position entirely, not recognizing Nicolas Maduro as the president of Venezuela.<sup>72</sup>

Instead, the U.S. has recognized the opposition leader Juan Guaidó and, later, Edmundo González Urrutia as Venezuela's legitimate interim president, arguing that the 2018 and 2024 elections were fraudulent.<sup>73</sup> By not recognizing Nicolas Maduro as the president of Venezuela in 2019, the U.S. has allowed itself to absolutely bypass the law shielding foreign leaders.<sup>74</sup> Secretary of State Marco Rubio stipulated: “Maduro is NOT the president of Venezuela and his regime is NOT the legitimate government.”<sup>75</sup>

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<sup>70</sup> Chile Eboe-Osuji, *No Immunity for Heads of State for International Crimes*, LAWFARE (May 23, 2024, 2:25 PM), <https://www.lawfaremedia.org/article/no-immunity-for-heads-of-state-for-international-crimes>.

<sup>71</sup> *Id.*

<sup>72</sup> *The Charges Against Nicolás Maduro: An Explainer*, N.Y. TIMES (Oct. 1, 2025), <https://www.nytimes.com/2025/10/01/nyregion/nicolas-maduro-venezuela-charges-explainer.html>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Marco Rubio (@SecRubio), X (July 27, 2025), <https://x.com/SecRubio/status/1949424526401692094>.

## III. The Exception

A. (*United States v. Noriega, 1990*)1. The Power of Executive Recognition (Status-Based Immunity)

Manuel Antonio Noriega Moreno was the de facto military ruler of Panama from 1983 until his removal by U.S. forces in 1989.<sup>76</sup> During his tenure, he ran a militarized authoritarian regime characterized by repression of political opposition, control of the media, and the use of torture, disappearances, and extrajudicial killings against critics and rivals.<sup>77</sup> He also used his control of the Panamanian Defense Forces to facilitate cocaine trafficking through Panama in coordination with the Medellín Cartel.<sup>78</sup> The United States never recognized Noriega as Panama's constitutional head of state.<sup>79</sup>

After Noriega's apprehension by U.S. forces during Operation Just Cause, he was indicted in the United States District Court for the Southern District of Florida and moved to dismiss on head-of-state immunity grounds.<sup>80</sup> The district court rejected the defense. It held, first, that *ratione personae* immunity in U.S. courts depends on a recognition determination by the Executive — and the State Department had never recognized Noriega as Panama's legitimate leader, which alone defeated the status-based claim.<sup>81</sup> It held, second, that even if Noriega had been entitled to consider conduct-based immunity, drug trafficking for personal

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<sup>76</sup> *Manuel Noriega*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/biography/Manuel-Noriega>.

<sup>77</sup> *Id.*

<sup>78</sup> *United States v. Noriega*, 746 F. Supp. 1506, 1513–15 (S.D. Fla. 1990), <https://law.justia.com/cases/federal/district-courts/FSupp/746/1506/1757098/>.

<sup>79</sup> *Id.* at 1522.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1521-28

enrichment could not qualify as an “official act” of the Panamanian state and therefore fell outside *ratione materiae*.<sup>82</sup>

After the abduction of Noriega by the U.S. military, Noriega was taken to the U.S. District Court for the Southern District of Florida in Miami.<sup>83</sup> Noriega’s lawyer filed for Ratione Personae, yet the doctrine was declined by the executive branch.<sup>84</sup> It reasoned that head-of-state immunity in U.S. courts is conditioned on a recognition determination by the Executive Branch, and that the United States had never recognized Noriega as Panama’s legitimate leader, leaving no head of state to whom the customary immunity could attach.<sup>85</sup> In U.S. courts, immunity is granted to legitimate leaders recognized by the U.S. president and the U.S. state department, which Noriega was not.<sup>86</sup>

As the Secretary of State, Marco Rubio stated, Maduro is “NOT the president ...”.<sup>87</sup> This policy of non-recognition allows the U.S. to treat Maduro as a private citizen rather than a sovereign leader.

## 2. The Private Act vs. Official Act Distinction (Conduct-Based Immunity)

Maduro’s and Noriega’s narco-trafficking journeys stemmed entirely from self-enrichment rather than providing beneficial factors to the country itself.<sup>88</sup> The U.S. court viewed this as a private act rather than an official act, which is not deemed a matter that warrants conduct-based immunity (*ratione materiae*).<sup>89</sup> The court clearly stated there is “ample doubt whether

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<sup>82</sup> *Noriega*, 746 F. Supp. at 1521–28.

<sup>83</sup> *Id.*

<sup>84</sup> *Noriega*, 746 F. Supp. at 1521–28.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Rubio, *supra* note 75.

<sup>88</sup> Alice Bennett, *Manuel Noriega: Messed Up Details About the Notorious Dictator*, GRUNGE (May 1, 2023, 7:44 PM EST), <https://www.grunge.com/1267655/manuel-noriega-messed-up-details-notorious-dictator/>.

