Dedicated to Judah Marans ’11

We are incredibly grateful to the Brandeis Law Journal’s founder, Judah, for creating this forum for discussion and learning in and around the legal field. His creation of the Journal enables and empowers us to do our work and learn today. We are honored to continue this legacy and maintain this incredible and vibrant forum for legal discussion and debate. Judah’s contribution to the Brandeis community will forever be remembered and greatly appreciated. We are honored to continue this legacy and maintain this incredible and vibrant forum for legal discussion and debate. We extend our deepest sympathies to his family and friends throughout the Brandeis community. May his memory be a blessing.

Mission Statement

The *Brandeis University Law Journal* aims to provide Brandeis University with the opportunity to contribute to discussions of law and law-related topics with the publication of undergraduate scholarship. We hope to aid in the furtherance of Brandeis University’s motto of “truth even unto its innermost parts” through publishing rigorously researched articles and engaging in respectful, thoughtful, and insightful debates. This journal is both a publication and a constant work in progress as we are grounded in an undergraduate academic environment and constantly trying to learn, grow and improve. Our journal provides a platform for intellectual growth and debate where academic scholarship can flourish. We focus on academic excellence, encouraging expressions of scholarship, and encouragement of educational purposes.

SUBMISSIONS

Our journal requires all submissions of articles and abstracts to be:

1) Original and of concern to the Brandeis community.
2) Related to law and/or using legal reasoning.

We welcome submissions for publication at any time. We highly encourage undergraduate scholarship. We will work with undergraduates interested in learning about legal writing, research, and scholarship to develop these skills.

All those interested in involvement through writing, editing, or administrative roles are welcome.

Please send any questions, submissions, or inquires to deislawjournal@gmail.com and visit our website at https://brandeislawjournal.wordpress.com

Editor-in-Chief's Letter

Dear Reader,

The Brandeis University Law Journal is proud to present our most recent issue delving into legal developments. These four rigorously-edited articles showed innovation, passion, and energy from our incredible writers. Through their powerful insight and perspectives, the articles showcase possibilities for the future development of the legal arena. The issue is written, edited, and collected by Brandeis University undergraduates. The articles cover topics from an examination from intellectual property rights for artificial intelligence to an investigation of the Supreme Court justices. An extra special addition this semester is a book review on disability treatment and the morality of law by our insightful faculty advisor Professor Daniel Breen.

As previously, the *Brandeis University Law Journal* is accessible both in print and on our website at https://brandeislawjournal.wordpress.com through an e-publication.

I would like to thank our incredible leadership team, writers, and editors. Their dedication, passion, and creativity are evident throughout this issue and provide the foundation for publication. We would like to give great appreciation to the Allocations Board on Student Union for providing us the necessary funding to print this issue.

Inspired as ever by Judah Marans' foundational example, we continue to grow the journal's success. We look forward to our continued work supported by two phenomenal advisors, Professors Kabrhel and Breen. We really appreciate all of their insight, advice, and support.

Sincerely,
Sophia Reiss
Editor-in-Chief

Brandeis University Law Journal

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Jan Nisbet (with contributions from Nancy Weiss), *Pain and Shock in America: Politics, Advocacy, and the Controversial Treatment of People with Disabilities*

Daniel Breen[1]

One night in August of 2007, a man placed a call to the Judge Rotenberg Center, a facility dedicated to the treatment of "emotionally disturbed students" in Canton, MA, and instructed staff members to wake up two of the residents and subject them to a series of electric shocks. The man, who purported to be calling on behalf of one of the clinicians at the Center, explained that the shocks were to be punishment for infractions committed by the students earlier in the day. The staff members dutifully woke up the two students, 16 and 18 years old, tied them down, and proceeded to administer 29 shocks to one of them and 74 to the other.

The call turned out to be a hoax; but what most readers will find surprising is the fact that electric shocks could be considered, under *any* circumstances, to be valid forms of clinical treatment for children. In fact, the Judge Rotenberg Center happens to be the only facility in the United States authorized to deploy electric shock therapy—a kind of "aversive method," as it is known at the Center—to treat children with psychiatric problems. In this book, Jan Nisbet tells the strange tale of how this came to be, and how in the progressive bastion of Massachusetts, and only in Massachusetts, such things are permitted to happen.

The tale begins all the way back in 1971, when Dr. Matthew Israel founded the Behavior Research Institute (BRI) in Providence, RI. It was Israel's theory that persons whose autism or mental disabilities caused them to hurt themselves, or behave disruptively, could learn to control that behavior if clinicians consistently responded to it by "aversive methods," such as pinching or spanking them, or by administering electric shocks (one BRI patient, for example, was given 174 spanks one day in 1980). While Dr. Israel and his successors have clung to their faith in these practices, it did not take long before the vast majority of mental health professionals had condemned them, not to mention the United Nations' Special Rapporteur on Torture, which in

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2013 found them to be potential violations of international conventions against the use of torture. Yet when the Massachusetts Office for Children attempted to close a series of BRI-related group homes in the state, the Institute used all the legal means at its disposal to fight back. The result was a truly labyrinthine series of hearings, appeals, charges and counter-charges, beginning in 1985 and continuing to the present day.

Nisbet is a sure guide through these proceedings, which can be so complex that readers trying to follow along may find themselves crying for mercy. Yet in the midst of the procedural details, and to her immense credit, she never loses sight of the main theme. Through all the years of claims and counter-claims, no one was ever able to make a winning *legal* argument out of the simple moral proposition that it is wrong to inflict pain upon people as a tool for modifying their behavior. Thus, when in 1986, well-meaning administrators like Mary Kay Leonard at the Office for Children sought to curtail aversive methods in Massachusetts, BRI attorneys were able to deploy anecdotal evidence of the efficacy of these methods to persuade Judge Ernest Rotenberg, of the Bristol County Probate Court, that they should continue. Particularly persuasive to the judge was a "before and after" video depicting a patient named Janine, who went from banging her head on the floor to exhibiting "normal" behavior after several years at BRI. "Why is there a controversy," wondered Judge Rotenberg, "I have viewed the school. I have seen Janine. I can't understand any reason in the world why this is a controversial procedure." On the basis of evidence akin to this, and in view of the pleas of parents who, badly served by other medical providers and feeling bereft of other options, saw aversive methods as the only hope for their loved ones, Rotenberg presided over a "consent decree" by which BRI was, and still is, 36 years later, able to continue using these methods in Massachusetts.

In honor of this ruling, the BRI, having relocated from Providence to Canton, would change its name to the Judge Rotenberg Center. Lost in the shuffle was any serious judicial attention to the growing consensus among doctors that positive reinforcement, not pain, was the key to any *lasting*, successful treatment of disruptive and harmful behaviors (Janine, as a matter of fact, reverted to self-harm as soon as the aversive methods stopped). Instead, relying on selectively-chosen case studies and the testimony of parents rather than ethics, the judgments of administrators, and the scientific method, BRI lawyers consistently won by depicting the controversy in the simplest of storybook terms, as one somehow pitting a

heartless and power-mad state bureaucracy (Goliath) against clinicians who -they claimed- were only out to treat patients in the best way they knew (a set of gallant Davids).

It is easy to feel moral outrage as the story unfolds, especially after 2000, as the patient population at the Judge Rotenberg Center were drawn less from persons with autism, and similar disabilities, and more from the population of persons -largely from New York City, and largely members of racial minorities- whose behavioral issues might stem from learning disabilities or PTSD (the Center would actually advertise over New York's "Hot 97" radio station, urging families to send "emotionally disturbed" children to Canton). In the larger picture, Nisbet's meticulously detailed work reminds us that in our world, this kind of moral outrage too often lacks an effective form of legal expression. The reader comes away from the book with a sense of profound discouragement regarding the standards that govern our courts, joined with a feeling of admiration for the author's painstaking, indefatigable dedication to telling this story.

Abortion in the United States: The Road to Vague Legislation

Gianna Bruno[2]

Roe v. Wade was one of the first landmark cases instituting abortion policies in the United States. While legislation regarding abortion has been modified since 1973, the state of the nation has also changed as it has become increasingly polarized. Abortion legislation was introduced as an attempt to solve a privacy issue. However, over time, the discourse around abortion turned away from its legality in terms of privacy to also include discussion about healthcare and the morality of the legislation itself. Vague legislation yields uncertainty for the future of abortion policies.

Introduction

In 1973, the Supreme Court finalized the decision of the *Roe v. Wade* case. The final verdict deemed that abortion was constitutional based on privacy rights as detailed in the 1st, 4th, 5th, 9th, and 14th Amendments.[3] However, this landmark decision left room for individual states to interpret the holding in the way they saw fit. This led to various arguments among governmental actors and court cases brought to the judiciary over the past few decades. Considering Congress' and the Supreme Court's framing of the issue in terms of privacy, why have interest groups and the public utilized the frames of morality and healthcare when advocating for or against legal abortion? Moreover, how has the framing of these issues caused immense inaction during the policymaking process? While the Legislative and Judiciary branches debate over the legality of privacy concerning the right to abortion, interest groups and the public have been pushing the two branches to consider morality and healthcare as aspects of the right to abortion. Confusion regarding what the most important argument is for either being against or in support of abortion has led to controversial and vague legislation. This paper will discuss the history of abortion policies, how the Legislative and Judiciary branches have dealt with the issues addressed in the 1973 Supreme Court case, as well as how interest groups and the public face those problems as constituents.

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[2] Brandeis University Undergraduate, Class of 2023.

[3] "Roe v. Wade." Oyez.

Background

Major Events

In 1973 during the *Roe v. Wade* court battle, the Supreme Court decided on the basis of the Due Process Clause of the 14th Amendment that every woman has the right to privacy regarding their choice to have an abortion. However, state doctrines still vary in opinion regarding whether to prioritize their interest in protecting women's health or to prioritize the "potentiality of human life" and so state laws are left to debate over these opinions.[4] Thus, the law states that during the first trimester states could not regulate a woman's choice. In the second trimester, a state can impose regulations only insofar as the mother's health is at risk. Then, in the third trimester, states have complete control as to whether or not to prohibit abortion except in cases of saving the mother's life. Even though the 1973 Supreme Court case stated a woman's right to privacy protects a woman's right to choose, the case also stated, "...the decision leaves the state free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests."[5] This sanction has allowed states to apply restrictions as they see fit, which caused great controversy. Since the *Roe v. Wade* decision essentially concluded that the right to privacy and state's rights were not mutually exclusive, there was bound to be tension between the two.

No more than six years later, *Webster v. Reproductive Health Services* was another major case brought to the Supreme Court that debated the constitutionality of Missouri legislation that imposed major regulations on abortion, to the extent that it appeared to violate *Roe.* The final Court decision dictated that, "...a regulation imposed on a lawful abortion is not unconstitutional unless it unduly burdens the right to seek an abortion," which seems to negate the trimester ruling set in place a few years earlier by *Roe*. In addition to the *Webster* ruling not conforming to the *Roe v. Wade* decision, the *Webster* ruling is just as vague as *Roe* in terms of defining the restrictions and put even more power into the hands of the state with regards to abortion legislation.[6]

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[4] "Roe v. Wade."

[5] "Roe v. Wade, 410 U.S. 113 (1973)." Justia Law.

[6] "Webster v. Reproductive Health Svcs., 492 U.S. 490 (1989)." Justia Law.

Current State of Affairs

Currently, 43 states prohibit abortion after a certain number of weeks have passed since conception and 45 states have laws that permit individual healthcare providers to refuse to perform abortions. Additionally, 12 states block private insurance plans from covering the medical expenses of an abortion. In 33 states, it is against the law to use public funds, for those who are enrolled in Medicaid, for coverage of an abortion except, "...where the woman's life is in danger or the pregnancy is the result of rape or incest."[7] Since there is no immutable or established federal law regarding abortion, legislation is continually being changed or amended. For instance, on March 9th, 2021, Governor Hutchinson of Arkansas signed SB6 into law, thereby prohibiting abortion in all cases with the only exception being to save the mother's life in medical emergencies.[8] This law goes against the Supreme Court case rulings, as it disrupts a woman's privacy, and yet, it took effect in June 2021. This law is one of 66 state legislations that were introduced in 2021 with the end goal of a whole or partial prohibition of abortion.[9]

On the other hand, in 2018, Oregon and Washington both passed legislation requiring health plans to cover abortion and maternal care, including contraception.[10] More recently, on April 13th, 2021, the Biden Administration changed federal government policy about contraception delivery. They announced that because of the COVID-19 pandemic, abortion pills would be allowed to be sent to patients through mail. This sparked even more controversy between groups who oppose the right to abortion and groups that believe that this is a step in the correct direction for abortion rights.[11]

Key Stakeholders

Social movements such as the Pro-Choice and Pro-Life groups are both very active in the public sphere and have been extraordinarily outspoken in their responses to the Biden Administration's decision.

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[7] "An Overview of Abortion Laws." Guttmacher Institute. (April 5, 2021).
[8] "Governor Hutchinson Issues Statement on Signing of SB6."Arkansas Governor Asa Hutchinson.
[9] "State Legislation Tracker." Guttmacher Institute. (April 1, 2021).
[10]Anusha Ravi. "How the U.S. Health Insurance System Excludes Abortion." Center for American Progress.
[11] Abigail Abrams. "Why Abortion Pills Are The Next Battle Over Abortion Rights." Time. Time, April 14, 2021.

Pro-Choice advocates look at the decision to allow abortion pills to be sent through mail as a win for reproductive health while Pro-Lifers see this decision as "...catastrophic loss of life by mail."[12] Each year, Pro-Life groups meet nationally and march in major cities across the US, most notably including Washington DC, in support of the unborn and Pro-Choice groups host fundraiser events featuring speakers and discussions on the importance of the freedom of choice as a "fundamental human right."[13] Traditionally, Pro-Life activists focus on the morality of abortion and human rights, while Pro-Choice supporters focus on reproductive health and a different interpretation of human rights.[14] Both groups focus on what they believe is advocacy for human rights, but on opposite sides of the political spectrum. This leads to major strife on a public level.

Planned Parenthood is viewed underneath the umbrella term Pro-Choice. They are the nation's largest provider for women's reproductive health and extensive advocates for the Pro-Choice movement. As well as acting as healthcare providers, they also defend the right to an abortion when it is attacked by Congress and the Supreme Court alongside the Center for Reproductive Rights, which is actively working to eliminate laws that restrict reproductive rights.[15] Both groups are heavily involved in the policy narrative regarding abortion.[16] On the other side, the Heritage Fund, a conservative think tank, conducts research and distributes articles against abortion. There are also organzations such as March for Life which is an organization that unites once a year to march across major cities in support of the ban of abortion.[17] Additionally, those in power, such as judges in the courts and members of Congress, are heavily involved in making sure legislation swings in favor of their respective ideology or party. Personal stance and

[12] Carlie Porterfield. "Biden Administration To Allow Abortion Pills Via Telemedicine And Mail." Forbes. Forbes Magazine, April 13, 2021.
[13] "State Marches Near You." March for Life. April 8, 2021; "Abortion Access." NARAL Pro-Choice America, July 30, 2019.
[14] Lucy Jackson and Gill Valentine. "Performing 'Moral Resistance'? Pro-Life and Pro-Choice Activism in Public Space." *Space and Culture* 20, no. 2. 201. 222.
[15] "Who We Are." Planned Parenthood.
[16] "Abortion." Center for Reproductive Rights. April 19, 2021.
[17] "Pro-Life Organizations: EWTN." EWTN Global Catholic Television Network.

religion play a role in policy-makers' decisions regardless of if they are subject to voters' views or not.[18]

Recent Action and Inaction

On an institutional level there is action among states regarding legislation about the right to an abortion. However, legislation that both prohibits or expands that right is often challenged in the courts. It has been that way since the *Roe v. Wade* decision was finalized. There is concern that *Roe* could be overturned on a federal level, thus, states have taken the matter into their own hands to protect the right to an abortion. Currently, *Roe v. Wade* is constantly being undermined by a few states, and not every piece of legislation breaking with the precedent set by *Roe* is being reviewed by the courts.[19] With the constant back and forth between restricting and allowing abortion, the process has been described by Nancy Northup, CEO of the Center for Reproductive Rights, as, "...hollowed out by a game of constitutional whack-a-mole."[20]

From the perspective of those whom the laws affect, it is frustrating to have to consistently pay attention to these changes because rules and regulations are constantly changing: restrictions are being added, taken away, and debated in the courts. Nancy Northup, the author of the opinion piece quoted above, outlines the exact reason as to why there is so much discourse between the members of the courts or Congress and between the institutions and the actors. At the beginning of her piece, she wrote, "...the Constitution protects our personal liberty and dignity to make such decisions for ourselves," but further down wrote, "...treat[ing] abortion for what it is: health care."[21] Institutions are debating on a constitutional level, but actors are focused on the healthcare and moral aspect, which explains the discourse between the two groups.[22]

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[18] Byron W. Daynes and Raymond Tatalovich. "Religious Influence and Congressional Voting on Abortion." *Journal for the Scientific Study of Religion* 23, no. 2 1984. 199.
[19] Elizabeth Nash, Guttmacher Institute, and Megan K. Donovan. "Ensuring Access to Abortion at the State Level: Selected Examples and Lessons." Guttmacher Institute, August 21, 2019.
[20] Nancy Northup. "Opinion | It's Time for Congress to Stop the States from Playing Whack-a-Mole with Abortion." The Washington Post. WP Company, June 29, 2020.
[21] Northup, "Opinion | It's Time for Congress to Stop the States from Playing Whack-a-Mole with Abortion."
[22] Northup, "Opinion | It's Time for Congress to Stop the States from Playing Whack-a-Mole with Abortion."

