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TEXAS UNDERGRADUATE LAW REVIEW

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The Necessity of Consulting Foreign Law in U.S. Constitutional Interpretation

The consultation of foreign law in the United States' approach to constitutional interpretation began in the now-hallowed chambers of Independence Hall in Philadelphia, PA in 1787. Yet today, the study of international laws by members of the federal judiciary is a source of controversy among legal scholars. Many detractors of the practice, like the late Supreme Court Justice Antonin Scalia, believe the Court's use of international law to make decisions in cases such as *Sosa v. Alvarez-Machain* (2003) is contradictory to the United States' sovereignty granted by the U.S. Constitution.[1] In this case, the justices were faced with interpreting whether the Alien Torts Claims Act, originally part of the Judiciary Act of 1789, gave a private right of action to individuals in cases concerning torts when violating the law of nations. In *Sosa*, Scalia wrote in a scathing dissent that the idea "that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment of *its own citizens* within *its own territory*, is a 20th-century invention of internationalist law professors and human-rights advocates."[2] Scalia was not alone in his belief that consulting foreign law undermined the independence of the United States. A 2004 Ohio State Law School Review article by Joan Larsen, a former University of Michigan Law School Professor and current Sixth Circuit Court of Appeals judge, argues against the substantive use of foreign law by the Supreme Court. One such example of substantive use of international law, Judge Larsen wrote, was when the Court applied foreign law in *Lawrence v. Texas* (2008), in which the Court struck down the Texas law criminalizing sodomy. Justice Anthony Kennedy recognized in the majority opinion that the "right the petitioners seek in this case has been accepted as an integral

[1] Melissa Waters, *Justice Scalia on the Use of Foreign Law in Constitutional Interpretation: Unidirectional Monologue or Co-Constitutive Dialogue?*, 12 TULSA J. O COMPARATIVE & INT'L L., 149 (September 1, 2004).
[2] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

part of human freedom in many other countries."[3] Judge Larsen countered by arguing that the Court became too extreme when foreign law had a substantive influence, writing that all courts are "better off to abandon this particular use of foreign and international law."[4] Judge Larsen and Justice Scalia, while being two of the most influential federal judges in the United States, both are wrong in their approaches to the Court's use of foreign law, and their arguments will continue to deteriorate the legitimacy of our nation's founding document.

The Framers often placed foreign law at the forefront of discussion when organizing our government's structure and purpose. The Declaration of Independence shows the "motivation for issuing this foundational document stemmed from a 'decent respect to the opinions of mankind,'"[5] demonstrating that the Framers created the transformative document not only for colonists pursuing freedom, but with respect to global opinion. David J. Seipp, a Boston Law School professor, perfectly summed up the danger of ignoring foreign law when he reflected on the peculiarity of July 4, 1776 being "the last time our founders would respect the opinions of mankind or seek a place 'among the powers of the earth.'"[6] Furthermore, embedded in the Constitution is a provision commonly referred to as the Law of Nations Clause, which extends federal jurisdiction to offenses in conflict with the law of nations, a clear indication of the Framers' intended level of international cooperation throughout the United States justice system. [7] This reference to the importance of foreign law proves the Framers were aware of, encouraged,

[3] Lawrence v. Texas, 539 U.S. 558 (2003).
[4] Joan Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 Ohio St. L.J. 1283 (November 5, 2004).
[5] Daniel Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 Cal. L. Rev.1335 (January 1, 2007).
[6] David Seipp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86 B. U. L. Rev. 1417 (February 1, 2006).
[7] *Id.* 1429

and participated in an international dialogue of legal study.[8] Thus, as both the Declaration of Independence and the Constitution were developed with respect to foreign law, the Constitution should continue to be interpreted with respect to foreign law when necessary.

The early Supreme Court consulted foreign law to reach significant decisions. Chief Justice John Marshall, considered by legal scholars as the justice most integral to the formation of the Supreme Court's power and legitimacy, used England's law as a model in *Rose v. Himley*. This 1808 case established the constitutionality of the Court's examination of a foreign tribunal's jurisdiction. Chief Justice Marshall believed England's law was most aligned with civilized nations and thus adopted England's legal approach to foreign tribunals as the governing principle of the case.[9] The direct use of foreign law by the Marshall Court demonstrates the degree to which the practice was considered acceptable by leaders instrumental in establishing the legitimacy of the Supreme Court and the judicial branch. The Court continued to use foreign law as a factor in significant legal cases almost a century later, most notably in *Paquete Habana v. United States* (1900). In *Paquete Habana*, the Supreme Court decided the constitutionality of the federal government's capturing fishing boats that ventured into the U.S. blockade of Cuba. The Court ruled the capture was unconstitutional because international law precedes U.S. law, and the capture of fishing boats in wartime infringed upon international customary law.[10] The strong relationship between U.S. law and international law thus extends from the creation of our nation's founding documents through the Supreme Court's understanding of law at the end of the 19th century. The understanding of foreign law held by today's conservative judges and other

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[8] Farber, *supra* note 5.

[9] Steven Calabresi, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and The Juvenile Death Penalty Decision*, 47 Wm. & Mary L. Rev. 743 (April 11, 2005).

[10] Farber, *supra* note 5.

members of legal academia is far removed from the ideals upheld by the Framers and our nation's long history of constitutional interpretation.[11] The Framers desired cooperation and encouraged international engagement, and judges who choose to ignore foreign countries' laws and constitutional interpretations neglect our nation's past.

The current trend of globalization is hindered by disregarding the current legal behavior of foreign countries, which is a striking departure from past Supreme Court decisions.[12] As national institutions become more globalized, the Court must improve its methods of fulfilling the duties granted by Article III of the U.S. Constitution. Legal questions facing foreign nations should not be ignored by our own judicial system, as social and economic activities affect both foreigners and Americans now more than ever. Arguably more pressing are public safety concerns, an issue which Justice Stephen Breyer addressed in his book, *The Court and the World*, stating that the security consequences of a more globalized world require the Supreme Court to "extend its awareness and understanding to places and circumstances traditionally beyond its ken." This way, governments can acquire new information about "foreign factual and legal conditions, policies, and institutions."[13] Global threats like terrorism and climate change demand long-term engagement from justice systems across the world, and by consulting foreign law, the Supreme Court has the unique opportunity to safeguard against these threats. Additionally, the expanding global market, growth of economic institutions like the European Union, and general acceptance of a regulated free market raise questions of legal jurisdiction. The Supreme Court and other high courts across the world must change the focus of conflict

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[11] *Id.*
[12] Austen Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 44 U. ILL. L. REV. (February 28, 2007).
[13] Stephen Breyer, *The Court and the World: American Law and the New Global Realities*, VINTAGE (Aug, 23, 2016).

resolution away from the mere avoidance of conflict toward encouraging foreign and domestic laws to work hand in hand.[14] Deciding the constitutionality of treaties with other countries against the backdrop of globalization, relating either to national security or economic regulation, leads to a greater emphasis on similarly enforced laws by multiple governments.[15] Ultimately, striving for constitutional interpretation that complements foreign law and global agreements will benefit the international justice system and those who fall under its jurisdiction.

Globalization has also led to increased transnational citation of law and more communication between judges in different countries.[16] For example, Supreme Court justices frequently travel abroad during their three-month summer recesses to educate about the interpretation of American law. They serve as legal ambassadors to like-minded governments and legal institutions, opening up America's judiciary to the world as emissaries of the U.S. Constitution. Judges like Justice Scalia and Judge Larsen, on the other hand, risk hurting the United States' legal standing abroad by disregarding the words of the Framers when interpreting the Constitution without considering foreign law. Similar to judicial decisions between different state courts, the use of foreign law in the Supreme Court can be, at maximum, "persuasive precedent," and represents no "binding" or "authoritative" legal action.[17] Thus, foreign law can serve only as persuasive authority, guiding judges' decisions through empirical data or written contemplation. For example, if a California court cited and concurred with the ruling of a New York court's precedent, no rational argument could me made arguing that New York is infringing upon the freedom or sovereignty of California. When Justice Kennedy utilized foreign

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[14] *Id*. at 123.
[15] *Id*. at 130.
[16] Farber, *supra* note 5.
[17] Seipp, *supra* note 6.

law in his majority decision for *Lawrence*, he cited the freedom homosexual people had in other countries and used this understanding as a source of legal evidence to guide his opinion. Another example of this practice can be seen in *Atkins v. Virginia* (2002), when the Supreme Court prohibited the execution of people with intellectual disabilities as a violation of the Eighth Amendment. In Atkins, the majority opinion cited an amicus brief submitted by the European Union advocating for prohibition of this type of execution. This citation drew criticism from then-Chief Justice William Rehnquist, who denounced the "Court's decision to put weight on foreign laws."[18] Detractors of this practice, like Chief Justice Rehnquist, often follow an interpretation of the Constitution too narrow in scope, refusing to recognize the societal advancement that accompanies the consultation of foreign law.

The idea that the law of the United States is exceptional compared to the law of foreign nations is dangerous to the continuation of a stable democracy. In fact, many argue that opposing the citation of foreign law in constitutional interpretation is related to multicultural relativism, or the idea that fundamental human rights in one country are distinct from the fundamental human rights granted in other countries.[19] The idea that the United States has so different a governing structure from other countries that observing the court proceedings of foreign nations would damage its independence is illogical, unsupported by evidence, and blatantly promotes a harmful ideology of American superiority. Countless democracies with governing structures and constitutions similar to those of the United States exist around the world. Indeed, the influence of the U.S. Constitution can be observed in many democratic constitutions around the world, and its

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[18] Atkins v. Virginia, 536 U.S. 304 (2002).
[19] *Id* at 15.

content continues to impact the creation of new governments.[20] This influence has granted the United States a critical role in establishing international norms directly related to basic American values like liberty and equality.[21] The United States and its Supreme Court only stand to benefit from observing and consulting similar court systems governed under like-minded constitutions.

In sum, there are a myriad of reasons to support the consultation of foreign law in the U.S. Supreme Court. First, the Framers utilized foreign law when crafting the legal blueprint of our nation and is a persuasive source of information that has been used repeatedly by the Supreme Court to decide important legal questions. Turning our backs to the very influences that forged our government's composition is antithetical to the continuation of a healthy democracy. Second, in an era of increasing globalism, strong relationships between domestic and foreign courts can only stabilize our nation's standing abroad. Finally, the strict aversion to the citation of foreign law is often misunderstood and has clouded the importance of looking beyond the textual limits of our Constitution. Since its founding, the Court has demonstrated time and time again the benefits of looking beyond the textual limitations of the U.S. Constitution by observing foreign court systems and the nature through which they interpret their own governing documents. In our increasingly globalized society, working to harmonize constitutional interpretations can provide a foundation for resisting world-wide security threats and protecting the international marketplace. To do this, judges must recognize that the U.S. Constitution is not superior to the constitutions of other democracies. Looking outside our constitutional borders can lend judges the ability to visualize the potential consequences of cases through a pragmatic,

[20] Albert Blaustein, *Our Most Important Export: The Influence of the United States Constitution Abroad*, 3 CONN. J. INT'L L. 15, 30 (1987).
[21] Farber, s*upra* note 5.

introspective lense and serves to benefit not only the interpretation of the U.S. Constitution, but judicial institutions around the world.

Trump v. Hawaii: *Plenary Power and the Legacy of Chinese Exclusion*

Court cases decided in favor of Asian exclusion and segregation in the United States are often understood as relics of a racist past. However, the Trump Administration's immigration policies reveal remaining racial animus in contemporary sentiments toward immigrant groups. In June 2018, the Supreme Court affirmed the executive branch's broad powers over immigration in *Trump v. Hawaii* (2018), allowing the third iteration of President Trump's travel ban to go into effect.[1] An evaluation of the new limitations on Muslim immigration to the United States necessitates an examination of *Chae Chan Ping v. United States* (1889) and *Korematsu v. United States* (1944), both of which affirmed anti-Asian animus and set precedents for federal constitutional authority over immigration.

