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Editor's Note

We are pleased to present the Amherst College Law Review's eighth issue. During our semester in Fall 2023, we welcomed many new members and had rich discussions about the many articles we received. We also welcomed guest speakers, Miriam Becker-Cohen '11, Mirah Curzer '08, and Jennifer Astrada '08, who offered an invaluable perspective on careers, legal questions, and their time at Amherst College.

We would like to extend congratulations to our editorial board and contributors for their hard work in putting this publication together. We would like to give a special thanks to Camille who took over the publication for the spring semester while we were studying abroad. We do hope that you enjoy this issue, and we welcome any comments, feedback, or submissions to aclawreview@amherst.edu.

Cheers,
Antonia Brillembourg and Sean Kim
Co-Editors-in-Chief of the Amherst College Law Review, Fall 2023

To echo Sean and Antonia's note, the 2023-2024 academic year was an excellent year for our Law Review. We received a diverse selection of compelling articles that prompted thought-provoking debates, and enjoyed working with our authors throughout the editing process. Thank you, all, for your valuable contributions and hard work! I look forward to seeing what this next year of the Law Review will bring.

Best,
Camille Shilland
Editor-in-Chief of the Amherst College Law Review, Spring 2024

Statement of Purpose

The Amherst College Law Review (ACLR) was born out of the desire to foster undergraduate scholarship in the liberal arts. Among our peers, the ACLR stands alone for its interdisciplinary approach to the study of law.

Given the ever-changing nature of our society, students of law encounter a host of new, troubling, and intriguing questions including, but not limited to, increasing inequality, salience of technology, and neoliberal globalization. These questions cannot be fully posed, much less answered, within the scope of conventional legal training and/or the traditional social sciences.

The mission of the ACLR is to pose these questions and to strive to answer them with the nuance, clarity, probity, and rigor provided by the liberal arts tradition. This journal brings the best scholarship of the contemporary humanities to bear on the most difficult and urgent juridical problems of our time.

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Aesthetics for the Public Good: The Fifth Amendment's Takings Clause and Development Restriction Policies

Thomas J. Walsh
The University of Alabama – Class of 2025

Abstract

As stated by the Takings Clause of the Fifth Amendment, it is impermissible that "private property be taken for public use, without just compensation." The Fourteenth Amendment extends these rights from the federal government to the states, establishing that it is likewise impermissible for "any State to deprive any person of life, liberty, or property, without due process of law." The Takings Clause specifies that one whose property is taken by the government for public use is entitled to just compensation, but it fails to specify further details regarding its implementation. Chief among concerns of policymakers and property owners alike, the Takings Clause fails to specify how to determine whether an imposition by the government on one's private property might constitute a compensable taking.

In *Penn Central Transportation Company v. City of New York* and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, arguments for the unconstitutionality of policies restricting development by the Fifth and Fourteenth Amendments were made. These cases feature the creation and implementation of policy evaluation criteria which would be situationally applied to find that legitimate public interest to preserve a distinct aesthetic outweighed the utility of economic development in cases deemed worthy by legislation.

Introduction

As stated by the Takings Clause of the Fifth Amendment, it is not permissible that "private property be taken for public use, without just compensation".[1,2] The Fourteenth Amendment extends these rights from the federal government to the states, establishing that it is likewise impermissible for "any State to deprive any person of life, liberty, or property, without due process of law."[3] The Takings Clause specifies that one whose property is taken by the

[1] Cornell Law School, "Takings," *Legal Information Institute*, https://www.law.cornell.edu/wex/takings. Accessed February 15, 2024.
[2] Cornell Law School, "Fifth Amendment," *Legal Information Institute*, https://www.law.cornell.edu/constitution/fifth_amendment. Accessed February 15, 2024.
[3] Cornell Law School, "Fourteenth Amendment," *Legal Information Institute*, https://www.law.cornell.edu/constitution/amendmentxiv. Accessed February 15, 2024.

government for public use is entitled to just compensation, but it fails to specify further details regarding its implementation or capacities.[4,5] Chief among concerns of policymakers and property owners alike, the Takings Clause fails to specify how to determine whether an imposition by the government on one's private property might constitute a compensable taking.

In *Penn Central Transportation Company v. City of New York* and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, arguments for the unconstitutionality of policies restricting development by the Fifth and Fourteenth Amendments were made.[6,7] In each case, it was found that no taking was committed by the government in imposing these restrictions. These cases feature the creation and implementation of policy evaluation criteria, which would be situationally applied to find that legitimate public interest to preserve a distinct aesthetic outweighed the utility of economic development in cases deemed worthy by legislation.[8]

[4] US Department of Housing and Urban Development, "Eminent Domain." Accessed February 15, 2024.
[5] US Department of Justice, "Fifth Amendment Takings Law," https://www.justice.gov/enrd/natural-resources-section/fifth-amendment-takings-law#:~:text=Also%20known%20as%20the%20%22Takings,the%20payment%20of%20just%20compensation. Accessed February 15, 2024.
[6] *Penn Central Transportation Co. v. City of New York*, 438 US 104 (1978).
[7] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 US 302 (2002).
[8] Bell, Abraham, "Private Takings," *Yale Law School*, 2007, https://law.yale.edu/sites/default/files/documents/pdf/Intellectual_Life/LEO_Bell_Private_Takings.pdf.

Penn Central Transportation Company v. City of New York

In 1978, the Court of Appeals of New York ruled on a case in which the Penn Central Transportation Company appealed a decision by New York City to restrict development atop a site which had been designated a "landmark".[9] This case, *Penn Central Transportation Company v. City of New York*, challenged whether the city's restrictions on development atop Penn Central's property, Grand Central Terminal, constituted a compensable taking as guaranteed by the Fifth and Fourteenth Amendments.

The Grand Central Terminal was designated a landmark by the New York City Landmarks Preservation Committee on August 2, 1967.[10] This action followed the adoption of the Landmarks Preservation Law in 1965, also known as the "Landmarks Law," which sought to foster "civic pride in the beauty and noble accomplishments of the past" through the protection of important cultural and historical landmarks in the city.[11] This law would require that the owner of a landmark keep the building's exterior in "good repair," and alterations to their exterior must be approved by the Landmarks Preservation Commission. The law's creation and adoption were based upon widespread agreement among the city's residents and leaders that implementing such a program would yield greater economic benefits to New York than the development it would restrict.[12] A 1968 ordinance gave owners of landmark sites opportunities for transferring

[9] Landmarks Preservation Commission, "LP-0266," August 2, 1967, http://s-media.nyc.gov/agencies/lpc/lp/0266.pdf.
[10] New York City Administrative Code, "Landmarks Preservation and Historic Districts," https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-133896. Accessed February 16, 2024.
[11] "Development Rights Transfer in New York City," *The Yale Law Journal*, December 1972, https://www.jstor.org/stable/795117.
[12] "About LPC," New York City Landmarks Preservation Committee, https://www.nyc.gov/site/lpc/about/about-lpc.page#:~:text=The%20Landmarks%20Preservation%20Commission%20is,%2C%20most%20notably%2C%20Pennsylvania%20Station. Accessed February 18, 2024.

development rights to nearby parcels, thus mitigating damages to property owners caused by the Landmarks Law.[13]

In January 1968, Penn Central entered into a 50-year lease with UGP Properties, Inc. Under the terms of the lease, UGP was to construct a large office building above the Grand Central Terminal.[14] UGP was to pay a substantial lease fee to Penn Central annually during and after construction of the building. Two building plans, one being a 55-story office building to be built atop the terminal and another 53-story building which required significant alterations to the building's facades for construction atop the terminal, were submitted to the Landmarks Preservation Commission. In September 1968, the Commission denied a certificate of no exterior effect.[15] Appellants applied for certificates of appropriateness for the two proposed plans, which resulted in four days of hearings with over 80 witnesses; these applications were also denied.

Penn Central did not pursue a judicial review of these denied certificate applications, nor did they attempt to develop an alternative to the proposed building plans which might be deemed more suitable an alteration to the Grand Central Terminal. Instead, they filed suit in the New York Supreme Court. The appellants asserted that the city had taken their property with neither just compensation nor due process, thus violating rights guaranteed to them by the Fifth and Fourteenth Amendments.

In considering the appellants' assertion that they had been denied due process, the Court considered several conditions. Due process would not be violated if use of property as it had been before the government's imposition was still permitted; the appellants had failed to prove that they were unable to earn a reasonable return on their investment in a property as-is; if the

[13] New York City Buildings, "1968 Building Code of the City of New York," https://www.nyc.gov/site/buildings/codes/1968-construction-codes.page. Accessed February 18, 2024.
[14] "Excerpt from Justice Brennan's Opinion for the Court," *The Bridge – Harvard University*, https://cyber.harvard.edu/bridge/LawEconomics/1978penn.htm. Accessed February 19, 2024.
[15] "Certificate of No Effect," New York City Landmarks Preservation Committee, https://www.nyc.gov/site/lpc/applications/certificate-of-no-effect.page. Accessed February 19, 2024.

property in question was unable to make a reasonable return on investment, the appellants' profits from nearby holdings could be partially attributed to a property; and the transferrable nature of lost development rights above a property provided just compensation for the appellants' loss of said development rights. After an ad hoc evaluation of each condition, the Court ruled that Penn Central was not denied due process as prohibited by the Fourteenth Amendment. The lack of interference with existing business operations and viability of continued return on real estate investment led them to conclude that due process had not been violated. The Court also makes a pertinent assertion that Penn Central was provided viable alternatives for earning the financial returns projected from their proposed development at the Grand Central Terminal, such as creating a different design to build atop the terminal or appealing the commission's decision, but they did not pursue these alternatives.

In considering the appellants' assertion that the city had committed a compensable taking without just compensation in violation of the Fifth Amendment, the Court considered several other conditions. First, not all government actions that restrict economic values constitute a taking. As such, an understanding of the circumstances around an alleged taking is required to determine whether a compensable taking has occurred. Diminution in property value resulting from zoning laws cannot, on its own, establish a taking. A zoning law which exclusively restricts modification of existing property features does not restrict airspace above the property, nor does it restrict gainful development of other portions of the property. If a zoning law which does not interfere with continued operation or revenue gains from a property and allows for development rights to be transferred to other properties, then such a law reasonably mitigates financial burdens imposed upon a property owner by said zoning law. The New York Court of Appeals ruled that the city's application of its Landmarks Law did not constitute a compensable taking.

As such, the Court held that the application of the Landmarks Law to the Penn Central Transportation Company's Grand Central Terminal did not constitute an unjust taking of the company's property as prohibited by the Fifth Amendment.

This ruling established the precedent that laws restricting the alteration of existing property do not, on their own, constitute a compensable taking of property. If continued operation and monetary return on investment following development restrictions on a property are unaffected by said restrictions, it is permissible for a government to impose these restrictions without compensation afforded to property owners. Two years after this ruling, in 1980, the state of New York passed its State Historic Preservation Act and established the State Register of Historic Places.

Penn Central v. City of New York set forth a procedure which established a precedent for ad hoc policy evaluation, demonstrating that unique circumstances around a policy's enactment ought to be evaluated in comparable cases.[16] *Seawall Associates v. City of New York* used a similar approach to *Penn Central* to determine that the city had gone beyond its legal limits to restrict development of single-room occupancy properties.[17] *Society for Ethical Culture v. Spatt* applied the *Penn Central v. City of New York* method to determine that a religious building's designation under the Landmarks Law was valid so long as the free exercise of religion was not impeded, thus reversing a previous ruling.[18]

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency

[16] Siedel, George, "Landmarks Preservation After Penn Central," *Real Property, Probate, and Trust Journal*, Summer 1982, https://www.jstor.org/stable/20781603?seq=9.
[17] *Seawall Associates v. City of New York*, 74 F. Supp. 2d 109 (SDNY 1999).
[18] *Society of Ethical Culture v. Spatt*, 68 F. 3d 1 (2d Cir. 1995).