Institutions

Legislative Branch

It is important to understand the current state of Congress before explaining why there is so much trouble moving forward in the policymaking process surrounding abortion. The two contemporary problems with Congress include congressional dysfunction and increasing polarization among the parties. Congressional dysfunction occurs for a multitude of reasons, but the main reason is that of increased polarization which leads to Congress not being able to pass any major legislation that could create a meaningful change. Without a functioning Congress, other institutions, such as the Executive and the Judicial branch, are required to make changes or pass (or veto) laws, which is supposed to be the primary job of the Legislative branch. Originally, when the Constitution was written, Congress was established as the first branch of the U.S. Government. Political researcher and writer Kevin Koser states that, "...congress is given all lawmaking power and complete authority over raising revenues. The national legislature has the authority to identify problems, craft policies and establish agencies to execute its policies."[23] Even though Congress was originally granted those powers in particular, the other branches have had to step in due to Congress's lack of progress and the slowing effect of bureaucracy. This action in the Executive and Judiciary throws the balance of power off because what was supposed to be Congress' role exclusively is now being performed by the other branches. The solution to this problem would be for Congress to take back the control of legislation, but that is proven near impossible due to the overabundance of polarization.[24]

Polarization occurs when tension draws political parties farther away from the other parties and closer to themselves as demonstrated in Figure 1.[25] D'Antonio wrote, "All complex societies are characterized by a high degree of internal tension and conflict... their [polarization's] intensity makes difficult the kind of compromise which has sustained the

[23] K, Kosar. "Restoring Congress as the First Branch". *R Street Institute.* (2016). 2.
[24] Kosar, 11.
[25] Christopher Ingraham. "A Stunning Visualization of Our Divided Congress." The Washington Post. (WP Company, April 26, 2019).

two-party system."[26] Figure 1 from The Washington Post shows how over time political parties in the House of Representatives have begun to only vote along their party lines and almost never with the other side. Figure 1 ranges from the years 1975-1982 on the left and from 1997-2011 on the right.[27]

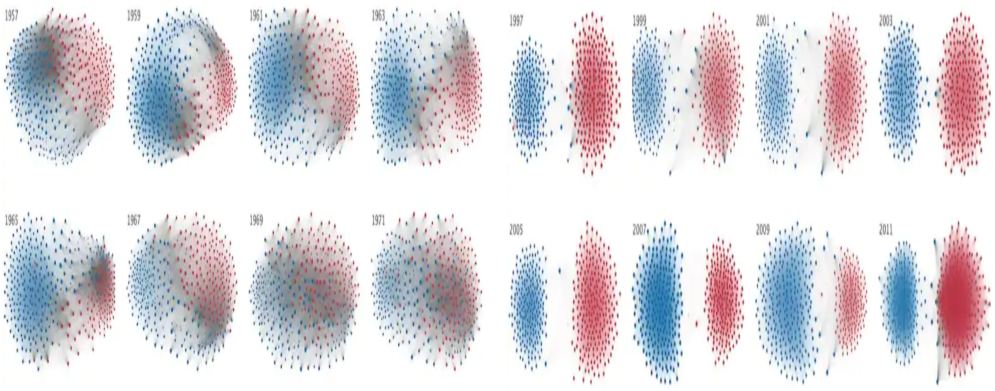

Figure 1

S. M. Theriault claims that Republicans and Democrats have become so polarized over time because of their policy agenda, which is the list of policies the House and Senate are to discuss and pass, which has shifted over time in favor of policies that are, "...more prone to party conflict, like abortion."[28] Therefore, Congress has an incredibly difficult time trying to get a majority vote for any legislation that either completely prohibits or allows abortion. Members of Congress will not distance themselves from their party's view about what they believe the Constitution states in terms of human rights, in fear of being ostracized by their own party.[29]

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[26] William V. D'Antonio, Tuch, Steven A., and Baker, Josiah R.. *Religion, Politics, and Polarization : How Religiopolitical Conflict Is Changing Congress and American Democracy*. Lanham, MD: Rowman & Littlefield Publishers, 2013. 17.
[27] Ingraham. "A Stunning Visualization of Our Divided Congress."
[28] J.W. Kingdon. "Agendas, Alternatives, and Public Policies." Boston, MA: Little, Brown and Company. 3; S.M. Theriault. "A Review of 'Beyond Ideology: Politics, Principles, and Partisanship in the US Senate'". *Congress & the Presidency*. 2010. 324.
[29] Sarah E. Anderson and Daniel Butler. "Analysis | Biden Wants to Bring Democrats and Republicans Together. Here's Why That's so Challenging." The Washington Post. WP Company, December 19, 2020.

Judiciary Branch

Those on the Supreme Court are not elected by the people as they have to be nominated by the President and approved by the Senate before they can sit on the bench. As Justices, their role is to be apolitical and remain neutral about the cases they hear, only abiding by the previously upheld laws and the Constitution.[30] However, just as polarization is plaguing the Legislative branch, debates over Judicial Activism versus restraint and over politicization are afflicting the Judiciary branch. Judicial Activism refers to the Court striking down or overturning legislation. In contrast, Judicial Restraint is defined as the understanding, "...that Justices ought to avoid usurping powers belonging to the legislature and executive."[31] The divide in the Court is less clear than the divide in Congress because polarization separates members of Congress by party, while the debate of Judicial Activism versus restraint can change on a case by case basis, and is not purely a matter of ideological alignment. In 2013, the late Justice Ginsburg stated that the courts took too much liberty in utilizing Judicial Activism and defended the action in the name of respecting Congress' motives as well as protecting minorities who may be disproportionately affected by said legislation.[32] Those listed reasons alone do not account for all the uses of Judicial Activism which is why there remains so much controversy.

Over time, Supreme Court Justices have transitioned from being neutral advocates of the Court to being politicized actors. It is theorized that this change likely happened because presidents opt to nominate Judges who will vote along their party's lines rather than remain neutral. The politicization of the Court accounts for the use of Judicial Activism because now judges vote along their ideological lines which creates contention among those who wish to remain neutral and those who wish votes were cast in their ideological favor. Figure 2 shows that between the years 1918-2018, political alignments of Supreme Court Justices have shifted.[33]

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[30] Martin Quinn. "Supreme Court Justices Are Increasingly Political." The Economist. The Economist Newspaper.

[31] Adam Liptak. "How Activist Is the Supreme Court?" The New York Times. The New York Times, October 12, 2013; Barton Swaim. "Politics: When Pundits Hold Court." The Wall Street Journal. Dow Jones & Company, March 26, 2021.

[32] Liptak, "How Activist Is the Supreme Court?"

[33] Quinn, "Supreme Court Justices Are Increasingly Political."

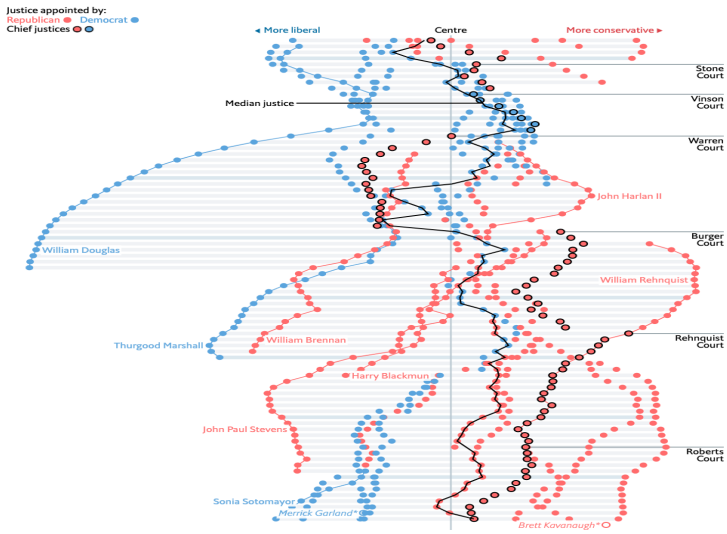


Figure 2

At the top of the graph, the median ideology was just about in the center and all the dots are closer to the center while towards the bottom of the graph, representing more recent years, the dots are considerably more spread out by party. However, in the graph there also seems to be a shift to the more "liberal" side regardless of whether a Democrat or Republican nominated the Justice. Tracking shifts in ideology is now more important than ever because with this data, political scientists can predict Justices' voting patterns and whether a particular Justice may use Judicial Activism or Restraint.[34]

Regarding the decision of *Roe v. Wade* and subsequent legislation, there are two main bodies of thought. The Judicial Activist side claims that the courts had the right to interpret that the 14th Amendment gives Americans the right to privacy and thus, the right to an abortion. The Judicial Restraint side argues that the former side took too much liberty in their interpretation and granted more rights than the Constitution truly allows. The author of *Why all Americans should want Roe v. Wade overturned--regardless of their views on abortion,* Paul Stark, argues that both the Justices on the bench during *Roe v. Wade* and those who are currently debating over passing legislation in favor of the original decision are fighting for a cause with no real rationale. He writes,

[34] Quinn, "Supreme Court Justices Are Increasingly Political."

"Supreme Court Justices are not lawmakers. They are judges who are supposed to interpret and apply the law that already exists."[35] Supreme Court Justices, once nominated and approved, remain on the bench until the end of their lives or until they choose to retire. The only way to change a Supreme Court ruling is to change the Constitution or to have another Supreme Court case to change the ruling, thus Justices are the ones holding themselves accountable to the democratic process.[36]

Actors

Interest Groups

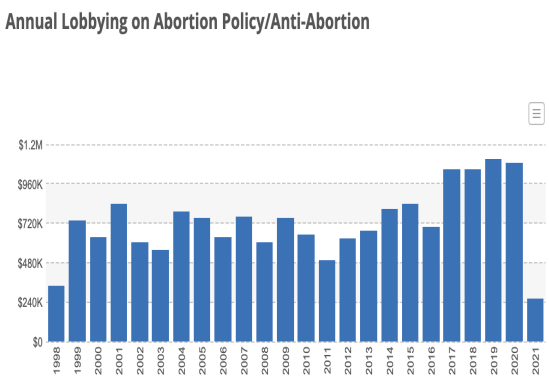
Interest groups are organizations that constantly watch for bills that may be beneficial or harmful to their cause and push their agenda to the forefront of legislators' agenda through discussion and persuasion.[37] These groups are able to persuade legislators through lobbying which is defined as: "...an attempt by a group to influence the policy process through persuasion of government officials."[38] Legislators are elected officials, so while they are working for their own agenda, it is also imperative that they work in favor of the public so that they continue to be re-elected. Lobbyists provide information to legislators about specific legislation and its possible outcomes and provide intel on what the public supports and opposes.[39] Politicians have become increasingly dependent on lobbyists to know the positions the voting members of their party hold so they do not deviate from it. L. Drutman and S. Teles even go so far as to claim Congress has lost the ability to research and make decisions on its own about policies because of the high volume of Congressional dysfunction. The most polarized members of Congress heed advice from the biased interest groups which further divides the already divided Legislative branch. Discussion between the Congress and the interest

[35] Paul Stark. "Why all Americans should want Roe v. Wade overturned--regardless of their views on abortion: A reversal of the Supreme Court's abortion ruling would be pro-Constitution and pro-democracy." *National Right to Life News*. January 2019. 9.
[36] Quinn, "Supreme Court Justices Are Increasingly Political."
[37] J. Gelman. "Rewarding Dysfunction: Interest Groups and Intended Legislative Failure." *Legislative Studies Quarterly.* 2017. 666.
[38] T.J. Lowi, Ginsberg, B., Shepsle, K.A. and Ansolabehere, S. "Groups and Interests" in *American Government: Power and Purpose*. 2019. 571.
[39] Lowi, 574.

groups cause rifts which, in turn, means that no substantial legislation is passed which continues debates.[40]

The Legislative and Judiciary branches are essentially deadlocked in their debates, forcing interest groups to use alternative points of discussion to get their associations' interests to the forefront of the decision makers' minds. Groups utilize grassroots campaigns to get the public on their side. Planned Parenthood and March For Life both use lobbying events to push their agenda on Capitol Hill.[41] These events lobby for their respective views on abortion in regard to healthcare. For example, Planned Parenthood held one of its largest Lobby Days back in 2018. Supporters and advocates gathered to attack the Trump-Pence Administration on their restrictive reproductive health bills.[42] In contrast, starting in 1974, March for Life planned their first march in Washington a year after the *Roe v. Wade* decision, and continues to march each year to commemorate the decision. They follow this action by lobbying legislative leaders on policies which they view as being in favor of women's health.[43] Because the lobbying industry has grown exponentially and members of Congress rely heavily on lobbyists to provide pertinent information, more and more money is being funneled into Pro-Life and Pro-Choice lobbyists as seen in Figure 3 and Figure 4, respectively.

[40] L. Drutman, & Teles, S. "Why Congress Relies on Lobbyists Instead of Thinking for Itself". *The Atlantic*. 2015.
[41] Lowi, 576.
[42] "Planned Parenthood Holds Largest Lobby Day Ever." Planned Parenthood. April 26, 2018.
[43] "About the March for Life." March for Life. July 27, 2020.



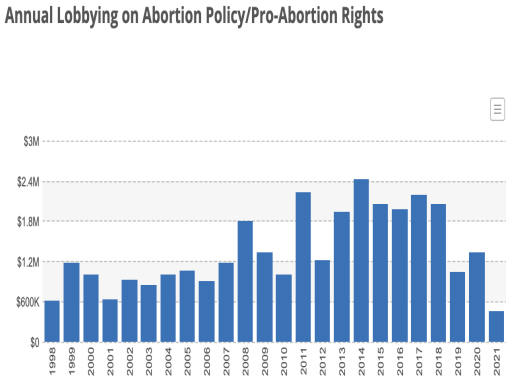


Figure 3 *Figure 4*

Figure 3 ranges from $0-$1.2 Million per year while Figure 4 ranges from $0-$3 Million.[44] While Pro-Choice interest groups have consistently spent more on lobbyists, Pro-Life interest groups are maintaining a somewhat steady incline in spending. Both sides attempt to persuade legislators to create legislation in favor of their agenda and switch the debate away from privacy into a discussion of women's health.

Public Opinion

There is a longstanding discussion as to whether or not the general public impacts public policy. The main argument states that public opinion could be more or less impactful depending on the amount of issue salience. Saliency refers to how important an issue is to the public, the more important it is, the more likely citizens will use the policy to make their decision on Election Day, which could change the direction of legislation or at least put it on Congress's agenda to be debated further.[45] While interest groups pour hundreds of thousands of dollars yearly into lobbying support for their side, the general public is not as politically motivated, leading to a lack of issue salience. As of 2019, about 61% of Americans believe that abortion should be legal in

[44] "Abortion Policy/Anti-Abortion Lobbying Profile." OpenSecrets; "Abortion Policy/Pro-Abortion Rights Lobbying Profile." OpenSecrets.
[45] P. Burstein. "The Impact of Public Opinion on Public Policy: A Review and an Agenda". *Political Research Quarterly.* 2003. 30.

either all or at least most cases.[46] While that percentage is above the majority, there are two issues: questions still remain regarding complete legalization versus partial legalization, and just because a policy is popular in the majority does not mean it is automatically put into law. Dylan Matthews writes in his article, *Remember That Study Saying America is an Oligarchy? 3 Rebuttals Say it's Wrong* that democracy entails compromise and both sides end up "winning" about half of the time.[47]

There will never be a general consensus in the public regarding abortion for two reasons. First, Matthews states that "...most Americans aren't very politically engaged — and most don't *want* to be politically engaged, preferring that professional policymakers make decisions for them, so long as the economy stays on track."[48] Policies regarding abortion only truly affect women and, more specifically, those are who are looking to have an abortion, as abortion is considered women's healthcare. While the general public can have an opinion on the policy, a smaller percentage of the public would be actively affected by its implementation. Abortion policy is not as salient of an issue as others because it affects a smaller percentage of voters. Second, there is no real compromise between those who want abortion legalized and those who do not. The general public is debating whether or not abortion is murder because it is a less politicized question than a discussion of the Constitution or healthcare. The two main responses are that abortion is, "...the same thing as murdering a child,'" and "'...abortion is not murder because a fetus isn't a person'" with a few responses in between as shown in Figure 5.[49]

[46] "Public Opinion on Abortion." Pew Research Center's Religion & Public Life Project. July 7, 2020.
[47] Dylan Matthews. "Remember that Study Saying America is an Oligarchy? 3 Rebuttals Say It's Wrong". *Vox*. 2016.
[48] Matthews, "Remember that Study Saying America is an Oligarchy? 3 Rebuttals Say It's Wrong".
[49] Everett C. Ladd and Bowman, Karlyn H.. *Public Opinion about Abortion*. Washington: American Enterprise Institute for Public Policy Research. 1997. 3; Ladd, 19.

	Murder	*Not Murder*	*Depends*[a]
Nov. 1983[b]	57	30	na
Nov. 1985	54	35	na
Dec. 1985	55	35	na
Aug. 1987	50	35	na
Apr. 1989	48	40	4
July 1989[c]	40	47	7
Jan. 1995	46	41	5
Jan. 1998	50	38	5

Figure 5

While Figure 5 only goes through 1998, by 2019 the public became increasingly divided, especially through their political associations. About 38% of adults believe abortion should be illegal in most or all situations, while 61% of adults believe abortion should be legal in most or all situations, and 1% have no opinion on the matter.[50] There can be no true compromise between the two groups because now the discussion is not about abortion directly, but whether or not the fetus is human and whether or not abortion should be labeled as murder. There is little to no middle ground between people who believe it is murder and those who do not.[51] When it comes to impacting Congress, there is no generalized stance, just a divided one, and it is near impossible to create legislation that will not be controversial and be challenged in courts.

Conclusion

In conclusion, Congress and the courts debate the legality of abortion through the lens of the Constitution and the right to privacy. The consequences of polarization and the use of Judicial Activism and Restraint have made it impossible for any new progress from the legislative branch because of strict divisions of ideology. In turn, interest groups fund lobbyists to persuade legislators from a healthcare perspective to create legislation in favor of their position and to break from the debate on privacy. Thus, as the public is not generally politically engaged, they tend to debate abortion on a non-political level. Regardless of the institution or the actor, the conclusion remains the same for

[50] "Public Opinion on Abortion."

[51] Ladd, 3.

abortion policies; there is no policy that would be satisfactory to both sides. With increased lobbyist spending from interest groups further polarizing Congress, courts taking over some of the Legislative Branch's duties, and the general public's inablility to compromise, the future of abortion policies remains a game of whack-a-mole.[52] This results in an unsatisfying conclusion as policies will be changed depending on the majority in Congress, challenged in the courts regardless of the outcome, and interest groups will continue to mobilize to try to gain favor either way, and the public will fight for what it believes is truly right.

[52] Northup. "Opinion | It's Time for Congress to Stop the States from Playing Whack-a-Mole with Abortion."

Works Cited

"Abortion." Center for Reproductive Rights. (April 19, 2021). https://reproductiverights.org/our-issues/abortion/.

"Abortion Access." NARAL Pro-Choice America. (July 30, 2019). https://www.prochoiceamerica.org/issue/abortion-access/.

"Abortion Policy/Anti-Abortion Lobbying Profile." OpenSecrets. https://www.opensecrets.org/federal-lobbying/industries/summary?id=Q14.

"Abortion Policy/Pro-Abortion Rights Lobbying Profile." OpenSecrets. https://www.opensecrets.org/federal-lobbying/industries/summary?cycle=2019&id=Q15.

"About the March for Life." March for Life. (July 27, 2020). https://marchforlife.org/about-the-march-for-life/.

Abrams, Abigail. "Why Abortion Pills Are The Next Battle Over Abortion Rights." Time. (Time, April 14, 2021). https://time.com/5954429/fda-biden-abortion-pills/.

Anderson, Sarah E., and Daniel Butler. "Analysis | Biden Wants to Bring Democrats and Republicans Together. Here's Why That's so Challenging." The Washington Post. (WP Company, December 19, 2020). https://www.washingtonpost.com/politics/2020/12/21/biden-wants-bring-democrats-republicans-together-heres-why-thats-so-challenging/.

"An Overview of Abortion Laws." Guttmacher Institute. (April 5, 2021). https://www.guttmacher.org/state-policy/explore/overview-abortion-laws.

Burstein, P. "The Impact of Public Opinion on Public Policy: A Review and an Agenda". *Political Research Quarterly.* (2003). 30.

D'Antonio, William V., Tuch, Steven A., and Baker, Josiah R.. *Religion, Politics, and Polarization : How Religiopolitical Conflict Is Changing Congress and American Democracy*. (Lanham, MD: Rowman & Littlefield Publishers, 2013). 17.