<sup>89</sup> *Noriega*, 746 F. Supp. at 1521–28.

head of state immunity extends to private or criminal acts in violation of U.S. law.”<sup>90</sup> Drug trafficking, the court implied, cannot constitute a protected sovereign act.<sup>91</sup>

### 3. The Ker-Frisbie Doctrine: Legality of the Capture

The Ker-Frisbie doctrine, *Ker v. Illinois* 1886 and *Frisbie v. Collins* 1952, established by the United States Supreme Court: “Forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court.”<sup>92</sup> Additionally, in *United States v. Alvarez-Machain* 1992, the Supreme Court held that DEA agents’ unlawful abduction of a Mexican national did not bar prosecution.<sup>93</sup> Thus, meaning that even if the abduction of the defendant, in this case, Nicolas Maduro, was a violation of Venezuela’s sovereignty or of international law, U.S. domestic courts will still proceed with the trial once the defendant is physically in court.<sup>94</sup>

Nicolas Maduro’s capture by the U.S. is seen by some scholars as the *Caracas Precedent*, where the U.S. places its domestic laws, accusing the defendant of narco-trafficking, over international law, Article 2(4) of the UN Charter, which prohibits every country from threatening or using force against the territorial integrity or political independence of any state and *ratione Personae*.<sup>95</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Ker v. Illinois*, 119 U.S. 436 (1886),  
<https://supreme.justia.com/cases/federal/us/119/436/>.

<sup>93</sup> *United States v. Alvarez-Machain*, 504 U.S. 655 (1992),  
<https://supreme.justia.com/cases/federal/us/504/655/>.

<sup>94</sup> *Alvarez-Machain*, 504 U.S. at 669–70.

<sup>95</sup> Gwyneth K. Shaw, *U.S. Flouted “Central Rule of International Law” with Venezuela Raid to Arrest Maduro*, Professor Saira Mohamed Says, BERKELEY LAW (Jan. 20, 2026),  
<https://www.law.berkeley.edu/article/professor-saira-mohamed-international-law-nicolas-maduro-venezuela-united-nations/>.

4. Comparison Table: Noriega (1990) vs. Maduro (2026)<sup>96</sup>

Legal Factor	Manuel Noriega (1990)	Nicolás Maduro (2026)
Status	De facto leader (not recognized)	Partially recognized President
U.S. Recognition	Denied (U.S.-recognized Endara)	Denied (U.S. recognizes González)
Primary Charges	Drug smuggling & RICO	Narco-terrorism & Firearms
Method of Capture	Military Invasion (Op. Just Cause)	Special Ops (Jan 3, 2026)

## CONCLUSION

Nicolas Maduro, an authoritarian leader elected in 2013, is charged with four counts of narco-terrorism.<sup>97</sup> Ultimately captured by the U.S. Army and taken to court in the Southern District of New York.<sup>98</sup> The capture of the Venezuelan president, Nicolas Maduro, was not only a major military

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<sup>96</sup> David J. Scheffer, *Maduro's Capture and International Law: The Noriega Precedent*, COUNCIL ON FOREIGN RELATIONS (Jan. 6, 2026, 12:22 PM), <https://www.cfr.org/articles/maduros-capture-and-international-law-noriega-precedent>.

<sup>97</sup> *Nicolás Maduro Was "Captured" by the US. This Is Who He Is*, ABC NEWS (AUSTL.) (Jan. 3, 2026), <https://www.abc.net.au/news/2026-01-03/nicolas-maduro-captured-by-us-military-who-is-he/104783352>.

<sup>98</sup> *Nicolás Maduro Will Appear in U.S. Federal Court on Monday*, NPR (Jan. 4, 2026), <https://www.npr.org/2026/01/04/nx-s1-5666351/nicolas-maduro-new-york-court-charges>.

event but also a legal one.<sup>99</sup> This clash of international and domestic laws demonstrates how the U.S. successfully instrumentalized the non-recognition of a country's president to strip away his status-based immunity.<sup>100</sup> Maduro's long-time involvement in narco-trafficking and cocaine importation was deemed by the U.S. court as a private act that came out of determination for self-enrichment rather than providing for the country's welfare, thus declining the defendant's possible utilization of *Ratione Materiae*.<sup>101</sup> This parallels the *United States v. Noriega* case, in which the former unrecognized leader of Panama during the 1990s was captured by the U.S. military and taken to court in the Southern District of Florida, sitting in Miami.<sup>102</sup> There, Noriega faced court for assisting and operating narco-trafficking throughout Latin America.<sup>103</sup> The Floridian court ruled that private acts do not constitute immunity in either of the two forms of immunity existing for country leaders.<sup>104</sup> While these cases might seem to violate international law, such as the UN Charter (sovereignty Article 2(4)), U.S. domestic law, including the Ker-Frisbie doctrine, allows these types of irregular legal events to proceed.<sup>105</sup> The U.S. successfully placed its own domestic law above international law, demonstrating how it employs the restriction of immunity theory.<sup>106</sup> Narco-terrorism is a crime that demands serious action, even if it endangers international order.<sup>107</sup> Ultimately, the U.S. has established a "narco-terrorism exception" in which

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<sup>99</sup> Mark Kersten & Mayya Chaykina, *To Prosecute or Not to Prosecute: Maduro's Indictment, Head-of-State Immunity, and the United States' Instrumentalisation of Non-Recognition*, JUSTICE IN CONFLICT (Jan. 6, 2026), <https://justiceinconflict.org/2026/01/06/to-prosecute-or-not-to-prosecute-maduros-indictment-head-of-state-immunity-and-the-united-states-instrumentalisation-of-non-recognition/>.

<sup>100</sup> *Id.*

<sup>101</sup> Scheffer, *supra* note 96.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Davit Khachatryan, *Illegality Without Consequences? Venezuela, Force, and the Erosion of Legal Constraint*, INTERNATIONAL POLICY FORUM (Jan. 13, 2026), <https://internationalpolicy.org/publications/venezuela-and-the-erosion-of-legal-constraint/>.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

the need for global accountability for serious crimes, such as narco-trafficking, outweighs the absolute immunity usually given to country leaders.