In January 2002, the Supreme Court heard arguments on the case of *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency.*[19] The arguments presented by the Tahoe-Sierra Preservation Council, representing roughly 2,000 landowners near Lake Tahoe in Nevada and California, asserted that a compensable taking had been committed by the bi-state Tahoe Regional Planning Agency, and they had not been justly compensated for such a taking. The alleged taking came as a result of temporary moratoria restricting property development in the agency's jurisdiction was temporarily halted.[20]

Lake Tahoe, nestled in the Sierra Nevada Mountains along the border between Nevada and California, is known worldwide as a major tourist destination due to its natural beauty. In addition to the alpine scenery surrounding the lake, the water in Lake Tahoe has been noted for being extraordinarily clear and blue.[21,22] However, land development beginning in roughly 1960 throughout the Lake Tahoe Basin had led to deterioration of the picturesque water noted in earlier accounts of the lake. In response to elevated levels of algae and pollution in the lake, Nevada and California gained approval from Congress and the President to enact the 1980 Tahoe Regional Planning Compact.[23]

The Compact required the adoption by the Tahoe Regional Planning Agency (TRPA) of new standards for air quality, water quality, soil conservation, vegetation preservation, and noise. The Compact prohibited the development of new subdivisions, condominiums, and apartment

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[19] *Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 US 302 (2002).
[20] Fox, Tedra, "Lake Tahoe's Temporary Development Moratorium: Why a Stitch in Time Should Not Define the Property Interest in a Takings Claim," *Ecology Law Quarterly*, June 2006, https://lawcat.berkeley.edu/record/1117764?ln=en.
[21] University of California, Davis, "Tahoe: State of the Lake Report 2015," *Tahoe Environmental Research Center*, https://tahoe.ucdavis.edu/sites/g/files/dgvnsk4286/files/inline-files/2_exec_summary.pdf. Accessed February 21, 2024.
[22] Sonner, Scott, "This US Lake is Overrun By Tourists, Jolting the Region Into Managing Huge Crowds," *USA Today*, July 24, 2023, https://www.usatoday.com/story/travel/destinations/2023/07/24/lake-tahoe-busy-tourist-crowds/70455636007/#:~:text=Roughly%20one%2Dthird%20the%20size,around%2015%20million%20each%20year.
[23] Tahoe Regional Planning Agency, "Bi-State Compact," https://www.trpa.gov/regional-plan/bi-state-compact/. Accessed February 22, 2024.

buildings; all cities and counties within the Lake Tahoe Basin were also subject to restricted quantities of building permits from 1981 to 1983.[24] The first moratorium, Ordinance 81-5, would become effective in the summer of 1981, but the region would fail to meet the thresholds required by the Compact. An additional resolution in 1983, Resolution 83-21, would impose another 8-month moratorium on all construction on sensitive lands in the Basin.[25] In 1984 and 1987, again, construction on sensitive lands in the Basin would be temporarily prohibited.[26,27]

Following the adoption of the 1984 plan, petitioners filed parallel actions in federal courts in Nevada and California. These would be consolidated and tried in Nevada. The group of petitioners was comprised of the Tahoe-Sierra Preservation Council, representing roughly 2,000 landowners and more than 400 individual owners of vacant lots throughout the impacted region. The individual owners in the class had purchased properties prior to the effective date of the 1980 Compact. Following litigation spanning multiple decades, the Supreme Court heard an appeal of the case following hearings by the District Court and, subsequently, the Court of Appeals. At each level, the precedent set by *Penn Central* was referenced for its circumstantial and adaptable approach to evaluating whether a governmental action constituted a taking.

The District Court, imitating *Penn Central's* approach, evaluated the intent and circumstances surrounding the TRPA's temporary moratoria.[28] By the *Penn Central* precedent, a combination of factors must be considered, namely the interference imposed by regulations on

[24] Tahoe Regional Planning Agency, "TRPA Governing Board Packets," December 1981, https://www.trpa.gov/wp-content/uploads/documents/archive/1981-DECEMBER.pdf.
[25] Tahoe Regional Planning Agency, "TRPA Governing Board Packets," September 1983, https://www.trpa.gov/wp-content/uploads/documents/archive/1983-SEPTEMBER.pdf.
[26] Tahoe Regional Planning Agency, "Environmental Impact for Adoption of a Regional Plan for the Lake Tahoe Basin," April 17, 1986, https://www.trpa.gov/wp-content/uploads/documents/archive/TRPA_Regional_Plan_Supp_EIS_1984.pdf.
[27] Tahoe Regional Planning Agency, "TRPA Governing Board Packets," July 1987, https://www.trpa.gov/wp-content/uploads/documents/archive/1987-JULY.pdf.
[28] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 34 F. Supp. 2d 1226 (D. Nev. 1999).*

"reasonable investment-backed expectations."[29] The Court concluded that land purchasers "did not have reasonable, investment-backed expectations that they would be able to build single-family homes on their land within the six-year period involved in this lawsuit" given that the "average holding time of a lot in the Tahoe area between lot purchase and home construction [was] twenty-five years." As such, it was illogical to conclude that the average individual represented by the Council had intentions and expectations of achieving the development they claimed would have taken place upon their property in the relatively short time where moratoria restricted development in the basin. The District Court also considered *Lucas v. South Carolina Coastal Council,* concluding that a taking was committed under the categorical rule used in the case.[30] *Lucas* was a legal battle over the construction of a luxurious beach home near Charleston which was halted by coastal development regulations, and the Supreme Court ruled South Carolina's actions unconstitutional.

However, an appeal by the TRPA to the Ninth Circuit Court challenged whether *Lucas'* rule applied.[31] The Ninth Circuit Court would rule that *Lucas* applied only in the event that a regulation permanently denies all economically productive use of a tract of land. The moratoria in *Penn Central*, instead, denied development only temporarily. The Circuit Court also ruled that another case cited, *First English Evangelical Lutheran Church v. Los Angeles County,* only concerned whether monetary compensation was a proper remedy for a taking, and it did not concern whether or not a taking had occurred.[32] The Court ruled that *Penn Central's* ad hoc approach to analyzing whether a taking had occurred was the proper framework for such a case, and the petitioners could not make a claim of a taking under the *Lucas* approach.

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[29] Washburn, Robert, "'Reasonable Investment-backed Expectations' As a Factor in Defining Property Interest," *Journal of Urban and Contemporary Law*, January 1996, https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1090&context=law_urbanlaw

[30] *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992).

[31] *Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764 (9th Cir. 2000).

[32] *First English Evangelical Lutheran Church v. Los Angeles County*, 482 US 304 (1987).

The Supreme Court, hearing the case after a further appeal by the petitioners, held that the "moratoria ordered by TRPA are not *per se* takings of property requiring compensation under the Takings Clause." *Per se* takings involve a physical taking of property by the government, and just compensation is required when the government executes such a physical intrusion onto private property.[33] In an evaluation of the case in the style of *Penn Central*, similar to that of *Palazzolo v. Rhode Island*, the Court found that a permanent deprivation of economic use had not occurred.[34] The Court found that "'fairness and justice' will not be better served by a categorical rule that any deprivation of economic use, no matter how brief, constitutes a compensable taking." Essentially, it was determined that the moratoria were justified and fair due to their distribution of burden about many parties and the temporary nature of the moratoria. Moreover, the Supreme Court wished to avoid the precedent of any temporary development restrictions being ruled a compensable taking requiring substantial financial resources to be distributed to any affected parties in the future. To set such a precedent would incentivize policymakers to avoid such development restrictions entirely, and this would likely lead to a lack of regulations advocating for the public interest in development restrictions. This could result in negative and unexpected consequences as motivated parties would have a legal precedent to halt any development limitation policies. Negative externalities could proliferate as litigious actors could easily oppose and halt initiatives serving the public good, such as preventing conservation easements.[35]

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[33] Echeverria, John, "What Is a Physical Taking?" *UC Davis Law Review*, December 2020, https://lawreview.law.ucdavis.edu/archives/54/2/what-physical-taking.
[34] *Palazzolo v. Rhode Island*, 533 US 606 (2001).
[35] McLaughlin, Nancy, "Enforcing Conservation Easements: The Through Line," *Georgetown Environmental Law Review*, 2022, https://www.law.georgetown.edu/environmental-law-review/wp-content/uploads/sites/18/2022/11/GT-GELR220023.pdf.

The conclusion in *Tahoe-Sierra* applied rules and criteria developed for ascertaining whether a taking had been committed in *Penn Central.* The *Tahoe-Sierra* case purposely avoided establishing a new precedent for hearing similar cases in the future, unlike the preceding *Penn Central* or *Kelo v. New London*.[36] The latter case set a controversial precedent in establishing that the government could take property and sell it to private developers while still serving the "public good," opposing many contemporary ideas about usage under eminent domain. *Tahoe-Sierra* continues to be cited by analyses of modern legal and political issues, such as the government's response to the COVID-19 pandemic, but its strategic avoidance of setting a radical new precedent has lent itself to fewer citations in case law than many contemporary cases.[37]

Combined Analysis

Penn Central finds that the government is able to restrict economic development in order to maintain aesthetic value integral to a locale's major attraction. Additionally, it determines that legislature deeming such aesthetic appearance more valuable than economic development was sufficient for legal permissibility of economic development restrictions. The case deals with the preservation of Grand Central Terminal's aesthetic beauty, attracting visitors and tourists due to its ornate craftsmanship and distinctive architecture. Legislation enacted by New York City determined that the appearance and attractive qualities of Grand Central Terminal outweighed the value of economic development atop the structure. The Court upheld the constitutionality of the legislation due to the specific circumstances of the legal dispute, and their decision was made

[36] *Kelo v. City of New London*, 545 US 469 (2005).
[37] Wulf, Henry, "Inverse Condemnation and Government Pandemic Response," *Casetext*, May 22, 2020, https://casetext.com/analysis/inverse-condemnation-and-government-pandemic-response-1?sort=relevance&resultsNav=false&q=.

strategically so as to ensure that the result would provide beneficial guidance on deciding future cases of a similar nature.

Similarly, *Tahoe-Sierra* finds that the government is able to restrict economic development in order to maintain aesthetic value integral to a locale's major attraction. Additionally, it determines that moratoria deeming such aesthetic appearance more valuable than economic development served a purpose sufficient for legal permissibility of economic development restrictions. The case deals with the preservation of aesthetic beauty, attracting visitors and tourists due to its uniquely beautiful water and grandiose alpine surroundings. Temporary development moratoria enacted in the Lake Tahoe Basin were based on a determination that the appearance and attractive qualities of Lake Tahoe outweighed the value of economic development atop the land surrounding the lake. Like in *Penn Central,* the Court upheld the constitutionality of the legislation due to the specific circumstances of the legal dispute, and their decision was made strategically so as to ensure that the result would avoid potential harm caused by the precedent of overcompensation for temporary restrictions.

Penn Central sought to maintain an aesthetic of man-made grandeur and *Tahoe-Sierra* sought to maintain a natural landscape which purposely lacks man-made objects. Despite the opposite settings of each case, their respective rulings jointly find that preservation of either man-made or natural beauty can be of such great value that they are worth halting economic development which might diminish them. Moreover, the Court defers to the decision-making capacity of legislators and policymakers in each case, saying of the Landmarks Law in *Penn Central* it was "enacted on the basis of legislative judgment that the preservation of landmarks benefits the citizenry both economically and by improving the overall quality of life." This

sentiment is mirrored by the Court in *Tahoe-Sierra,* contending that "such an important change in the law should be the product of legislative rulemaking rather than adjudication."

By analyzing both these cases in parallel, we can ascertain a broad series of specific circumstances and attitudes which could be useful in determining the constitutionality of uncompensated protection of aesthetic beauty through economic restrictions.

1. If economic development restrictions are temporary in nature, do not conflict with preexisting economic functions, and do not actively alter the behavior of the average property owner affected, it is likely that these restrictions do not constitute a compensable taking.
2. If aesthetic appearance serves a beneficial purpose to the public in generating economic, cultural, and tourism value, it is likely that economic development restrictions which protect this aesthetic value serve the public interest, and are thus within the government's capacity to enact.
3. When a legislature determines that the aforementioned aesthetic appearance is worthy of enacting broad economic development restrictions, the Court is often deferential towards this policy judgment.
4. The unique economic and cultural circumstances regarding an alleged unconstitutional taking are the most important factor in determining the constitutionality of the policy action. This may involve evaluation of diminution of value or alteration of intended use.

It is noteworthy, however, that these rules are made to apply in cases where aesthetic appearance, not environmental conservation or some other end, are the basis for legal action. This list of conditions may not be exhaustive. Additionally, the subjective and circumstantial

nature of evaluating an alleged unconstitutional taking make it impossible to create a perfect test of factors used to determine the constitutionality of economic development policy. Inverse condemnation, a remedy for property owners from whom property is taken without substantial government interests or wherein economic value from property is deprived, may be granted in opposition to the conditions above should the individual members of a particular court disagree with the methodology used in previous cases.[38]

It is likely that cases of this ilk will be seen in the coming years. In exclusive suburban areas of the United States facing skyrocketing housing costs and mounting political pressure, such as Marin County, CA, Oakland County, MI, and Fairfax County, VA, construction restrictions have been enacted to preserve exclusivity while often citing aesthetic appearance as a justification for such actions.[39,40,41] Minimum lot sizes, for example, are often implemented with the express purpose of restricting housing supply.[42] It has long been known that "income clustering," wherein housing restrictions group people of similar incomes near one another, has come from strict rules on housing development.[43] Directly resulting from these restrictions, socioeconomically disadvantaged individuals have often been priced out of purchasing or renting housing in these counties and others like them.