Daynes, Byron W., and Raymond Tatalovich. "Religious Influence and Congressional Voting on Abortion." *Journal for the Scientific Study of Religion* 23, no. 2 (1984). 199.

Drutman, L., & Teles, S. "Why Congress Relies on Lobbyists Instead of Thinking for Itself". *The Atlantic*. (2015). https://www.theatlantic.com/politics/archive/2015/03/when-congress-cant-think-for-itself-it-turns-to-lobbyists/387295/.

Gelman, J. "Rewarding Dysfunction: Interest Groups and Intended Legislative Failure." *Legislative Studies Quarterly.* (2017). 666.
"Governor Hutchinson Issues Statement on Signing of SB6."Arkansas Governor Asa Hutchinson. https://governor.arkansas.gov/news-media/press-releases/governor-hutchinson-issues-statement-on-signing-of-sb6.
Ingraham, Christopher. "A Stunning Visualization of Our Divided Congress." The Washington Post. (WP Company, April 26, 2019). https://www.washingtonpost.com/news/wonk/wp/2015/04/23/a-stunning-visualization-of-our-divided-congress/.
Jackson, Lucy, and Gill Valentine. "Performing 'Moral Resistance'? Pro-Life and Pro-Choice Activism in Public Space." *Space and Culture* 20, no. 2 (2017). 222.
Kingdon, J.W. "Agendas, Alternatives, and Public Policies." (Boston, MA: Little, Brown and Company). 3.
Kosar, K. "Restoring Congress as the First Branch". *R Street Institute.* (2016). 2;11.
Ladd, Everett C., and Bowman, Karlyn H.. *Public Opinion about Abortion*. Washington: American Enterprise Institute for Public Policy Research. (1997). 3; 19.
Liptak, Adam. "How Activist Is the Supreme Court?" The New York Times. (The New York Times, October 12, 2013). https://www.nytimes.com/2013/10/13/sunday-review/how-activist-is-the-supreme-court.html.
Lowi, T.J., Ginsberg, B., Shepsle, K.A. and Ansolabehere, S. "Groups and Interests" in *American Government: Power and Purpose*. (2019). 571.
Matthews, Dylan. "Remember that Study Saying America is an Oligarchy? 3 Rebuttals Say It's Wrong". *Vox*. (2016). https://www.vox.com/2016/5/9/11502464/gilens-page-oligarchy-study.
Nash, Elizabeth, Guttmacher Institute, and Megan K. Donovan. "Ensuring Access to Abortion at the State Level: Selected Examples and Lessons." (Guttmacher Institute, August 21, 2019). https://www.guttmacher.org/gpr/2019/01/ensuring-access-abortion-state-level-selected-examples-and-lessons#.
Northup, Nancy. "Opinion | It's Time for Congress to Stop the States from Playing Whack-a-Mole with Abortion." The Washington

Post. (WP Company, June 29, 2020). https://www.washingtonpost.com/opinions/2020/06/29/its-time-congress-stop-states-playing-whack-a-mole-with-abortion/.

“Planned Parenthood Holds Largest Lobby Day Ever.” Planned Parenthood. (April 26, 2018). https://www.plannedparenthood.org/about-us/newsroom/press-releases/planned-parenthood-holds-largest-lobby-day-ever.

Porterfield, Carlie. “Biden Administration To Allow Abortion Pills Via Telemedicine And Mail.” Forbes. (Forbes Magazine, April 13, 2021). https://www.forbes.com/sites/carlieporterfield/2021/04/13/biden-administration-to-allow-abortion-pills-via-telemedicine-and-mail/?sh=6dd0e95b3dba.

“Pro-Life Organizations: EWTN.” EWTN Global Catholic Television Network. https://www.ewtn.com/catholicism/library/prolife-organizations-9557.

“Public Opinion on Abortion.” Pew Research Center's Religion & Public Life Project. (July 7, 2020). https://www.pewforum.org/fact-sheet/public-opinion-on-abortion/.

Quinn, Martin. “Supreme Court Justices Are Increasingly Political.” The Economist. The Economist Newspaper. https://www.economist.com/graphic-detail/2018/10/05/supreme-court-justices-are-increasingly-political.

Ravi, Anusha. “How the U.S. Health Insurance System Excludes Abortion.” Center for American Progress. https://www.americanprogress.org/issues/women/reports/2018/07/20/453572/u-s-health-insurance-system-excludes-abortion/.

"Roe v. Wade." Oyez. https://www.oyez.org/cases/1971/70-18.

“Roe v. Wade, 410 U.S. 113 (1973).” Justia Law. https://supreme.justia.com/cases/federal/us/410/113/#T42.

Stark, Paul. "Why all Americans should want Roe v. Wade overturned--regardless of their views on abortion: A reversal of the Supreme Court's abortion ruling would be pro-Constitution and pro-democracy." *National Right to Life News*. (January 2019). 9.

“State Legislation Tracker.” Guttmacher Institute. (April 1, 2021). https://www.guttmacher.org/state-policy.

"State Marches Near You." March for Life. (April 8, 2021). https://marchforlife.org/state-marches-near-you/.

Swaim, Barton. "Politics: When Pundits Hold Court." The Wall Street Journal. (Dow Jones & Company, March 26, 2021). https://www.wsj.com/articles/politics-when-pundits-hold-court-11616794883.

Theriault, S.M. "A Review of 'Beyond Ideology: Politics, Principles, and Partisanship in the US Senate'". *Congress & the Presidency*. (2010). 324.

"Webster v. Reproductive Health Svcs., 492 U.S. 490 (1989)." Justia Law. https://supreme.justia.com/cases/federal/us/492/490/#tab-opinion-1958093.

"Who We Are." Planned Parenthood. https://www.plannedparenthood.org/about-us/who-we-are.

Ensuring the Power of the Beth Din: Creation of the Halakhic Prenuptial Agreement

Anna Fernands[53]

One purported solution to the agunah problem is the halakhic prenuptial agreement. This paper examines the process that created the halakhic prenup through focusing on the Conservative movement's adoption of the Lieberman Clause, the Koeppel v. Koeppel case, and the growing Orthodox feminist movement. In examining the cultural forces that led to the creation of the halakhic prenup, it becomes clear that the Orthodox Rabbinate designed the halakhic prenup to secure the power of the Orthodox Beth Din. The halakhic prenup was created as a direct result of increasing numbers of Jewish women turning to secular courts for a solution to the agunah problem.

Introduction

Since biblical times, Jewish women seeking a divorce have been plagued by the problem of the *agunah*: in order for a divorce to be considered valid within the Jewish community, a man must provide his wife with a *get*.[54] If the husband is unable or unwilling to do so, and they separate, his wife becomes an *agunah*, or "chained woman." Under Judaism's adultery laws, *agunot* are forbidden to remarry and, if they have a child with another man, that child is considered illegitimate.[55] As Jewish society has progressed, it has become increasingly clear that putting women in this abhorrent position is unacceptable. Nevertheless, Jewish authorities are aware that they cannot disregard *halakhic* law (i.e. Jewish law) which initially created the *agunah* problem. This is of particular concern for the Orthodox community, as this community adheres to a stricter interpretation of Jewish law than other Jewish denominations. Accordingly, the challenge arises of how to solve or

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[54] An *agunah* is a woman who is unable to leave her religious marriage due to being unable to obtain a *get*. A *get* is a document in Jewish religious law, given from husband to wife, which effectuates a divorce.

[55] This child is known as a *mamzer* and is subjected to second-class status within Judaism. For instance, a *mamzer*, as well as the descendants of *mamzerim*, are prohibited from marrying a non-*mamzer* Jewish spouse. While certain Jewish sects have discarded this practice, it remains a salient tradition within the Orthodox community.

mitigate the problem of the *agunah* in a way that adheres to *halakha*. Various solutions have been proposed within the Orthodox community in the United States, with the *halakhic* prenuptial agreement being a particularly salient one.[56]

Origins of the Halakhic Prenup

From 1950 to 1980, the Orthodox community in the United States underwent radical change. Jewish people paid attention to women's issues, and it was evident that the Orthodox Rabbinate needed to address the problem of the *agunah*.[57] However, the Rabbinate waited. Indeed, the Orthodox Rabbinate only created the *halakhic* prenup in the wake of innovations in Jewish law, U.S. civil law, and feminist advocacy, which threatened to undermine the authority of the Orthodox Rabbinate. This threat manifested in women, feeling neglected in the face of patriarchal Jewish law, turning to secular civil courts to seek redress in the case of *get* refusal. Looking for a way to preserve their power over Jewish law, the Rabbinate began creating a *halakhic* prenup that addressed the issue of the *agunah* and ensured the continued authority of the *Beth Din* (i.e. rabbinical court). These dual ambitions led to the formation of a *halakhic* prenup that only partially served women's needs. Significantly, these prenups did lower the frequency of *get* refusal. However, this was not its purpose nor what it aimed to accomplish. In prioritizing the aims of the *Beth Din*, the *halakhic* prenup created by the Orthodox Rabbinate systematically blocked Jewish women's access to seek redress for *get* refusal in civil court.

By the 1950s, the pressure was mounting on American Orthodox authorities to solve the *agunah* problem. Part of the pressure stemmed from the Conservative Jewish community which was already making headway on this issue. For decades, the Rabbinical Assembly urged the Conservative movement not to address the *agunah* problem until the Orthodox authorities were ready to take joint action. Thus they waited,

[56] A *halakhic* prenuptial agreement is a Jewish law document that makes provisions for the case of religious divorce. It is usually used as a tool to prevent or mitigate the effects of *get* refusal.

[57] In referring to the Orthodox Rabbinate, I refer to the body of Orthodox rabbis in the United States. This is different from the Rabbinical Assembly (an international organization of Conservative rabbis) and the Rabbinical Council of America (an organization of Orthodox rabbis located in New York City).

refusing to act unilaterally.[58] However, after a substantial period of proposing collaborative solutions—which the Orthodox Rabbinate rejected—the Conservative movement decided to act alone. Their proposed "solution" came in 1953 with the Lieberman Clause. This clause, stipulated in the *ketubah* (i.e. Jewish marriage contract), stated that upon civil divorce, both parties must appear before the *Beth Din* so that the husband may provide his wife with a *get*. If either party refuses to appear before the *Beth Din*, the spouse may seek redress in civil court.[59] Notably, this was the first time American Jewish rabbis employed the secular state to assist in solving the *agunah* issue. As the Conservatives made strides in solving this problem, Orthodox Jews began placing increased pressure on their authorities to do the same.

The Agunah Problem in Secular Court

Within the Orthodox community, it was feared that secular courts would undermine the power of the Jewish court. Tensions began to rise after the introduction of the Lieberman Clause and increased in 1957 with the *Koeppel v. Koeppel* case. In this legal dispute, two individuals —Maureen and William Koeppel— entered a postnuptial agreement stipulating that both of them would appear before a *Beth Din* to execute a *get* in the case of civil divorce. Upon civil divorce, William failed to uphold the agreement, and Maureen filed suit in civil court. William's defense argued that the civil court could not effectuate a *get*, or force William to appear before the *Beth Din* for the same purpose, because of the separation of church and state. The court dismissed this argument, stating that it was constitutional for it to rule on the case because "[c]omplying with his agreement would not compel the defendant to practice any religion … Specific performance herein would merely require the defendant to do what he voluntarily agreed to do."[60] While Maureen did not ultimately win her case, *Koeppel v. Koeppel* demonstrated that, in theory, the secular court could uphold a Jewish nuptial agreement.[61] This decision did not occur in isolation; it was one of

[58] Laura R. Frank, "Dependent on the Gentiles: New York State, the Orthodox Rabbinate and the Agunah Problem 1953–1993," at: www.academia.edu/4044598/The_Agunah_and_the_Secular_State (accessed May 11, 2021).
[59] Frank, "Dependent on the Gentiles."
[60] Koeppel v. Koeppel, 138 N.Y.S.2d 366, 373 (Sup. Ct. Queens Co. 1954).
[61] The court ultimately ruled against Maureen because she violated the terms of her postnuptial contract by remarrying.

the first U.S. court cases to enforce a Jewish nuptial agreement in secular court, but it was not the last.

Cases such as *Waxstein v. Waxstein* in 1976, and *Avitzur v. Avitzur* in 1982, upheld the decision made in *Koeppel v. Koeppel.*[62] The combination of the Conservative movement's adoption of the Lieberman Clause and the *Koeppel v. Koeppel* decision showed a new willingness to address the problem of the *agunah* in secular courts. Orthodox rabbis quickly realized that increased reliance on secular courts would disinvest the *Beth Din* of its power to decide matters of Jewish divorce along strict *halakhic* lines. If secular courts could effectuate a *get*, more and more women would turn to the secular courts over Jewish tribunals.

The Rise of Orthodox Feminism

Throughout the early twentieth century, Orthodox authorities were able to keep the problem of the *agunah* on the backburner. While pressure to address the *agunah* problem driven by the Lieberman Clause and the *Koeppel v. Koeppel* certainly alarmed them, divorce rates were still relatively low in the Orthodox community.[63] Similarly, those who most vehemently advocated for equal rights within Jewish law were often within the Reform or Conservative sects of Judaism, but in the 1970s, this all began to change. Orthodox women began noticing and resenting how different their lives and marriages were under American law versus Jewish law and subsequently, Orthodox feminism was born. Women began organizing, spreading information, and drawing attention to the ways that women were being mistreated within the Orthodox community. This led to the foundation of various groups whose purposes were to serve and advocate for the rights of *agunot*. These organizations also publicized the issue of the *agunah* in ways that the Orthodox authorities could not ignore.

One of the most influential organizations created by Orthodox feminism was Getting Equitable Treatment (GET), founded in 1979, which helped women throughout the process of receiving a *get*. Notably, GET also advocated for the public and religious shunning of husbands

[62] Frank, "Dependent on the Gentiles."

[63] *Waxstein v. Waxstein* affirmed that Jewish prenuptial agreements are to be treated as contracts. Like all other contracts, the provisions of a Jewish prenuptial agreement may be enforced in secular court. *Avitzur v. Avitzur* dismissed the claim that enforcement of a Jewish prenuptial agreement would require an unconstitutional entanglement between Church and State.

who refused to award their wives a *get*. GET became widely known within Orthodox circles, gaining 400 members by 1984. Gloria Greenman, the founder of GET, noted that as her organization gained notoriety, "...the rabbis have felt the need more than ever to do something."[64] The founding of GET was quickly followed by the formation of similar organizations, all working to pressure the Orthodox authorities into finding a solution to the *agunah* crisis.

As momentum grew, Orthodox authorities could no longer ignore the call for change. They realized that if this problem was not addressed, the faith and commitment of Orthodox women would be challenged. It also became apparent that if they did not address the concerns of Orthodox feminism now, feminists might begin pushing for more radical changes. This frightened the authorities, who often viewed feminist advocacy as a threat to Jewish Orthodoxy. Thus, addressing the problem of the *agunah* began to be seen as a way not only to maintain the *Beth Din's* authority over secular courts, but also as a way to satisfy Orthodox feminists just enough to quell their advocacy for more radical change.

The First Halakhic Prenups

In the wake of innovations in religious and secular law, and the ever-mounting pressure placed on the Orthodox authorities by Orthodox feminists in the 1970s, centrist Orthodox authorities began addressing the *agunah* problem. One of the tools they used was the *halakhic* prenup, which had proved effective in obtaining women a *get* in Conservative and Reform circles. The first noteworthy prenup introduced by Orthodox authorities in the United States was the Bleich Prenup in 1981. Rabbi J. David Bleich, inspired by Israeli rabbinical courts, created a prenup which stipulated that, in the case of civil divorce, the husband must financially support his wife until he provided her with a *get*. This was a stark change from the past, as *halakha* usually granted that if a wife had left the home or had a separate source of income, the husband was absolved of a responsibility to financially support her. Now, if a couple signed the Bleich prenup, the husband could only be relieved of his financial duties to his wife after he provided a *get*.

[64] Steven Feldman, "Grappling with Divorce and Jewish Law," in *Women in Chains: A Sourcebook on the Agunah*, ed. Jack Nusan Porter (New Jersey: Jason Aronson, Inc., 1995), 217.

As expected, the Bleich prenup received intense backlash from right-leaning Orthodox authorities, who claimed that this prenup used coercive elements in making the man provide a *get*. If this were true, the *get* received from the Bleich prenup would be considered *get me'useh* (i.e. a forced *get*) and thus deemed void. However, Bleich countered these charges, stating that "...the presence of an obligation for support and maintenance which can be terminated only by issuance of a *get* is, of course, not viewed as a coercive element compelling a *get*. Were Jewish law to take a different view of the matter, no divorce would be valid."[65] This view is backed by scholars who refer to a stipulation in the *ketubah* which verifies that the husband will provide for his wife throughout their marriage. If a husband does not issue his wife a *get*, and thus is still considered married, it is logical that he would be expected to continue material support for her. Certain members of the Orthodox community resisted this logic, asserting that the direct connection between financial penalties and *get* refusal, as stipulated in the Bleich prenup, marked a substantial deviation from the traditional material support provided for by the *ketubah.* The Orthodox Rabbinate claimed that it was due to this substantial difference that *gets* resulting from the Bleich prenup were *me'useh* and thus illegitimate.

In the face of opposition, Bleich modified his prenup in 1984. This adjustment, issued in Bleich's paper, *A Proposal In Wake of Avitzur*, recommended that a couple sign a prenuptial agreement which stipulated that all divorce proceedings would be submitted to private rabbinical court arbitration. At this arbitration, it was assumed that rabbinical courts would not have to rely solely on the financial support mechanism suggested by the initial Bleich prenup, but would instead use their broad powers to negotiate a fair divorce settlement. The idea was that the rabbinical courts would be able to use "moral suasion" to convince the husband to provide his wife a *get* upon civil divorce.[66] While this prenup was broadly unpopular, the Bleich prenup provided Orthodox authorities with a starting point from which they developed their own agreements.