Prior to *Chae Chan Ping*, the federal government did not have statutory authority over immigration. Often referred to as the Chinese exclusion case, *Chae Chan Ping* established the "plenary power" of Congress over immigration.[2] In constitutional law, plenary power is "complete power over a particular area with no limitations," except for judicial oversight.[3] For example, Article I, Section 8, Clause 3 of the U.S. Constitution grants Congress plenary power over interstate commerce. Plenary power over immigration is not outlined in the Constitution but was instead enumerated through *Chae Chan Ping*.[4] The case established the federal government's ability to completely ban immigration based on nationality.[5] President Trump's

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[1] *Trump v. Hawaii*, 585 U.S. at 2412 (2018).
[2] *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).
[3] *Plenary power*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/plenary_power.
[4] Gabriel Jackson Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, IMMIGRATION LAW STORIES (forthcoming 2005).
[5] Michael Kagan, *Is the Chinese Exclusion Case Still Good Law? (The President Is Trying to Find Out)*, 1 NEV. L.J FORUM 80 (2017).

travel ban bears many similarities to Chinese Exclusion, as he fulfilled his campaign promise of a "total and complete shutdown of Muslims entering the United States."[6]

<u>*Chae Chan Ping v. United States*</u>

The fate of Asian-American immigrant communities in the late 19th and early 20th centuries was inextricably linked to the idea of the "Other" in America by virtue of race, national origin, class, and citizenship status.[7] By the mid-1850s, approximately 20,000 Chinese laborers had immigrated to work in California mines.[8] In the post-gold rush era, a labor shortage persisted, and Chinese laborers were viewed as a "yellow peril" that were driving down white workers' standards of living.[9] A workingman's movement emerged among the white miners, an important constituency in state politics, leading to violence against the Chinese.[10] Soon, anti-Chinese sentiments achieved bipartisan support in California, and Chinese exclusion rose to the level of national politics.

Through *Chae Chan Ping*, the Court gave statutory legitimacy to animus against the Chinese, affirming the legality of both the Chinese Exclusion Act of 1882 and the Scott Act of 1888. Chae Chan Ping was a Chinese man who immigrated to California prior to the Chinese Exclusion Act, which prohibited Chinese immigration and naturalization but did not remove existing Chinese residents.[11] In 1887, Ping decided to visit China and obtained a certificate from the U.S. government to ensure his ability to return to the United States.[12] However, just eight

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[6] Jenna Johnson, *Trump calls for 'total and complete shutdown of Muslims entering the United States'*, THE WASHINGTON POST (Dec. 7, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/.
[7] MAE NGAI, *THE LUCKY ONES* 3 (2010).
[8] *Id.* at 7.
[9] *Id.* at 32.
[10] *Id.* at 33.
[11] *Chae Chan Ping*, 130 U.S. at 581-582.
[12] *Id.* at 582.

days before his return, Congress passed the Scott Act, which expanded Chinese exclusion to prohibit Chinese laborers abroad from entering the country and rendered 20,000 Chinese laborers' reentry certificates void.[13] Prohibited from disembarking, Ping was detained at port in San Francisco.

The central question of *Chae Chan Ping* was whether Congress had the authority to enact an exclusionary immigration law. Although the Constitution enumerates Congress' authority to regulate naturalization, it does not explicitly outline authority over immigration. The Court found that Congress possesses the authority to exclude "foreigners" when the "interests of the country require it."[14] The case determined the legal status of immigrants to be so essential to the nation's safety that Congress must have virtually unrestricted regulatory authority, or plenary power, over immigration. The Court never considered the possibility of Chinese exclusion contradicting the Equal Protection Clause of the Fourteenth Amendment, which holds that the state cannot "deny to any person within its jurisdiction the equal protection of the laws."[15] Although *Chae Chan Ping* has never officially been overturned, modern legal consensus holds the case was wrongly decided because Chinese exclusion was rooted in racial animus.[16] The decision reflects the pervasiveness of anti-Chinese sentiments in the late 19th century, as the Justices described Chinese Americans as "a different race in this country, who will not assimilate with us,"[17] affirming the false notion that Chinese Americans posed a threat to America's predominately white society. Furthermore, Chinese exclusion rapidly became Asian exclusion; in 1917,

[13] *Timeline of Chinese Immigration to the United States*, UNIVERSITY OF CALIFORNIA REGENTS, http://bancroft.berkeley.edu/collections/chinese-immigration-to-the-united-states-1884/timeline.html.
[14] *Chae Chan Ping*, 130 U.S. at 604.
[15] U.S. CONST. AMEND. XIV, § 1.
[16] Kagan, *supra* note 5 at 81.
[17] *Chae Chan Ping* at 597.

Congress used its newly established authority to create the "Asiatic barred zone," a geographical area from which no Asians could immigrate that primarily targeted Japanese people.[18] Concurrent with the widespread adoption of eugenics theory, the National Origins Act of 1924 further restricted international immigration by establishing a series of national quotas designed to encourage Northern and Western European immigration while limiting immigration from Asia, Africa, the Middle East, and Eastern and Southern Europe.

As a result, racism and exclusionism characterized the United States' immigration policy during the first half of the 20th century until the Immigration and Nationality Act (INA), which holds that "No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence,"[19] repealed national-origins quotas in 1965. The new immigration policy placed preferences on people of certain categories, such as those with relatives in the U.S., those with labor skills, or those seeking asylum or refuge. The Act also gives the president authority to restrict immigration should the entry of a certain individual or group be deemed "detrimental to the interests of the United States,"[20] a provision that proves relevant in *Trump v. Hawaii*.

<u>*Trump v. Hawaii*</u>

In *Trump v. Hawaii*, the Supreme Court examined whether President Donald Trump had the executive authority to issue Presidential Proclamation No. 9645 under the provision for presidential authority in the INA.[21] Proclamation No. 9645 is the third iteration of an executive order banning immigration from Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and

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[18] Chin, *supra* note 4 at 32.
[19] 8 U.S. Code § 1152(a) (1965).
[20] 8 U.S. Code §1182(f) (1965).
[21] *Hawaii*, 585 U.S. at 2415, 2423.

Yemen, all but two of which are countries where Islam is the predominant religion.[22] In accordance with his erroneous belief that "Islam hates us,"[23] Trump draws no distinction between Islam and radical Islamic terrorism in Proclamation 9645. For example, President Trump maintains that "several terrorist groups are active within Chad or in the surrounding region, including elements of Boko Haram, ISIS-West Africa, and al-Qa'ida in the Islamic Maghreb."[24] Trump contends that the existence of fringe terrorist groups in a country is sufficient evidence to prove every citizen in that country poses a risk to national security. The historical tendency of the U.S. government to scapegoat external groups for internal problems, as seen in Chinese Exclusion, is similarly evident through the Trump Administration's "travel ban."

Shortly after President Trump issued Proclamation No. 9645, the United States District Court for the District of Hawaii struck down the Proclamation.[25] The plaintiffs, including the Muslim Association of Hawaii, argued the travel ban not only violated the INA but also the Establishment Clause of the First Amendment, which prohibits the federal government from making any law "respecting an establishment of religion, or prohibiting the free exercise thereof."[26] The Supreme Court granted review, with President Trump serving as the petitioner and Hawaii, et. al as the respondent.[27] Writing for the Court's majority in a 5-4 decision, Chief Justice John Roberts argued Proclamation No. 9645 did not violate either the INA or the Establishment Clause.[28] He explained that regardless of the President Trump's public statements

[22] Presidential Proclamation No. 9645 §§ 1(g), 2.
[23] Theodore Schleifer, *Donald Trump: "I Think Islam Hates Us"*, CNN (March 10, 2016), https://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/.
[24] Presidential Proclamation No. 9645 at §§ 2(a).
[25] *Trump v. Hawaii*, OYEZ, (Mar. 31, 2019) https://www.oyez.org/cases/2017/17-965.
[26] U.S. CONST. amend. I.
[27] *Supra* note 25.
[28] *Supra* note 21.

about Islam, it could "reasonably be understood to result from a justification [referring to national security] independent of unconstitutional grounds."[29]

In her dissent, Justice Sonia Sotomayor drew parallels between the Court's decision and its 1944 decision in *Korematsu v. United States*, which upheld the constitutionality of Franklin Roosevelt's Executive Order No. 9066 ordering the internment of Japanese Americans during World War II.[30] Sotomayor argued, "The [Japanese] exclusion order was rooted in dangerous stereotypes about a particular group's supposed inability to assimilate and desire to harm the United States."[31] In the same manner, she condemned the Court's sanctioning of the travel ban and the executive branch's use of national security as a defense for an unnecessary policy, which mirrored the rationale presented in *Korematsu*.[32] Sotomayor highlighted the danger of affirming similarly misguided logic by replacing one discriminatory decision with another and furthered her dissent by citing multiple tweets and statements from President Trump, arguing, "The full record [of Trump's assertions] paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith."[33] She specifically referenced President Trump's December 2015 assertion made on MSNBC, in which he stated, "It's not unconstitutional keeping people out, frankly, and until we get a hold of what's going on. And then if you look at Franklin Roosevelt… what he was doing with Germans, Italians, and Japanese, because he had to do it. Because look,

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[29] *Hawaii*, 585 U.S. at 2430.
[30] *Korematsu v. United States*, 323 S. Ct. at 215–16 (1944).
[31] *Hawaii,* 585 U.S. at 2445.
[32] *Id.* at 2446, 2447.
[33] *Id.* at 2448.

we are at war with radical Islam."[34] President Trump himself affirmed the similarity of his anti-Muslim policies to anti-Japanese sentiments during World War II, and his statement alluding to Japanese internment as a means of legitimizing his travel ban parallels past policy driven by racist stereotypes with his own. Despite President Trump's Islamophobic remarks, Chief Justice Roberts argued the travel ban was a "facially neutral policy" and refused to examine the president's legislative motivations. Justice Roberts rejected Sotomayor's comparison of *Hawaii* to *Korematsu*, claiming, "It is wholly inapt to liken that morally repugnant [executive] order [for Japanese exclusion] to a facially neutral policy denying certain foreign nationals the privilege of admission."[35]

Conclusion

The *Trump v. Hawaii* decision thus reveals a fundamental flaw in the "rational basis" test. Through rational basis review, the Supreme Court has the authority to assess whether laws are "rationally related to a legitimate governmental interest."[36] Thomas B. Nachbar, Professor of Law at the University of Virginia School of Law, makes a compelling argument against rational basis review: "In the hands of the modern Court, rationality analysis has turned on its head the traditional refusal of courts to look into legislative motivation."[37] Regarding Trump's travel ban, the majority of the Court identified a rational governmental interest in the form of national security. In her dissent, however, Justice Sotomayor provided sufficient evidence of the anti-Islam animus President Trump propagated as the motivation behind his travel ban. The

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[34] Alan Gomez, *What President Trump has said about the travel ban,* USA TODAY (Jun. 11, 2017), https://amp.usatoday.com/story/news/politics/2017/06/11/what-president-trump-has-said-about-muslims-travel-ban/102565166/.
[35] *Hawaii*, 585 U.S. at 2431.
[36] Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1267 (Nov. 2016).
[37] *Id.* at 1660.

Court must instead account for the law's ability to define and shape social understandings. Legislative motivation is a key factor in the creation of law, as the law creates status quo and sets further precedent. In the era of Chinese exclusion, the status quo held that Chinese immigrants posed a dangerous threat to American society. *Hawaii* affirms a similar hostility, perpetuating a false connection between Muslims and terrorism. The plenary power doctrine was instituted to allow the government to exclude what it perceived to be an unfavorable group of people and deny them equal protection under the law. It is not enough to advocate for better immigration laws; rather, *Trump v. Hawaii* calls into question the broader framework of American jurisprudence and the extent to which the legacy of Chinese exclusion continues to affect modern legal decisions.