However, the tides of progressive political thought through the college-educated upper-middle class and upper class have brought such restrictions under fire. The state of

[38] Cornell Law School, "Inverse Condemnation," *Legal Information Institute*, https://www.law.cornell.edu/wex/inverse_condemnation. Accessed February 26, 2024.
[39] Foley, Brian, "The Effects of Residential Minimum Lot Size Zoning on Land Development: The Case of Oakland County, Michigan," *AgEcon Search*, 2004, https://ageconsearch.umn.edu/record/11169/.
[40] California Housing Partnership, "Marin County 2023 Housing Needs Report," May 2023, https://chpc.net/resources/marin-county-housing-need-report-2023/.
[41] Fairfax County, Virginia, "Communitywide Strategic Housing Plan," June 2018, https://www.fairfaxcounty.gov/housing/sites/housing/files/assets/documents/communitywide%20housing%20strategic%20plan/communitywide%20housing%20strategic%20plan%20final.pdf.
[42] Zhao, Weihua, "The Long-Run Effects of Minimum Lot Size Zoning on Housing Redevelopment," *Journal of Housing Economics*, March 2022, https://doi.org/10.1016/j.jhe.2021.101806.
[43] Neiman, Max, "Zoning Policy, Income Clustering, and Suburban Change," *Social Science Quarterly 61* 666-675 (1980), December 1980, http://www.jstor.org/stable/42860778.

Washington, for example, recently eased its strict housing construction restrictions.[44] Suffering from rapidly increasing housing costs throughout the state, Washington deemed that construction restrictions had needlessly prevented construction of housing for low- and middle-earning individuals which could provide a higher quality of life to the state's residents. Washington has long held its natural beauty and cleanliness in high regard, but the value of equitable housing policies for its residents had begun to outweigh the relative value of protecting the vistas in and around their metropolitan areas. Of course, this leads to the conclusion that aesthetic beauty may be protected by restrictions put forth by the legislature, but restrictions may be loosened at the expense of aesthetic beauty, according to the needs of a constituency. Minneapolis, Minnesota eliminated single-family zoning restrictions, but saw success hampered by other housing restrictions even as new apartment buildings sprung up throughout the city.[45] As such, it is most accurate to view aesthetic beauty as an economic good, itself, with its own level of value subject to the needs and desires of stakeholders.

Given that aesthetic appearance can be thought of as an economic good, implying that it has some sort of quantifiable value, it is presumable that further legal challenges could arise as prospective builders and property managers will challenge economic restrictions on their development projects similar to those of *Penn Central* or *Tahoe-Sierra.* If the value of economic development to a community or region outweighs the costs of such activity, including the loss of preexisting aesthetic beauty, we can expect that stakeholders may take legal action to loosen restrictions. In these situations, the reasonability of investment-backed expectations and the validity of building restrictions as an item in the public's interest will come into question.

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[44] *HB-110*, 2023, Washington State Legislature.
[45] Hanley, Allison, "Rethinking Zoning to Increase Affordable Housing," *Journal of Housing and Community Development*, December 22, 2023, https://nahro.org/journal_article/rethinking-zoning-to-increase-affordable-housing/.

Though these hypothetical cases may often deal with neither breathtaking natural beauty nor world-renowned architecture, the conditions and principles ascertained from rulings in these cases should serve as a very broad guide for legal challenges moving forward.

Conclusion

Penn Central Transportation Company v. City of New York and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* set precedents and methodologies for evaluating economic development restrictions for the purpose of preserving valuable aesthetic appearance. The methods created and implemented in these cases will likely continue to provide a road map for evaluating a broad swath of ever-evolving property law rulings, policies, and legislation through the lens of the Fifth and Fourteenth Amendments.[46] Cases such as *Tyler v. Hennepin County* continue to build upon the methods set forth in *Penn Central* and *Tahoe-Sierra.*[47] Further evolution of legal thought around economic development and inverse condemnation ought to be guided by precedent set by *Penn Central* and *Tahoe-Sierra,* especially regarding sociopolitical issues such as the ongoing US housing crisis.[48] Though not limited to this issue, it is possible that these two cases hold the key to unlocking a proper legal basis upon which more equitable housing policies can be enacted throughout the United States in the near future.

[46] Byrne, J. Peter, "*Penn Central* in Retrospect: The Past and Future of Historic Preservation Regulation," *Georgetown Environmental Law Review*, 2021, https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3464&context=facpub.
[47] *Tyler v. Hennepin County*, 598 US 631 (2023).
[48] American Civil Liberties Union, "Explanation of How Eminent Domain Can Be Used to Restore the Real Estate market and the Financial System Without the Adverse Consequences to the Current Holders of the Condemned Mortgages, https://www.aclu.org/wp-content/uploads/document/12-Paper_entitled_How_Eminent_Domain_Can_Be_Used_to_Restore_the_Real_Estate_Market.pdf. Accessed March 3, 2024.

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All Deserve the Freedom to Love: A Case for the Legal Recognition of Polyamorous Relationships

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Abstract

Across the United States, polyamorous adults suffer discrimination due to their being in non-monogamous relationships. Does the government have an obligation to protect all relationships among consenting adults? The following paper presents an argument that relationships among polyamorous adults should be granted the same legal recognition as monogamous people to alleviate the burdens of discrimination they face. Currently, the most expedient step towards harm-reduction in this regard is through the creation of domestic partnerships at the municipal level. This must occur as a first step to protecting the rights of consensually non-monogamous people themselves, and the foundational right of freedom for consenting adults to form relationships as they please.

Introduction

In the wake of Obergefell v. Hodges, it is tempting to believe that all consensual relationships among adults have acquired the benefits of legal recognition.[49] However, despite significant strides made towards relationship equality, I posit the laws of the United States fail to deliver what is owed to adults in consensually non-monogamous (CNM) relationships. Members of the CNM community are largely denied protection, and as a result members of such unions experience harm–including workplace and housing discrimination and being denied child custody.

In this paper, I advocate for the creation of legally recognized polyamorous domestic partnerships. I argue the government should protect individuals' freedom to form relationships – so long as they do not harm others. More specifically, I advocate for the removal of current

[49] *Obergefell v. Hodges*, 576 U.S. 644, (2015).

barriers preventing the legal recognition of CNM relationships at the municipal level. This will allow the creation of legally recognized domestic partnerships among more than two individuals by local governments–an essential step to alleviating the harms faced currently by members of the CNM community.

I first explicate the current state of law regarding legal recognition of CNM relationships. Following this, I highlight the urgency of this issue by revealing the discrimination faced by CNM individuals. Later, I reveal the merits of domestic partnerships as an expedient step towards harm-reduction. Then, I establish that polyamorous relationships do not cause harm towards others and conclude by advocating for their legal recognition.

Legal Barriers to the Creation of Consensually Non-Monogamous Domestic Partnerships

As it stands, state governments in the United States largely prevent the creation of domestic partnerships for members of the CNM community at the municipal level. This is so for two reasons: the legal recognition of polyamorous relationships is criminalized by states, and state governments limit the ability of local governments to pass or uphold CNM domestic partnership ordinances. The former of the two is reflected in the following:

> All fifty states and Washington, D.C., prohibit polygamy or bigamy in their statutes or constitutions. California, Colorado, Washington, and Washington, D.C., added domestic partnerships or civil unions to their definitions of statutory bigamy. Forty-eight states do not discuss domestic partners in their antipolygamy laws, but multiple-partner ordinances may clash with these statutes if the rights they create are not sufficiently distinguishable from marriage.[50]

This summary of the state of the law reveals the widespread criminalization of polygamous and bigamous marriage at the state level. Furthermore, it reveals such criminalization either extends to CNM domestic partnership ordinances, or has the potential to if

[50] Harvard Law Review, "Three's Company, Too."

they are not, "sufficiently distinguishable from marriage," in the majority of states.[51] From this, it is evident that the criminalization of polygamy and bigamy at the state level often also prohibits the creation of CNM domestic partnerships at the local level.

Furthermore, state legislatures can prevent the creation of CNM domestic partnerships by directly criminalizing polyamorous domestic partnerships. For example, "before municipalities pass polyamorous ordinances in D.C. and the three states that make multiple-partner domestic partnerships a felony, decriminalization may be necessary."[52] Similarly to statutes banning polygamy and bigamy, the criminalization of polyamorous domestic partnerships of course prevents the creation of CNM domestic partnerships.

Criminalizing the legal recognition of polyamorous relationships is not the only legal barrier to the creation of CNM domestic partnerships. State governments also limit the authority of local governments which creates a significant hurdle to legally recognizing CNM partnerships. As noted in the following:

> Most states, including Massachusetts, have enacted "home rule" amendments or statutes, granting local government subunits the power to initiate legislation not specifically authorized by the state legislature. In contrast, some states have Dillon's Rule, which requires the state legislature's express permission as a prerequisite to local action like passing domestic partnership ordinances. Although local governments in home rule states have greater autonomy, their authority varies across and within those states based on unique home rule provisions. Consequently, determining if a local government can enact an ordinance requires checking the specific statute for that entity's power in relation to the state.[53]

Here, it is revealed that the autonomy states afford to local governments classifies municipalities as falling into one of two categories. The first of these is municipalities operating under Dillon's Rule. In the thirty-nine states that employ Dillon's Rule, local governments' ability to legally

[51] Ibid.
[52] Ibid.
[53] Ibid.

recognize CNM partnerships is entirely contingent upon approval from their state legislature.[54] Requiring approval from the state government to pass ordinances limits the power of local governments. This is so because a state government can trump the desire of a local municipality to create legal status for CNM relationships by withholding the necessary permission. As a result, employing Dillon's Rule can be used as a tool in the arsenal of preventing the creation of CNM domestic partnerships at the municipal level.

Similarly, the second category of municipal authority–Home Rule–erects barriers preventing the legal recognition of CNM domestic partnerships. In the thirty-one states which provide for Home Rule in their constitution, and the eight which authorize it through statute, local governments have, "the power to initiate legislation not specifically authorized by the state legislature."[55] However, despite Home Rule granting municipalities this power, state governments may still disallow such municipalities' CNM domestic partnership ordinances. This occurs by state governments passing legislation which bars the creation of such unions.

For example, Article XI section 5 of the California state constitution includes a provision which allows for local governments to create laws, "in respect to municipal affairs."[56] However, this authority granted to these municipalities is not absolute. This is exemplified by the California Supreme Court's ruling in In Re Lane: "[t]he Penal Code sections covering the criminal aspects of sexual activity [including bigamy] are so extensive in their scope that they clearly show an intention by the Legislature to adopt a general scheme for the regulation of this subject."[57] Despite being granted authority to regulate domestic partnerships, a local government's power was superseded by the California Supreme Court. This ruling reveals that

[54] Nebraska Legislative Research Office, "Dillon Rule and Home Rule;" Richardson, Gough, and Puentes, "Is Home Rule the Answer?"
[55] Harvard Law Review, "Three's Company, Too."
[56] California Legislative Information, "California Constitution Article XI."
[57] *In re Lane*, 372 P.2d 897 (Cal. 1962).

authority granted by Home Rule provisions is weak because it can be superseded by the state. Home Rule municipalities subject to the will of state courts and legislatures can face barriers when attempting to legally recognize CNM relationships. This is so because members of CNM partnerships cannot truly put faith in legal recognition at the municipal level due to the fact that it may be invalidated by state courts or legislatures.

In summary, there are several legal barriers to the formal recognition of CNM relationships at the municipal level. Among the most pressing of these are the criminalization of polygamy or polyamorous domestic partnership. Furthermore, state courts and legislatures restricting municipal governments from legally recognizing polyamorous relationships creates another barrier. Overall, because municipalities are subject to the will of the state government, their ability to pass CNM domestic partnerships ordinances is limited without approval–or absence of disapproval–from the state.

Discrimination Faced by the Consensually Non-Monogamous Community

I have established that unlike their monogamous counterparts, members of the CNM community are denied the legal right to marriage or domestic partnership. This inhibits the well-being of such individuals because the government itself discriminates against CNM people, and because it fails to protect CNM people from private citizens who would victimize them for their preference of relationship style. In the following section, I illuminate the areas in which polyamorous people face discrimination to motivate the enactment of legal protections. These areas include the workplace, housing, child custody, and more. The patterns of discrimination reflect a lack of legitimacy afforded to CNM partnerships. Such discrimination harms the, "4 to 5 percent of people in the U.S. [that] are in a consensually non-monogamous relationship."[58]

[58] McArdle, "Polyamory and the Law."

First, the lack of legal protections offered to people in CNM relationships results in inequality and discrimination in the workplace. Such individuals do not have access to shared resources granted to legally recognized monogamous couples. "Benefits like health insurance, life insurance, family leave, bereavement leave, relocation assistance, and pension benefits are central to the livelihood and well-being of employees, their partners, and their legal dependents," but are not available to people in CNM relationships.[59] Furthermore, there is anecdotal evidence that polyamorous people face termination as a result of their engaging in CNM practices.[60]

These examples of discrimination could be alleviated by legal recognition of polyamorous couples. This is so because it would allow the sharing of employment benefits among partners, and lay the groundwork for making polyamorous practices legally protected–and consequently not grounds for termination. Furthermore, legal recognition could offer CNM unions legitimacy that would serve to reduce stigma against them and the discrimination which results from it.