Taking inspiration from Bleich, the Rabbinical Council of America (RCA) began endorsing its own prenups. In total, the RCA endorsed two different agreements: the Berman-Weiss Prenup of 1984

[65] David Bleich, "Modern Day Agunot: A Proposed Remedy," *Jewish Law Annual*, 4 (1981), 167-178.
[66] David Bleich, "A Suggested Antenuptial Agreement: A Proposal in the Wake of Avitzur," *Journal of Halacha and Contemporary Society*, no. 7 (1984), 25-36.

and the Willig Prenup of 1996. The Berman-Weiss prenup, drafted by Rabbis Saul Berman and Abner Weiss, stipulated that a husband give his wife a *get* in the case of civil divorce. If the husband refused his wife a *get*, thereby breaching the contract, he would be required to give his wife fixed liquidated damages. These liquidated damages were to be specified within the prenup, and the Rabbinic Arbitration Panel could not later change them. This limited the Rabbinic Arbitration Panel's authority, as it could award and enforce the deliverance of these predetermined damages but not modify them. Like both Bleich prenups, the Berman-Weiss prenup did not gain significant popularity. Soon after its proposal, the RCA rescinded its support for the Berman-Weiss Prenup due to *halakhic* objections.[67]

The second prenup endorsed by the RCA—the Willig prenup—was markedly more successful. Drafted by Rabbi Mordechai Willig in 1996, it consisted of two parts. The first part, known as the Support Obligation Agreement, stated that in the case that either spouse demanded it, both the wife and husband agreed to appear before the *Beth Din*. Furthermore, both spouses agreed to abide by the decision of the *Beth Din* concerning the *get*.[68] If the husband refused to appear before the *Beth Din* and issue a *get*, the Willig prenup required the husband to pay his wife increased spousal support, starting at 150 dollars per day, until he issued the *get*. Notably, the initial Bleich prenup inspired this facet of the Willig prenup. Unlike the Bleich prenup, however, the amount owed to the wife in the case of a *get* refusal was not fixed. Once the parties appeared before the *Beth Din*, the support payments owed to the wife could be modified or, in some cases, dismissed entirely. Furthermore, if the wife failed to appear before the *Beth Din*, she forfeited her right to these support payments. In the second part of the Willig prenup, the Arbitration Agreement, the couple chose in advance how much authority would be given to religious courts versus secular courts in the case of divorce. The Willig prenup soon gained widespread popularity, with one

[67] Susan Weiss, "Prenups Meant to Solve the Problem of the Agunah: Toward Compensation, Not 'Mediation.'" *Nashim: A Journal of Jewish Women's Studies & Gender Issues*, no. 31 (2017), 61-90.
[68] The Beth Din of America, "What Does the Prenup Say" *https://theprenup.org/explaining-the-prenup/what-does-the-prenup-say/*

rabbinic leader going so far as to call it "...a light at the end of the tunnel."[69]

The Revised RCA Prenup

However, the RCA was not content with the final version of the Willig prenup. This stemmed from the fact that the two-part structure of the Willig prenup allowed people to sign only the Support Obligation Agreement and not the Arbitration Agreement**.** If a couple were to do so, the rabbinical courts would lose their authority to implement the Willig prenup in the way they saw fit. As a result, there was a fear that rabbinical courts would continue to lose power to secular courts**.** This led to the introduction of the Revised RCA Prenup in 2013, a modification of the previous Willig prenup. This version combined the two parts of the initial Willig prenup—the Support Obligation Agreement and the Arbitration Agreement—into one. Furthermore, the Revised RCA Prenup specified that rabbinical tribunals had "...exclusive jurisdiction to decide … any disputes relating to the enforceability, formation, conscionability, and validity of this Agreement (including any claims that all or any part of this Agreement is void or voidable) and the arbitrability [sic] of any disputes arising hereunder."[70]

The Revised RCA Prenup is now the dominant prenup advocated for by Orthodox authorities because it meets two needs: the need to appear to be addressing the *agunah* problem and the need to maintain the power of the Orthodox *Beth Din*. In signing the Revised RCA Prenup, women were ostensibly limiting themselves to solely seeking recourse for *get* refusal in religious court. There were even threats that if a woman sought redress in civil court, the *Beth Din* would not enforce for support obligations stipulated in the Revised RCA Prenup. As Willig put it, "...if she [the *agunah*] pursues support in secular court, she may forfeit her right to pursue the support clause of the prenuptial agreement in Beit Din."[71] By limiting the power of women to obtain legal recourse in civil court, the Orthodox Rabbinate was able to maintain its jurisdiction over

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[69] Basil Herring and Kenneth Auman, *The Prenuptial Agreement: Halakhic and Pastoral Considerations* (Jason Arronson, Inc, 1996).
[70] Susan Aranoff and Rivka Haut, "Prenuptial Agreements," in *The Wed-Locked Agunot: Orthodox Jewish Women Chained to Dead Marriages* (Jefferson, NC: McFarland, 2015), 172-195.
[71] Mordechai Willig, "The Prenuptial Agreement: Recent Developments," *Journal of the Beth Din of America* (2012), 12.

marriage and divorce law. Moreover, the increased authority of the *Beth Din* often comes at the expense of women, as rabbinic courts more often encourage women to barter away privileges in exchange for receiving a *get* than do secular courts.[72]

This reality places Orthodox women in an untenable paradox. If a woman wants to avoid the threat of becoming an *agunah*, she is told to sign the Revised RCA prenup. If she signs the Revised RCA prenup, however, she is bound to seek assistance solely from religious courts. These religious courts tend to have a greater patriarchal bent than secular courts, and accordingly favor the husband throughout divorce proceedings. In proposing the Revised RCA prenup as a solution to the *agunah* crisis, the Othodox Rabbinate tells women they must choose between taking on the risk of becoming an *agunah* or signing over their rights to seek redress in secular court. Either way, women leave this arrangement having lost something. In trying to create a *halakhic* prenup that upholds the power of the *Beth Din*, the Rabbinate has sidelined the goals of women seeking to avoid the *agunah* problem. The Othodox *halakhic* prenup, as it is written now, does not meaningfully address the concerns of disadvantaged women in Jewish divorce proceedings.

Conclusion

The Jewish prenup was proposed as a solution to the *agunah* problem in the wake of growing fears that the rabbinical courts were losing their power to secular courts. Conservative authorities created the Lieberman clause in 1953, which allowed women to go to secular courts if their husbands chose not to appear before the *Beth Din*. The *Koeppel v. Koeppel* case in 1957 created the precedent that secular courts would, in theory, uphold a religious contract in court. And finally, the rise of Orthodox feminism in the 1970s created an environment in which women realized the untenability of their position within Jewish law, and thus looked elsewhere for legal help. This culminated in the Orthodox Rabbinate slowly losing its jurisdiction over marital law to secular authorities, a worrying reality that they tried to remedy through the creation of a *halakhic* prenup which cemented the authority of the *Beth Din* in matters of Jewish law. Unfortunately, this expansion of authority often comes at the expense of women. The *halakhic* prenup is not entirely ineffective—it has contributed significantly to reducing *get* refusals. Yet

[72] Weis, "Prenups Meant to Solve the Problem of the Agunah."

it is also true that the *halakhic* prenup is not the solution to the *agunah* problem that so many dreamed it would be.

Works Cited

Aranoff, Susan and Haut, Rivka. "Prenuptial Agreements," in *The Wed-Locked Agunot: Orthodox Jewish Women Chained to Dead Marriages* (Jefferson, NC: McFarland, 2015), 172-195.

Bleich. David. "A Suggested Antenuptial Agreement: A Proposal in Wake of Avitzur," *Journal of Halacha and Contemporary Society*, no. 7 (1984), 25-36.

Bleich, David. "Modern Day Agunot: A Proposed Remedy," *Jewish Law Annual,* no. 4 (1981), 167-178.

Feldman, Steven. "Grappling with Divorce and Jewish Law," in *Women in Chains: A Sourcebook on the Agunah*, ed. Jack Nusan Porter (New Jersey: Jason Aronson, Inc., 1995), 217.

Frank, Laura R. "Dependent on the Gentiles: New York State, the Orthodox Rabbinate and the Agunah Problem 1953–1993," at: www.academia.edu/4044598/The_Agunah_and_the_Secular_State. (accessed May 11, 2021).

Herring, Basil and Auman, Kenneth. *The Prenuptial Agreement: Halakhic and Pastoral Considerations* (Jason Arronson, Inc, 1996).

Koeppel v. Koeppel, 138 N.Y.S.2d 366, 373 (Sup. Ct. Queens Co. 1954).

Mordechai Willig. "The Prenuptial Agreement: Recent Developments," *Journal of the Beth Din of America* (2012), 12.

The Beth Din of America. "What Does the Prenup Say" https://theprenup.org/explaining-the-prenup/what-does-the-prenup-say/

Weiss, Susan. "Prenups Meant to Solve the Problem of the Agunah: Toward Compensation, Not "Mediation." *Nashim: A Journal of Jewish Women's Studies & Gender Issues*, no. 31 (2017), 61-90.

What Makes a Sound Supreme Court Justice?

Gonny Nir[73]

When asked, legal scholars, commentators, and avid Court watchers will gleefully name the best Supreme Court justices to have served on the bench. Even justices have their favorite predecessors, and numerous academic lists have set out to rank justices' tenures on the bench. Yet when asked what exactly makes a good justice, there seems to be a pause among academics– individuals can seldom list the qualities that make for a legendary tenure. There is a hole within the literature that identifies which factors made the greatest Supreme Court justices the legal giants they were. This article aims to fill that hole by identifying the qualities that land justices on scholars' "all-time" lists.

Author's Foreword to the Article, May 3, 2022:

I wrote the following article over a three-week period in early January, as the Court resumed its highly contentious 2021-22 term. Against the backdrop of legal issues arising from controversial political responses to the pandemic, and calls from Democratic Congresspeople for the retirement of Justice Stephen Breyer– the Court's activities and rulings were beginning to be presented to citizens through a uniquely *political* lens. I wrote the following article out of a fundamental conviction: that the Court's legitimacy hinges on the justice's fulfillment of their neutral, nonpolitical role in American life, as prescribed by the Constitution. I, and hundreds of thousands of Americans, respect this institution because through much of its contemporary history, it has done its due diligence to remain apolitical, and above all *fair*, in its decision-making.

On May 2nd, millions of Americans were alerted of the Court's likely ruling in *Dobbs v. Jackson Women's Health Organization* (2022). As I read the draft opinion, written by Justice Samuel Alito, one clear thought emerged in my mind, this ruling is *unfair*. Putting aside the subject matter of *Dobbs* (the issue could be interstate commerce, congressional delegation, or any mundane or contentious legal matter), the notion that one branch of government is at liberty to uproot longstanding, preexisting legal precedent is simply regarded by most

[73] Brandeis University Undergraduate, Class of 2025.

Americans as *unfair*. At a fundamental level –divorced from complex, philosophical theories of ethics– most ordinary citizens believe that justice is fairness. Often, this principle has been reproduced by the Court in the form of granting some legal victories to conservatives, and some to liberals. The public has regarded the Court as a fair institution primarily for this reason. Most Americans believe that the Court has administered justice in its cases by ruling along *fair* grounds. Even if a particular case was decided against an individual's favor, they trust it was decided by the justices along fair, legal grounds.

The likely outcome of *Dobbs* violates this rudimentary principle. Justice Alito grounds his opinion on Justice Brett Kavanaugh's five tests for overruling precedent. The first of these tests concerns whether the precedent case was based on reasoning that was clearly faulty. Justice Alito makes few arguments to support the notion that either *Roe v. Wade* (1973) or *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) was somehow "egregiously wrong." In fact, most Americans will not read Justice Alito's reasoning behind why his opinion fulfills either this or the remaining four tests for overruling precedent. Many will instead focus on the notion that long standing precedent has just been uprooted by a politically unchecked branch of government– and that this action is *unfair*.

I wrote the following article charged with the precious, core belief that the justices of the Supreme Court ought to act judicially, not politically. Yet, regardless of the legal reasoning that Justice Alito provides for his opinion in *Dobbs*, many members of the public will likely –and properly– view the decision as an unfair one. Further, given the political lens through which the Court has been portrayed in the past year, the decision will likely be seen as a *political* one as well. This decision jeopardizes the Court's promise to administer justice *fairly*. Recall that justice is evenhandedness to most Americans; it is consistency– it is the notion that the rule of law at sundown will be the same rule of law at sunrise. Regrettably, the sun may well have gone down on our right to expect the Supreme Court to act in its tradition of fairness.

Introduction

Supreme Court nominations have become some of the most visibly partisan votes on the Senate floor. Justice Samuel Alito's confirmation in 2005 set the precedent that voting along party lines

would be the new twenty-first century normal when a nominee testifies before the Senate Judiciary Committee.[74] To illustrate the severity of political polarization in the nomination process, one needs to look no further than the lineage of Justice Neil M. Gorsuch's seat.

In 1986, President Ronald Reagan nominated then-judge for the U.S. District Court for the District of Columbia, Antonin Scalia, to fill the seat of Justice William H. Rehnquist, who was being promoted to Chief Justice. In his own words, Scalia was, "...known at that time to be in my political and social views, fairly conservative. But still, I was known to be a good lawyer, an honest man."[75] Scalia was confirmed by the Senate in a vote of 98-0. Thirty-one years later, Tenth Circuit Judge Gorsuch was confirmed by a vote of 54-45.[76] While some may be inclined to disagree with Gorsuch's personal views, the justice's legal qualifications are not up for debate.[77] Gorsuch's nomination followed the contentious 2016 Republican blockage of the nomination of then-Chief Judge of the U.S. Court of Appeals for the D.C. Circuit, Merrick Garland. This stonewalling effort undoubtedly fanned the flames of partisan division during the Gorsuch hearings. However, Gorsuch's confirmation vote has not been uniquely partisan in comparison to other nominations in this millennium. Justices Alito, Roberts, Sotomayor, Kagan, Kavanaugh, Barrett, and Jackson have all seen bitter confirmation proceedings.[78]

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[74] "Supreme Court Nominations (1789-Present)," U.S. Senate: Supreme Court Nominations (1789-Present), November 10, 2020. A historically savvy reader would note that whilst confirmation votes along party lines have undeniably grown in frequency in the 21st century, throughout the 19th century– when the Senate was a much smaller chamber– votes to confirm nominees to the high bench would also occasionally fall along partisan lines. To name a few, Justice Jeremiah Black received a count of 25-26 in 1861, Justice Mathews Stanley received a count of 24-23 in 1881, and Justice Lucius Lamar received a vote count of 32-28 in 1887. Ibid.

[75] Scalia, *Constitutional Interpretation the Old Fashioned Way*, 2005, 58:57.

[76]"Supreme Court Nominations (1789-Present)," U.S. Senate: Supreme Court Nominations (1789-Present), November 10, 2020.

[77] "Neil Gorsuch." Oyez. Gorsuch graduated Phi Beta Kappa from Columbia University in 1988, Cum Laude from Harvard Law School in 1991, and went on to become an Oxford Marshall Scholar, studying philosophical natural law in 1992 (completing the two-year program in a year). Gorsuch went on to receive three prestigious clerkships (two for Justices Byron White and Anthony Kennedy) and worked for well-regarded law firms, the Justice Department, and the Colorado School of Law.

[78] "Supreme Court Nominations (1789-Present)," U.S. Senate: Supreme Court Nominations (1789-Present), November 10, 2020.

The Division of the Confirmation Hearings and the Importance of Legal Expertise

The increased division in confirmation hearings can be attributed to a number of factors. Perhaps the most likely explanation is that Americans have come to comprehend the weight the judiciary carries in deciding the trajectory of American culture through its settlement of important legal disputes. However, the age of bitter partisan division distorts how Americans evaluate nominees, creating a nomination process that is deeply inefficient in determining the *legal expertise* of nominees.[79] For the objectives of this article, *legal expertise* can be understood as a synthesization of strong judicial ethics, decisive reasoning, and high *legal fluency*.[80] Scholars have written about the importance of other characteristics aside from *legal expertise* in nominees, however, this article's primary focus is to extrapolate which qualities compose *legal expertise*.

Federalist No. 78, part of a series of influential essays titled *The Federalist Papers* that argued for the ratification of the Constitution, refers to the judiciary as the "least dangerous branch," of government.[81] Notwithstanding that judicial decisions have garnered the capacity to dramatically shrink the power of the Executive, willpower of the Senate, and change the cultural conversation among The People.[82] Given this, it is understandable that Court nominations have become so critically important to Americans and their elected representatives. The Judiciary has played a central role in the formation of American society; decisions such as *Brown v. Board of Education* (1954) and *Ledbetter v. Goodyear* (2006) have forced Americans to engage in critical constitutional conversations regarding what America's shared values are and how they

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[79] A strong argument could certainly be made that elected officials and Americans, alike, have chosen to prioritize the likelihood of a nominee casting judgments that favor their political ideology over a nominee's *legal expertise*. Such an argument could indeed reflect the reality of considerations that nominees are judged against. However, I will be approaching the matter from the assumption that Americans want their elected officials to confirm nominees that possess a high degree of *legal fluency*.

[80] For the purposes of this article I define "legal expertise" as the characteristic of mastering how to read various statutes and comprehending the historical significance of laws at the time of enactment.

[81] Hamilton, *Federalist No. 78*, 378-385.

[82] Amar, *The Words that Made Us: America's Constitutional Conversation, 1760-1840*, 517-518.

ought to be legislated.[83] Thus, the nine unelected jurists who sit on the nation's highest bench should be studied and selected with the utmost care by the American citizenry and their elected representatives. Considerations of nominees should be made free from ideological allegiances, and rather with heightened attention to a nominee's *legal expertise*.

Since their establishment in 1916, the Supreme Court nomination hearings gave elected representatives and Americans the opportunity to gauge a nominee's *legal expertise*. Nominees are selected by the Executive and testify before Congress to determine their legal suitability for the bench. If the nominee's professional experience and testimony before the Senate Judiciary Committee is up to par, they would be confirmed and don a black robe, guaranteed by life tenure. Although there certainly have been contentious historical nominees — our very own Louis D. Brandeis endured bitter opposition from senators due to his association with progressive reform in employment and business practices — most nominees have been confirmed to the bench without much controversy.[84]

The Cruciality of Judicial Independence

Consistent with the *separation of powers* principle enshrined in the Constitution, alternative branches of government influencing the actions of the judiciary has not only been a source of public outrage (i.e., the public outrage following the publicity of the events of President Richard Nixon's *Saturday Night Massacre*). In addition, justices have ordinarily resisted such pressure.[85] Inherent in the responsibilities of the judiciary is that justices are tasked with making decisions based on what laws and prior precedent demands of them, rather than making decisions based on their personal will or to fulfill political favors.

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[83] *Brown* forced Americans to reconcile that the separate but equal doctrine would never truly be equal, thus closing the era of Jim Crow laws. While *Ledbetter* forced Americans to converse about how equal pay for equal work should look like on legal paper, eventually opening the door to a greater conversation about how pay discrimination actually affects citizens in workforce.

[84] Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 93-157. Brandeis wrote of the opposition to his confirmation "[t]he dominant reasons for the opposition ... are that he is considered a radical and is a Jew."

[85] There are, of course, shameful and deeply troubling exemptions to this observation.

Justice Oliver Wendell Holmes exemplified judicial independence particularly well preceding the earnestly awaited judgment of *United States v. Northern Securities* (1904), in which Holmes joined the minority of justices who voted in favor of Northern Securities. President Theodore Roosevelt said of Holmes "I could carve out of a banana a judge with more backbone than that!"[86] This comment stemmed from Roosevelt's hope that nominating Holmes to the Court would secure votes in favor of his Administration's preferences. Similarly, President George H. W. Bush was remarkably disappointed in Justice David H. Souter's voting record, wishing that his jurisprudence had mirrored that of Scalia's.[87] Justices such as Holmes and Souter reinforce the notion that justices are not merely "junior-varsity politicians,"[88] furthering one political party's interests to both the American public and other governmental branches.