The Efficiency of the Paris Agreement

Since President Trump's June 2017 decision to withdraw the United States from the Paris Agreement, an international effort to reduce greenhouse gas emissions, his administration has received heavy backlash and criticism from media and the general public. However, they both fail to grasp that the Paris Agreement lacks the credibility required to be considered a serious approach at reducing global greenhouse gas emissions. This paper will examine the reasons why the deal lacks authenticity and explain how the entire agreement is inherently flawed.

Costs of the Agreement

Initially signed in 2015 under the Obama Administration, the Agreement has many provisions requiring analysis in order to fully understand their issues. The stated goal of the Agreement is to significantly reduce carbon dioxide emissions before their effects cause irreversible damage to the earth's climate. The main factor in achieving these reductions depends heavily upon incentive-based Nationally Determined Contributions (NDCs) from each participating country. These contributions are a commitment outlining each country's plan for achieving its emissions reduction goals based on different capabilities and circumstances.[1] The agreement claims to work by utilizing both binding and non-binding aspects of NDCs that require individual nations to "report regularly on their emissions and on their implementation efforts" and allow for flexibility in each country's specific requirements to ideally prevent the earth from warming more than 2 degrees Celsius before the end of the century.[2]

Not only does the Agreement fail to focus heavily enough on reducing emissions, but the majority of monetary contributions necessary to achieve each country's NDC fall on countries

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[1] Adoption of the Paris Agreement, *adopted* Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/L.9/Rev/1.
[2] *Id.* at art. II.

that have lower emission rates than the rest of the world.[3] The goal of resource mobilization, the practice of allocating money to achieve NDCs, is to help developing nations begin making efforts toward reductions they otherwise may not be able to afford by requiring some developed countries to pledge individually chosen amounts of money each year to the Green Climate Fund. The funds differ per country and are meant to reach an agreed-upon goal of $100 billion per year by 2020.[4] Of the 195 participating countries that adopted the agreement, a select handful are expected to assume a majority of costs in reaching this $100 billion target, with Japan and the European Union being the most burdened.[5] Although the United States has pledged more money in the form of direct contributions than Japan, the United States' NDC requires a far smaller percentage of overall gross domestic product (GDP) compared to those of Europe and Japan. The marginal abatement costs, the cost of reducing one more unit of pollution, for both Japan and the European Union are high, with each ton of carbon dioxide costing several hundred dollars, while the marginal abatement costs for China, India, South Africa and Russia—some of the world's leading emissions contributors—are close to zero.[6] Many of the fastest-growing contributors of emissions bear essentially no costs. For example, because China is considered a developing country, it is not required to make a contribution to the Green Climate Fund, despite having the world's second-largest GDP.[7]

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[3] Weifeng Liu, et. al., *Global Economic and Environmental Outcomes of the Paris Agreement*, Brookings Institution: Climate and Energy Economics Project, (Jan. 7, 2019).
[4] *Resource Mobilization,* Green Climate Fund, (2019), https://www.greenclimate.fund/how-we-work/resource-mobilization.
[5] *Status of Pledges and Contributions Made to the Green Climate Fund,* Green Climate Fund (Jan. 24, 2019), https://www.greenclimate.fund/documents/20182/24868/Status_of_Pledges.pdf/eef538d3-2987-4659-8c7c-5566ed6afd19.
[6] Liu, *supra* note 4 at 2.
[7] *Supra* note 6 at 2.

There is also no clear-cut plan for how the monetary contributions will be redistributed. In fact, the only explanation offered by the Green Climate Fund is that, "Once 60% of contributions have been approved towards projects and programmes, the Fund will rely on a systematic process to replenish these resources."[8] While this seemingly is a legitimate effort, the Fund's website further reveals that only about $10 billion has been raised as of January 2019, a figure far short of its $100 billion annual contribution goal that was supposed to be met by 2020.

A widespread lack of financial contributions and new policy shows that in order to coerce each country to participate in the agreement, negotiations were made to allow leading polluters, such as China and India, to appear as if they are making emissions-reducing efforts without requiring any significant actions.[9] While China announced in 2017 that it will implement a cap-and-trade system designed to reduce emissions from manufacturers and utilities in 2020, many experts expressed concern that this commitment is too timid. Huw Slater, a senior consultant of an advising firm that has worked with the Chinese government and Chinese power companies, claims, "This approach reflects the fact that the government's goal for now is to reduce the rate of increase in emissions rather than to achieve absolute reductions."[10]

Many developing countries were also incentivized to sign with the promise of redistributed wealth with no actual written requirements to reduce emissions. Because the Agreement fails to require countries to implement new climate-related policies, it inherently lacks a strong incentive for developed nations to continue monetarily supporting developing nations. Many poorer nations are losing patience while waiting for the promised aid, as there is

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[8] *Supra* note 5.
[9] *Supra* note 6 at 2.
[10] James Temple, *China is Creating a Huge Carbon Market—But Not a Particularly Aggressive One,* MIT TECHNOLOGY REVIEW, (June 18, 2018), https://www.technologyreview.com/s/611372/china-is-creating-a-huge-carbon-market-but-not-a-particularly-aggressive-one/.

no explicit guarantee of receiving funds. Recently Xie Zhenhua, the vice-chairman of China's leading economic body, accused developed nations of "back-sliding" on their contribution pledges.[11]

In defense of polluters, it is nearly impossible for massive countries, such as China and India, to reduce carbon emissions while satisfying immense, growing energy demands. Millions of people there are continuously rising out of poverty; in fact, the number of extremely poor people in India drops by 44 people each minute.[12] While this shift is overwhelmingly positive, it has caused massive increases in the world's emerging middle classes' energy needs. For example, "China will have 150 million SUVs by 2025 (45 percent of its passenger vehicle fleet), up from just four million SUVs in 2010,"[13] and according to estimates from the state-owned China National Petroleum Corporation, this surge in demand "will more than offset the impact of increasing electric vehicles and hybrids."[14] Additionally, as India continues to economically advance, its energy demands will advance as well. India is now the third-largest oil consumer in the world, and it is predicted its energy consumption will grow the fastest among all major economies by 2035.[15] Because coal and natural gas are still the most-utilized energy sources

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[11] Jeremy Hodges, *Where's the Money? China Accuses Rich Nations of 'backsliding' on Climate Change Aid Pledges,* NATIONAL POST (2018), https://nationalpost.com/news/world/wheres-the-money-china-accuses-rich-nations-of-backsliding-on-climate-change-aid-pledges.

[12] Joanna Slater, *India is No Longer Home to the Largest Number of Poor People in the World. Nigeria Is*, WASHINGTON POST, (July 10, 2018), https://www.washingtonpost.com/news/worldviews/wp/2018/07/10/india-is-no-longer-home-to-the-largest-number-of-poor-people-in-the-world-nigeria-is/.

[13] Ier, *China and India Will Continue to Increase Oil and Coal Consumption, Paris Agreement Notwithstanding,* INSTITUTE OR ENERGY RESEARCH (2017), https://business.financialpost.com/opinion/china-was-the-climate-champion-of-paris-now-its-doing-a-complete-u-turn.

[14] *Id* at 4.

[15] *India's Energy Consumption to Grow Faster Than Major Economies,* THE ECONOMIC TIMES (2017), https://economictimes.indiatimes.com/articleshow/56800587.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

worldwide, their use provides the most efficient and cost-effective way to keep up with growing energy demands in these countries.[16] Even if developed nations gave sufficient fiscal assistance to switch to renewable energy, population growth within the two countries makes significant emission reductions unrealistic.

Developed nations were also given misleading incentives to join the Paris Agreement. Europe is known for its seemingly progressive ideas surrounding alternative energy, with France in particular deriving approximately 75 percent of its energy needs from nuclear power.[17] Because of Europe's generally progressive climate initiatives and the billions of dollars it has already pledged to the Green Climate Fund, the continent tends to be more encouraging of developing nations to adopt clean energy sources than others. One such goal includes funding several renewable energy projects in regions of North Africa, which is particularly attractive to Europe because, according to The International Energy Agency, "the potential [solar energy] from concentrated solar power technology alone could amount to 100 times the electricity demand of North Africa, the Middle East and Europe combined."[18] This potential incentivizes stronger political communication between the regions to build a new energy market, but the Agreement does not account for how the funds from Europe will be redistributed. Europe fails to recognize that the Agreement's current writing creates ambiguity on how renewables can realistically be implemented in developing regions, especially while the funds cannot be redistributed until 60 percent of the Green Climate Fund goal is achieved.

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[16] Jude Clemente, *Today's Poor Need More Oil, Natural Gas and Coal,* FORBES (2017), https://www.forbes.com/sites/judeclemente/2017/11/30/todays-poor-needs-more-oil-natural-gas-and-coal/.
[17] *Nuclear Power in France,* WORLD NUCLEAR ASSOCIATION, (2018), http://www.world-nuclear.org/information-library/country-profiles/countries-a-f/france.aspx.
[18] Sameh Mobarek, *Renewable Energy Export-Import: a Win-Win for the EU and North Africa,* THE WORLD BANK, (Jan. 7, 2016), http://blogs.worldbank.org/energy/renewable-energy-export-import-win-win-eu-and-north-africa.

Target Goals and Reality

The most concerning aspect of the Agreement is the lack of honesty from many participating countries. Each country in the Agreement purposely chose the year when emissions were highest as its baseline year in order to give the appearance of achieving significant reductions. The Paris Agreement was signed in 2015, yet the United States' baseline year for reductions is 2005, when the country emitted a record-high 5,921 million metric tons of carbon dioxide. The United States already achieved a 10 percent reduction when comparing 2005 rates to 2015 rates, placing it one-third of the way toward its 2025 emissions goal before enacting any new policies.[19] Since then, the United States has already reached about 55 percent of its 2025 target.[20] In 2017, "America experienced the largest year-over-year reduction in carbon emissions—a 0.5 percent decline—of any advanced country. U.S. emissions fell for the third consecutive year without government restrictions on fossil fuel use."[21] This is partially explained by the growing use of renewable energy in the United States and the fact that its energy demands are not growing at the same rates of developing nations. While this reduction appears to be significant, both the misleading and inconsistent achievements of many countries participating in the Agreement illustrate the lack of ambition integral to the success of the Paris Agreement. Several studies note that the current terms of the Agreement's NDCs do not offer realistic means of preventing a full 2 degrees Celsius of warming. One goes as far to say, "Substantial enhancement or over-delivery on current INDCs by additional national, sub-national and

[19] Liu, s*upra* note 4 at 2.
[20] *Greenhouse Gas Inventory Data Explorer,* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (2017), https://cfpub.epa.gov/ghgdata/inventoryexplorer/#iallsectors/carbondioxide/inventsect/current.
[21] H. Sterling Burnett, *Paris Climate Participants Miss Targets While U.S. Reduces Its Emissions*, THE HEARTLAND INSTITUTE (July 12, 2018), https://www.heartland.org/news-opinion/news/paris-climate-participants-miss-targets-while-us-reduces-its-emissions.

non-state actions is required to maintain a reasonable chance of meeting the target of keeping warming well below 2 degrees Celsius."[22]

China similarly used 2005 as its baseline year. There were also significant reductions in emissions over the following 10 years until the ratification of the agreement, yet unlike the United States, China's emissions have increased since signing the Agreement. In fact, China's carbon dioxide emissions rose at the fastest rate in seven years during the first quarter of 2018. [23] Completely opposite of the country's 2030 goal, the sharp emissions increases are again explained by the continuing growth of China's middle class and its energy demands. While China has quickly become the leading producer of electric vehicles and continues to seek clean alternative options, it is still the world's largest consumer of coal and second-largest consumer of oil.[24] It is simply too expensive and inefficient to reduce emissions while competing in an international marketplace and satisfying the enormous energy demands of the nation.