Denial of resources to members of polyamorous partnerships is not limited to the workplace. It is also evident when examining housing discrimination against CNM people. Most states lack, "legal provisions protecting people from discrimination based on marital status, meaning landlords may legally ask questions about [potential tenants'] relationships and may refuse to rent," to them if they are unmarried.[61] A handful of states–Alaska, California, Massachusetts, Michigan, and New Jersey–provide protections to unmarried partnerships, but for CNM people elsewhere in the U.S., housing discrimination is a very real threat.[62] A potential remedy to housing discrimination looks like, "a city or county ordinance prohibiting

[59] Human Rights Campaign, "Issue Brief Domestic Partnerships."
[60] McArdle, "Polyamory and the Law."
[61] Nolo, "Housing Discrimination."
[62] Ibid.

discrimination on the basis of sexual orientation. Although usually passed to protect the housing rights of gay and lesbian tenants, most local laws forbidding discrimination based on sexual orientation also protect unmarried, heterosexual couples."[63] By limiting housing discrimination, local ordinances would reduce harm and discrimination experienced by the CNM community.

Finally, child custody is particularly difficult for CNM partnerships given that, "courts in the U.S. and around the world have recognized the 'Rule of Two' [which states] children are allowed two legal parents."[64] Some strides have been made, such as, "six states–California, Delaware, Maine, Vermont, Washington and… Connecticut–enact[ing] laws over the past decade expressly allowing a court to recognize more than two parents for a child."[65] However, these laws do not guarantee the granting of parental status to all parents of a child of a CNM relationship. Furthermore, in areas without such laws, members of polyamorous relationships who want to attain legal status as caregivers for their children still face barriers. This is largely due to the lack of legitimacy afforded to CNM relationships within the legal system:

> Many judges conclude, without supporting evidence, that people who engage in CNM are less moral, less stable, and less capable to care for children compared to monogamous people (e.g., V.B. v. J.E.B., 2012; Cross v. Cross, 2008). Further, some family courts have misunderstood polyamorous relationships, many assuming that long-term committed plural relationships are equivalent to "wife-swapping" or casual sex-only swinging. (Cross v. Cross, 2008; In re Aleksandree M.M., 2010). Ignorance about polyamory fuels systematic discrimination towards these families.[66]

The discrimination I have outlined thus far has harmful consequences beyond limiting the equal treatment of CNM people. In addition, "CNM-related minority stress [has been] positively related to increased psychological distress, such as higher self-reported depression and anxiety

[63] Ibid.
[64] Sheff, "Multiple Parents."
[65] Joslin and Douglas, "The next Normal."
[66] Polyamory Legal Advocacy Coalition, "FAQs."

symptoms."[67] The harms CNM people face as a result of being non-monogamous stems from discrimination faced because of their practicing CNM. Having revealed these real harms and their origin, I now defend the use of domestic partnership as a means to alleviate them.

The Merits of Domestic Partnerships to Achieve Harm-Reduction

I posit that the remedy to achieve legal recognition for polyamorous relationships is to improve legal transparency and remove current barriers in place. Specific to decriminalization, it is urgent that we clearly decriminalize CNM domestic partnerships and ensure that such partnership ordinances are allowed–even in states which criminalize CNM marriage. In regards to the restriction of local autonomy, municipalities should be granted an inalienable right to recognize adult CNM relationships. Following this, local governments should pass ordinances offering members of CNM relationships the option to form domestic partnerships to ensure the liberty of adults to form consensual relationships of their choosing.

To be clear, my support of legal recognition via domestic partnership is not as a preferred option to marriage, but an expedient first step to alleviate the current harms facing the CNM community. I defend this position by drawing on the progress generated by the creation of domestic partnerships between same-sex partners, and the potential for domestic partnerships to offer the same benefits to the CNM community.

Prior to the legalization of same-sex marriage, the general climate regarding legalization was fairly mixed with a slight trend towards a pro-legalizaition stance among people in the United States. According to Pew Research Center, "in 2001, roughly one-third of American adults supported gay marriage (35%), while 57% opposed it." A decade later in 2012, "Pew Research Center polling [found] slightly more support for same-sex marriage (48%) than

[67] Witherspoon and Theodore, "Exploring Minority Stress."

opposition to it (43%)," indicating a gradual shift toward acceptance of same-sex marriage among Americans.[68]

The slim majority in favor of same-sex marriage achieved in 2012 occurred about half a century after calls to grant legal status to our relationships occurred in the gay community. These are understood to have begun in the 1960s in the United States.[69] In the time between the 1960s and the establishment of marriage equality, some strides were made towards protecting same-sex couples through the creation of domestic partnerships. These reduced harm by providing protection from discrimination and by providing legal legitimacy.

While the general attitude towards relationships which are not heterosexual and monogamous has become more tolerant, the timeline for the legalization of same-sex marriage indicates that a years-long battle stands in the way of legalizing polyamorous marriage–if it is to be legalized at all. Because of the significant time barrier and the ongoing harm occurring currently, domestic partnerships offer significant benefits in the way of harm-reduction and by offering legal legitimacy.

With the theoretical harm-reduction benefits of legalizing polyamorous domestic partnerships established, I now offer concrete examples of domestic partnerships created at the municipal level which have actually reduced harm. Recall the barriers to legalization mentioned previously–both criminalization and restriction of the autonomy of local governments. Logically, legalizing CNM domestic partnerships at the local level depends on removing both of these barriers. As previously stated, this can be achieved through decriminalization and both increasing the transparency of and expanding Home Rule provisions in regards to creating domestic partnerships.

[68] Pew Research Center, "Overview of Same-Sex Marriage."
[69] Ibid.

The merits of Home Rule privileges which allow for the creation of domestic partnerships are abundant. For example, in Florida prior to Obergefell v. Hodges, the case Lowe v. Broward County challenged Broward county's authority to create domestic partnerships among same-sex and opposite-sex partners. This challenge occurred despite the county being granted Home Rule authority prior by the state government.[70] Lowe's challenge was unsuccessful because of the expansiveness of Home Rule in this state. Because of this, couples in this county were allowed to enjoy their local government's protection of their private lives.

The benefits of local partnership laws which create legal status for CNM partnerships are further evidenced by those already passed. Progress has already been made on this issue in several local governments, specifically in three municipalities in Massachusetts. "In 2020 and 2021, three Boston-area municipalities–the city of Somerville followed by Cambridge, and the town of Arlington became the first in the country to extend the legal definition of domestic partnerships to include polyamorous relationships."[71] As a result, polyamorous couples in both cities now have greater access to resources which were previously denied to them due to their practicing of CNM. In Cambridge, this guarantees hospital visitation, visitation at correctional facilities, access to children at school, and preventing housing and employment discrimination within the city.[72] Likewise, in Somerville access to children is guaranteed within the city.[73] In both cities, some of these rights may also be available elsewhere, depending on the location.[74] These examples illustrate merits offered by legal recognition at the local level to ensure the liberty owed to members of CNM relationships.

[70] Florida Supreme Court, *Lowe vs. Broward County.*
[71] McArdle, "Polyamory and the Law."
[72] Polyamory Legal Advocacy Coalition, "Cambridge Domestic Partnership."
[73] Polyamory Legal Advocacy Coalition, "Somerville Domestic Partnership."
[74] Polyamory Legal Advocacy Coalition, "Cambridge Domestic Partnership;" Polyamory Legal Advocacy Coalition, "Somerville Domestic Partnership."

It is evident that domestic partnerships offer a protection to the private sphere that reduces harm experienced by polyamorous people. Furthermore, the creation of domestic partnerships can offer the benefit of creating legal legitimacy. Because of these two gains shown, in both the face of current harm and in bolstering the defense for equality, domestic partnerships offer great benefits in the here and now to members of the CNM community.

Polyamory is Harm-Neutral

Up to this point, I have argued that protecting the private life of polyamorous individuals by offering legal recognition and protection fulfills the government's obligation to its CNM citizens. A core component of this hinges upon my claim that polyamory does no harm in and of itself as long as it is practiced by consenting adults. To further defend my overall position, I counter arguments which contend that polyamory actually harms members of such relationships, children parented by such unions, and women.

In congruence with my defense of polyamory's harm-neutrality, a 2018 study published in the Journal of Social and Personal Relationships found that, "no differences in mean levels of relationship and sexual satisfaction were found between CNM and monogamous individuals," when evaluating both types of relationships.[75] Even if this were not the case, and polyamorous individuals were less happy than their monogamous counterparts, the government would produce greater harm than good by intervening or failing to offer CNM people protections and legal status. The negatives of such a paternalistic state, or a state which allowed for relationship inequality among its citizens, would far outweigh the benefits of limiting the nonexistent harms of polyamorous unions.

[75] Wood et al., "Reasons for Sex and Relational Outcomes."

Furthermore, some opponents of CNM argue that children parented by non-monogamous couples are subject to a variety of harms. Psychologist Dr. Karen Ruskin, a marriage and family therapist, raises the potential for these children to have greater feelings of neglect and abandonment than children raised by monogamous couples.[76] According to this position, polyamorous union harms others who did not consent to the union–the children.

This position contrasts greatly with the following findings from a 2021 Canadian study published in the Archives of Sexual Behavior. The findings reveal the following:

> Many of the participants of said study who indicated being in childrearing roles discussed the cooperative elements of raising children. Pain mentions the mentality of "it takes a village to raise a family," which is echoed in the "more is more" theme of our research project. This is similar to Pallotta-Chiarolli et al.'s (2013) concept of collaborative parenting in which several adults contribute to raising children. Within the present study, not only were participants involved in multiple parenting families once children were born, but multiple partners were involved from conception or even earlier family planning discussions. Childbearing participants spoke of receiving support from their partners and their partners' partners which in turn allowed them to reinvest that support in childrearing and in their own partnered relationships. In addition to having more time to reinvest in relationships with others, participants were able to ensure some free time to themselves.[77]

Upon weighing these opposing perspectives on polyamorous parenting, I argue the study's finding, that children can benefit from polyamorous parents, is likely more accurate than Dr. Ruskin's conclusion. It is more likely that children can benefit from having either monogamous or polyamorous parents to an equal degree. This claim is further supported by the conclusion of a 2011 study published in Social Science Research: "marriage is not a blanket prescription for the well-being of children, any more than it is for the well-being of adults. Recent policy initiatives to promote marriage need to take account of how variation within marriage relates to child

[76] Ruskin, "Polyamory – Not Healthy for Children."
[77] Landry, Areneau, and Darling, "It's a Little Bit Tricky."

well-being."[78] The study reveals that the benefits offered to a child by their parent(s) is more related to the quality of the care provided by them, rather than the structure of their family.

Additionally, as has been previously mentioned, there are already polyamorous partnerships raising children together who are burdened by discrimination.[79] Because of this, it is of the greatest utility to limit discrimination of CNM parents for the welfare of a child they are raising. This is so on the grounds that allowing ease of parenting by means of formalizing one's status as a parent will benefit children. This will occur because it will allow all of a child's parents to have an equal role in areas of caretaking which require legal status. Consequently, it is inconsistent to raise child welfare as a criticism of creating CNM domestic partnership as they will serve to enhance child welfare.

Finally, I will address the criticisms of those who believe that allowing for the legal recognition of polyamory will harm women. More specifically, some argue that polyamory could be a, "co-opting and rebranding of polygamy, so that it loses its nasty association with the oppression of the most disadvantaged women," and that, "the co-opting of the sanitized version [of polygamy] will further normalize a practice that is anything but liberating for women in this arrangement."[80] Elaborating on this concern, sociologist Elisabeth Sheff, who studies polyamorous families, voices that polyamory among partners of varying sexes occurs on the backdrop of patriarchal power dynamics and the current inequality of the sexes.[81] This fact could be used to argue that polyamorous relationships involving women and men will be built upon the sexist power structures which exist in society at large. Following this, normalizing and legally

[78] Musick and Meier, "Are Both Parents."
[79] McArdle, "Polyamory and the Law."
[80] Bindel, "Rebranding Polyamory."
[81] Ibid.

recognizing CNM relationships will serve to strengthen the patriarchy and should consequently not occur.

To address this, I will first agree polyamory could harm women if gender power dynamics are not consciously counteracted in CNM relationships. Despite this, I contend it would be more harmful to women for the government to disallow the creation of CNM domestic partnerships because of this potential. This is true because this disallowing would be based on the infantilization of women, stripped of their agency by a paternalistic government who would claim to know more about what serves to benefit them than themselves. Furthermore, it would also fail to counteract the current discrimination polyamorous women face by virtue of practicing CNM. Therefore, women's rights would be better served by allowing the legal recognition of CNM unions than by disallowing them.