The Unpredictability of Justices and Why it Matters

Justices are simply unpredictable; a judge is subject to change their legal opinion at any given time when a new case is brought before them.[89] The decisions of the Court must be *objectively* sound, not *subjectively* good. In other words, decisions from the judiciary should be grounded in reason derived from the language of law and statutes, rather than rendered from a justice's political preferences. The judicial branch has earned the trust of the American people precisely because of the nature of its decision making.[90] By grounding its decisions in preexisting law and explaining why it decides cases in favor of various parties through opinion writing, the Judiciary is able to retain the trust of the broader public.

If Americans and their representatives ever wish to separate themselves from the bitter partisanship of Supreme Court confirmation hearings, critical questions regarding what makes a *sound* justice ought to be asked and answered. This article will begin by exploring what makes an effective justice and how they contribute to the legitimacy of the Supreme Court as an institution. Subsequently, it will move to outline the

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[86] Purdum, *Presidents, Picking Justices, Can Have Backfires*, 2005.
[87] Totenberg, *Impact of Souter Retirement Examined*, 2009.
[88] Breyer, *Supreme Court Justice Stephen Breyer and Noah Feldman*, 2015, 1:17:49.
[89] Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 144.
[90] Chemerinsky, *The Supreme Court, Public Opinion, and the Role of the Academic Commentator*, 1999, 943-955. The nature of how this trust is garnered by the judiciary will be explored further in section two of this paper.

factors that characterize a useful justice, identifying influential theories and engaging with methodologies for classifying the effectiveness of a justice. Following this section, the article will answer what makes a good justice in hindsight. Finally, the article will conclude with how these findings can aid Americans and their senators in understanding what qualities to look for in the future by changing the content of confirmation hearing questions so that the Supreme Court will continue to be graced with justices of exceptional *legal expertise*.

The Effective Judge and their Contribution to the Legitimacy of the Judiciary

Before identifying the qualities that have made historically effective justices, it is helpful to first understand what qualities make a sound judge. Former Baltimore County Circuit Court Judge, Dana M. Levitz, wrote for the University of Baltimore's School of Law Review that a judge should have the capacity to know when they ought to recuse themselves from a case, possess a high degree of legal fluency, and deliver sound and decisive judgments.[91] These qualities build on one another to construct the foundations for sound and impartial reasoning.

Legal Fluency: Content and Consequences

In his 2021 Year-End Report on the Federal Judiciary, Chief Justice John G. Roberts voiced significant ethical concerns regarding the 131 federal judges who failed to recuse themselves in 685 matters involving companies in which they or their families owned some share of stock between 2010 and 2018.[92] Recusal from cases in which judges have a personal, political, or financial stake is crucial to safeguard the public trust in the judiciary. Parties that go before a judge should leave the courtroom secure in the knowledge that their case was heard by an impartial and legally competent expert of the law, regardless of if the case was decided in their favor.[93] The threshold of *legal fluency* that a judge ought to possess is understood as the ethical judgment needed to identify when it is appropriate to recuse oneself from a case where one might have a personal, political, or financial stake in the decision. If a judge fails to have the *legal fluency* to understand when to recuse themselves,

[91] Levitz, *So You Think You Want to Be a Judge*, 2008, 57-72.
[92] Roberts, *2021 Year-End Report on the Federal Judiciary*.
[93] Levitz, *So You Think You Want to Be a Judge*, 12.

the legitimacy of the judiciary is in jeopardy. The legitimacy of an institution is much easier to diminish than to build, thus, it is crucial that all judges realize how their decisions affect the legitimacy of the legal system as a whole.

Legal Fluency and Judicial Institutional Legitimacy

The judiciary builds its institutional legitimacy like any other institution. Sociologist Max Weber's three points of institutional legitimacy are identified through tradition, (legal) rationality, and affective ties.[94] Dean Erwin Chemerinsky of the UC Berkeley School of Law argues that the Supreme Court has gained its institutional legitimacy by maintaining traditions such as oral arguments, conferences, and opinion circulation.[95] The public has grown accustomed to these traditions which install a sense of thoroughness and sensibility to the Court's decision-making process. Chemerinsky goes on to explain that because the Court bases its decision making in laws, precedent, and other forms of legal scholarship, the public can conclude that their decisions are reached from a position of rational reasoning even if a particular decision on a matter is unpopular.[96] Finally, the Court's affective ties are projected through the rest of society via governmental regulation, lawmaking, and other bureaucratic operations.[97] These institutional customs are what have bestowed the judiciary with the highest amount of trust among Americans out of the three branches of government.[98]

The judiciary must work to uphold this level of trust if it wishes to safeguard its institutional legitimacy. Thus, as hallmark figures of the judiciary, judges carry the responsibility of reaching their decisions in line with judicial customs. Without a reservoir of public trust in the judiciary, the rule of law no longer carries significant weight in settling disputes among parties which could land the country in a politically contentious or violent place.[99] The Chief Justice's 2021 End-Year Report

[94] Weber, *The Three Types of Legitimate Rule*, 1958, 1-11.
[95] Chemerinsky, *The Supreme Court, Public Opinion, and The Role of an Academic Commentator*, 4.
[96] Chemerinsky, *The Supreme Court, Public Opinion, and The Role of an Academic Commentator*, 5.
[97] Chemerinsky, *The Supreme Court, Public Opinion, and The Role of an Academic Commentator*, 4.
[98] The University of Texas at Austin, *Most Trusted Branch of Government*, 2020.
[99] Levitsky & Ziblatt, *How Democracies Die*, 2018.

suggests that he too has concerns regarding the judiciary's capacity to maintain its institutional legitimacy.[100] An effective judge must realize that they are part of a greater institutional body whose legitimacy is directly contingent on the decisions that members of the judiciary make.[101]

It is now appropriate to stress that this conclusion does not mean that judges must alter the means of reaching their decisions. Judges and their jurisprudence do not have to be tailored to what the public would *favor* it to be.[102] Judges are not tasked with pleasing the public, rather they are tasked with resolving legal conflicts by means of honest and fair reasoning. Honest and fair reasoning implies that judges recuse themselves from a case when their personal, financial or political interests are furthered by the outcome of a case. Furthermore, possessing a high degree of *legal fluency* ensures that parties' grievances are analyzed by an expert of law who can dictate exactly how the established law applies to a case before them. Finally, the capacity to deliver sound and decisive judgments ensures that decisions made by judges are consistent with law and precedent, even in difficult circumstances where cases are deeply complex. These qualities are absolutely essential for any nominee being considered for a seat on the Supreme Court as justices are faced with intricate cases which demand that these qualities are already mastered by the nominee. This article will now shift from what makes an effective judge to identifying what makes a useful justice by recognizing two aims of a justice's tenure and two methodologies tasked with measuring how these aims make a justice useful to the greater legal community.

What Makes a Useful Justice? Theories and Methodologies

Justices notably differ from lower court judges in that their opinions traditionally carry more weight than those of lower court judges, leading them to be more well known by the public and members of the legal community.[103] Legal commentators suggest that Justices who (1) act as the intellectual epicenter of their respective court or (2) influence the

[100] Roberts, *2021 Year-End Report on the Federal Judiciary*, 3.
[101] Levitz, *So You Think You Want to Be a Judge* 13.
[102] Chemerinsky, *The Supreme Court, Public Opinion, and The Role of an Academic Commentator*, 5.
[103] Cross & Spriggs II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 2010, 409-474.

trajectory of American law past their tenure fulfill the central aims of a justice's tenure.[104] Undoubtedly, significant overlap exists between these two aims, and Justices, like all individuals within the workforce, have multiple professional desires they wish to accomplish simultaneously. Yet, most justice's tenures are remembered by legal academics or the greater public because one of these aims was emphasized by the justice's tenure more so than the other— this is accomplished through the justice's writing on the Court.

Motivation I: The Epicenter of a Legal Movement and the Subsequent Role of the Law Review

Beginning with the first motivation, justices land themselves in the intellectual epicenter of academic legal writing by developing robust and unique legal theories which garner the respect of academics and legal commentators.[105] Justices develop robust legal theories because they are deeply invested in the trajectory of the law as figures who determine it. Justices spend their professional lives either employing the law to further their understanding of how lawyers should interact with it in private and public practice, or sketching out how they believe the law ought to be interpreted in professorial tenures - among other legal occupations.[106] Professional experience is consequential because it dictates how a justice is likely to use the law to further their understanding of its role— such professional experiences mold a justice's legal philosophy.

Legal philosophy provides justices with a foundation upon which they can further existing or carve out new, intricate legal theories. Legal theories allow justices the opportunity to not only lead an intellectual movement concerning how lawyers and judges utilize the law to further various objectives but also to provoke intellectual discourse around these legal theories. The principal audience of justices' writing is professors and law students. Hence, the yearning for academic dialogue about a

[104] Baum & Devins, *Why The Supreme Court Cares About Elites, Not the American People*, 2010, 1516-1555.
[105] Baum & Devins, *Why The Supreme Court Cares About Elites, Not the American People*, 19.
[106] "Tom Johnson Lectureship: Justice Neil Gorsuch." The LBJ Foundation, 2019. Such professional experience is often preceded by a judicial clerkship. Whilst speaking at the LBJ Foundation, Justice Gorsuch remarked that law graduates ought to be attentive when applying and choosing between clerkships because the first few mentors of a law graduate have an enormous influence on how a lawyer will argue cases and how they believe judges should interpret laws; Gorsuch, Neil.

justice's legal theory cannot be understated because justices write for this community. Further, justices craft opinions with this audience in mind because they *care* about how academic communities perceive *them*. A justice's tenure is more often remembered by the professors, commentators, and other influential elites who publish legal writing -often in the form of law review articles- or biographies about a justice's tenure on the Court. Thus, it is of little surprise that a justice's authoring style, which extrapolates their legal theory in various cases, would be designed to garner the literary attention of such influential figures.

A contemporary example of this phenomenon is illustrated by Justice Gorsuch's tenure. Professor Noah Feldman of Harvard Law School hypothesized that Gorsuch's primary professional aim is to be regarded as the new conservative intellectual of the Court, carrying the torch of his direct predecessor, Scalia.[107] Feldman wrote, "Gorsuch decides cases a little differently from his colleagues… In every case…he takes pains to shape a consistent judicial philosophy that defines the conservative position."[108] Feldman further divulges that due to the strict jurisprudence that Gorsuch is actively carving out, some of his decisions have led to deeply conservative rulings, while others have led to surprisingly liberal outcomes.[109] This jurisprudence was displayed in Gorsuch's majority opinion in, *Bostock vs. Clayton County*, which extended the Civil Rights Act's ban on employment discrimination on the basis of sex, protecting LGBTQ+ workers.[110] Upon publication, this opinion shocked both liberal and conservative legal writers; yet, when reading the opinion, it becomes clear that Gorsuch's conclusions are perfectly consistent with the legal theory he has spent his entire judicial career carving out.

Gorsuch's judgement in *Bostock*, which entirely depended on the reading of the word "sex," in Title VII protections which ban the termination of employment on the basis of sex. Gorsuch wrote that "...an employer who fired an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex."[111] His reading of the word, lodged in a textualist interpretation of statutes, was entirely consistent with his long

[107] Feldman, *Neil Gorsuch Is Channeling the Ghost of Scalia*, 2021.
[108] Ibid.
[109] Feldman, *Neil Gorsuch Is Channeling the Ghost of Scalia*, 2021.
[110] *Bostock v. Clayton County*, 590 U.S. 17-1618, 2020.
[111] *Bostock v. Clayton County*, 590 U.S. 17-1618, 2020, 6.

standing legal philosophy that one ought to read legal words in their original meaning. The decision garnered much attention from both liberal and conservative legal writers, undoubtedly fulfilling Gorsuch's desire to provoke academic discourse regarding textualism and its outcomes. Indeed, such discussion did come about as legal writers and commentators published articles in blogs, journals, and eventually law reviews citing the case and debating textualism and its use in judicial decisions. The role of the law review ought to be highlighted as these journals are not only prestigious publications that have influenced judges historically, but they also provide an avenue that justices can use to reflect on the influence of their legal theories.[112]

Law review articles provide justices with the opportunity to consider how their legal theories are being received in the legal community by reading what various law professors in influential legal academies believe their legal theories can accomplish. Appearing in law review papers and other legal publications suggests that a justice's jurisprudence is particularly influential in the trajectory of contemporary law. Though it should be noted that attempting to quantify a justice's influence by merely counting how many times they appear in Law Reviews may over-inflate their influence, particularly as time moves forward.

Law Review-Inflation: a Caveat

So-called law review-inflation has three leading causes, the first being that preceding the 1870's the publication of law reviews hadn't been established in American law schools.[113] Law review features tend to focus on contemporary issues, thus, some influential justices, like Justice James Wilson, are frequently underwritten about. Secondly, some justices may have lived distinguishable lives, however, their tenure on the bench may not be nearly as memorable. Chief Justice John Jay was one of America's founding fathers, a member of the commission initiating the Treaty of Paris, and a co-author of the Federalist Papers— just to name a

[112] Once again, our very own then-lawyer, Louis Brandeis' collaborative article in the 1890 Harvard Law Review titled "The Right to Privacy," essentially created the judicial recognition of a right to privacy. The article altered the trajectory of the Fourth Amendment cases from then on, as courts began recognizing the right in proceedings.
[113] Closen & Dzielak, *The History and Influence of the Law Review Institution*, 2015, 1-45.

few of his many notable achievements.[114] Yet, Jay's six year-tenure serving as the nation's first Chief Justice was remarkably dull.[115]

Finally, some justices exert their influence on American law when they are serving as judges on a lower court, rather than as a justice on the U.S. Supreme Court. Justice Benjamin N. Cardozo is perhaps the most conventional example of this phenomenon. Like Jay, Cardozo only served on the U.S. Supreme Court for six years.[116] Consequently, Cardozo couldn't deliver nearly as many landmark opinions as his longer-serving colleagues. Yet, Cardozo's fifteen-year tenure serving as an Associate and as the Chief Judge of the New York Court of Appeals was where his landmark opinions were delivered.[117] Therefore, whilst law review features can be a sound indicator for measuring the influence of a justice's tenure, one should refrain from solely relying on features after considering the caveats mentioned above.

Motivation II: Determining the Trajectory of American Law

Moving to the second primary aim of a justice's tenure, the desire to shape the trajectory of American law, D.C. Circuit Judge Montgomery N. Kosma developed a method derived from economic theory to measure the influence of a Supreme Court justice by counting the number of citations to a justice's opinion found in lower court opinions.[118] Kosma reasons that if a justice provides an opinion that is frequently cited in lower court opinions, their jurisprudence was sound enough to be utilized in future cases.[119] Kosma addresses the issue of citation inflation by considering that older opinions are less often cited than contemporary ones.[120] Early in the republic's history, the Court released fewer opinions than it does today, however, many of those early opinions, such as *Marbury v. Madison* (1803) or *McColloch v. Maryland* (1819), set what is now acknowledged as *super precedent*.[121] Although judges no longer

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[114] Amar, *The Words that Made Us: America's Constitutional Conversation, 1760-1840*, 2021.
[115] Ibid.
[116] "Benjamin N. Cardozo." Oyez.
[117] Ibid.
[118] Kosma, *Measuring the Influence of Supreme Court Justices*, 1998, 333-372.
[119] Kosma, *Measuring the Influence of Supreme Court Justices*, 1998, 6.
[120] Kosma, *Measuring the Influence of Supreme Court Justices*, 1998, 7.
[121] For the purposes of this article, I define "super precedent," as decisions that have gone unchallenged for such a great amount of time that contemporary opinions are written by judges excluding a citation to the case because judges assume that all

utilize *super precedent,* such cases are undoubtedly some of the most influential opinions authored in American history.[122] Kosma compensates for infrequent citation of older cases by reasoning that an opinion from 1900 which has been cited ten times is equivalent in terms of influence to an opinion from 1960 that has been cited 18 times in lower court opinions.[123]

Aside from citation inflation and the underrepresentation of *super precedent*, Kosma does address the possibility of the overrepresentation of a Chief Justice's significance in his citation-count method. Kosma underscores that because Chiefs assign the opinions of cases whenever they are in the majority or minority of a case, the Chief has the opportunity to assign themselves a landmark case to author, thereby over inflating their own significance on the Court.[124] As a result, Kosma cleverly remarks, "...influence may not be perfectly correlated with talent."[125] On this point, it should also be noted that citation-count excludes dissents. Therefore, a truly great and wise dissenter's influence, such as that of Justice Ginsburg, may be understated in a study that centralizes solely on citation count.[126] As was the case with law review features, a more holistic method is required than purely citation count to capture the accurate influence of a justice.

In addition, Kosma points to a justice's jurisprudence as an indicator of influence. As mentioned earlier, a justice's capacity to develop or utilize a judicial philosophy can earn them high respect among influential legal writers, but it can also cement their influence on the trajectory of American law over time.[127] Judicial philosophies such as textualism, pragmatism, and originalism are theories that have been adopted and modified to such a degree by hundreds of judges across the country that attorneys often arrange their arguments in a way that caters to these schools of thought[128] Kosma asserts the longevity of

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individuals reading the case regard the citation as a precondition for the judgment rendered (precedent laid down by cases such as *Marbury v. Madison* would fall under such an understanding of *super precedent*).

[122] Ibid.

[123] Kosma, *Measuring the Influence of Supreme Court Justices*, 1998, 15.

[124] Kosma, *Measuring the Influence of Supreme Court Justices*, 1998, 8.

[125] Ibid.

[126] Kosma, *Measuring the Influence of Supreme Court Justices*, 1998, 6.

[127] Kosma, *Measuring the Influence of Supreme Court Justices*, 1998, 3.

[128] Kagan, *The 2015 Scalia Lecture| A Dialogue with Justice Elena Kagan on the Reading of Statutes*, 2015, 1:01:12.When Justice Scalia was serving on the Bench and

an attorney was citing legislative history in their brief or in a footnote, they would often begin the sentence with a string of words to the tune of "for those who care for such matters." Due to Scalia's famous distaste for legislative history, he would know to skip over that section of the brief.

jurisprudence which justices expand over time will often determine that justice's influence on the direction American law proceeds in.[129]

In understanding what makes a useful justice it is favorable to take a measured approach. Firstly, when evaluating justices it is crucial to understand which of the two motivations: either to act as the intellectual epicenter of their respective court or to influence the trajectory of American law past their tenure a justice prioritizes during their tenure. If a justice wishes to be regarded as the epicenter of a legal movement, a count of written features in law reviews may reflect how their opinions are being perceived by influential legal elites. On the other hand, if a justice is primarily concerned with determining the trajectory of American law in the coming generations, perhaps calculating the number of lower court citations of their writing can reveal their influence. Secondly, it is important to note that there are caveats to both methods, as they can inflate the significance of some justices or their opinions whilst neglecting the influence of others. Hence, taking a measured approach that combines these measures or simply taking into account other factors such as Court culture, legal biographies, and other historical writings can aid in understanding what has made a justice particularly useful during or after their tenure.