Europe has some of the most ambitious goals in the Paris Agreement, including reducing emissions by 40 percent and sourcing 50 percent of its energy from renewable sources by 2030.[25] However, despite its objectives, Europe's emissions also increased since signing the Agreement. In fact, "Emissions from countries in the European Union increased by 1.5 percent, or 50 million tons, in 2017 alone."[26] Germany, one of Europe's most dominant economic and energy players, stated in 2017 that it would not be able to meet its targets due to increased use of coal fired

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[22] Joeri Rogelj, et. al, *Paris Agreement Climate Proposals Need a Boost to Keep Warming Well Below 2 °C,* 534 NATURE INT'L J. O SCIENCE 631-639
(June 30, 2016).
[23] Burnett, *supra* note 23.
[24] *China is Rapidly Developing Its Clean-Energy Technology,* THE ECONOMIST (March 15, 2018), https://www.economist.com/special-report/2018/03/15/china-is-rapidly-developing-its-clean-energy-technology.
[25] Liu, *supra* note 4.
[26] Burnett, *supra* note 23.

power plants supporting the automobile industry, a significant portion of its economy. In fact, air pollution levels in certain parts of Germany have significantly breached EU standards, and in response, the EU has begun court proceedings to fine the country. Despite this court action, however, Germany's transportation minister Andreas Scheuer has requested the EU review its nitrogen dioxide limits that many countries find too stringent,[27] even though one metric ton of nitrous oxide has the equivalent effect of almost 300 metric tons of carbon dioxide.[28] Germany, the economic powerhouse of the EU, is deliberately disregarding and fighting climate initiatives designed to limit emissions, so while Europe asserts it cares about international environmental objectives, the actions of some of its nations suggest otherwise, making the legitimacy of Europe's efforts questionable at best.

Conclusion

Despite media portrayal, the United States has taken more action than most other countries when it comes to reducing emissions. The Trump administration has made clear it does not prioritize creating stringent and effective environmental policy, yet the country continues to move towards goals set by the Paris Agreement even though it is a perfunctory attempt at achieving effective change. Arguments supporting the Agreement's effort to reduce any amount of emissions fail to consider the dangerous mindset of combating climate change without clear, effective incentives or consequences. The countries involved are more concerned with appearance rather than following through on real efforts to decrease emissions.

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[27] Arthur Neslen, *German Backlash Against EU Air Pollution Limits 'Lacks Evidence'*, THE GUARDIAN (Feb. 5, 2019), https://www.theguardian.com/environment/2019/feb/05/germany-air-pollution-limit-eu-backlash-evidence-world- health-organisation.
[28] *Meet N2O, the greenhouse gas 300 times worse than CO2,* THE CONVERSATION (Dec. 8, 2014), https://theconversation.com/meet-n2o-the-greenhouse-gas-300-times-worse-than-co2-35204.

The Paris Agreement set mediocre goals and placed too much responsibility on richer countries to assist developing ones. In addition to basing goals off misleading emission statistics, countries participating in the Agreement do not take reducing emissions as seriously as scientists encourage them to. If the world's governments want to make serious efforts at reducing greenhouse gas emissions, large stakeholders, such as the United States and Germany, need to seriously pursue and adopt alternative energy before allocating resources to developing economies. While nations, such as India and China, have made attempts to expand alternative energy, these efforts go largely unnoticed as market forces currently favor coal and oil.[29] There is economic opportunity in alternative energy markets, and countries with rapidly expanding economies have the potential to reap the socioeconomic benefits, including job creation, better health outcomes, and reduced air pollution.[30] As countries develop individual initiatives, whether economic or climate-based, the disconnect between international efforts to address climate change grows. For example, the United Kingdom's decision to leave the European Union, otherwise known as Brexit, has already complicated European solidarity on the Paris Agreement and climate change. Europe played a major factor in the success of the Paris negotiations, but this unity can no longer be assured.[31]

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[29] Kevin Frayer, *China is Creating a Huge Carbon Market—But Not a Particularly Aggressive One,* MIT TECHNOLOGY REVIEW (June 18, 2018), https://www.technologyreview.com/s/611372/china-is-creating-a-huge-carbon-market-but-not-a-particularly-aggressive-one/.

[30] *Ahead of China, India to Remain Fastest Growing Economy in FY19 & FY20: ADB*, THE FINANCIAL TIMES (July 19, 2018), https://economictimes.indiatimes.com/news/economy/finance/india-fastest-growing-economy-in-asia-on-track-to-meet-fy18-target-adb/articleshow/65049353.cms.

[31] Michael Klare, *What's the Greatest Threat to Action on Climate Change? Nationalism,* THE NATION, (Sep. 15, 2016), https://www.thenation.com/article/whats-the-great-threat-to-action-on-climate-change-nationalism/.

The United States is holding the world back from developing successful alternative energy markets through a lack of comprehensive federal action. To achieve the goals of the Paris Agreement, American legislators need to look beyond the interests of the fossil fuel lobby and of the constituents whose jobs are no longer economically viable to see the value of a new, untapped market. In today's political climate, this is a daunting task, as narrow-minded ideologies continue to spread throughout the country and prevent environmental progress. However, if the United States felt economic pressure, perhaps from a trade pact centered around alternative energy involving the EU, India, and China, then legislators may better grasp the economic opportunities presented by new climate policies. Until then, a climate agreement involving nearly every country in the world will remain impossible to achieve.

Money Laundering and the Rise of Cryptocurrency: The United States and South Korea

Independent from the United States Federal Reserve System, Bitcoin is a popular type of virtual currency that has been argued to be the future of transactions. Bitcoin was founded by the anonymous Satoshi Nakamoto and continues to foster anonymity in transactions by allowing users to act under pseudonyms. Anonymity is Bitcoin's most attractive aspect, and since Bitcoin keeps a record of digital addresses rather than its users' information, transaction recipients are often onerous to accurately track. While Bitcoin is arguably the most popular type of cryptocurrency, there are many other similar types. Given the enigmatic features of many cryptocurrencies, the U.S. Commodity Futures Trading Commission has warned against handling investments and certain business deals with Bitcoin and other cryptocurrencies.[1] Other than the warning, the government has voiced no cautions or advice in regards to specifically using Bitcoin. Criminal activity, such as money laundering and ransom, have steadily increased through the use of Bitcoin in recent years. Illegal activity involving Bitcoin is spiking, and the cryptocurrency lacks both effective global and national regulation. National regulation of Bitcoin seems virtually impossible because Bitcoin operates on a global network. While 26 percent of Bitcoin users are American,[2] it is certainly debatable whether the United States should try to further regulate it.

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[1] The U.S. Commodity Futures Trading Commission, *A CFTC Primer on Virtual Currencies*, COMMODITY FUTURES TRADING COMMISSION (Oct. 17, 2017), https://web.archive.org/web/20180512073101/https://www.cftc.gov/sites/default/files/idc/groups/public/@customerprotection/documents/file/labcftc_primercurrencies100417.pdf

[2] Kate Rooney, *Your Guide to Cryptocurrency regulations around the world and where they are headed*, CNBC (March 27, 2018), https://www.cnbc.com/2018/03/27/a-complete-guide-to-cyprocurrency-regulations-around-the-world.html

The Steady Rise of Crime

CipherTrace, a cryptocurrency security firm, announced in its 2018 report that three times as much cryptocurrency was stolen in 2018 versus 2017, thus resulting in a six-fold increase in cryptocurrency complaints to the U.S. Federal Bureau of Investigation.[3] In the summer of 2018, a young Bitcoin dealer, Jacob Burrell Campos, was found to have allegedly "committed a total of 28 counts of international money laundering," after wiring $900,000 from his U.S. bank account to one in Hong Kong.[4] In May 2015, Ross Ulbricht was sentenced to life in prison for trafficking narcotics, conspiracy to commit money laundering, and computer hacking while "operating on the Silk Road" through Bitcoin.[5] A study conducted at the University of Sydney concluded that 25 percent of Bitcoin users engage in illicit activity. The study also found that around "$76 billion of illegal activity per year involves Bitcoin (46% of bitcoin transactions), which is close to the scale of the U.S. and European markets for illegal drugs."[6] The rise of virtual crime through Bitcoin continues to steadily increase.

The Legality of Cryptocurrency

In 2012, a leaked FBI report on Bitcoin detailed a correlation between the rise of money laundering and the proliferation of Bitcoin, but because Bitcoin has legitimacy behind it as an international currency, the United States cannot deem Bitcoin and other cryptocurrencies illegal. Danton Bryans noted in an *Indiana Law Journal* article that "bitcoins are functionally equivalent

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[3] Shaurya Malwa, *$1.2 Billion in Cryptocurrency Laundered Through Bitcoin Tumblers, Privacy Coins*, CCN (May 7 2018), https://www.ccn.com/1-2-billion-in-cryptocurrency-laundered-through-bitcoin-tumblers-privacy-coins
[4] Wolfie Zhao, *21-Year-Old Trader Prosecuted Over Bitcoin Money Laundering*, CoinDesk (Aug. 20, 2018) https://www.coindesk.com/21-year-old-trader-prosecuted-over-bitcoin-money-laundering
[5] *United States v. Ross William Ulbricht*, 79 F.3d 466 (2d Cir. 2015).
[6] Foley, Sean and Karlsen, Jonathan R. and Putnins, Talis J., *Sex, Drugs, and Bitcoin: How Much Illegal Activity Is Financed Through Cryptocurrencies?*, Review of Financial Studies, JEL Classification G18, O31, O32, O33 (forthcoming Dec. 2018).

to dollars, euros, or any other currency, [and can] act as commodities, similar to purchased goods. Under either theory, the use of bitcoins should be lawful."[7] Further, with one Bitcoin equaling approximately $3,600, Bitcoin's attractiveness as a currency is partly due to its legitimacy and worth. Considering Bitcoin's versatile use, the criminalization of Bitcoin would seem to infringe upon certain individual, corporate, and economic rights.

Regulating Cryptocurrency

The attempts made by the United States to regulate crime on the global Bitcoin network have proven ineffective. The Department of Treasury requires all money transmitters to register and comply with the Financial Crimes Enforcement Network (FinCEN). In simple terms, a money transmitter is simply a business that provides money transfer services. Along with registration, the United States requires recipients to "report suspicious financial activity and obtain state licenses."[8] Although these efforts are mandated by the Bank Secrecy Act of 1970 (BSA), which requires U.S. financial firms to collaborate and comply with the federal government in order to minimize fraud and money laundering, FinCEN and BSA regulation remains ineffective due to the anonymity that ultimately defines Bitcoin and diminishes the feasibility of BSA enforcement. Additionally, FinCEN released a guidance that further interprets BSA in regards to cryptocurrency in the spring of 2013, "but the guidance does little to clarify Bitcoin's legal status beyond the BSA."[9] In response, founding member of the Bitcoin Foundation Patrick Murck argued that FinCEN "does not have authority to promulgate new rules without first going through the required notice and comment proceeding of the Administrative

[7] Bryans, Danton, *Bitcoin and Money Laundering: Mining for an Effective Solution*, INDIANA LAW JOURNAL, 2014, at Vol. 89: Iss. 1, Article 13. P 449.
[8] HG Legal Resources, *What Is The Threat of Money Laundering Associated with Bitcoin?*, HG LEGAL RESOURCES https://www.hg.org/legal-articles/what-is-the-threat-of-money-laundering-associated-with-bitcoin-31835
[9] Bryans, *supra* note 7, at 450.

Procedures Act."[10] While federal law does require Bitcoin users to obtain licensure, the extent to which users should be required to comply with the federal government is often still questioned.

Ineffective regulation is also a result of the government's lack of action in regards to businesses using Bitcoin. Like individual Americans, businesses have a certain independence that allows them to manage their own operations. Because Bitcoin is internationally considered legitimate, many corporations have adopted Bitcoin as their only accepted currency, rather than fiat money. From security consulting firms to food services, Bitcoin is increasingly becoming welcomed by American business.[11] The U.S. government has failed to clarify Bitcoin's safety in business transactions, thus rendering the conception that Bitcoin is accepted as legitimate for business operations. While the American government cannot theoretically ban Bitcoin in business transactions, its silence seems to confirm acceptance and approval. This notion of approval could have detrimental consequences, such as leading to an increase in American business failure. Does the government have a duty to proactively advise businesses against a possibly unstable currency whose network has proven to be a breeding ground for crime?