This is not to say that there are not myriad women and girls who suffer in patriarchal, polygamous arrangements. However, this problem is not related to the structure of polyamorous relationships but rather is a consequence of patriarchal power structures as a whole. Monogamy is neither immune to, nor the solution to the gendered power dynamics that may occur in opposite-sex couples. This is true on the grounds that women and girls can also suffer in predatory monogamous arrangements, or be in monogamous relationships which embody gendered power dynamics. Because this can occur in both monogamous and polyamorous relationships in patriarchical societies, potential sexism within a polyamorous relationship is a symptom of the ills of the society in which it occurs, not the structure of the relationship itself. In other words, blame put on polyamory is misplaced and should rather be directed towards the patriarchy.

Furthermore, using this misplaced blame to argue against the creation of legal status and protection for polyamorous unions fails to account for the needs of polyamorous unions constituted by same-sex individuals. Such unions would not face gender-based power imbalances due to their homogenous sexual composition. To legislate all polyamorous unions only for the concerns regarding mixed-sex relationships would be heteronormative and result in the allowance of discrimination against same-sex CNM relationships based on reasoning which does not apply to them. Therefore, the potential for sexist power dynamics to occur both does not have polyamory to blame, and does not adequately account for the wide variety of polyamorous relationships which would be recognized should domestic partnerships be legalized.

From these points it is clear that all of the harms frequently attributed to polyamory actually have other sources. These include poor relationship skills, poor parenting skills, or sexism. While these may manifest in polyamorous relationships, it is not by virtue of their structure, as they can manifest in monogamous relationships just as easily. Because of this, to object to the allowance of CNM domestic partnerships on the grounds that they themselves are harmful by virtue of their structure is erroneous.

Conclusion

The call for legal recognition of CNM relationships is urgent. Everyday, polyamorous people face unwarranted discrimination for engaging in a private practice which does no harm. Because of this, it is the obligation of the government to protect these people as means of ensuring individual liberty. As has been revealed by the previously analyzed examples of historically stigmatized relationships throughout history, this can be achieved through legal

recognition. This will both allow CNM adults to form legally recognized unions, and offer them protection from discrimination.

The first step along this road is the allowance of the creation of CNM domestic partnerships. This can be achieved by first removing legal barriers faced by local municipalities, and then passing legislation creating the right to such partnerships. This will serve polyamorous people, their children, and the society at large in that it will allow the laws of the U.S. to follow the shifting needs of the people they govern to ensure freedom. To oppose this is to oppose equal protection under the law for all people. It is to stand in opposition to the individual liberty consenting adults are owed when navigating their romantic lives.

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The AI-Authorship Copyright Question: How a Court Case and a Bureaucratic Decision Changed Intellectual Property Law

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Abstract
The Supreme Court based its ruling against granting copyright privileges to AI-authored works on a narrow construction of the word "individual," in Thaler v. Vidal. This article explores the consequences of this decision in terms of the (1) moral imperatives that might guide interaction with AI, (2) separation of powers between judicial and executive branches of government, and (3) the relationship between human and machine producers in a competitive market. The final analysis reveals that Thaler is likely to carry increasing legal authority moving forward, despite the fact that it is not necessarily beneficial to keep AI out of the market.

Introduction

The emergence of advanced artificial intelligence, capable of producing creative and original works, created an intellectual property problem: could these works be granted privileges in American copyright law? There was no law that stated they could not, but the laws that govern intellectual property were not written with AI in mind. According to the Chevron doctrine—which says that "courts should defer to an agency's reasonable interpretation of an ambiguous statute"[82] – entities like the U.S. Copyright Office have significant discretionary power in deciding whether or not existing law allows AI-authored works to get IP protections. In 2024, the Supreme Court is expected, by many, to discard the Chevron doctrine,[83] creating a legal environment in which judges will determine what to do with AI-produced works and IP, with less guidance from the executive branch. This change creates an expectation that the 2022 decision in

[82] Amy Howe, "Supreme Court likely to discard Chevron" Scotusblog, (2024): https://www.scotusblog.com/2024/01/supreme-court-likely-to-discard-chevron/
[83] Ibid.

Thaler v Vidal, which assigned a narrow construction to the word "individual," will become a more important source of legal authority, moving forward. Thaler established that AI programs cannot hold copyrights, on the grounds that an AI program is not an "individual." With the court's holding poised to become more authoritative in banning AI-authored works from the market, two important issues emerge: (1) the narrow construction of the word "individual" in Thaler is somewhat arbitrary, and (2) it is not necessarily beneficial to keep AI-authored works out of the marketplace.

Stephen Thaler applied for a patent on behalf of an AI program, acknowledging that the "invention [was] generated by artificial intelligence."[84] His application was denied before failing on appeal. The appellate court ruled that only an object of human production is protected under the Patent Act.[85] This holding did not totally resolve the question because it did not determine where the line between human-augmented and totally-automated are delineated. If AI programs alone cannot receive legal privileges for their creations, how would the law apply to cases of joint authorship between humans and AI?

In 2022, Kristina Kashtanova published a graphic novel with AI-generated illustrations. After initially granting a copyright for the work, the USCO canceled her registration. A month after canceling the registration, the USCO announced that it would – all of a sudden – allow AI-authorship.[86] Not only did the development contradict the cancellation of Kashtanova's earlier copyright, it also seemed close to contradicting Thaler. Although, it is important to note that a human-AI co-authored work does have a human author, and is thus within Thaler's narrow

[84] Leonard Stark, Decision in Thaler v Vidal, United States Court of Appeals for the Federal Circuit, August 5, 2022, https://cafc.uscourts.gov/opinions-orders/21-2347.OPINION.8-5-2022_1988142.pdf pp.
[85] Ibid.
[86] "Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence" United States Copyright Office, March 16, 2023.
https://www.federalregister.gov/documents/2023/03/16/2023-05321/copyright-registration-guidance-works-containing-material-generated-by-artificial-intelligence#footnote-7-p16191

construction of "individual." While the USCO's initial decision about the Kashtanova copyright appeared to exclude AI authors, its subsequent rule change suggested the prospect of more inclusive policies. The USCO presented contradictory leanings with regard to the underlying legal ambiguity, despite Thaler and despite the logic that the Chevron doctrine depends on. Why then, one might ask, is this such a difficult question for legal authorities?

Background: The Utilitarian Gray Area

Despite Thaler, the law is ambiguous over the question of granting copyrights and other intellectual property privileges to AI. There are two flavors of approaches to the issue, one is judicial and the other is political. The judicial answer is that some laws have narrow wording, such as "individual," that could be argued to preclude AI. The Thaler decision depends on this reasoning.[87] If Thaler categorically bans granting IP protections to AI-authored works, that is a judicial solution to this question. The political approach is acknowledging that there is a danger to human competitors in the market if non-human alternatives are able to produce comparable work and receive the same legal privileges. Of the two classes of approaches, the judicial approach is the useful one, if for no other reason than the recalcitrant nature of the political process.

The issue with Thaler is that the narrow construction of "individual" is somewhat arbitrary. Both narrow and broad constructions for words like "individual" and "person" have been applied to different laws, and there is not a clear a priori reason that a narrow or broad construction is better than the other. For example, the construction of "person" used in the Equal Rights Amendment includes companies.[88] But the Torture Victims Protection Act only

[87] Stark, 6.
[88] Ciara, Torres-Spelliscy, "Does We the People Include Corporations" Human Rights Magazine (ABA), Volume 43 No. 2., 2017. www.americanbar.org./Torres-Spelliscy/DoesWeThePeopleIncludeCoporations

understands "individual" as a human being.[89] One could say that "individual" and "person" are sufficiently disanalogous for this to be a non-issue, but they are essentially synonyms and laws are generally understood to be based on the meaning of words within the language at the time of writing. Arguing that there exists some special reason that the word "person" has a broader meaning than "individual" is somewhat suspect.

Like the judicial solution, the political solution also depends on relatively uncertain logic. If AI-authorship could be proven to be bad for human artists, congress could simply ban such works. One could say that the political solution might rely on the assumption that congress needs to change the law because existing law is incoherent. Legal scholar Margot Kaminski points out that a foundational "purpose of copyright law…[is] to incentivize (presumably human) authors to create new works for the benefit of net social welfare."[90] If allowing AI into the creative market disincentivizes all human competitors, a situation emerges where a law that exists to incentivize actually disincentivizes. Self-contradictory laws can be said to need amendment so as to not self-contradict. The problem with a political solution, however, is that it depends on the assumption that congress legislates according to efficiency and collective benefit, rather than politics.

Both Thaler and Kashtanova failed to gain IP protections, which suggests that authorities lean toward excluding AI-authored works. Without a mandate from congress forcing them to ban these works, and with the Chevron doctrine's uncertain future, the Thaler decision has become an important source of legal authority. Before discussing the reasoning behind this important decision, however, it is important to consider the relationship between humans and AI in the competitive market.

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[89] "Mohamad v. Palestinian Authority." Oyez, www.oyez.org/cases/2011/11-88. Accessed 29 Apr. 2023.
[90] Margot E Kaminski, "Authorship, disrupted: AI authors in copyright and first amendment law," UC Davis Law Review 51 (2017): 597.

Fear the Machines: A Psychological Framework

There is a deep-seated human paranoia about AI programs undermining economic opportunity. People assume that technology will make human labor obsolete, and workers will cease to earn a living. Fear, it might be said, lies at the heart of academics Julia Kirby and Thomas Davenport's "automation vs. augmentation" model of AI. They argue that

> … the reason people hate automation is that it involves someone in a managerial position spotting a shortcoming or limitation in employees, or simply a weakness relative to machine performance, and then punishing them for that weakness.[91]

Indeed, the human "weakness" relative to AI appears to have been assumed without further consideration. The "assumption of diminished utility" happens when authorities assume that granting privileges for AI-authored works will competitively hurt human producers, despite evidence to the contrary. Perhaps, for example, the market value of the average originally composed pop song would decrease if AI programs could compose high-quality ones rapidly and gain copyright privileges, allowing AI-authored works to flood the market.

The first issue with this logic, is that it is not clear that the best AI-produced song, for example, is competitive in the current market when compared to the average composition written by a professional-level human songwriter. Indeed, if it is not competitive, the value of high-quality human creations would continue to hold and offer the prospect of profitability due to a quality premium. Wage-earning human artists would be insulated. Only low-quality works would flood the market. Quality discrepancy, then, is the first consideration that suggests it is inappropriate to assume that awarding AI such IP privileges will disincentivize human artists.

[91] Thomas, Davenport, and Julia Kirby, Only humans need apply: Winners and losers in the age of smart machines, New York: Harper, 2016. Pp. 61.

The next flaw with the diminished utility assumption might be called "the rate of production principle": human artists that co-author with AI increase their output by more than the value they lose by letting AI into the market. They stand to make more money co-authoring with AI than by producing works without AI. For example, if an author working alone can only write one book a year, he makes more money splitting the copyright privileges with an AI and producing ten books per year, despite the market value of the average book being lower. It follows that utilitarian considerations may still support granting privileges for AI-authored works. The rate of production principle suggests that granting AI-authored works copyright privileges will result in the artists making more money than in the pre-AI era because, despite sacrificing a portion of the copyright to the AI, their productive output increases by many multiples. Thus, utilitarian considerations do not unambiguously support the prohibition of such rights. Indeed, they may support the granting of such rights.

Political realities see things differently. Creative-industry pressure groups have lobbied aggressively against the use of AI. Screenwriters in Hollywood brought this issue to bear in 2023.[92] Regardless of the possibility that screenwriting could become a more profitable profession under conditions of AI-human co-authorship, the fear of human obsolescence is a more salient consideration. Anxiety could be a relevant factor to this behavior; if artists stand to make more money using AI than prohibiting it, it would be rational for the guilds to support the integration of AI rather than oppose it. However, if there is widespread paranoia about the 'obsolete human artist,' then it follows that the guilds should vehemently oppose the integration of AI into creative practices. The critical issue with the integration of AI into labor could be irrational fear on behalf of humans. Importantly, generative AI cannot improve without

[92] Noam Scheiber and John Koblin, "Will a Chatbot Write the Next 'Succession'?" The New York Times, April 29, 2023. https://www.nytimes.com/2023/04/29/business/media/writers-guild-hollywood-ai-chatgpt.html

continuous training on new data. Giving legal protections to work produced by AI does not imply that those AI would somehow be entitled to train on all of the best human-produced works. Thus, mechanisms could be put in place to prevent AI from becoming functionally competitive with human professionals. The critical question is, then, whether or not it makes sense from a policy perspective to grant personhood to AI?

AI and Legal Personhood

In a highly authoritative piece, legal personhood is defined as "[being] the subject of rights and duties."[93] Legal scholar Shawn Bayern argues that because anything that can enter into a contractual agreement can self-grant some form of legal personhood, AI programs are entitled to legal personhood.[94] The main and only justification for the decision in Thaler was that an "individual," according to the court, can only be a human.[95] In the decision, the court reasoned as though "individual" and "person" were interchangeable.[96] It set a precedent that the USCO was forced to follow in their 2023 AI guidelines.[97] Regardless of the Thaler decision, there are fairly clear signs that AI personhood is a legally coherent and ethically defensible position.