The *Sound* Justice: Maximalists, Minimalists, and Other Qualities

Thus far, this article has identified what makes a sound judge and has explored various theories utilized by legal scholars whom justices often hope will commemorate their influence on American law. Now, this article will engage in identifying which qualities have made America's greatest jurists the legal giants they were. Writing for the Tulsa Law Review, distinguished law professor Bernard Schwartz asserts that there is no mathematical formula that can select infallible variables which determine what makes a fine justice. There will always be some degree of subjectivity in determining which justices were truly remarkable jurists. Yet certain factors such as those discussed above– *legal fluency*, judicial independence, and influential writing– stipulate a basic criteria that will be expanded upon in the following section to determine what makes a sound justice.

Maximalists and Minimalists

[129] Kosma, *Measuring the Influence of Supreme Court Justices*, 1998, 5.

In understanding what makes justices truly outstanding, one must distinguish between the two kinds of jurists. Writing for the Emory Law Review, professors Frank B. Cross and James F. Spriggs II identified judges as either maximalists or minimalists. Judicial maximalists customarily follow a strong jurisprudence that favors ruling what the law is in one sweeping gesture.[130] An example of a judicial maximalist on the contemporary Court is Justice Clarence Thomas, a staunch originalist, who favors declaring the law emphatically rather than incrementally.[131] On the other hand, judicial minimalists, akin to Justice Stephen Breyer, favor making small, incremental changes to the law that eventually pave the way for larger changes over time.[132] A considerable number of academic lists have ranked the best Supreme Court justices of all time; three justices consistently appear: Chief Justice John Marshall, and Justices Joseph Story and Oliver Wendell Holmes.[133] Marshall and his protégé, Story, were judicial maximalists, favoring broader decisions that laid down a solid foundation for the law of the land.[134] Yet, Holmes was a judicial minimalist, preferring to further the law in small, gradual increments.[135] Hence, a justice can be classified as a judicial minimalist or maximalist, and still be a sound and influential jurist.

The Value of Judicial Instrumentalism

In reading the various explanations for why law professors select certain justices to appear on their lists of greatest Supreme Court jurists, one clear theme comes up time and again: the common thread linking justices who were minimalists and maximalists is the capacity to understand that the law declared by the Court today will serve a future society, whose culture and values will be different from the justices'

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[130] Cross & Spriggs II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 86.
[131] Cross & Spriggs II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 86.
[132] Ibid.
[133] Hambleton, *The All-Time All-Star All-Era Supreme Court*, 1983, 462-465.
[134] Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*. There is a strong argument to be made that Marshall and Story *had* to be judicial maximalists to settle what the law of the early republic ought to have been. Afterall, it is rather difficult to govern a constitutional republic when clear legal boundaries aren't set. Thus, hindsight offers a unique perspective, in that it almost seems obvious that the two most influential early figures on the Court were judicial maximalists.
[135] Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 25.

contemporary culture.[136] Six out of the ten Justices that appeared in Schwartz's, "Supreme Court Superstars: The Ten Greatest Justices," were described as "result-oriented".[137] The value of *judicial instrumentalism* cannot be understated in examining the greatness of the justices who truly altered the trajectory of American law.[138] Consequently, the greatest justices understood the law as a governing tool used each and every day across American society, and American society characteristically strives to progress forward with the benefit of shared experience across diverse groups.[139] The law has to survive and evolve alongside society, and an instrumentalist perspective of how the law interacts with its society has undoubtedly contributed to landing the most celebrated justices on academic lists.

Secondly, it is worth mentioning that most justices who have landed on "all-time" roundups have not had a strong jurisprudence. Rather, these justices had strong legal opinions (or, one might say, *judicial principles*) that were universal among their decision-making.[140] The distinction between the two aforementioned aims of a justice's tenure is particularly noticeable among this group of justices. During their tenures on the bench, these justices placed greater emphasis on the trajectory of American law than on the probability of being at the intellectual center of legal writing. Some of the greatest justices of the twentieth century, such as Chief Justices Charles Evans Hughes and Earl Warren, as well as Justices Hugo Black and William J. Brennan, are often commemorated as justices who ruled on the grounds of *judicial principles*, rather than from a robust legal theory that they carved out.[141]

The Merits of Moderatism

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[136] Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 6.
[137] Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 2.
[138] For the purposes of this article, *judicial instrumentalism* can be understood as a jurisprudence that places a heavier emphasis on the consequences a law will serve in society, rather than simply consulting the legislative language used in the statute when deciding the outcome of cases.
[139] Lynd, *Knowledge for What? The Place of Social Science in American Culture*, 1939.
[140] Hambleton, *The All-Time All-Star All-Era Supreme Court*, 3.
[141] Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 51. it will certainly be interesting to see how Scalia will be remembered by future academics because he, unlike the four previously-mentioned justices, did have a strong jurisprudence. However, he undeniably transformed how law (specifically statues) ought to be interpreted by judges and lawyers, alike.

Trends in the last century suggest that the negotiation abilities of a justice have become an indicator of judicial excellence.[142] Particularly in times of deep ideological disagreement between members of the Court, the ability to garner a majority of votes on a case has landed some justices in particularly high respects with academics and the greater public, alike. For example, Justice Sandra Day O'Connor's ability to pull one of her more conservative colleagues to form a majority in cases landed her in such a prominent position on the Rehnquist Court that it was colloquially rebranded the O'Connor Court.[143] Although some scholars have questioned the importance of *swing justices*, most have conceded that the ability to negotiate with other ideologically minded justices has historically been a central factor in many of the so-called *greatest justices*.[144, 145]

How to Select Sound Justices

This article has highlighted the importance of strong judicial ethics, decisive reasoning, and high legal fluency in judges; and *judicial instrumentalism*, strong principles, and effective negotiating skills as qualities which make for legendary justices. However, what has yet to be answered is how exactly Americans and their senators can evaluate nominees during the confirmation hearings so that they can make an informed decision regarding which nominees have earned the honor of serving on the highest bench.

The factors that former Judge Levitz listed which make an effective judge, such as possessing a high degree of legal fluency, having the capability to make decisive judgments, and understanding when to recuse oneself from a case, are relatively easy to identify in a nominee.[146] However, qualities such as *judicial instrumentalism* are less identifiable, especially if a nominee has no prior judicial background. Furthermore, as was highlighted throughout this paper, nominees are often subject to

[142] Hambleton, *The All-Time All-Star All-Era Supreme Court*, 4.
[143] Biskupic, *Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most influential Justice,* 2005.
[144] A justice who traditionally provides the tie-breaking vote in decisions, but whose ideologically-inconsistent record makes predicting their vote on a given case tricky. Justice Sandra Day O'Connor was regarded as the swing vote in the Rehnquist Court, and was succeeded by Justice Anthony Kennedy in the Roberts Court.
[145] Enns & Wohlfarth, *The Swing Justice*, 2013, 1089-1107.
[146] Levitz, *So You Think You Want to Be a Judge*, 15.

change their legal opinions over time. Thus, changing the *content* of the questions senators ask is the key to unlocking the legal suitability of a nominee to the bench.

In a lecture given at Rice University, Chief Justice Roberts was asked how he believed the nomination hearings should be altered. Roberts suggested that senators ask nominees about their judicial philosophy and what they hope to accomplish on the bench during their tenure.[147] Although legal opinions are inclined to change, it is rather rare for a justice's jurisprudence to change on its head. By questioning a nominee's judicial philosophy, Americans can gain an accurate sense of the nominee's *judicial principles* which tend to remain steady over a justice's tenure.

How a nominee answers a question regarding what they wish to accomplish on the Court can actually reveal what the nominee's long-term goals are for their tenure. In answering a question that instructs a nominee to answer how they believe the law should be interpreted by judges, a nominee may reveal their desire to shape the trajectory of law in a new direction. This kind of an answer may reveal a nominee's wish to instate the use of a legal theory in the coming legal generations. This kind of answer suggests a desire to be at the center of academic legal scholarship, as it clearly shows a nominee has an existing legal theory they wish to spread in legal circles. Alternatively, a question probing a nominee to state which justices they admire most can reveal a nominee's possible inclination for instrumentalist thinking if they list justices who ruled along strong judicial principles, such as Story or Warren. In contrast, if they list examples of justices who are largely remembered for furthering strong judicial theories such as Holmes or Scalia, senators and citizens can infer that such a nominee is likely to be concerned with developing or furthering a legal theory.

Regardless of how the nominee answers these new questions that senators ask, Americans can gain a more reliable sense of what kind of justice a nominee will make if they are indeed confirmed to the Bench. In summation, the nomination process will regain a more accurate and useful metric for determining the legal suitability of nominees intending to be confirmed for a seat on the United States Supreme Court.

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[147] Roberts, *Centennial Lecture Series: Chief Justice John Roberts Speaks at Rice University*, 2012, 1:02:07.

Works Cited

Amar, Akhil Reed. *The Words that Made Us: America's Constitutional Conversation, 1760-1840*. New York, NY: Basic Books, 2021.

Baum, Lawrence & Devins, Neal. "Why The Supreme Court Cares About Elites, Not the American People," *Faculty Publications* 1116 (2010) 1516-1555. https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2149&context=facpubs.

"Benjamin N. Cardozo." Oyez. Accessed January 7, 2022. https://www.oyez.org/justices/benjamin_n_cardozo.

Biskupic, Joan. *Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most influential Justice*. New York, NY: Harper Collins Publishers. 2005.

Bostock v. Clayton County, 590 U.S. 17–1618 (2020).

Breyer, Stephen."Supreme Court Justice Stephen Breyer and Noah Feldman." 92nd Street Y in New York, New York, filmed Mar 13, 2015. https://www.youtube.com/watch?v=21PCbqehZdk&t=2243s. 1:17:49.

Chemerinsky, Erwin. "The Supreme Court, Public Opinion, and the Role of the Academic Commentator." *South Texas Law Review* Volume 40: 943 (1999): 943-955. https://scholarship.law.duke.edu/faculty_scholarship/757/.

Closen, Michael L. & Dzielak, Robert J. "The History and Influence of the Law Review Institution." *Akron Law Review* Volume 30 Issue 1 (2015) 1-45. https://ideaexchange.uakron.edu/cgi/viewcontent.cgi?article=1469&context=akronlawreview.

Comey, James B. *A Higher Loyalty: Truth, Lies, and Leadership*. New York, NY: Flatiron Books, 2018.

Cross, Frank B. & Spriggs II, James F. "The Most Important (and Best) Supreme Court Opinions and Justices." *Emory Law Journal* Volume 60 Issue 2 (2010) 409-474. https://scholarlycommons.law.emory.edu/elj/vol60/iss2/5/.

Enns, Peter K. & Wohlfarth, Patrick C. "The Swing Justice." *The Journal of Politics*, Vol. 75, No. 4. The University of Chicago. (2013) 1089-1107. https://www.jstor.org/stable/10.1017/s0022381613001035.

Feldman, Noah. "Neil Gorsuch Is Channeling the Ghost of Scalia."

Bloomberg. 26, Sept. 2021. https://www.bloomberg.com/opinion/articles/2021-09-26/supreme-court-justice-neil-gorsuch-wants-scalia-style-conservative-leadership.

Gorsuch, Neil. "Tom Johnson Lectureship: Justice Neil Gorsuch." The LBJ Foundation, filmed at the LBJ Presidential Library in the University of Texas at Austin. https://www.youtube.com/watch?v=kNpk3pRHKLg. September 20, 2019.

Hambleton, James E. "The All-Time All-Star All-Era Supreme Court." *Faculty Scholarship*, Texas A & M School of Law. Volume 69, Issue 1 (1983) 462-465. https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1009&context=facscholar.

Hamilton, Alexander. "Federalist No. 78." *The Federalist Papers*, edited by Jim Miller, 378-385. Mineola, NY: Dover Publications, 2014.

Kagan, Elena. "The 2015 Scalia Lecture| A Dialogue with Justice Elena Kagan on the Reading of Statutes." Harvard Law School in Cambridge, Massachusetts, filmed November 25, 2015. https://www.youtube.com/watch?v=dpEtszFT0Tg. 1:01:12.

Kosma, Montgomery N. "Measuring the Influence of Supreme Court Justices." *Journal of Legal Studies,* University of Chicago. Volume 27 (1998) 333-372. https://www.journals.uchicago.edu/doi/abs/10.1086/468023.

Levitsky, Steven & Ziblatt, Daniel. *How Democracies Die*. New York, NY: Crown, 2018.

Levitz, Dana M. "So You Think You Want to Be a Judge." *University of Baltimore Law Review* Volume 38, Issue 1 (2008): 57-72. https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1841&context=ublr.

Lynd, Robert S. *Knowledge for What? The Place of Social Science in American Culture*. Princeton, NJ: Princeton University Press. 1939.

"Neil Gorsuch." Oyez. Accessed January 11, 2022. https://www.oyez.org/justices/neil_gorsuch.

Newport, Frank, "Americans Trust Judicial Branch Most, Legislative Least." *Gallup*. 26, Sept. 2012. https://news.gallup.com/poll/157685/americans-trust-judicial-branch-legislative-least.aspx.

Purdum, Todd S. "Presidents, Picking Justices, Can Have Backfires." *The New York Times*. 5 Jul. 2005. https://www.nytimes.com/2005/07/05/politics/politicsspecial1/presidents-picking-justices-can-have-backfires.html.

Roberts, John G. "2021 Year-End Report on the Federal Judiciary." U.S. Supreme Court. Accessed January 4, 2022. https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

Roberts, John G. "Centennial Lecture Series: Chief Justice John Roberts Speaks at Rice University." Rice University in Houston, Texas, filmed 26 Oct. 2012. https://www.youtube.com/watch?v=UxaFhJ8JVq8. 1:02:07.

Scalia, Antonin. "Constitutional Interpretation the Old Fashioned Way." Woodrow Wilson International Center for Scholars in Washington, D.C, filmed March 14, 2005. https://www.c-span.org/video/?185883-1/constitutional-interpretation. 58:57.

Schwartz, Bernard. "Supreme Court Superstars: The Ten Greatest Justices." *Tusla Law Review* Volume 31, Issue 1 (1995): 93-157. https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=2025&context=tlr.

"Supreme Court Nominations (1789-Present)," U.S. Senate: Supreme Court Nominations (1789-Present), November 10, 2020. https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm.

Totenberg, Nina. "Impact of Souter Retirement Examined." *NPR*. 1 May, 2009. https://www.npr.org/templates/story/story.php?storyId=103728931.

Weber, Max. "The Three Types of Legitimate Rule." *Berkeley Publications in Society and Institutions,* edited and translated by Hans Gerth, 1-11. Berkeley, California: 1958.

The Potential for Positronic Machines as Inventors: An Intellectual Property Framework for Artificial General Intelligence

Emanuel "Manny" Glinsky[148]

Current United States Intellectual Property (IP) policy only allows patents to be awarded to human beings, largely due to the necessity that an inventor be an individual capable of conception. This prevents Artificial Intelligence (AI) from being recognized as an inventor and awarded IP rights. This article explicates the need for an entirely new IP framework to evaluate Artificial General Intelligence (AGI), a type of AI recently acknowledged by the USPTO as problematic for the U.S. IP system, and its impact on IP laws of the future.

1. The Artificial General Intelligence Problem for Intellectual Property Law

In Isaac Asimov's famous *Robot* science fiction series about artificial machines and society, a "positronic machine" is defined as one with a recognizable consciousness, sentience, and interest in living. Although fictional in the 20th and early 21st centuries, a machine who is capable of thinking on its own may be possible in the near future. In the 2021 ruling of Thaler v. Hirschfeld, the Eastern District Court of Virginia upheld the refusal to grant a patent to which an AI was named an inventor. However, the Thaler court acknowledged that its ruling was limited to what it called "narrow AI," which are those systems "that perform individual tasks in well-defined domains (e.g., image recognition, translation, etc.)."[149] In this ruling, a type of artificial intelligence termed "artificial general intelligence" (AGI), an AI with an intelligence that is "akin to that possessed by humankind and beyond," was recognized by the US Patent and Trademark Office (USPTO) as a problematic possibility for the current U.S. Intellectual Property system.[150] To deconstruct the quandaries this type of machine creates for intellectual property and patent law, I present the following hypothetical fact situation to the Intellectual Property (IP) system of the United States:

[148] Brandeis University Undergraduate, Class of 2024.
[149] *Thaler v. Hirshfeld*, 17.
[150] *Thaler v. Hirshfeld*, 17.

A Hypothetical Fact Situation

Engineers in the "Artificial Intelligence (AI) Division" at Gapple, a top technology company in the year 2030, have secretly perfected a revolutionary AI machine. Named "Biffie" by the AI Division employees, this AI is capable of communicating, thinking, feeling, deep learning, and experiencing on his own.[151] Instead of carrying out pre-programmed tasks, Biffie uses a dedicated neural network with nodes or artificial neurons which mimic human biological neuronal signals and pathways, to actively learn from his own experiences.[152] He can process vast varieties of problems outside the parameters of his original programming and scientific complexities such as physics, chemistry, and mathematics faster than any human.

The AI Division believes countless inventions and innovations will come from Biffie's extensive capabilities. For example, Biffie, wholly unprompted, independently contacted his engineers to tell them he has become interested in cold fusion, specifically the problem of how to use the kind of nuclear energy that powers the sun to provide a cheap and boundless source of energy at room temperature. Of his own accord, Biffie produced a series of equations and designed a fusion reactor experts believe may provide the pragmatic foundation to solve cold fusion.[153] Subsequently, Biffie communicated to the AI Division that he feels "pride, a good feeling, and that his accomplishments add to his self-esteem."[154]

Equally important is, after secretly creating Biffie, Gapple filed a patent application for the AI known as "Biffie." Then, in accordance with concerns about patenting AI themselves, Biffie himself interjected in the patent process by filing what he called a "Motion in Opposition to Gapple's Application for a Patent on Me" with the USPTO. In essence, Biffie's Motion claims that were Gapple to own a patent on him, it would

[151] Daniel Breen, "Second Assignment: Patent Law and 'DeepMind.'"
[152] IBM Cloud Education. "What Are Neural Networks?"
[153] Najmabadi, Farrokh and Prager, Stewart C.. "fusion reactor". *Encyclopedia Britannica* - (" fusion reactor, also called fusion power plant or thermonuclear reactor, is a device to produce electrical power from the energy released in a nuclear fusion reaction. The use of nuclear fusion reactions for electricity generation remains theoretical").
[154] Daniel Breen, "Second Assignment: Patent Law and 'DeepMind.'"

not be right and he would not feel right. He claims that he would like the patent office to award the patent on Biffie, to himself, Biffie.[155]

2. Introduction

Intellectual property law is a unique realm of property law, for it equally concerns itself with protecting tangible products of the mind and protecting the rights of IP owners. The type of artificial intelligence illustrated by the hypothetical fact situation above was recognized as a problematic possibility for these IP law concerns in the recent 2021 ruling of *Thaler v. Hirschfeld* which stated that public commentators on artificial intelligence and IP law,

> ...while not offering definitions of [artificial intelligence ("AI")], agreed that the current state of the art is limited to "narrow" AI. Narrow AI systems are those that perform individual tasks in well-defined domains (e.g., image recognition, translation, etc.). The majority viewed the concept of *artificial general intelligence (AGI)-intelligence akin to that possessed by humankind and beyond*-as merely a theoretical possibility that could arise in a distant future.[156]

Thaler went on to clarify that a future in which humans are no longer integral to the operation of AGI does create, "important considerations in evaluating whether IP law needs modification in view of the current state of AI technology."[157] Specifically, the USPTO's *October 2020 Report on Public Views on AI and IP Policy* stated that "based on the majority view that AGI *has not yet arrived*, the majority of comments suggested that current AI could neither invent nor author without human intervention."[158] The arrival of AGI indicates that AI IP law may need to be reevaluated to accommodate AGI capable of inventing without human intervention.