However, perhaps the governmental silence is due to the cryptic nature of Bitcoin and other similar virtual currencies. According to CNBC, various U.S. agencies "differ in their definitions of Bitcoin," with some, such as the Securities and Exchange Commission, defining it as a security, while others, such as the Commodity Futures Trading Commission, consider it a commodity.[12] While Bitcoin can rightfully be argued to be both a commodity and a security, effective regulation and fruitful enforcement can only exist once the government clarifies how it views Bitcoin.

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[10] *Id.*
[11] Bryans, *supra* note 7, at 454.
[12] Rooney, *supra note* 2.

Current federal regulations have declared that operating without a license is illegal for money transmitting businesses. However, it is often difficult to prove whether or not a money transmitting business is licensed or not since cryptocurrency transactions can often be hidden behind pseudonyms. Federal investigation in virtual laundering is "most effective where knowledge of a licensure requirement can be shown or if the money is clearly dirty."[13]

Certain states have made efforts to regulate virtual money laundering, such as Virginia, which recently passed a law called the Virginia Act. The Virginia Act, through its careful rhetoric and intentional inclusion of cryptocurrency in its legislation, has proven to more acutely regulate Bitcoin and other cryptocurrency than other laws, both federally and on the state level. For example, the Virginia Act defines a money transmission as "receiving money or monetary value for transmission by wire, facsimile, electronic means or other means or selling or issuing stored value."[14] Further, the Virginia Act defines stored value as "monetary value that is evidenced by an electronic record"[15] that does not necessarily have to be redeemable. By being publicly recorded as a blockchain,[16] Bitcoin does not have to be redeemed, which validates the Virginia Act's careful inclusion of Bitcoin in state law. In 2013, Tangible Cryptography LLC was targeted by the Commonwealth of Virginia for possibly operating as an unlicensed money transmitter, despite its registration with FinCEN.[17] So, due to the clarity and inclusive nature of the Virginia Act, the Virginia could detect the Tangible Cryptography LLC violation even while the business was fulfilling federal requirements. The ambiguity between state and federal law causes significant nuances in the enforcement and regulation of Bitcoin activity.

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[13] Bryans, *supra* note 7, at 463.
[14] *Id*. at 468.
[15] *Id*.
[16] *Id*.
[17] *Id*.

One possible solution to ending some Bitcoin users' virtual crime is to simply eradicate anonymity by prohibiting users from having pseudonyms. However, while erasing this mysterious and central quality of Bitcoin seems plausible, additional challenges are certain to arise. One challenge is a software called Dark Wallet. The sole purpose of Dark Wallet's design and code is to further protect user anonymity beyond the partial invisibility Bitcoin already grants their users. The creators of Dark Wallet, free-market anarchist Amir Taaki and 3D-printed gun creator Cody Wilson, argue that Dark Wallet's ability to allow money laundering, child pornography, murder, and other dark crimes is completely legal under American law since the software's code is fully protected under the First Amendment.[18] Despite their argument, the United States certainly has the power to scrutinize such software due to the actual meaning of the First Amendment. For example, the United States Supreme Court would not consider Dark Wallet as protected under the First Amendment because of its enablement of child pornography. Enabling or instigating a crime like child pornography would fail the Miller Test, a legal assessment used by the Supreme Court to determine the legality of certain obscene expressions. The Miller Test was established through *Miller v. California*, and in order for an expression, work, or speech to be considered obscene, it must satisfy all three prongs to the Miller Test:

- Whether 'the average person, applying contemporary community standards,' would find that work, taken as a whole, appeals to 'prurient interest,'
- Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law,

[18] Andy Greenberg, *'Dark Wallet' Is About To Make Bitcoin Money Laundering Easier Than Ever*, WIRED (April 29, 2014, 6:11 PM), https://www.wired.com/2014/04/dark-wallet/

- Whether the work, 'taken as a whole,' lacks serious literary, artistic, political, or scientific value.[19]

South Korea's Regulations

Federally, the United States has only addressed Bitcoin in seemingly broad terms. However, other nations are making more active efforts to understand and regulate Bitcoin and similar cryptocurrencies. In late July 2018, the *Korea Times* announced that South Korea will "establish a department exclusively for policymaking initiatives in the nation's blockchain industry."[20] Accordingly, the sole purpose of this department will not only be to create policy for financial innovation, but to also respond to challenges within the world of cryptocurrency. In addition, South Korea has also embraced global initiative by coming to an agreement with China to combine their cryptocurrency "monitoring experience and information exchange on internal control of financial institutions and anti-money laundering."[21] With the goal of becoming a leading nation in financial technology, Korea decision to partner with China demonstrates its willingness to fully understand, regulate, and innovate within the cryptocurrency industry as a whole. Additionally, partnering with other countries can prevent crime because criminals are presently able to migrate to nations with lax cryptocurrency regimes.[22] Although utilizing global cooperation to tackle some of the issues behind cryptocurrency is a relatively new idea, it could be one of the strongest forces behind successful monitoring and regulation.

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[19] *Miller v. California,* 413 U.S. 15 (1973).
[20] Kevin Helms, *South Korea's Crypto Regulation Shakeup: New Bureau, Agreement with China*, BITCOIN NEWS (July 22, 2018), https://news.bitcoin.com/south-koreas-crypto-regulation-agreement-china/
[21] *Id.*
[22] Iwa Salami, Annotation: From University of East London, *Bitcoin's Surge Intensifies Need for Global Regulation of Cryptocurrencies*, THE CONVERSATION (Nov. 29, 2017), http://theconversation.com/bitcoins-surge-intensifies-need-for-global-regulation-of-cryptocurrencies-86893

South Korea has also made efforts to address the challenge of anonymity. Financial Services Commission Vice Chair, Kim Yong-beom, stated in January 2018 that "local banks will launch a real-name system for cryptocurrency trading, requiring transactions to be traceable… the new measures will prevent foreigners and minors under age 19 from buying or selling bitcoins and other digital currencies, [and] is aimed at preventing the use of cryptocurrency trading to engage in money laundering, tax evasion, and other criminal activities."[23] After the real-name system's implementation, market participants within the cryptocurrency space have claimed that South Korea's efforts were "positive on a long-term basis."[24] Julian Hosp, president of cryptocurrency startup TenX, argues that "if investor and companies have more legal security working in the ecosystem, it's going to have some short-term downsides, but long term, it's going to have a really, really big boost."[25] John Sarson with Blockchain Momentum sided with Hosp by claiming that "it's a good thing [when] an investment exchange knows their client and makes sure that their clients are doing things that are above board legally… adding those rules allows for greater scale and legitimacy."[26] So, despite the fact that requiring real-name identification for transactions might reduce the attractiveness of cryptocurrencies in general, erasing anonymity seems to have a positive impact in terms of encouraging legal action within the cryptocurrency world. The real-name requirement serves the business community while inconveniencing criminals, which arguably leads to the conclusion that requiring a real name during transactions acts as a deterrent for criminal activity.

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[23] Associated Press, *South Korea To Start Real-Name Trading of Cryptocurrency*, BUSINESS INSIDER (Jan. 22, 2018, 11:02 PM), https://www.businessinsider.com/ap-south-korea-to-start-real-name-trading-of-crypto-currency-2018-1.
[24] Cheang Ming, *New Cryptocurrency Rules Just Came Into Effect in South Korea*, CNBC (Jan. 29 2018, 2:20 AM), https://www.cnbc.com/2018/01/29/south-korea-cryptocurrency-regulations-come-into-effect.html
[25] *Id.*
[26] *Id.*

In addition to having a real name tied to accounts, all Korean financial companies will be required to follow the Korean Financial Intelligence Unit (KoFIU) anti-money laundering guidelines. In order to better address the current cryptocurrency market and rising virtual crime rates, KoFIU revised its previous regulations on virtual currency and ratified their new regulations in January 2018. Accordingly, the revised guidelines differ from the previous in three major ways: cryptocurrencies will be subject to due diligence and monitoring, all foreign cryptocurrency transactions are required to be reported, and all suspicious transactions must be rejected by the receiver.

According to the first guideline, increased monitoring on virtual transactions and customer due diligence are required by law.[27] Just like with most transactions, cryptocurrency transactions typically involve two parties: the sender and the receiver. However, cryptocurrency transactions differ radically from typical money exchanges because Bitcoin and other blockchain technologies operate on an independent computer network that analyzes data regarding a transaction. Once this data is constructed into a "block" and the transaction is completed, the money might be sent to a "money-collecting" account. Money-collecting accounts are typically used, as the name implies, to collect money. This collected money is usually traded further through other virtual transactions.[28] Before the revision to Korea's anti-money laundering guidelines, only money-collecting accounts were subject to customer due diligence. Now non-trading accounts, a second type of account that primarily serves for operational expenses, will also be subject to due diligence and monitoring.[29] Additionally, Korea claims that by

[27] Press Release, Financial Services Commission of South Korea, Revision to Virtual Currency Anti-Money Laundering Guidelines (June 27, 2018).
[28] *Id*.
[29] *Id*.

monitoring different types of cryptocurrency transactions, money laundering through non-trading accounts might be better prevented.[30]

In addition, Korean law now requires full disclosure on information regarding overseas cryptocurrency exchanges. Along with continuing disclosure of domestic exchange information, increasing transparency on foreign transactions is intended to prevent illicit activities, such as tax evasion and money laundering. Primarily, the Korean government hopes to increase law enforcement's capability to discover such behavior. Without transparency, launderers are able to better "hide" behind their anonymity.

Finally, all Korean cryptocurrency users will be required to reject "suspicious" transactions.[31] While it might seem intuitive to reject a transaction that seems suspicious, it is not always clear whether or not one should accept a transaction. Writing a clear law that demands rejection of all unknown or suspicious transactions solidifies the notion that not every transaction conducted on blockchain technology *has* to be accepted. Additionally, this particular revision also increases awareness that not every exchange is a legal one. Considering the nature of these three major revisions, it might seem perplexing that they were not included in the original Korean anti-money laundering law. However, what seems intuitive tomorrow regarding cryptocurrency might seem unthinkable today. It is important to understand that because blockchain technology is a new and constantly changing innovation, the legal implications of blockchain must be continuously reevaluated.

[30] *Id*.
[31] *Id*.

Conclusion

Overall, the United States' regulation of cryptocurrency is minimal compared to South Korea's efforts. Accurately tracing launderers who wash their money with Bitcoin is often an arduous process. In addition to the power of anonymity, "many blatant infringers may hide behind less rigorous international laws and avoid U.S. regulations while openly promoting criminal activities."[32] Thus, cryptocurrency will be best regulated through initiatives similar to what South Korea has embarked on: global cooperation, stringent laws, and increased cryptocurrency transparency.

However, even if the United States mirrors South Korea in its cryptocurrency regulation, there still might not be significant and rapid change in the rate of crime committed by American Bitcoin users due to the gaps and ambiguity between federal and state laws; regulation is piecemeal because only some states have sufficient regulation. Despite the challenge of ensuring coherence between state and federal laws, if the United States government simply starts to mirror South Korea by attempting to further understand, regulate, and innovate within the world of blockchain, progress in effective regulation would be viable and more foreseeable than the status quo.

[32] Bryans, *supra* note 7, at 470.

Water-Based Abuses in The West Bank

During the 1995 negotiations of the Interim Agreement of the West Bank and the Gaza Strip (Oslo II), the Israeli government and the Palestine Liberation Organization (PLO) engaged in historic talks regarding the transition of power in the West Bank. Following 27 years of intense geopolitical strife, the Oslo II accord offered an unprecedented chance at peace. The talks hoped to allow "Palestinians to conduct their own internal affairs, reduce points of friction between Israelis and Palestinians, and open a new era of cooperation and co-existence based on common interest, dignity and mutual respect."[1] The agreement aimed to immediately solve the West Bank's most pressing issues; therefore, understanding the region's complexity, domestic and international pundits structured the agreement to last only five years, leaving more contentious controversies (e.g. rule of Jerusalem and the right of return) for future negotiations. The interim agreement intended to promptly alleviate suffering in the West Bank without addressing all areas of contention, which could have prevented the agreement's ratification.