AI-programs are human-like. Corporations carry legal personhood status despite being non-human, yet the most advanced AI platforms are more similar to humans than corporations are. The double standard—rejecting AI legal personhood while granting it to corporations—suggests that non-personification comes from bias. One legal scholar calls attention to this problem with the example of a program that can pass what engineers call "The

[93] Bryant Smith, "Legal personality" Yale Law Journal 37 (1927): 283.
[94] Shawn Bayern, "The implications of modern business–entity law for the regulation of autonomous systems," Stanford Technology Law Review (2016): 99.
[95] Stark, 6.
[96] Ibid.
[97] "Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence" United States Copyright Office, March 16, 2023. https://www.federalregister.gov/documents/2023/03/16/2023-05321/copyright registration-guidance-works-containing-material-generated-by-artificial-intelligence#footnote-7-p1619

Turing Test" and "act…as a human acts."[98] He notes that under the current system of legal personhood, such a program should indeed have legal personhood status because it would be able to enter into agreements.[99] On that basis, personhood is presumed to already exist for AI. This view contradicts Thaler.

There are also ethical issues. On the one hand, there is presumably a sentience threshold that, once met, will morally obligate the granting of AI legal personhood. In a sense, there lies an ethical obligation not to deny legal personhood to the self-aware computer. On the other hand, there are potential benefits to granting AI legal personhood. Scholar Lance Eliot posits, for example, that granting AI legal personhood will provide a reliable means to "hold AI accountable."[100] So, rejecting AI legal personhood may be unethical because it denies equal rights to a sentient being and it may be unethical because it protects malicious programs from the legal consequences of their actions. It follows that ethical considerations strongly imply granting legal personhood status to AI, once such technology acquires sentience. However, there is not yet compelling evidence that AI has become sentient. The ethical basis for granting AI legal personhood, although likely to become relevant in the future, is not yet fully present.

Given that there remains a strong legal basis for granting AI legal personhood, the central question is: why is personhood summarily rejected by the courts? It all comes down to the Supreme Court's holding in Mohamad v Palestinian Authority, a case in which a narrow construction was applied to the word "individual" in the context of a different law.

The Legal Basis for Exclusion in Two Cases

[98] Shawn Bayern, "The implications of modern business–entity law for the regulation of autonomous systems," Stanford Technology Law Review (2016): 99.
[99] Bayern, 104.
[100] Lance Eliot, "Legal Personhood for AI is Taking a Sneaky Path that Makes AI Law and AI Ethics Very Nervous Indeed" Forbes, November 21, 2022. https://www.forbes.com/sites/lanceeliot/2022/11/21/legal-personhood-for-ai is-taking-a-sneaky-path-that-makes-ai-law-and-ai-ethics-very-nervous-indeed/?sh=2f45780af48a

The justification for Thaler was based on a past interpretation of "individual" in a different law in the Supreme Court case Mohamad v Palestinian Authority. In the 2022 decision, Circuit Judge Stark of the U.S. Court of Appeals for the Federal Circuit made the following assessment in denying personhood to AI,

> The Patent Act expressly provides that inventors are "individuals." [However]...The Patent Act does not define "individual." However, as the Supreme Court has explained, when used "[a]s a noun, 'individual' ordinarily means a human being, a person." Mohamad v Palestinian Auth., 566 U.S. 449, 454 (2012)...This is in accord with "how we use the word in everyday parlance."[101]

As noted earlier in an example comparing the Torture Victims Protection Act and the Equal Rights Amendment, judges generally construe the word "person" differently in different legal texts, so it would not be completely unprecedent for the Supreme Court to explore expanding its construction of "individual" in IP laws. The operative reasoning from Mohamad is unclear: if the basis of a narrow construction is that "individual ordinary means a human being,"[102] then it makes sense to exclude AI; however, what if it is the case that because "we use the word in everyday parlance"[103] to mean human, the court concluded that "individual ordinary means a human being?"[104] Then, one could argue that standard use includes AI, which prompts the reasoning that "individual" includes AI. Some judges might feel uncomfortable with applying an amended meaning of word to a law after that law had already been put into effect. Even under such objections, there is a case to be made for a more broad construction. Certainly at the time the law was written, "individual" did not have a more narrow meaning than "person." If so, how can "person" include corporations, while "individual" must exclude AI?

[101] Stark, 6.
[102] Ibid.
[103] Ibid.
[104] Ibid.

There is not a clear text-based reason why a narrow, humans-only construction should be the default. Mohamad v Palestinian Authority, merely established that "the word "individual" in the Torture Victim Protection Act means a human and therefore does not impose any liability against organizations."[105] Mohamad did not establish anything about the correct interpretation of the text of any other laws. Nor did it apply a sweeping and authoritative decision about what the word "individual" means. In different legal contexts, an organization can be considered a person, such as "in the Equal Protection Clause of the Fourteenth Amendment."[106] Nevertheless, until the Supreme Court addresses the question, the judicial branch is generally unable to permit AI into the market.

The Kashtanova copyright highlights the problems with unclear legal guidance. Unlike Stephen Thaler, who sought to give an AI a patent for something it had created, Kashtanova sought a copyright for herself regarding a work that she had made using AI. Rather than denying privileges outright, as had happened to Stephen Thaler, the USCO elected to grant registration for exactly those aspects of the book that were made without AI. Utilitarian considerations suggest that Kashtanova should have received intellectual property privileges for the book she wrote, to maximize the per unit value of a book in a market that will continue to over-saturate as a result of what Davenport and Kirby term "augmentation" of production. Instead, the USCO limited her registration, decreasing the unit value of her book, and ultimately establishing a disincentive for similar artists, thus disincentivizing and diminishing production.

The USCO's decision with the Kashtanova book was guided by the Thaler decision. In a letter to her lawyer, the agency points to the human-authorship requirement in writing,

[105] "Mohamad v. Palestinian Authority." Oyez, www.oyez.org/cases/2011/11-88. Accessed 29 Apr. 2023.
[106] Ciara, Torres-Spelliscy, "Does We the People Include Corporations" Human Rights Magazine (ABA), Volume 43 No. 2., 2017. www.americanbar.org./Torres-Spelliscy/DoesWeThePeopleIncludeCoporations

> We conclude that Ms. Kashtanova is the author of the Work's text as well as the selection, coordination, and arrangement of the Work's written and visual elements. That authorship is protected by copyright. However, as discussed below, the images in the work that were generated by the Midjourney technology are not the product of human authorship. Because the current registration for the Work does not disclaim its Midjourney-generated content, we intend to cancel the original certificate issued to Ms. Kashtanova and issue a new one covering only the expressive material that she created.[107]

Given that the USCO had originally issued a copyright registration, it is fair to assume that without Thaler, Kashtanova would have received full copyright privileges.

Broadly, non-personification seems to have grown out of the interplay of three variables: paranoia about the obsolete human artist, bias against the legal personhood of advanced AI, and the Thaler decision. Despite reasons to believe that granting AI-authored works copyright privileges may benefit human artists, professional guilds oppose integration. Despite legal justification for granting AI legal personhood under Bayern's model, the courts reject it based on its application of Mohamad v Palestinian Authority. As a result, bureaucratic authorities are forced to adopt more exclusionary policies, undermining utilitarian considerations that serve as the foundation of the intellectual property laws they exist to manage. Concerning the copyright of AI-authored works, the combination of paranoia, bias, and questionable reasoning fused together to fundamentally contradict the purpose of the system.

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What to the Enslaved is the Right to Have Rights?

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Abstract
My paper critiques Hannah Arendt's assessment of chattel slavery in chapter nine of *The Origins of Totalitarianism* (1951). I argue that the enslavement of Africans and their descendants in antebellum United States constitutes a form of statelessness. By comparing the experiences of enslaved Africans to those of European refugees during the interwar period, the paper shows how Arendt misses significant parallels in the conditions of both groups. I compare the respective roles of enslaved Africans and stateless Europeans in systems of economic production, and consider the ways in which these groups were made into foreigners by their countries of residence such that they were excluded from political participation. This paper will also examine how Arendt's theory of statelessness parallels sociologist Orlando Patterson's theory of natal alienation, which describes the extreme cultural dispossession endured by enslaved people. Finally, I will consider the different forms of legal recognition accorded to people based on their categorization as stateless or enslaved, with a particular focus on the Supreme Court ruling in *Dred Scott v. Sandford* (1857).

Introduction

The Origins of Totalitarianism (1951) has endured as a founding text in anti-imperial studies due to Hannah Arendt's incisive critiques of European fascism and the inequalities of citizenship produced by the nation-state system. Despite this, American exceptionalism and Eurocentrism pervade much of Arendt's political writings. Contemporary scholars have already criticized the philosopher's reverence for the U.S., as it has impeded her ability to properly contextualize the republic's history of white supremacy.[108] In *Origins,* Arendt circumscribes the development of the Rights of Man to the French and American Revolutions, rendering the Haitian Revolution invisible and the role of slavery in revolutionary founding unthinkable. The issue persists in *On Revolution* (1963), where Arendt makes scant reference to Black chattel

[108] Owens, "Racism in the Theory Canon"; Gaffney, "Memories of Exclusion."

slavery and none to the Haitian Revolution, despite the latter tethering self-government to abolitionism and both directly impacting natural rights discourse. Arendt's failure to properly contextualize chattel slavery within the history of democratic citizenship undercuts her ability to diagnose citizenship's antithesis—statelessness. In chapter nine of *Origins*, Arendt characterizes the United States as the "country par excellence of immigration" and asserts that the country has *always* viewed newcomers, including stateless Europeans, as having the potential to be citizens.[109] One would have to exclude Africans forcibly taken through the Middle Passage and into the U.S. from the category of "newcomers" for Arendt's assertion to be sensical. Consequently, Arendt misses important connections between the respective conditions of the stateless and the enslaved.

Examining Arendt's theory of statelessness in light of the experiences of enslaved and manumitted Africans in the U.S. makes our understanding of statelessness more expansive. In chapter nine of *Origins*, Arendt uses "rightless" and "stateless" interchangeably to describe the condition European refugees found themselves in during the interwar period. I contend that rightlessness is the defining feature of statelessness. Statelessness deprives people of the supposedly inalienable rights they are entitled to as citizens, the most fundamental ones being the right to political action and the right to opinion. Because Arendt treats rightlessness and statelessness as synonymous, the distinction she draws between slavery and statelessness is highly questionable. Chattel slavery, like Arendtian statelessness, removes an individual from participating in the social contract as an autonomous agent, because their humanity was rhetorically unacknowledged by the contract and they were treated as an object to the contract. As a result, the master-slave relationship heightens the inequality of power Arendt observes

[109] Arendt, "The Decline of the Nation-State and the End of the Rights of Man," 277. The quote is in footnote 21.

between the citizen and the stateless. In the U.S., slavery created a dynamic antithetical to the one between citizens because American citizenship is premised on equality under the law.

This paper argues that kidnapped Africans and their descendants experienced statelessness in Antebellum United States. I will first reconstruct Arendt's argument about the condition of statelessness and her comparison of it with slavery. Then, I will compare the respective roles of enslaved people and stateless people in systems of economic production. This comparison will show that Arendt misses how economic extraction motivates polities to create stateless persons within their borders. Next, I will consider the ways in which enslaved Black people and stateless Europeans were made into foreigners by their countries of residence such that they were excluded from political participation. To this end, I will show that much of Arendt's analysis of statelessness is consonant with the concept of natal alienation, which Jamaican sociologist Orlando Patterson developed to articulate the cultural dispossession experienced by enslaved people in his book *Slavery and Social Death* (1982). Through Patterson, we see how white slaveholders wielded the same authoritarian power that European nation-states used to render people rightless and internally exiled. But for the enslaved, this authoritarianism occurred both on societal and interpersonal levels. Next, this paper will show that *Dred Scott v. Sandford* (1857) ratified the status of enslaved Africans as stateless persons and exposed free Black people to that same status. This judicial decision unambiguously placed all Black people outside of the political community with no recourse. Finally, I will consider the different forms of legal recognition accorded to people based on their categorization as stateless or enslaved.

Understanding the Right to Have Rights

According to *Origins*, rightlessness is the condition that stateless people find themselves in. This condition entails the loss of legal status, the right to action, and the right to free speech. Not only are stateless people rejected from the polity of the country in which they reside, but they have a minuscule chance of becoming a full-fledged member of another polity due to their status as perpetual foreigners. For Arendt, statelessness is problematic because it is global. If stateless people enter another territory, they will at best be regarded as charity rather than people to whom that territory has an obligation to protect. The absence of obligation means that stateless people have no recourse if nations revoke their protection: "[N]o law exists which could *force* the nations to feed them."[110] The transience in which stateless people live serves as a precondition for genocide, as evidenced by the persecution of Jewish and Armenian people in interwar Europe. When Arendt says that enslaved people "still belonged to some sort of human community" due to the necessity of their labor, she is reflecting on the extermination camps Jewish people were sent to during the Holocaust specifically because the Nazi regime saw no place or need for Jewish people in the German polity.[111] Through the Nuremberg laws, Nazi Germany isolated Jewish people from the rest of the world and rendered them *rightless*.[112] In sum, the stateless individual is no longer viewed as a person before the law, and they cannot turn to the political community for remedy.