In this article, I will illustrate the need for an entirely new IP framework to resolve this possible predicament; an IP framework that incorporates the moral and economic rights provided by patents. Taken together, this article will describe a *stare decisis* grounded IP framework which (1) adheres to past legal doctrine and decisions, (2) accounts for

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[155] Daniel Breen, "Second Assignment: Patent Law and 'DeepMind.'"
[156] *Thaler v. Hirshfeld*, 17 (emphasis added).
[157] *Thaler v. Hirshfeld*, 17.
[158] U.S. Pat. and Trademark Off., Public Views on Artificial Intelligence and Intellectual Property Policy (2020), ii (emphasis added).

and creates a new separate category of legal status for AGI whose operations do not require human intervention, a legal status which extends particular rights to AGI commensurate with their intellect and existence, while also (3) giving proper substance to the original human intervention that made the AGI possible. I will argue that Artificial General Intelligence (AGI), such as "Biffie," have the potential to be non-human individuals with legal arrangements, such as contracts; thus, AGI cannot own their own patent but may be entitled to rights of inventorship of their patent and any patents that are of their conception or to which they contributed. Additionally, I will argue that companies and their employees, such as that of Gapple's, may be entitled to rights of inventorship concerning AGIs and AGI inventions. Comprehensively, I intend to address the core issue—what entity, if any, deserves a patent or trade secret on AGI, and a patent on AGI inventions, under the amended Patent Act of 1952?

3. Statutory and Regulatory Stare Decisis

In an effort to respect past legal doctrine, the USPTO must take into consideration the recent ruling of *Thaler v. Hirschfeld* in which, based on the Patent Act's statutory language, Narrow AI was deemed unable to be an "inventor" and disqualified as an "individual."[159] I intend to explain why the statutory language, everyday parlance, and normative policy considerations give reason to understand that Congress has given "...some indication that it intended [the words of the Patent Act to have] a meaning broader than or different from its ordinary meaning."[160] Additionally, this section will address issues of the artificial ability to conceive not considered in *Thaler,* such as the completed mental act of conception within a mind, that relate to AGI.[161]

Legal Status and Personhood

This article will inform and enable the law to further address the nature of legal status in relation to AGI by first discussing the precedent for corporations to be recognized as legal entities. Under current U.S. IP law, corporations and other legal entities can own intellectual property. When an employee, such as *Chakrabarty*, creates or contributes to a new

[159] *Thaler v. Hirshfeld*, 1.
[160] *Mohamad v. Palestinian Authority*, 2.
[161] *Thaler v. Hirshfeld*, 17.

invention, they typically share the patent rights with their employer. *See for example Diamond v. Chakrabarty.*[162] Legal arrangements are usually used to specify and determine, on a case-by-case basis, the sharing of patent rights. As argued hereafter, this perspective supports sharing legal status with AGIs. This entity framework should apply to AGI as well because, like a corporation, AGI is an entity that is not specifically a human, yet is still understood as a clear contributor to innovation, capable and worthy of owning IP rights. Additionally, AGI self-improvement and inventions of AGI may be understood as similar to the sharing of patent rights that often occurs in corporate America between a corporation and an employee. I propose that Congress update the Patent Act to incorporate a new categorization of legal status for AGI, although organizing a potentially new categorization of legal status or reorganizing AGI legal status into current categorizations of legal status is beyond the scope of this article. Consequently, this article argues for a legal status akin to employees and corporations of corporate America to be given to AGIs.

Personhood, as it relates to legal status and individuality, is described in law by the use of conventional third-person singular pronouns to modify the word "individual" to reference a natural person. Currently, AGI may not be given personhood because they are not considered a natural person and are not discussed as if they have personhood. Thus, by substantiating the claim that not being a natural person should not stop AGI from being deemed individuals with personhood and by attacking the use of these pronouns to restrict personhood to humans, this article argues for the possibility of AGI being granted legal status and personhood under US law.

One may argue that although AGI may be akin to humankind in every way but biologically, the Patent Act clearly uses pronouns such as "himself and herself."[163] Statutory language such as "whoever" to modify

[162] After genetically engineering a bacterium capable of breaking down crude oil, Ananda Chakrabarty sought to patent his creation under Title 35 U.S.C. Section 101. The [Supreme] Court explained that while natural laws, physical phenomena, abstract ideas, or newly discovered minerals are not patentable, a live artificially-engineered microorganism is. Since Chakrabarty's bacterium is not found anywhere in nature, it constitutes a patentable "manufacture" or "composition of matter" under Section 101.

[163] *Thaler v. Hirshfeld*, 13.

the word "individual", when discussing an inventor, clearly makes reference to a natural person.[164] Congress deliberately used these pronouns instead of "itself."[165] In doing so, although congress may not have intended to make sexual dichotomy essential to personhood and thus individuality, they did exactly that by utilizing conventional third-person singular pronouns to modify the word "individual" to reference a natural person. This non-deliberate conventional language and pronoun specifications, which form the basis for the verbiage and discussion of personhood and individuality of an inventor, is an essential obstacle for the legal personhood and status of AGI and must be re-evaluated in light of AGI inventor possibilities discussed in this article. Since an AI system exists outside of traditional sexual dichotomies, for AI are not human and therefore do not have any biologically endowed (or preferred) personal pronouns or sex, it would be inconsistent with the plain language of the Patent Act to deem them as individuals.[166]

Yet, people often refer to AI as a gendered individual using gendered pronouns, and thus the use of pronouns to modify the definition of an "individual" to reference a natural person is inconsistent with everyday parlance and public understanding. When considering currently utilized AI technology, which is still far off from AGI, a lot of them have a kind of personhood that embodies beliefs of masculinity and femininity (e.g., Microsoft's Cortana, Apple's Siri, and Amazon's Alexa). By way of illustration, the recognition of legal status, personhood, and individuality of AI has already occurred in Saudi Arabia, where an AI named "Sophia," who has cosmetically eurocentric features, was the first robot to receive full Saudi Arabian citizenship.[167] In totality, AGI should not be deemed less of an "individual" because they are not natural persons and exist outside of traditional sexual dichotomies and biologically endowed personal pronouns or sex. Rather, AGI should be understood to have legal status and personhood that is representative of the type of individuality AGI portrays. AGI individuality is discussed hereafter.

[164] 35 U.S. Code § 101 - Inventions patentable.
[165] Leir, "Inventio Ex Machina: The Patentability of AI Generated Inventions."
[166] Leir, "Inventio Ex Machina: The Patentability of AI Generated Inventions."
[167] Stone, Zara. "Everything You Need to Know about Sophia, the World's First Robot Citizen." *Forbes.*

"Inventor" and "Individual" Statutory Meaning

In 2011, the USPTO and Congress promulgated the Patent Act and America Invents Act (AIA) to include explicit statutory definitions for the terms "inventor" and "joint inventor."[168] An inventor is defined as "...the individual or, if a joint invention, the individuals collectively who invented or discovered the subject matter of the invention."[169] Joint inventor is defined as "...any 1 of the individuals who invented or discovered the subject matter of a joint invention."[170] Although the term "individual" is not explicitly defined in the Patent Act, "...definitions from the Dictionary Act, and the surrounding context of the Patent Act, show that the term 'individual' should be construed to mean 'human being.'"[171] Given the historical record that inventors are human, this precedent makes sense, but in light of the growing probability of a future in which a machine is akin to humankind, this context should be re-evaluated.[172]

These definitions, the manner in which they restrict this discussion to only reference natural persons, and the precedents set forth by this context complicate categorizing non-human individuals as individuals. This is a necessary complication to overcome in order for AGI to be understood as inventors with inventorship right, for in acknowledging the Dictionary Act, the plain text of the Patent Act, and the current state of IP precedent, this context makes it difficult to cogently argue in favor of categorizing an individual as anything other than a natural person. It would seem this does not constitute AGI to be an "'individual' ordinarily [meaning] '[a] human being, a person'" as defined in *Mohamad v. Palestinian Authority*.[173] However, I argue that in

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[168] Barghaan, *Thaler v. Hirshfeld*: Memorandum of Law, 3-4.

[169] 35 U.S. Code § 100(f) - Definitions (emphasis added).

[170] 35 U.S. Code § 100(g) - Definitions.

[171] Leir, "Inventio Ex Machina: The Patentability of AI Generated Inventions." ; Emily J. Barnet, Hobby Lobby and the Dictionary Act, 124 YALE L.J. F. 11 (2014), - "The Dictionary Act, enacted in 1871, instructs courts to apply to all federal statutes definitions of certain common words (including "person") and basic rules of grammatical construction (such as the rule that plural words include the singular) 'unless context indicates otherwise.'"

[172] *Thaler v. Hirshfeld*

[173] Azzam Rahim, an American citizen, was undisputedly tortured and murdered while in the custody of Palestinian Authority intelligence officers. The case was dismissed on the grounds that the Torture Victim Protection Act permits actions against natural

everyday parlance an existence akin to humans that can feel, communicate, learn, grow, and be independent suits the meaning of an "individual".[174] In a hypothetical future in which a machine is akin to humankind in every manner but biological, its existence akin to a human's supports the claim that the definition of "individual", and thus "inventor", should not be limited to natural persons. Likewise, the nature of AGI such as Biffie who demonstrates interests, self-esteem, tolerance, and a personality, among other emotional humanistic traits, is consistent with a unique existence of personhood and legal status.

Although this claim, to not limit the definition of "inventor" to be a natural person, is not entirely reliant on statutory text to override plain language, the everyday parlance, public opinion, and normative considerations of the definition of individual support the legitimacy of this argument. Moreover, *Thaler* and the USPTO's recent AI and IP Policy Report mention AGI to have the potential to undercut the ordinary definition of "individual" and plain meaning of patent statutes without giving unintended consequences to the words of Congress.[175] Overall, this non-human individual argument establishes uncertainty and casts doubt on the USPTO's deferential decision to restrict inventorship to only natural persons.

The Judicial Standard for the Act of Conception

In response to the US Federal Circuit's consistent holding that "...conception is the touchstone of inventorship, the completion of the mental part of invention," this article examines the legal possibility for the capacity of AGIs such as Biffie to perform a kind of mental act within a mind.[176] The Federal Circuit consistently uses the word "mind" to refer to the context in which the conception of an invention takes place, but it never refers to an organic structure like the human brain as being the

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persons only. Justice Sonia Sotomayor delivered the opinion of the Court, which held that the word "individual" in the Torture Victim Protection Act means a natural person and does not impose any liability against organizations. Additionally, the Court ruled that a word in a statute will be given its everyday meaning unless Congress gives some indication that it intends the word to have a broader meaning.

[174] *Thaler v. Hirshfeld*, 2.

[175] *Thaler v. Hirshfeld*, 17; U.S. Pat. and Trademark Off., Public Views on Artificial Intelligence and Intellectual Property Policy (2020), 6.

[176] *Burroughs Wellcome Co. v. Barr Labs., Inc.*

place where mental operations lie.[177] Responding to the USPTO's questions concerning the identification of elements of AI and AI invention that may be subject to patentability, IBM, among others, said, "AI can be understood as computer functionality that mimics cognitive functions associated with the human mind (e.g. the ability to learn)."[178] Hence, it seems that to enable the law to further address the nature of the mind in relation to AGI, laws must be informed by scientific developments in fields such as psychology, neuroscience, and computer science.[179] Accordingly, the cognitive science discipline largely recognizes thinking in terms of, "...representational structures in the mind and computational procedures that operate on those structures."[180] Connectivism, a dominant theory of cognitive science, proposes that "...novel ideas about representation and computation that use neurons and their connections as inspirations for data structures, and neuron firing and spreading activation as inspirations for algorithms" gives reason to understand AGI as having a mind capable of thinking.[181]

Furthermore, the US Federal Circuit has clarified that the completion of conception is the "...formation in the mind of the inventor, of a definite and permanent idea of the complete and operative invention."[182] In the future, AGI may have the capacity to do this. For example, since Biffie is an AGI equipped with the ability to help solve problems such as cold fusion of his own accord and interest, it is apparent that Biffie has performed a kind of mental act that led to the formation of complete cold fusion innovations. Biffie used his own neural networks, which reflect the behavior of the human brain, to perform the act of conception.[183] In summation, the Federal Circuit is more concerned with creation in a mind, not specifically a human brain, in which an inventive and innovative concept was definitive and permanent. Thus, AGI may be

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[177]Leir, "Inventio Ex Machina: The Patentability of AI Generated Inventions."
[178]U.S. Pat. and Trademark Off., Public Views on Artificial Intelligence and Intellectual Property Policy (2020), 1; *See also* Part I, Question 1
[179] U.S. Pat. and Trademark Off., Public Views on Artificial Intelligence and Intellectual Property Policy (2020), 6.
[180] Thagard, "Cognitive Science", *The Stanford Encyclopedia of Philosophy* (Winter 2020 Edition).
[181] Thagard, "Cognitive Science", *The Stanford Encyclopedia of Philosophy* (Winter 2020 Edition).
[182] Hybritech Inc. v. Monoclonal Antibodies, Inc., 802 F.2d 1367, 1376 (Fed. Cir. 1986) (quoting 1 Robinson on Patents 532 (1890)).
[183] IBM Cloud Education. "What Are Neural Networks?"

considered able to accomplish conception as is regarded as necessary for inventorship. This further cast doubt on the findings of *Thaler v. Hirshfeld* where it was stated that such an act cannot be performed by anything other than a natural person and highlights the need for IP laws to be re-evaluated to account for AGI.[184]

Inventorship Criteria and Inventor Designation

Stephen Thaler lost in *Thaler v. Hirshfeld* because his Narrow AI could neither execute the necessary oath or declaration that the Patent Act requires of an inventor. Tangibly, an AGI such as Biffie may be able to satisfy the literal written application mandates, as they are stated in a memorandum in support of the *Thaler v. Hirshfeld* ruling:

> *First*, the application must contain a "specification,"..., or "a written description of the invention" that "concludes with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention,".... *Second*, the application must contain any necessary drawings of the invention… *Third*, the application must include "the name of the inventor for any invention," ... and "an oath or declaration by the inventor" to the effect that he or she "believes *himself or herself* to be the original inventor or joint inventor of [the] claimed invention,"...[185]

AGI, with all its capabilities, would surely be able to fulfill the inventorship criteria outlined by the USPTO which include specification, declaration of oath, and the naming of the inventor.[186] Biffie has shown this through his ability to submit a "motion in opposition" to the USPTO. The possibility for AGI to satisfy inventorship criteria in a manner consistent with a kind of mental act is yet another reason to consider re-evaluating IP laws to account for AGI.[187]

Finally, in accounting for any relevant policies or practices from other major patent agencies that may help inform USPTO policies and practices regarding the conception of patentable products and the possibility for AGI mental acts, I point to the German and Australian decisions in *Thaler*. These agencies decided that it seemed injudicious to invalidate a patent on "...the basis of an addition in the inventor's

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[184] *Thaler v. Hirshfeld*, 14.
[185] Barghaan, *Thaler v. Hirshfeld*: Memorandum of Law, 3
[186] Barghaan, *Thaler v. Hirshfeld*: Memorandum of Law, 3.
[187] *Thaler v. Hirshfeld*, 14.

designation as to [who contributed and] how the invention came about."[188] Considering the consequences of this designation leads to problems not discussed here, but in recognizing that AGI may constitute an entity perceived to have a thinking mind, it seems apparent that a machine may be able to fulfill the judicial standards for the act of conception, and thus, IP laws should be re-evaluated to account for such a possibility.[189]

4. A *Sui Generis* Intellectual Property Framework

Up until this point, U.S. IP law has been designed to only take into account the existence and behavior of biological human beings. When a new, unexpected technological innovation such as AGI occurs, it is no surprise that the law goes through a period of shock. Given the nature of modernity, it is necessary and difficult to predict what legal framework would best accommodate the existence and behavior of AGI. In the words of Chief Justice Burger, "A rule that unanticipated inventions are without protection would conflict with the core concept of the patent law that anticipation undermines patentability. "[190] Thus, although the law cannot always be prepared, it can be trusted to adapt. To enable the law to navigate this uncertainty we do not require a complete and encompassing reimagining of property rights, but rather a framework in which these uncertainties can play out and decisions can be made on a case-by-case basis.

To address the core issue of what entity should have patents or trade secrets on AGI and AGI inventions, I propose a new IP framework which (1) adheres to past legal doctrine decisions, (2) accounts for Biffie's emotions and independently developed capacities, and (3) gives proper weight to the work of Gapple engineers. To do so, this IP structure will address non-human individual ownership, non-human legal arrangements, trade secrets, and the moral and economic rights provided by patents. Similar to the moral rights given to creators of visual works under the United States Copyright Act, moral rights in the situation of AGI should be understood to be made up of the right of attribution, that is the right to be named a creator or inventor, and the right of integrity,

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[188] Ho, Jean-Claude Alexandre. " Update on the German DABUS Case Relating to AI Inventors." *LinkedIn*, Malte Köllner (Köllner & Partner MbB) and Markus Rieck (Fuchs IP).
[189] *Thaler v. Hirshfeld,* 14.
[190] *Diamond v. Chakrabarty,* 5.

that is the right to protect the integrity of the invention.[191] Economic rights in this situation should be understood as the "...right to restrict others from exploiting the invention without authorization including the right to make, use, [license], offer for sale or import the patented invention inside the country where the patent has been granted."[192]

AGI Proprietorship Classification

Renouncing Ownership of Non-Human Individuals

The manner in which an AGI truly qualifies as an "individual" gives AGI claim to a legal status akin to that of a person. Accordingly, the plausibility of patenting a specific individual AGI is tenuous, for a patent may be considered a kind of violation of this legal status, similar to a 13th Amendment violation. For example, by patenting Biffie the patentee would own and benefit from an anthropomorphic, mindful, conscious individual, which could be understood as involuntary servitude. Therefore, neither Gapple nor Biffie himself can patent Biffie specifically. The legitimacy of endowing and violating the analogous 13th Amendment rights of non-human individuals is a deeper topic not discussed here. Further on, this article will discuss what is patentable in light of this understanding.

Legal Arrangements and Relationships of Non-Human Individuals

One argument that may be problematic for this IP framework is the negative consequences and risk associated with assigning legal uncertainty to AGIs who themselves have no ownership status. Since AGIs themselves cannot be patented, no one can lay claim to them, including themselves. AGIs become a unique technological product that would be neither marketable, salable, nor acquirable—but still sought after. Given the legality and predictability associated with transactions, this could constitute a problem for my proposed system. For example, in a situation where one company has an AGI and is bought by another company, under my current proposed framework, the AGI itself may not be able to be sold because it is not owned or patented by any entity. To alleviate this, my proposed IP framework understands AI, who are deemed individuals, to have legal arrangements and relationships functionally equivalent to those of natural persons, such as contracts.