The Oslo II Accord focused primarily on: establishing a temporary Palestinian counsel; fragmenting the West Bank; implementing provisional legal statutes; and furthering economic cooperation. Most notably, the Accord split the West Bank into three distinct parts, called Areas A, B, and C, each with their own unique civil laws, military rule, and degree of self-determination. Area A was designed as a prototype of a Palestinian State controlled by the Palestinian National Authority, while Area C contentiously remained under the Israeli Civil Administration's (ICA) control with the promise of future partial withdrawal. The two negotiating parties were unable to agree upon Area B, so it was left under Palestinian National

[1] Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Isr.-Palestine, *adopted* Sept. 28, 1995.

Authority and joint Israeli-Palestinian Security Control. These areas determined which legal statutes ought to be enacted and the entities obligated to uphold them. After the interim period, the Israeli government and the PLO revisited the Oslo II Accord's unresolved points of contention. These debates resulted in the 2000 Camp David Summit and the 2001 Taba Summit, where negotiators claimed they had "never been closer to reaching a [final] agreement."[2] Unfortunately, both summits failed to reach a conclusive agreement, and talks have failed to conspire since. Consequently, Oslo II still provides de facto legal parameters in the West Bank despite being outdated and lacking substantial enforcement mechanisms.

Since Oslo II's expiration, a multitude of cries declaring human rights violations have erupted from the West Bank. One of the often neglected abuse allegations concerns one of the most basic necessities for human existence: water. Palestinians in the West Bank claim that their limited access to potable water condemns them to a lower quality of life. Furthermore, they argue for extensive change in the physical and political infrastructure that constrains their economic and political existence.[3] Meanwhile, the Israeli government denies claims of abuse, stating that they comply with the water allocation amounts detailed in Section 40 of Oslo II.[4] These contrary assertions illustrate the larger sentiments held by Palestinians in the West Bank and the Israeli government. The discrepancy in the perception of the issue has weakened the chance of a social political reformation since the Oslo II accord.

[2] Institute for Palestine Studies*, The Taba Negotiations,* 31 J. Palest. Stud. 79 (2002).
[3] Camilla Corradin, *Israel: Water as a Tool to Dominate Palestinians*, Al Jazeera (Jun. 23, 2016), www.aljazeera.com/news/2016/06/israel-water-tool-dominate- palestinians-160619062531348.html.
[4] Factsheet: Water in the West Bank, International Organizations Branch, Civil Administration o□ Judea and Samaria (2012).

Establishing the Baselines of Just Water Practice

A pragmatic and justified baseline for minimum levels of potable water must be established by evaluating the extent of water-based abuse in the West Bank. Minimum levels will vary based on the standards which differ in terms of justification, the degree of obligation, and the entity responsible for upholding the standard. Three baselines are appropriate to judge abuse and subsequently use to make realistic recommendations for improvement. The baselines are not completely independent, but rather function in a hierarchy with each subsequent baseline building upon the previous one.

1. The Humanitarian Baseline

The first baseline depends on the minimum levels of water required for basic human needs to be met. Although there is not a universally accepted humanitarian axiom, the United Nations (UN) and World Health Organization (WHO) both offer a proposition for one. The UN and the WHO qualify this requirement by arguing that the minimum level of water required is the amount needed to "promote health" by means of consumption and hygiene.[5] The WHO then quantifies this requirement, arguing that "50 [to] 100 litres of water per person per day are needed to ensure that most basic needs are met and few health concerns arise."[6] The UN furthers in its resolution, "The Human Right to Water and Sanitation," that "the right to safe and clean drinking water and sanitation [is] a human right" and that "states and international organizations [should] provide financial resources, capacity-building and technology transfer … [to] provide

[5] Guy Howard and Jamie Bartram, *Water, Sanitation and Health Programme*, WORLD HEALTH ORGANIZATION, 2003, at 3.
[6] *Id.*

safe, clean, accessible and affordable drinking water."[7]

2. The Legal Baseline

Legal parameters that currently govern the West Bank define the second baseline. Article 40 of the Civil Annex to the Interim Agreement, which technically expired with the cessation of Oslo II in 2000, was the most recent charter to detail water allocation in the West Bank. Accordingly, no legally tangible enforcement mechanism exists to uphold the specified amounts in Article 40. Nonetheless, Article 40 still loosely operates as the de facto legal parameters in the West Bank as a result of domestic necessity and international condemnation. Thus, it is practical and justified to refer to Article 40 as the legal baseline for water allocation in the West Bank. Article 40 states,"Palestinians [in Area A and B] are entitled to 196 [million cubic metres] of self-extracted water per year, plus an additional 31 MCM that Israel needs to actively supply from its own water and with its own infrastructure."[8] Additionally, both the Israeli government and the PLO "shall take all necessary measures to prevent any harm, pollution, or deterioration of water quality of the water resources."[9]

3. The Economic Baseline

This article offers a third baseline from an economic understanding of Palestinian water needs in relation to economic endeavors (e.g. agriculture, industry, and housing). Although the literature on Palestinian water access does not specify an amount for economic needs, academia nearly universally recognizes that Palestinians in Areas A and B do not have enough water for both personal consumption, hygiene, and critical economic undertakings. The most comprehensively studied and largest water-driven sector of the economy is agriculture; therefore,

[7] U.N. GAOR, 64th Sess., 1st. plen. mtg at 48, U.N. Doc. A/RES/64/292 (Jul. 28, 2010).
[8] *Supra* note 4.
[9] *Supra* note 1.

the economic baseline will be primarily based on agricultural needs. On a global level, "70% of all water resource use is for agriculture, and the bulk of global food production depends on a range of agricultural systems in which water is the critical factor."[10] Contemporary water allocation in the West Bank has not taken this reality into account. As a result, "irrigated agriculture [in Areas A and B to] use about two thirds of Palestinian water resources" primarily designated for domestic purposes.[11] The economic baseline addresses the progressive realization of appropriate water allocation for agricultural needs, rather than using a simple binary conclusion on whether a specified quantity is met.

Evaluating the Extent of Water-Based Abuses

The humanitarian baseline, as described by the UN and WHO, claims that an individual must have access to 50 to 100 liters of potable water per day in order to satisfy all consumption and hygiene needs while mitigating health concerns. According to a European Parliamentary report by Elena Lazarou, a senior policy analyst, "Palestinians have access to 70 litres/capita/day (l/c/d) on average for domestic use and personal hygiene."[12] Lazarou computed this number referring to reports that directly measure Palestinian water access. The Israeli government attempts to bypass responsibility for suboptimal statistic by mentioning that "The [Palestinian Water Authority] P.W.A estimates their total water loss, or 'unaccounted-for-water' at 33%" due to "poor water infrastructure and well maintenance."[13] Effectively, "Palestinians in the West Bank are left with 73 litres" per person per day after accounting for water loss.[14] Although this

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[10] WORLD HEALTH ORGANIZATION, *The Right to Water* (2003).
[11] World Bank, *Assessment of Restrictions on Palestinian Water Sector Development* (2009).
[12] Elena Lazarou, *Water in the Israeli-Palestinian Conflict*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE (Jan. 2016), www.europarl.europa.eu/RegData/etudes/BRIE/2016/573916/EPRS_BRI%282016%29573916_EN.pdf.
[13] *Supra* note 4.
[14] Corradin, *supra* note 3 at 4.

amount falls within the limit of the humanitarian baseline, the accessible amount is still suboptimal because it does not fully guarantee “very low levels of health concerns” as specified by the WHO.[15] Additionally, the accessible water is often not potable as a result of the “25 MCM of untreated sewage discharged to the environment each year.”[16] This lamentable practice is primarily in place because “only 30-35% of the population as a whole is connected to sewerage networks.”[17] This is a clear violation of the humanitarian baseline’s guarantee for clean and safe water. Holistically, current water allocation by the Israeli government does meet the humanitarian baseline, but actual water access falls short. This discrepancy in allocation and access is due predominantly to a lack of fruitful infrastructure.

The legal baseline, as established by Article 40 of the Civil Annex to the Interim Agreement, states that Palestinians are allowed to extract 196 MCM of water per year while the Israeli Government provides them an additional 31 MCM per year. Unlike the humanitarian baseline, the legal baseline does not concern itself with access but exclusively to allocation. Unfortunately, most of the literature focusing on water in the West Bank does not use allocation as a metric when evaluating water practice for the region. Nonetheless, the Israeli Civil Administration (ICA) of Judea and Samaria and the World Bank provide an assessment of water allocation compliance in the West Bank. A World Bank report established that Palestinians in the West Bank are entitled to 118 MCM of self-extraction water per year by looking exclusively at amounts allocated to Areas A and B from infrastructure developed on the Western, North Eastern, and Eastern aquifer. However, declining water levels in the Western Aquifer Basin

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[15] Guy Bartram, *supra* note 5 at 10.
[16] *Supra* note 11 at 38.
[17] Jauad El-Kharraz, *Local Water Supply, Sanitation and Sewage Palestine*, EMWIS (Aug. 9, 2011), www.emwis.org/countries/fol749974/country608613/national_program/Palestine_Final.pdf.

prevent Palestinians from withdrawing more than 113.5 MCM.[18] Despite these claims, the ICA asserts that Palestinians are allocated 227 MCM of water per year but are receiving 248 MCM. They explain that the Israeli government gives an additional 21 MCM of water beyond its obligation and unapproved wells are withdrawing 17 MCM of water, causing the excess allotment.[19] The ICA calculates these figures by adding the base extraction amount (118 MCM), the amount extracted from newly developed infrastructure (78 MCM), the amount Israel provides (31 MCM), and all other forms of extraction (21 MCM).

In both interpretations, the Israeli government is technically permitting Palestinians the ability to acquire the amount of water detailed in the legal baseline. Nonetheless, the clearly incongruent nature of the two reports demonstrates the need for a non-partisan investigation of Israeli compliance with Article 40.

The economic baseline, characterized by the amount of water needed for economic endeavors, argues for the progressive realization of appropriate and equitable allocation of water for agricultural needs. Currently, in Area A of the West Bank, "Due to the low quantities of water available to Palestinian farmers, only 6.8% of the cultivated land in the West Bank is irrigated."[20] Even with the limited amount of water, irrigated agriculture "contributes about 12% to GDP and employ[s] 117,000 people … [but] dwindling water availability … could [cost] as high as 10% of GDP and 110,000 jobs."[21] Since Oslo II, there have been no substantial water allocation reforms addressing the burgeoning agriculture need.[22] Accordingly, Palestinians

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[18] *Supra* note 11 at 29.
[19] *Supra* note 4 at 3.
[20] Lazarou, *supra* note 13 at 5.
[21] *Supra* note 11 at 11.
[22] Anja Bursche, *Agricultural Water Demand Management in the Palestinian Territories*, FRIENDS OF THE EARTH MIDDLE EAST (April 2011), ecopeaceme.org/uploads/13218002600~^$^~Agri_WDM_Pal_11.2011.pdf.

restrict their individual water allotment to survive economically which, in turn, violates the humanitarian baseline. The World Bank quantifies, "after taking account of industrial, commercial and public consumption … the average actual domestic availability and consumption is about 50 [liters per capita per day], with many households consuming as little as 20 lpcd."[23] Meanwhile Israel appropriates "three [to] five times more water than the Palestinians."[24] However, Israel does treat its domestic wastewater and recycles it for agricultural use.[25] Generally, Israel does not publish reports concerning the matters of the economic baseline, because the baseline's contents rarely fall under the purview of international scrutiny. There is still a stark contrast between the reality in the West Bank and the economic baseline.