Arendt uses slavery as a foil to underscore the severe unbelonging that stateless Europeans experienced. We must first assess the scope of Arendt's comparison: Is Arendt referring to slavery in antiquity? Is she including other forms of forced servitude, such as debt bondage or prison labor? Since Arendt says little on this matter, we might instead turn to Aristotle, whom Arendt cites while comparing statelessness to slavery. In *Politics*, Aristotle

[110] Ibid., 296. Italics has been added for emphasis.
[111] Ibid., 297.
[112] Ibid., 288-289.

developed his theory of natural slavery, arguing that some humans are born servile and others rulers, to justify chattel slavery in Athenian democracy.[113] We can reasonably conclude that Arendt is orienting her discussion around this particular type of unfree labor, as opposed to serfdom practices in other Greek city-states. Furthermore, Arendt asserts that slavery's "fundamental offense" was creating conditions wherein some people were born enslaved and others free, which excludes some people "from the even possibility of fighting for freedom."[114] This applies to natural slavery and *partus sequitur ventrem*—a doctrine in Roman slave law dictating that a child inherits their mother's status with regard to enslavement. This doctrine would later be used in the Americas. Given that Arendt wrote *Origins* while residing in the U.S. and she envisions the U.S. as having a key role in post-totalitarian politics,[115] the experiences of enslaved Africans in the U.S. are relevant for assessing the validity of her distinction between slavery and statelessness.

One may reasonably worry that any comparison between statelessness and American slavery is inappropriate due to the very real differences in international relations that emerged in between the height of the Transatlantic slave trade and the time of Arendt's writings. Constitutionalism had only emerged in the Age of Revolution, and did not dominate national governments as it would after World War II. In contrast, Arendt's conception of statelessness is informed by the modern international system of states, with specific reference to the League of Nations and the United Nations. The temporality of Arendt's argument can be most felt here: "The second loss which the rightless suffered was the loss of government protection, and this did not imply just the loss of legal status in their own, but in *all countries*."[116] In this respect, the

[113] Aristotle, *Politics*, 13-20.
[114] Arendt, 297. Arendt further elaborates on the role of slavery in Greek and Roman societies in *On Human Condition* (1958) and *On Revolution* (1963).
[115] Owens, "Racism in the Theory Canon," 5.
[116] Arendt, "The Decline of the Nation-State and the End of the Rights of Man," 295. Italics has been added.

intergovernmental treatment of chattel slavery during the long 19th century is not quite analogous, as there were no centralized bodies for diplomacy to regulate such treatment.

Despite this, antislavery contributed significantly to the founding of international human rights law. We see this shift in international relations with Great Britain, which signed bilateral treaties with other empires in the Americas to end *all* participation in the Transatlantic slave trade after they imposed their own ban in 1807.[117] But chattel slavery—and thus the possibility for Afro-descended people to be rendered rightless—was still alive in the Americas until the end of the 19th century. Moreover, understanding American chattel slavery as it relates to Arendtian statelessness is important because the Rights of Man did not spring into being in the 20th century. This egalitarian discourse on rights was directly built off of centuries of Black slave labor and set the stage for modern capitalist exploitation. The founding of the American republic created self-government without emancipation. Referencing the American and French Revolutions, Arendt recognizes the philosophical paradoxes of the Rights of Man to an extent. The universalism associated with the inalienable rights of the individual runs counter to cultural particularism of the nation-state, and ignores how such cultural particularism determines who has the right to have rights.[118] However, rightlessness encompasses far more than the refugee problem in interwar Europe. To conceive enslaved Africans and their descendants as rightless is to capture the full scale of philosophical paradoxes that underlie American citizenship.

Economic Extraction and the Rightless

Arendt argues that enslaved people, unlike the stateless, had a recognized place in society through their exploited labor. Thus, enslaved people still had "a distinctive character, a place in

[117] Asante, "The Ideological Origins of Chattel Slavery in the British World;" Martinez, *The Slave Trade and the Origins of International Human Rights Law*.
[118] Arendt, "The Decline of the Nation-State and the End of the Rights of Man," 291.

society—more than the abstract nakedness of being human and nothing but human."[119] In other words, Arendt separates enslaved people from stateless people partly because stateless people were treated by European nation-states as *disposable* in a way that, according to her, enslaved people were not treated as by their host communities. This argument holds currency today: civil rights activist Michelle Alexander echoes Arendt's sentiment—that enslaved people had a recognized place within society—when she categorizes slavery as a system of exploitation and mass incarceration as a system of marginalization in *The New Jim Crow* (2010). The former system at least acknowledges that the individual being exploited—the enslaved Black person—is needed in the economy.[120] In this line of argument, however, both authors fail to consider how, by being recognized as property, each enslaved person was seen as *replaceable*.

This replaceability is antithetical to the ideological premises of most Western nation-states, where contractarian logic dominates and the dignity of the individual is viewed as foundational to one's citizenship. This hypocrisy led Frederick Douglass to declare slavery unconstitutional, as America's founding documents entitled men to "a natural right of freedom."[121] Given the centrality of property rights in the founding of the American republic, enslaved Black bodies were made into *objects* of the social contract, such that their existence was bound by the will of white people, who were free-born and could act as *subjects* of the contract, i.e. consenting parties.[122] The inclusion of the Three-Fifths Compromise and Fugitive Slave Clause in the U.S. Constitution prove this effect. Beyond the Constitution, white supremacy reified enslaved people's status as objects through sales contracts between slave traders and buyers, agreements to temporarily lease out the enslaved person to another person, inheritance

[119] Ibid., 297.
[120] Alexander and West, *The New Jim Crow*, 219.
[121] Douglass, "What to the Slave is the Fourth of July?".
[122] Mills, *The Racial Contract,* 11-12.

transfers, and documents related to estate management. The enslaved person's role as object-worker—or an "animate instrument" as Aristotle describes—meant that they were still outside of the polity, which exposes them to immeasurable violence often *endorsed* by the law.[123]

If we are to consider chattel slavery vis-à-vis Arendtian statelessness, then we must ask: How does slavery fit into Arendt's understanding of labor in relation to citizenship? Some scholars characterize Arendt as devaluing labor and work relative to political action in her polemic *The Human Condition* (1958). However, Prof. Ayten Gündoğdu disagrees with this reading, arguing that Arendt understands labor to be indispensable to the human experience.[124] Arendt characterizes the right to work as an "elementary right" on par with the right to residence in *Origins*.[125] But this conception of labor as a means of asserting one's dignity assumes that the laborer chooses how and for whom they work, as well as an ability to earn wages from that work. Arendt's brief discussion of migrants in European labor markets proves that being economically useful does not yield legal or social protection for the rightless. For example, France exploited stateless people in the 1930s by "calling in alien workers in times of need and deporting them in times of unemployment and crisis."[126] More damningly, refugees were often subjected to forced labor in concentration camps by both Nazi Germany and many European states post-World War II. Although to a different degree than enslaved Africans, stateless Europeans were often reduced to a laboring entity by the society in which they resided. Political theorist Michael Walzer says that statelessness does not preclude one's participation in distributive relations, but without protection from *any* state, non-members are especially vulnerable in the marketplace.[127]

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[123] Aristotle, *Politics*, 13; Asante, "The Ideological Origins of Chattel Slavery in the British World."
[124] Gündoğdu, "Expulsion from Politics and Humanity."
[125] Arendt, "The Decline of the Nation-State and the End of the Rights of Man," 276.
[126] Ibid., 286.
[127] Walzer, "Membership," 31–32.

Enslavement is arguably the greatest danger posed to non-members in the marketplace, as they become the commodity themselves. For enslaved people, work is no longer the services one chooses to offer for a fixed price and time, but something to be extracted indefinitely by the person who benefits from those services. While free labor can uplift the human spirit, the absence of compensation in forced labor degrades the enslaved person's spirit. By not receiving rightful compensation, the enslaved person must dedicate their existence to maintaining subsistence. Such deprivation automatically precludes the enslaved from taking civic action that would be considered customary within the polity, such as attending a protest, signing a petition, or going to a town hall meeting. Rather than grant the right to political action, governments rendered enslaved people politically inert. The only viable way for enslaved people to contest their status as a commodity is illegally—either by running away or starting an uprising. History has borne this out, as white anxieties rose with the growth of the Underground Railroad and revolts such as Nat Turner's Rebellion. Without illegal contestation, the economic deprivation of chattel slavery works to immobilize the enslaved person both physically and socially. White Americans justified the immobility of enslaved Africans on account of their foreignness.

The Mark of the Foreigner

Cultural dispossession plays a key role in nation-states rendering ethnic minorities rightless, as evidenced by Arendt's discussion of assimilation. Differences in language, culture, and religion distinguished refugees from nationals in the interwar period. European nation-states sought to eradicate this difference because, as Arendt puts it, "in every sense the refugees represented separate foreign minorities who frequently did not care to be naturalized."[128] From the perspective of European nation-states, they were not obligated to provide protection to

[128] Arendt, "The Decline of the Nation-State and the End of the Rights of Man," 282.

refugees if they did not adopt the nation's customs. When nation-states realized they could not forcibly "transform [refugees] into nationals of the country of refuge," they pursued deportation and internment.[129] The imperative to divorce rightless people from their cultural heritage was not exclusive to European refugees, as this same imperative emerged in American chattel slavery. An African enslaved in the U.S. belonged to their host community as a possession, and was actively denied a political family to share heritage with. According to Patterson, the eradication of kinship ties and cultural heritage severed the enslaved person from the society they were stolen from *and* the society by which they were enslaved.[130] This severance morphed the enslaved person into a non-human Other. Patterson terms this radical condition of foreignness "natal alienation."

In the United States, Blackness became the mark of foreignness, which white slaveholders used to justify the Transatlantic slave trade. As a result, communal ties attempted by enslaved Africans after being taken into the host community were extremely fragile due to the normalization of family separation, refusal to recognize slave marriages, ability for whites to enslave a free person of color with few legal repercussions, and empowerment of slave patrols to hunt down runaways.[131] An enslaved parent was not legally recognized as having a right to their child, but their enslaver was. This extreme unbelonging enabled the host community to objectify and, ultimately, commodify enslaved people. The enslaved lived in a state of internal exile and were often regarded as an "enemy within" by the subjugating classes.[132] We see this in natural slavery theory, as Aristotle associates the slavish soul with the barbarian, who is non-Greek.[133] But unlike with slavery in antiquity, the cultural differences between enslaved Blacks and free

[129] Ibid., 281.
[130] Patterson, *Slavery and Social Death*, 5-7.
[131] Douglass, "What to the Slave is the Fourth of July?".
[132] Patterson, *Slavery and Social Death*, 44.
[133] Aristotle, *Politics*, 17-19.

whites hardened through the rise of scientific racism in the 19th century, which presupposed that people of African descent were of a biologically inferior order relative to people of European descent.[134] Consequently, whiteness was a heavily guarded gate into the body politic—the United States' "one-drop rule" excluded mixed-race people from being recognized as white, and thus having access to citizenship.

Arendt has been able to recognize how racialization impedes one's ability to culturally assimilate into a community in which they are a minority. In "Reflections on Little Rock Nine" (1958), Arendt underscores the enduring relationship between Blackness and foreignness in the United States, as she likens the "visibility of the Negro" to the "audibility" of new immigrants to discuss how descendants of enslaved Africans experienced social exclusion under Jim Crow:

> They are not the only "visible minority," but they are the most visible one. In this respect, they somewhat resemble new immigrants who invariably constitute the most "audible" of all minorities and therefore are always the most likely to arouse xenophobic sentiments. But while audibility is a temporary phenomenon, rarely persisting beyond one generation, the Negroes' visibility is unalterable and permanent.[135]

The "unalterable and permanent" foreignness associated with Blackness was made salient by chattel slavery, and served to uphold the system indefinitely. The alienation of Black people parallels the othering of European refugees. This is evidenced by a representative to the League of Nations openly characterizing the latter group as "inhabitants who would regard themselves as permanently foreign" in their country of refuge.[136] Moreover, Arendt constructs a very similar argument to Patterson's when she describes the consequences of the first loss of the rightless. She asserts that by losing their homes, stateless people lost "the entire social texture into which

[134] Mills, *The Racial Contract*, 16-17, 33.
[135] Arendt, "Reflections on Little Rock," 47.
[136] Arendt, "The Decline of the Nation-State and the End of the Rights of Man," 275. The quote can be found in footnote 17.

they were born."[137] However, Arendt is incorrect to assert that "the impossibility of finding a new one" was an unprecedented occurrence before the denaturalization process in Europe. In the U.S., enslaved people were deprived of agency when it came to reestablishing a home within the host community. Enslaved people were only allowed to operate as extensions of their slaveholders, not as individuals with recognizable personhood. This extreme power differential existing in a democratic polity can be best understood through what Patterson calls *sovereignal freedom*, which he defines as "the degree that we exercise power, over ourselves and others."[138] This understanding of freedom, undergirded by ideas of mastery and conquest, defines the white citizen's dominion over the enslaved Black person.