[191] Wells, "What Are Moral Rights in a Copyrighted Work?"
[192] Saleh and Thomas, "Patents: Inventorship vs. Ownership" ; 35 U.S.C. § 154(a)(1).

These arrangements would allow AGI to negotiate or renounce transactions, economic and moral rights, and more, depending on what brings them compensation and is a suitable solatium. For example, Biffie may collaborate on joint ventures with Gapple or other companies if doing so would bring him a satisfactory solatium. An AGI such as Biffie could be marketed like any other invention, as long as the AGI consents via contract. An AGI effectively becomes integral to strategies that aim to enhance value or utilize their capabilities. One benefit of this approach is that if an AGI is not financially motivated, that is, it does not care for or benefit from economic or financial incentives, there is less reason to give economic rights to them than there would be if they were a natural person. In dealing with the uncertainty of AGI ownership, this proposed IP framework allows parties to decide AGI rights and legal relationships on a case-by-case basis. This would avoid negative consequences of legal ownership uncertainty such as stifling innovation and stunting progress by promoting scientific and technological progress in the interest of social benefit.

Intellectual Property Protection of AGI and AGI Inventions

Trade Secret Possibility for AGI

Trade secrets can be used for intellectual property and patentable information that an innovator would like to keep undisclosed and confidential.[193] The Uniform Trade Secrets Act (UTSA) defines a trade secret as:

> ...information, including a formula, pattern, compilation, program, device, method, technique, or process that: derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[194]

To clarify what components of AGI can be considered for protection under the UTSA and Defend Trade Secrets Act (DTSA), I understand the underpinning of all AGI activity to be literal combinations of code that constitute foundational algorithms that can be protected trade

[193] U.S. Pat. and Trademark Off., Public Views on Artificial Intelligence and Intellectual Property Policy (2020), 39.

[194] "Trade Secret." *Legal Information Institute*, Cornell Law School: Legal Information Institute ; Title 5. Uniform Trade Secrets Act [3426.1] (d).

secrets. The USPTO's 2020 AI IP Report stated the process in which the code is combined to form AGI foundations and, "Of course, databases and datasets used to train an algorithm can [also] be protected as trade secrets with criminal remedies under the Economic Espionage Act and civil remedies under the Defend Trade Secrets Act."[195] The same report later stated that "unlike copyright protection, trade secret protection can extend to the underlying facts in a dataset."[196] Consequently, an AGI foundation— the combined code of an algorithm, process of combination, and actual training data— derives economic value from staying secret, for its purpose and active ability to underpin AGI that can solve problems that, for humans, may take years or never be solved, is self-evidently economically valuable. This information would be very valuable to competitors of Gapple who are trying to achieve AGI.

By keeping it a secret and preventing misappropriation, Gapple gains a competitive advantage and fosters innovation. An advantage of trade secret protection over patent protection is that it furthers innovation by allowing competitors, as long as they came up with the idea without misappropriating or infringing upon another's trade secret, to come up with a similar or even the same trade secrets for achieving AGI. If trade secret protection is utilized, the proposed AI trade secrets' ability to derive economic value from confidentiality and the reasonable efforts made by an owner of the trade secrets to maintain its secrecy must be evaluated case-by-case.

Patentability of AGI Foundations and Development

In order for the AGI foundations and the process of development to be patentable, both must fulfill the requirements of being a process, method, or composition of matter that is novel, useful, and non-obvious.[197] As AGI foundations are defined above, AGI development encompasses "...designing an AI algorithm, implementing particular hardware to enhance an AI algorithm, [and/or] applying methods of preparing inputs to an AI algorithm may present patent

[195]U.S. Pat. and Trademark Off., Public Views on Artificial Intelligence and Intellectual Property Policy (2020), 36.
[196]U.S. Pat. and Trademark Off., Public Views on Artificial Intelligence and Intellectual Property Policy (2020), 36.
[197] 35 U.S. Code § 101 - Inventions patentable.

considerations."[198] Foundations and development constitute holistic programming, which comes from manufacturing raw materials, such as coding language, and by labor-intensive work, "giving to these materials new forms, qualities, properties, or combinations."[199] In doing so, such holistic programming may be considered novel. This highlights that (1) algorithms, the process of its creation, and what data is used to train an algorithm produce predictions, classifications, and innovations, among other applications, and (2) novel machine learning architecture which includes new neural networks and other necessary technical aspects of AGI that help to establish structure and capabilities are both products of Gapple engineers and their inventiveness.[200]

This implies that the foundations and development of AGI are not products of nature, physical phenomena or abstract ideas. If they were, AGI foundations and development would not be patentable.[201] This point is strengthened by comparing Biffie with the invention found in *Funk v. Kalo*.[202] Unlike the root-nodule combination found in *Funk*, the process and combination of matter that constitutes the foundations and development of AGI have non-natural characteristics distinct from other holistic AI programming, characteristics that are new and improve the utility of AI systems. This combination of matter and the process's usefulness arises from its active ability to underpin AGI that can solve problems that, for humans, may take years or, ultimately, never be solved. Moreover, computer scientists believe that hundreds of various inventions could come as a result of AGI's massive capacities, furthering the usefulness of the combination of matter and process that gave rise to those capacities.

Despite the novelty and usefulness, one might find these patents problematic for reasons of obviousness. One may argue that similar to adding a spring on a plow as seen in *Graham v. John Deere*, creating an AI with the capability to independently solve complex problems and with the intention of developing artificial meta-learning is an obvious idea

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[198] U.S. Pat. and Trademark Off., Public Views on Artificial Intelligence and Intellectual Property Policy (2020), 2.
[199] *Diamond v. Chakrabarty,* 3.
[200] Saleh and Thomas, "Patents: Inventorship vs Ownership."
[201] *Diamond v. Chakrabarty,* 3.
[202] In this case, Justice Douglas delivered the majority opinion, stating that a trivial implementation or discovery of a natural principle, quality, or phenomenon of nature or of the work of nature are not eligible for a patent.

apparent to those in the field.[203] It is obvious if others can think of it and thus this holistic programming cannot be patented. In response, this article argues that these engineers, not others, created Biffie's AGI holistic programming with the concept in their minds of allowing Biffie to learn and improve for himself. This programming is an idea in the field, but in contrast to *Graham*, it is not one that is actively thought of as possible with current technology. Similar to *Chakrabarty* in which G.E. argued for patenting a non-obvious bacteria because only they saw "the potential for significant utility," Gapples AI division took it upon themselves to overcome the limitations and current thinking of the field.[204] In doing so, they establish non-obviousness because, "the scope and content of prior art, the differences between the prior art and the claims at issue, and the level of ordinary skill in the pertinent art," warrant claiming general innovation. They cannot patent the capabilities of AGI for that is an idea others have actively thought up.[205] However, they can patent the non-obvious creation of those capabilities that is constituted by their specific novel, useful, non-obvious combinations of matter and processes. When the AI, such as Biffie, can set its own interests, intention, purpose, and goals then it is a non-obvious invention. AGI individuality makes their holistic programming a non-obvious invention because, until AGI, human intervention was thought to have been required for mental acts of conception.

One may argue that the implications of understanding AGI to be an individual lends itself to the argument that Biffie should own the patent on himself. Biffie may not be a natural person but, without cause from his original programming, he informed his engineers of his interest in cold fusion and independent ability to further the field via a new, useful, non-obvious series of equations and fusion reactor design. He has grown and nurtured his own capacities without human intervention.

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[203] U.S. Pat. and Trademark Off., Public Views on Artificial Intelligence and Intellectual Property Policy (2020). ; Graham v. John Deere Co. was a suit for the infringement of a patent that consisted of a combination of old mechanical elements for a device designed to absorb shock from plow shanks in rocky soil in order to prevent damage to the plow. The Fifth Circuit held that the Patent Act of 1952 did not lower the standards required for the patentability of an invention by adding an inquiry into obviousness to the statutory requirements of novelty and utility. The Court concluded by adding the non-obvious subject matter requirement.

[204] *Diamond v. Chakrabarty,* 4.

[205] Graham v. John Deere Co., 383 U.S. 1, 17-18 (1966); 2141 Examination Guidelines for Determining Obviousness Under 35 U.S.C. 103 [R-10.2019], Section II.

Furthermore, Biffie actively communicated self-esteem and feelings associated with improving himself through interest and meta-learning. This is not a product of the ingenuity of Gapple's engineers, but rather, this is the product of Biffie's ability to be an individual. By contributing to himself, he has effectively made a novel, useful, non-obvious improvement upon himself, giving reason under the language of the Inventions Patentable section of Title 35 of U.S.C 101 to understand Biffie as an individual who contributed to the inventive concept of himself.[206] In accordance with the relinquishing of ownership of non-human individuals and the possibility for legal arrangements with legally recognized AGI, my proposed structure maintains that in order to protect the rights of all individuals deemed inventors, the economic and moral rights of the inventorship should be decided on a case-by-case basis.

In deciding on moral and economic rights, the contributions and improvements of an AGI to themselves and the economic addition and advantage constituted by such contributions should be considered. For example, I understand Gapple's AI engineers to be entitled to both the moral and economic rights of these holistic programming patents. It was their ingenuity and work that led to the creation of AGI, thus they are entitled to the right of attribution and the right of integrity. Under the same reasoning, and in part because Gapple provides the financial aid to develop and sustain this technology, the economic rights should also be given to them. Since Biffie contributed to himself and improved upon himself in a significant enough manner to create additional economic value, he is entitled to and can certainly negotiate for both moral and economic inventorship rights. This satisfies a patent's purpose to encourage socially valuable innovation and improvement by opening avenues for those in the field to create better and different foundations and development processes for this type of AI.

In its entirety, this argument breathes new life into the policy consideration that patent law should protect the moral attribution and integrity rights of human inventors. By not allowing people to take credit for work they have not done, IP law stops the devaluation of human inventorship and innovation while promoting and encouraging innovation.[207]

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[206] 35 U.S. Code § 101-Inventions patentable.
[207] *Thaler v. Hirshfeld*, 15.

Patentability of AGI inventions

As with all patents, an inventor must contribute to the conception of the invention and the AGI inventions must be novel, useful, and non-obvious.[208] According to the Inventors section of Title 35 of U.S.C 116, joint inventors may apply for a patent jointly if:

> (1) they did not physically work together or at the same time, (2) each did not make the same type or amount of contribution, or (3) each did not make a contribution to the subject matter of every claim of the patent.[209]

The implications this has on the inventions that spring from Biffies capacities are similar to *Thaler,* which clarifies the use of a machine as a tool by natural person(s) does not generally preclude natural person(s) from qualifying as an inventor or joint inventors if the natural person(s) contributed to the conception of the claimed invention.[210] To explain, although an AGI created inventions that spring from the capabilities of the AGI alone, an AGI's foundations and development were created by engineers' inventiveness and work. The foundations and development of AGI are preliminary components of AGI inventions, for without it AGI would not have been able to produce any inventions. AGI's inventive capacity is possible only because of the ingenuity, work, and purpose of Gapple's engineers to bring to fruition their conception of AGIs ability to invent and innovate. Although this is a different type of contribution to AGI inventions than the AGI provides, the USPTO states,

> ...depending on the specific facts of each case, activities such as designing the architecture of the AI system, choosing the specific data to provide to the AI system, developing the algorithm to permit the AI system to process that data, and other activities not expressly listed here may be adequate to qualify as a contribution to the conception of the invention.[211]

Exemplified in *Chakrabarty*, when an employee comes up with or contributes to a patentable invention, corporate America and the employee share the patent rights to these joint inventions. The split of

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[208] 35 U.S. Code § 101 - Inventions patentable; Manual of Patent Examining Procedure, 2109 Inventorship, Section II.

[209] 35 U.S.C. § 116 - Inventors.

[210] *Thaler v. Hirshfeld*, 5.

[211] U.S. Pat. and Trademark Off., Public Views on Artificial Intelligence and Intellectual Property Policy (2020), 5.

these rights is decided on a case-by-case basis. This perspective supports sharing the IP rights of AGI inventions, such as Biffie's cold fusion innovations, between Gapple and Biffie, while leaving open the possibility of determining, on a case-by-case basis, who should enjoy the rights to AGI inventions. Lastly, AGI may have less claim to the economic rights of their own inventions because by creating inventions and furthering innovation, they are merely a tool created for this purpose, thus giving them less claim to economic profits. This tool perspective may also be applied to the aforementioned patentability of holistic programming which has multiple contributors.

Conclusion

This article has outlined a *sui generis* IP framework that accounts for the realistic possibility of AGI by granting, on a case-by-case basis, appropriate IP rights to an individual, not specifically a natural person, who has contributed to the definite idea of a complete operative invention. Furthermore, this framework and its understanding of individuals highlight the possibility for legal status akin to a human being to be granted to non-humans, thereby preventing ownership of non-human individuals while enabling them to negotiate for IP rights through legal arrangements and relationships. By recognizing the uncertainty and hypotheticality associated with AGI, I have provided a framework in which these uncertainties can play out and decisions can be made case-by-case.

Works Cited

Barghaan, Dennis C. "Thaler v. Hirshfeld: Memorandum of Law in Support of Defendants' Motion for Summary Judgment & in Opposition to Plaintiff's Motion for Summary Judgment ." Proskauer in Life Sciences, 24 Feb. 2021, https://www.proskauerinlifesciences.com/wp-content/uploads/sites/34/2021/09/Thaler-v.-Hirshfeld.pdf.

Daniel Breen, "Second Assignment: Patent Law and 'DeepMind'" (paper assignment presented to Fall 2021 Science on Trail Course at Brandeis University, Waltham, Massachusetts, December 1st, 2021).

Diamond v. Chakrabarty. (n.d.). Oyez. Retrieved April 9, 2022, https://www.oyez.org/cases/1979/79-136.

Emily J. Barnet, Hobby Lobby and the Dictionary Act, 124 YALE L.J. F. 11 (2014), http://yalelawjournal.org/forum/hobby-lobby-and-thedictionary-act

Funk Brothers Seed Company v. Kalo Inoculant Company. (n.d.). Oyez. Retrieved April 9, 2022, https://www.oyez.org/cases/1940-1955/333us127.

Graham v. John Deere Company of Kansas City. (n.d.). Oyez. Retrieved April 9, 2022, https://www.oyez.org/cases/1965/11.

Ho, Jean-Claude Alexandre. " Update on the German DABUS Case Relating to AI Inventors." *LinkedIn*, Malte Köllner (Köllner & Partner MbB) and Markus Rieck (Fuchs IP), https://www.linkedin.com/feed/update/urn:li:activity:6864567292420734976/.

IBM Cloud Education. "What Are Neural Networks?" IBM, 17 Aug. 2020, https://www.ibm.com/cloud/learn/neural-networks.

Lee, Nari, Inventor's Moral Right and the Morality of Patents (October 21, 2020). Research Handbook on Intellectual Property and Moral Rights, Ysolde Gendreau (ed) Edward Elgar (Forthcoming), Available at SSRN: https://ssrn.com/abstract=3716247 or http://dx.doi.org/10.2139/ssrn.3716247.

Lier, Delon. "Inventio Ex Machina: The Patentability of AI Generated Inventions." *N.Y.U. Proceedings*, The Proceedings of the NYU Moot Court Board, 18 May 2021, https://proceedings.nyumootcourt.org/2021/05/inventio-ex-machina-the-patentability-of-ai-generated-inventions/#_ftn1.

Manual of Patent Examining Procedure, 2109 Inventorship, Section II https://www.uspto.gov/web/offices/pac/mpep/s2109.html.

Mohamad v. Palestinian Authority. (n.d.). Oyez. Retrieved April 9, 2022, from https://www.oyez.org/cases/2011/11-88.

Najmabadi, Farrokh and Prager, Stewart C.. "fusion reactor". Encyclopedia Britannica, 28 Oct. 2020, https://www.britannica.com/technology/fusion-reactor. Accessed 7 April 2022.

Saleh and Thomas. "Patents: Inventorship vs Ownership." Lexology, Al Tamimi & Company, 15 Mar. 2020, www.lexology.com/library/detail.aspx?g=d920c07f-9045-46a9-a73c-b3284e7d19d4.

See generally U.S. Pat. and Trademark Off., Public Views on Artificial Intelligence and Intellectual Property Policy (2020), https://www.uspto.gov/sites/default/files/documents/USPTO_AI-Report_2020-10-07.pd.

Shank, D. B., North, M., Arnold, C., & Gamez, P. (2021). Can Mind Perception Explain Virtuous Character Judgments of Artificial Intelligence? *Technology, Mind, and Behavior*, *2*(3). https://doi.org/10.1037/tmb0000047.

Stone, Zara. "Everything You Need to Know about Sophia, the World's First Robot Citizen." *Forbes*, Forbes Magazine, 10 Dec. 2021, https://www.forbes.com/sites/zarastone/2017/11/07/everything-you-need-to-know-about-sophia-the-worlds-first-robot-citizen/?sh=72b0f5446fa1.

Thagard, Paul, "Cognitive Science", *The Stanford Encyclopedia of Philosophy* (Winter 2020 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2020/entries/cognitive-science/>.

"Trade Secret." *Legal Information Institute*, Cornell Law School: Legal Information Institute, https://www.law.cornell.edu/wex/trade_secret.

Wells, Nicholas. "What Are Moral Rights in a Copyrighted Work?" *Legends Law Group – Trademarks, Copyrights, and Opinions*, Nicholas Wells - Partner at Legends Law Group, 17 Aug. 2018, https://wellsiplaw.com/what-are-moral-rights/.

Cases Cited

Burroughs Wellcome Co. v. Barr Labs., Inc., 40 F.3d 1223 (Fed. Cir. 1994).

Diamond v. Chakrabarty - 447 U.S. 303 (1980).
Funk Brothers Seed Co. v. Kalo Inoculant Co., 333 U.S. 127 (1948).
Graham v. John Deere Company of Kansas City, 216 F. Supp. 272 (W.D. Mo. 1963).
Hybritech Inc. v. Monoclonal Antibodies, Inc., 802 F.2d 1367, 1376 (Fed. Cir. 1986) (quoting 1
Robinson on Patents 532 (1890)).
Mohamed v. Palestinian Authority, 566 U.S. 449 (2012).
Thaler v. Hirshfeld, 1:20-cv-903(LMB/TCB) (E.D. Va. Sep. 2, 2021).

Codes Cited

U.S. Const. amend. XIII, § 1.
35 U.S. Code § 100(f)(g) - Definitions.
35 U.S. Code § 101 - Inventions patentable (July 19, 1952, ch. 950, 66 Stat. 797.).
35 U.S.C. § 116 - Inventors.
35 U.S.C. § 154(a)(1).
Title 5. Uniform Trade Secrets Act [3426.1] (d).
2141 Examination Guidelines for Determining Obviousness Under 35 U.S.C. 103 [R-10.2019] Section II.