The Causes of Water-Based Abuses

The first and most far-reaching cause of the West Bank's current water reality in is the standard of water allocation Article 40 of the Oslo II Accord established. Although Article 40 has technically expired, its contents are still used to model water allocation in the West Bank. As described in detail in the previous section, Article 40 critically miscalculates the national standard by not accounting for the immense economic needs of Palestine's growing population. This negligence of Palestinians' economic well-being has continued to be reflected and practiced in contemporary water practice in the West Bank. As a result, Palestinians are not able to realize their economic desires and often compromise standards set by the humanitarian baseline to maintain financial sustainability.

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[23] *Supra* note 11 at 35.
[24] Martin Asser, *Obstacles to Arab-Israeli Peace: Water*, BBC NEWS (Sept. 2, 2010), www.bbc.com/news/world-middle-east-11101797.
[25] Lazarou, *supra* note 13 at 5.

The second and possibly most amenable cause of the current water circumstance in the West Bank is the antiquated infrastructure Palestinians currently rely on. Due to a legal inability to construct additional and up-to-date infrastructure, "current investment in the West Bank water sector is one tenth of planned levels," thus "Palestinians struggle to attain the most basic level of infrastructure."[26] The existing infrastructure cannot access water that is increasingly deeper and dirtier because of Israeli over-pumping and Palestinian sewage contamination.[27] Moreover, according to the European Parliamentary Research Service, "one third of water supplied to the West Bank is lost due to aging infrastructure and leakages."[28] Failure to erect new infrastructure leads to chronic water shortages, forcing Palestinians to rely on Mekorot, Israel's transnational water utility, to provide the considerable difference between access and need.[29, 30]

The third and most internationally condemned cause of the current water circumstances in the West Bank are the Joint Water Commission's (JWC) practices. The JWC was established in Oslo II to "coordinate [the] management of water resources" and act as Article 40's "enforcement mechanism."[31] Since 2010, Israel possessed an imbalance of power over the JWC because Palestinians have refused to sit on the committee; this imbalance "has rendered the planning and development of infrastructure in the West Bank extremely difficult."[32] The JWC grants permits to 56 percent of Palestinian projects regarding water compared to nearly 100 percent of Israeli projects.[33] In response, Palestinians often bypass the permit requirement which

[26] *Supra* note 11 at 9, 57.
[27] Corradin, *supra* note 3 at 3.
[28] Lazarou, *supra* note 13 at 5.
[29] *Supra* note 11 at 57.
[30] Lazarou, *supra* note 13 at 5.
[31] *Supra* note 1 at 29.
[32] *Id*. at 7.
[33] Corradin, *supra* note 3 at 3.

legally binds the JWC to destroy illegal infrastructure.[34] As a result, Palestinians in Areas A and B "are unable to access sufficient water supplies and became water-dependent" on Mekorot.[35] Additionally, "JWC approval has been withheld for agricultural water projects" which further compounds Palestinian economic problems.

The fourth and perhaps most disputed cause of the current water reality in the West Bank is due to the monopolistic public utility that Palestinians rely on to compensate the difference between access and need. The 40 current municipal wells in the West Bank have annual yields "insufficient to meet water demand."[36] The deficit is supplied mainly through Mekorot, and as a monopolistic institution, it forces vulnerable Palestinian households to spend up to 25 percent of their incomes on water.[37] Reliance on Mekorot caused the poorest Palestinians' dependence on Israel, fundamentally stifling Palestinian efforts for independent water extraction.[38]

Policy Solutions

Since Oslo II, the Israeli government and PLO have focused on water allocation as an isolated issue with little connection to other societal aspects. This mindset hinders substantive reforms in water practice. Shifting their paradigm to consider water a means of furthering general economic and political ambitions effectively deconstructs the zero-sum narrative that has plagued the West Bank's water policy.

The first solution is amending Article 40 to more adequately address Palestinian needs. The Palestinian Water Authority (PWA), on behalf of the Palestinian people, should renegotiate the terms of Article 40 to increase the amount of allocated water and develop joint

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[34] *Id*. at 5.
[35] *Id*. at 1.
[36] El-Kharraz, *supra* note 18 at 19.
[37] Corradin, *supra* note 3 at 6.
[38] *Supra* note 11 at 39.

Israeli-Palestinian water infrastructure. These alterations will nearly guarantee improvement in the socioeconomic quality of life for Palestinians while simultaneously benefiting the Israeli government by creating an economically and socially stable neighbor. To ensure compliance, the JWC will presumably assume the enforcement mechanism role as detailed in Article 40.

In accordance with the humanitarian baseline, a second policy solution should promote technology transfers between the Israeli government and the PLO to modernize the antiquated water infrastructure. These transfers will progress through the development of joint Israeli-Palestinian water infrastructure as mentioned above and the sharing of wastewater recycling techniques. These improvements will immediately decrease the water loss rate and allow for reusing water for agriculture. Additionally, this partnership will greatly encourage the advancement of technologies (e.g. desalinization) for more effective water use.

The third policy solution is reforming the JWC to better incorporate Palestinian votes and needs. The PWA's role as a regulator and utility provider should be strengthened in the JWC so that Palestinians have equitable jurisdiction in permit granting. Additionally, the criteria for granting a permit should be updated to include agriculture endeavors. The benefits from reforming the JWC will come to fruition after amending Article 40.

The fourth policy solution is to incorporate progressive demand-based water pricing into Mekorot's and the PWA's pricing schemes. The PWA currently allows Palestinian municipalities to price water based on given supply, and Mekorot uses volume pricing.[39] Both practices inadvertently hurt farmers and poor individuals while allowing excessive water use by the wealthy. Altering these pricing schemes to incorporate progressive pricing based on demand

[39] Bursche, *supra* note 23.

would ensure that farmers and poor individuals are able to economically survive and that excess water use is curbed.

Conclusion

Water-related injustices have a profound impact on the lives of the Palestinians in Areas A and B of the West Bank. The irrefutable instances of Palestinian suffering need to be immediately and properly addressed. The four unique policy solutions presented in this paper aim to address the need to mitigate suffering and further socio-political aspirations.

The Immigration Rule of Lenity and its Implementation in Cancellation-of-Removal Cases

This paper aims to critique the normative understanding of judicial deference to federal administrative agencies used in immigration cases at the circuit and Supreme Court levels, primarily through the misapplication of the immigration Rule of Lenity (ROL). Part I discusses the genesis and language of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), the law which originally spawned discussion of the cancellation-of-removal defense. Part II provides a short analysis of the implementation of *Chevron* deference, specifically in the immigration context. Finally, Part III explains the inconsistent application of the immigration ROL in cases of *Chevron* deference and provides a short summary of possible implications.

The IIRIRA and the Cancellation-of-Removal Defense

The IIRIRA was passed in 1996 and introduced new eligibility standards under which both documented and undocumented immigrants could be deported.[1] In particular, the IIRIRA expanded the definitions of "crimes involving moral turpitude" and "aggravated felony" to include both violent and non-violent crimes, and specified a interpretive use in the immigration context.[2] Under these new standards, revisions for "relief-from-removal" mechanisms (a legal defense which offered relief from deportation) were also issued, thereby creating the "cancellation-of-removal" defense. The "cancellation-of-removal" defense replaced the "suspension of deportation" defense and increased the physical presence requirement (a period of

[1] U.S. Citizenship and Immigration Services, *Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Application for Naturalization.* Federal Register: The Daily Journal of the United States Government, (March 29, 2019), https://www.federalregister.gov/documents/2019/03/29/2019-05986/agency-information-collection-activities-extension-without-change-of-a-currently-approved-collection

[2] Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104–208, § 110 Stat. 3009-546 (1996).

continued residency in the United States) from 7 to 10 years. These revisions made requirements much more stringent and used the new offense classifications as justifications for the deportation of both documented and undocumented immigrants.[3] This section focuses on the legal implications of the "cancellation-of-removal" defense as a relief from deportation.

The application of the cancellation-of-removal defense for non-lawful permanent residents is a pressing issue for undocumented immigrants and their legal counsel. It is one of the only methods enshrined in the law to protect undocumented immigrants from deportation and provide a pathway to a permanent residency.[4] The law is complex, and the stakes are high. Undocumented immigrants who qualify for this defense must have already begun removal proceedings, and are risking deportation and a life outside the United States. For these reasons, it is important to understand the legal ramifications of the application of the cancellation-of-removal defense.

<u>Eligibility Requirements</u>

The requirements for an undocumented immigrant to be eligible under INA § 240A(b)(1) are stringent. They require that the non-Legal Permanent Resident:

1. Has been physically present in the United States continuously for at least 10 years.[5]
2. Has met the "good moral character" [GMC] standard.[6]

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[3] Siskind Susser, *ABCs of Immigration: Cancellation of Removal for Non-lawful Permanent Residents*, SISKIND SUSSER PC: IMMIGRATION LAWYERS (January 03, 2017), http://www.visalaw.com/abcs-of-immigration-executive-summary-abcs-of-immigration-cancellation-of-removal-for-non-lawful-permanent-residents/

[4] Susser, *supra* note 3.

[5] Illegal Immigration Reform and Immigrant Responsibility Act § 110.

[6] Id.

3. Has not been convicted of offenses deemed a "crime involving moral turpitude", an "aggravated felony", or any other offense listed in Immigration and Nationality Act [INA] § 212(a)(2), 237(a)(2), or 237(a)(3).[7]
4. Cause exceptional and extremely unusual hardship to her LPR or U.S. Citizen spouse, child or parent.[8]

The stringency with which these requirements are tested depends on the political climate in the Executive Office for Immigration Review. For example, in recent decades, the standard to which a removable alien is held in proving that they are "deserving of a favorable exercise of discretion on [one's] application" has tightened. This standard is often an insurmountable hurdle for immigrants already worn down by the grueling American immigration and amnesty system.

<u>Analysis</u>

These eligibility requirements are often criticized for their vague language and rigid clauses. For example, requirements such as the "exceptional and extremely unusual" standard, which requires the defendant to prove that deportation "would cause exceptional and extremely unusual hardship to his or her LPR or U.S. citizen spouse, child, or parent," often make it extremely difficult for legal counsel to claim relief via this defense.[9] This is because the final interpretation of these terms is wholly reliant on the court's interests.[10] In effect, the non-citizen

[7] Id.
[8] Id.
[9] INA § 240A(b)(1).
[10] Matthew F. Soares, *Agencies and Aliens: A Modified Approach to Chevron Deference in Immigration Cases*, 99 CORNELL L. REV. 925 (2014) at 944-946, http://scholarship.law.cornell.edu/clr/vol99/iss4/5.

concedes removability and their welfare becomes predicated on the “good faith, discretion and compassion” of the court.[11]

Eligibility requirements such as the GMC and the physically present standard have been used to unjustly deport long-time permanent residents in cases such as *Holder v. Sawyers*, in which the defendant was convicted of a drug possession offense just two months shy of the 7 years of residence required to be eligible for a discretionary cancellation-of-removal defense.[12] The Board of Immigration Appeals agreed that the conviction qualified as a removable offense and dismissed Sawyers’ appeal for cancellation.[13] It is clear the punishment of deportation is not proportional to the crime of drug possession, so much so that it seems reasonable to reject the BIA’s decision as a violation of the Eighth Amendment. However, the source of injustice doesn’t seem to lie in the BIA’s hardline stance on eligibility requirements, but with the fact that the immigration court deferred to the BIA in the first place. Criticism might be better directed at the norms which allowed for the BIA’s interpretation of the “physically present” standard rather than the court’s own interpretation.

The *Chevron* Framework and Judicial Deference

In 1984, the adjudication of *Chevron v. Natural Resources Defense Council, Inc.*, developed the two-step *Chevron* test now used by the United States judiciary to determine whether or not a court can yield or submit its judgement to an external relevant party, particularly federal administrative agencies.[14] This relegation of interpretive duties to an external

[11] Id.
[12] Soares, *supra* note 9.

[13] Holder v. Sawyers, 566 U.S. 583 (2012).
[14] *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

non-judicial party is known as judicial deference. This following section articulates the requirements for applying the Chevron test for judicial deference and the application of the doctrine in immigration law.

Eligibility and Application

The United States judiciary can choose to defer the interpretation of a particular statute to an administrative agency only when the statute and administrative agency in question meets the requirements set out by the *Chevron* two-step analysis, in which 1) courts must consider whether Congress has intentionally expressed a method for the courts to interpret a statute, and 2) if Congress has not, then the court must consider whether or not the relevant agency's interpretation meets a standard of permissible construction.

Once a court makes clear its intention to defer to an external agency, it must first meet the standard of ambiguity in Congressional intent. The "ambiguity standard" requires the plain language and legislative intent behind the statute in question to be "silent or ambiguous" with regards to the issue at hand.[15] Courts can attempt to interpret the ambiguous language of a statute through exercising the "literal rule" of statutory interpretation by reviewing the plain language of the statute to see if a literal interpretation of the law generates a reasonable conclusion. If it does, *Chevron* is not triggered. If the interpretation does not, the court will proceed with *Chevron* eligibility testing.[16] Failure of the "literal rule" to yield any reasonable result issues the

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[15] Chevron v. NRDC *supra* note 14.

[16] Jonathan Kim, et. al, *Chevron Deference*, CORNELL LAW SCHOOL LEGAL IN□ORMATION INSTITUTE (December 2017), https://www.law.cornell.edu/wex/chevron_deferencehttps://www.translegal.com/lesson/statutory-interpretation-2

application of other tools of statutory construction, but those will not be discussed at length in this article.

Courts can then use several "methods of reference" to verify the ambiguous status of a statute's legislative intent. To determine whether congressional intent "directly speaks to the issue," courts usually look to:

- Explicit records of legislative intent.
- Speeches and floor debate made prior to voting on the bill.
- Relevant statutes that point to the limits of the statute in question.
- Case law prior to the implementation of the statute in question.[17]

Courts may also use these tools of statutory interpretation to check for intentional ambiguities put in place by Congress.

The next standard the court must meet is that of "permissible construction." This standard requires courts to check if the agency's interpretation of the statute is permissibly constructed in relation to the general understanding of the spirit of the law.[18] Courts use a series of questions to determine permissible construction requirements. These include:

1. Was the agential interpretation in question issued by the agency normally charged with administering the construed statute? For example, since the BIA is the default

[17] Valerie C. Brannan, *Statutory Interpretation: Theories, Tools, and Trends*. CONGRESSIONAL RESEARCH SERVICE (2018), at 19-20.
[18] David Kemp, *Chevron Deference: Your Guide to Understanding Two of Today's SCOTUS Decisions*, JUSTIA LAW BLOG (May 21, 2012), https://lawblog.justia.com/2012/05/21/chevron-deference-your-guide-to-understanding-two-of-todays-scotus-decisions/

agency which enforces immigration law (specifically cases which undergo revision and appeal), an agential recommendation to an immigration court would pass the test.

2. Is the agential interpretation of the statute reasonable or rational, given the facts of the case? Testing language for the statute states that the agential interpretation ought not be "arbitrary, capricious, or manifestly contrary to the statute."[19]

Once these standards have been met, *Chevron* dictates that even if a court finds a better interpretation from either the court itself or another agency, it ought to defer to the interpretation from the relevant agency.

<u>*Chevron* in Cancellation-of-Removal Cases</u>

Two cases stand out as prime examples of the unjust nature of *Chevron* deference in cancellation-of-removal cases: *Martinez-Gutierrez v. Holder* and *Kawashima v. Holder*. In *Martinez-Gutierrez*, the plaintiff was brought to the United States in 1989 at the age of 5 by his father.[20] Martinez-Gutierrez's father was given LPR status in 1991, but Martinez-Gutierrez was not granted this status until 2003. In 2005, he was caught smuggling undocumented immigrants across the border. The case deferred to the BIA's interpretation of the residency requirements.[21] The plaintiff admitted to the crime and sought cancellation of removal, but his petition was denied because he did not meet the requirements of INA §1229b(a)(1) or §1229b(a)(2).

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[19] *Supra* note 11.
[20] *Martinez-Gutierrez v. Holder*, 566 U.S. 583 (2012).

[21] Id.

In *Kawashima*, Mr. Kawashima was brought to the United States as a small child along with his family.[22] He did not apply for LPR status or any other discretionary residency permit in his years of legally residing in the United States. Several years later, both Mr. Kawashima and his wife were convicted of filing a false tax return, which qualified as an "aggravated felony" and led to the denial of his cancellation-of-removal request. The court deferred to the BIA's hardline interpretation of INA §1229(a)(1) and ordered both Kawashima and his wife to be deported.[23]

Though the details of these cases are different, there are striking similarities between *Martinez-Gutierrez* and *Kawashima* in terms of their effect on immigration law. Both cases involved respondents coming to the United States as minor children who were then ordered to be removed per the Board of Immigration Appeal's recommendation. Neither Mr. Kawashima nor Martinez-Gutierrez entered the United States legally, and neither of them were permanent residents of the United States for long enough to qualify for LPR status. Additionally, both of their crimes were non-violent and did not cause damages exceeding $10,000.

These cases set several dangerous precedents. First, the court's initial deference to the BIA's unjust and hardline interpretation of INA statutes shows that even a minimal standard of ambiguity within the courts is enough to seek deportation of immigrants that have committed non-violent crimes. The fact that both cases resulted in a declaration of disproportionate punishment also reveals a glaring hole in the *Chevron* step two standard for "permissible construction," where any agential reading of plain language statutes is sufficient to meet the

[22] *Kawashima v. Holder*, 565 U.S. 478 (2012).

[23] *Id*.

"rational and reasonable" requirements. Finally, the fact that several tools of construction were fruitlessly used to resolve Congressional ambiguity in INA §1229b(a)(1) without once referring to the Immigration Rule of Lenity reveals two major points: first, that the BIA is incompetent at statutory interpretation; and second, that lenity does not seem to be considered a formal tool of statutory construction in immigration law.

Inconsistent Implementation of the Immigration Rule of Lenity

The immigration rule of lenity is a judicial doctrine which requires courts to construe criminal statutes in favor of the defendant to ensure a more lenient punishment whenever an ambiguity or inconsistency occurs during statutory interpretation. Since its genesis in *Fong Haw Tan v. Phelan*,[24] the Supreme Court has repeatedly used ROL to interpret ambiguities and inconsistencies in favor of an alien defendant. In *Fong Haw Tan,* a Chinese native living in the United States was convicted on two counts of murder and received a sentence of life imprisonment for each count. However, under Section 237(a) of the INA, any non-LPR immigrant sentenced "more than once" is privy to deportation. The Court split in trying to apply Section 237(a), since it was unclear whether or not two offenses of the same variety and magnitude counted as "more than once" when the convictions were held at the same time. The immigration rule of lenity was applied by the judge and the Supreme Court granted a writ of certiorari in order to resolve the issue in a more precise manner. However, circuit courts operate differently in cases modeled after *Fong Haw Tan*. Unlike the criminal rule of lenity, the immigration rule of lenity is not one which is rooted in constitutional protections. This is used to

[24] David S. Rubenstein, *Putting the Immigration Rule of Lenity in its Proper Place: A Tool of Last Resort After Chevron*, ADMINISTRATIVE LAW REV. (2007), at 494.

justify the inconsistent application of the immigration rule of lenity, even as a doctrine of last resort.[25] This refusal to apply the immigration rule of lenity (or the dismissal of countervailing considerations to *Chevron* analysis) is a trend which spills over into lower courts as well.[26]

Critique of Inconsistent Implementation

In the years after *Chevron*, courts have viewed the Immigration Rule of Lenity as a competing doctrine to *Chevron* rather than one which can inform its analysis. This is for two primary reasons. First, courts fail to consider the rule of lenity as a legitimate tool of statutory construction, leading them to blindly defer to an agential interpretation. Second, deferring to an agential interpretation often conflicts with a judicial interpretation that includes the principle of lenity. Both fail to ameliorate the harmful effects of deportation in cases where punishment is disproportionate to the crime committed.

Immigration courts' tendencies to blindly prefer judicial deference over applying their tools of statutory interpretation (as in *Martinez-Gutierrez*) is a failure to uphold their duty as members of the judicial branch to be the arbiters and interpreters of the law. This tendency gives federal administrative agencies the ability to override judicial interpretations of ambiguous statutes with their own interpretations, thus posing a threat to the separation of powers. Furthermore, executive agencies' interpretations of immigration law often prioritize disproportionate punishments that would not be prescribed under any other form of interpretation.

[25] Rubenstein *supra* note 24, at 496.
[26] Soares, *supra* note 9.

Proof of this phenomenon can be found in *Ramos v. Nielsen*, in which the Department of Homeland Security sought to terminate the Temporary Protected Status (TPS) designation for El Salvador, Nicaragua, Haiti, and Sudan under a hardline reading of the Temporary Protected Status section of the U.S. Immigration Code.[27] The Department argued that these four countries had exceeded 18 months of TPS designation, the originally specified time span, and proposed the deportation of hundreds of thousands of immigrants from those countries. Previous administrations had extended TPS designation when the status came up for review, heeding the advice of regional political and environmental experts who had determined the existence of "extraordinary conditions" that prevented deportation. However, the Trump administration changed course and decided to simply eliminate the designation altogether. Luckily for the immigrants, California District Judge Edward Chen[28] rejected the proposed termination on the grounds that it violated the Equal Protections Clause because of racial animus against non-white immigrants.

In addition to demonstrating that federal agency decisions are often arbitrary and disproportionately punish immigrants with deportation, *Ramos* showed that judicial readings are more likely to protect the immigration status of vulnerable populations. Furthermore, in both the judicial and agential reading of the law, the immigration rule of lenity is nowhere to be found, even though almost all tools of statutory construction had been used to no avail. If landmark cases in immigration law such as *Ramos* fail to use the rule of lenity before acquiescing to the

[27] 8 U.S.C. § 1254a. section 1254a(b); *Ramos v. Nielsen*, 321 F. Supp. 3d 1083 (N.D. Cal. 2018).

[28] *Ramos v. Nielsen supra* note 27.

federal agency's interpretation, it is safe to say that the rule of lenity is ignored in most relevant cases.

Furthermore, conflict between agential and judicial readings of immigration law incentivize courts to defer to agential readings rather than continuing their own efforts to resolve ambiguity. As previously observed, when courts fail to use all their tools of statutory construction their review of the legal issue remains ambiguous until Chevron is invoked. Until the invocation, the judiciary holds a certain interpretation of the law that, while incomplete, serves as a backstop if the first step of Chevron is failed. This interpretation is completed when courts revisit it post-Chevron and is often more amenable to the non-citizen's request for cancellation-of-removal than the usual hardline interpretations of federal executive agencies, as proven in *Kawashima*. Judicial readings of immigration law tend to utilize all of the tools of statutory construction, including the immigration ROL. This is in contrast to agential readings, which often cut their processes short due to economic and time constraints.[29] These conflicting processes of resolving ambiguities incentivize immigration courts to never come back to their "backstop" interpretation. It is a quicker and more expedient process to simply defer to an executive agency than to break a middle ground between both interpretations. In this race for efficiency, it is not uncommon to lose sight of justice and the principle of proportional punishment.

Conclusion

[29] Soares, *supra* note 9.

While citizens of the United States enjoy an ostensibly fair and equal legal system, it is not often that we see this fairness and equality extended to undocumented immigrants. The processes of judicial deference and statutory construction clearly highlight these inequalities, particularly through the disproportional punishments doled out by rigid and uncompromising interpretations of immigration law. New policies that regulate judicial deference are necessary in order to prevent unneeded deference to federal executive agencies, which do not have to consider legal standards such as the ROL. Federal agencies need to step back and let the judiciary simply do what it does best; that is, apply the law.