One may reasonably doubt that enslaved Africans were incapable of establishing a new home for themselves in the New World. One might say that multiple routes to emancipation made it so that enslaved Africans in the Americas could reclaim a distinct place in the world, in a way that stateless Europeans generally could not.[139] To prove this difference, one could point to the pervasiveness of concentration camps in the interwar period because, as Arendt argues, "if the Nazis put a person in a concentration camp and if he made a successful escape, say, to Holland, the Dutch would put him in an internment camp."[140] In contrast, once a slaveholder brings their enslaved laborers into free territory, they forfeit their claims to ownership under common law practice. Additionally, the Republic of Haiti granted nationality to all Africans—regardless of enslaved status—once they entered the country in its 1816 Constitution, and the American Colonization Society attempted to repatriate thousands of people of African

[137] Ibid., 293.
[138] Patterson, "Freedom, Slavery, and the Modern Construction of Rights," 116.
[139] Arendt, "The Decline of the Nation-State and the End of the Rights of Man," 293.
[140] Ibid., 288.

descent—both free-born and enslaved—in the first half of the 19th century to regions of modern-day Sierra Leone and Liberia.[141]

However, these counter-arguments fail on three counts. Firstly, statelessness in the interwar period was far more complex than one may assume, as some refugees—including Arendt herself—were able to acquire residence in the U.S., the UK, and Israel. Secondly, one cannot misconstrue the aforementioned facts as enslaved people having the *right* to travel to free states or to Haiti. The aforementioned common law practice was still circumscribed by the slaveholder's choice to enter a free territory. The mobility of enslaved people was heavily restricted by the Fugitive Slave Acts of 1793 and 1850, the latter of which being a legislative response to the Underground Railroad. To exert agency, enslaved people had to flee and, consequently, bear the label of "criminal" to attain freedom. Stateless Europeans were similarly deprived of the right of residence. After World War I, Germany, Belgium, and other major European powers canceled the naturalization applications of refugees en masse. These cancellations denied refugees the chance to establish a new home.[142] Whether enslaved or stateless, people were forced to look for a community where they could gain rights and were by and large denied in their search. Thirdly, a deeper analysis of American Colonization Society's aims reveals how chattel slavery in the U.S. denied citizenship to *all* people of African descent, not just those who were held in bondage. Repatriation efforts reveal how the most powerful members of the American polity treated people of African descent as things to be rid of, much in the same vein as how Arendt describes Europe's treatment of refugees after World War II.[143]

[141] Dubois, Gaffield, and Acacia, "Constitution Républicaine (1816)"; Spooner, "'I Know This Scheme Is from God," 568.
[142] Arendt, "The Decline of the Nation-State and the End of the Rights of Man," 277-279.
[143] Ibid., 276.

In the U.S., manumitting enslaved people did not lead to their political integration; to the contrary, it created a new imperative for white society to make Black people deportable. White slaveholding statesmen such as Henry Clay and Andrew Jackson financially supported efforts to deny Black people the right of residence years before the *Dred Scott* decision, and they did so while asserting their own benevolence. Proponents of the repatriation argued that free Black people would fare better in Africa than in the U.S.[144] In truth, the white slaveholding class feared the political agency of the free Black population. Abolitionists and free-born Black people, especially those who lived in the U.S. for multiple generations, resisted emigration because the scheme viewed African-American citizenship as unthinkable.[145] The logic of repatriation was ultimately one of expulsion. It presumed the foreignness of the Black person in America, irrespective of their free status or generational attachment to the U.S., and the threat that free Black people posed to the maintenance of a white supremacist plantocracy. Through manumission, freedpeople could no longer be used exclusively as a tool for capital accumulation by white planter elites—the truest citizens of the United States. Freed from acute economic deprivation, the formerly enslaved could take political action; the lives of Frederick Douglass and Harriet Tubman exemplified this. Separately, free-born Black people disrupted the vision of the U.S. as a racially homogeneous nation-state, a vision that the American government was attempting to realize through westward expansion under the ideology of manifest destiny. In many ways, this campaign to excise the free Black population explains the political imperative behind the ruling in *Dred Scott*, as the two are rooted in the same fear—the fear of Black political empowerment.

[144] Spooner, "'I Know This Scheme Is from God," 563.
[145] Ibid., 566, 569-70.; Guyatt, "The American Colonization Society."

Dred Scott **and the Loss of the Polity**

In a 7-2 ruling, *Dred Scott v. Sandford* (1857) crystallized the natal alienation of African-Americans in a juridical context. The Supreme Court marked "the loss of the polity itself" for anyone socially recognized as Black; such a loss constitutes statelessness from Arendt's perspective.[146] The facts of the case bear this out: Between 1836 and 1846, Dred Scott and Harriet Robinson, an enslaved couple, lived in free land —the state of Illinois and territory of Wisconsin—due to moving around with Scott's slaveholder, Dr. John Emerson. When Emerson died in 1843, his widow Eliza Irene Sanford inherited his estate, including his chattel. Sanford refused to manumit Scott, Robinson, and their daughters, despite them offering payment. After a series of trials in Missouri state courts, the enslaved couple sued in federal court in 1853 and the central legal questions were the following: Had the Scott family been *permanently* manumitted once they entered a free territory? Did they have standing to sue under the 5th Amendment? The Supreme Court not only ruled that the Scotts were still enslaved, but that no individual of African descent could sue in federal court because they did not have citizenship.

This ruling was a process of denationalization, not just a confirmation of it, because the Court said that Congress did not have the right to prohibit slavery in new territories, rendering legislation such as the Missouri Compromise unconstitutional. The Scotts felt entitled to freedom due to their residence in Wisconsin Territory, which had been admitted as a free territory by the Northwest Ordinance of 1787—an act of Congress.[147] By denying the Scotts freedom, the Supreme Court opened the door for Black freedpeople in previously unorganized territories to be reenslaved, should their ex-masters sue to reclaim them. And while states could confer freedoms

[146] Arendt, "The Decline of the Nation-State and the End of the Rights of Man," 297.
[147] Taney, Dred Scott v. Sandford, 60 U.S. 394. By the time of Taney's opinion, the Missouri Compromise had been overridden by the Kansas-Nebraska Act, which allowed residents of new territories to decide whether to allow or ban slavery.

to a Black person that were commensurate with those of whites, those freedoms would "not make him a citizen of the United States, nor entitle him to sue in its courts, nor to any of the privileges and immunities of a citizen in another State."[148] By excluding Black people from the purview of the Privileges and Immunities Clause, the Supreme Court made their free status revocable once they entered a slaveholding state. No constitutional guarantee of due process at the state level existed at that point. As a result, no right was inalienable for the enslaved or their descendants. Chief Justice Roger Taney confirmed that the privileges granted to those racialized as Black were entirely subject to the polity's will.

Moreover, the *Dred Scott* decision epitomizes the contradiction between the universalist ideals espoused by American revolutionaries and the exclusionary praxis of the racial contract.[149] By declaring "[e]very citizen has a right to take with him into the Territory any article of property which the Constitution of the United States recognises as property,"[150] the Supreme Court chose to ignore a common law doctrine that benefitted formerly enslaved defendants. To justify this, Justice Taney applies originalism when interpreting the Fugitive Slave Clause and Three-Fifths Compromise: "The only two clauses in the Constitution which point to this race, treat them as persons whom it was morally lawful to deal in as articles of property and to hold as slaves."[151] The only means to reverse this decision was through the passage of the 13th and 14th Amendments. Until then, avenues for manumission, freedom of movement, marriage, and other privileges were circumscribed by slave codes and the whims of individual slaveholders, neither of which were obligated to consider enslaved people's opinions, much less their humanity.[152] By re-enslaving the Scott family, the Supreme Court also denied sovereignal freedom to Scott and

[148] Douglass, "What to the Slave is the Fourth of July?".
[149] Mills, *The Racial Contract*.
[150] Taney, Dred Scott v. Sandford, 60 U.S. 395.
[151] Ibid., 393.
[152] Ibid.

Harriet, as they no longer had a right to their own daughters—Eliza Sanford and her brother did. This exposed the Scotts to the danger of being separated, as the Sanfords would have been within their rights to sell each of them. The possibility of severing the family unit—the ultimate kinship tie—typifies the Supreme Court's endorsement of natal alienation for Afro-descended people.

Justice Taney's conception of whiteness as a prerequisite of American citizenship descends from normative understandings of the nation-state. White slaveholding framers such as George Washington and Thomas Jefferson constituted the original "people of the United States" and it is only through shared heritage with those men that one can claim citizenship. Rather than literal genealogy, this shared heritage is the *image* of community over time, as political theorist Bernard Yack puts it.[153] White immigrants had access to the polity; Black people born in the U.S. did not, even if they were mixed with European ancestry. To resolve this contradiction, Justice Taney again looked to the framers' original intent, finding that Black people "were not regarded in any of the States as members of the community which constituted the State" when the Constitution was adopted.[154] As the *Dred Scott* decision illustrates, enslaved individuals were wholly excluded from citizenship under popular sovereignty because the Constitution, and thus all national political institutions, recognized them as "foreign" and outside the polity's bounds. The white supremacist manifestation of popular sovereignty in *Dred Scott* predates by sixty years Europe's Minority Treaties—treaties which Arendt reads as remarkable for making plain the exclusionary underpinnings of citizenship within the nation-state: "[O]nly nationals could be citizens, only people of the same national origin could enjoy the full protection of legal institutions."[155] By not deeply engaging with American chattel slavery in her analysis, Arendt

[153] Yack, "Popular Sovereignty and Nationalism," 520.
[154] Taney, Dred Scott v. Sandford, 60 U.S. 393.
[155] Arendt, "The Decline of the Nation-State and the End of the Rights of Man," 275.

misses *Dred Scott* as a process of denationalization. This omission is critical because the Supreme Court rendered people of African descent illegible under national law.

Slavery, Statelessness, and Legal Recognition

The continuity between statelessness and the condition of enslaved Black people is that both render the individual's rights to enter and to leave a territory into which they were born asymmetrical in a way that citizens do not experience. By exploring international and subnational mobility, one uncovers some discontinuities between chattel slavery and Arendtian statelessness. Stateless Europeans and enslaved Africans differed in their ability to exercise the right of entry and the right of exit. For the stateless, the right of exit varied significantly based on the policies of their "home" country. Some enjoyed greater freedom of movement than jailed criminals, while others were herded into displaced persons camps.[156] Due to being a means of capital accumulation, enslaved people—unlike most residents of a territory—did *not* have the right to leave. In the American context, enslaved Black people were economically productive as extensions of the plantations and households they supported. They could generate value for their slaveholder if they left the plantation while being leased to another white person. However, they could not generate value if they left to a free territory. In Arendt's conception of statelessness, losing the right of entry and the right of exit is emblematic of rightless people becoming illegible in the eyes of the law. Whether enslaved people can be considered illegible strikes at the heart of Arendt's comparison between statelessness and slavery.

To understand why Arendt felt compelled to compare those held in bondage to those she considered stateless, we must look at the issue of legal recognition for both parties. According to Arendt, what distinguishes statelessness from enslavement is the fact that the former, in contrast

[156] Ibid., 296.

to the latter, deprived people "of all clearly established, officially recognized identity."[157] Stateless people do not exist in regards to the law in the country they reside in. At most, they are recognized as "displaced persons" under international law.[158] The extent to which the term can be regarded as true legal recognition is dubious, as international law—constituted by parties in a treaty acting in good faith—is not enforceable in the way domestic law is within a sovereign state. Moreover, the term "displaced persons" erases the legal void in which stateless people are stranded because it assumes that the stateless can simply be relocated to their "country of origin," even when that country will not recognize the stateless person as a citizen.

In contrast, those who agree with Arendt may argue that the evasive diction of the U.S. Constitution, where enslaved people are referred to as "all other Persons" with regard to the Three-Fifths Compromise, and the very existence of slave codes acknowledged the personhood of enslaved Black people in distinct ways. The former acknowledges the personhood of the enslaved rhetorically. The latter keeps enslaved people within the pale of humanity when one considers an argument Frederick Douglass made in "What to the Slave is the Fourth of July?" (1852): If the slaveholding class truly believed enslaved Africans were subhuman, then they would not need to regulate them so differently from other animal-property. For example, do states ban cattle from learning to read and write? Do they criminally punish dogs for running away from home? In both cases, no. But Virginia and other slaveholding states did precisely that to enslaved Blacks in order to prevent them from attaining equal status as whites.[159] In both the Constitution and slave codes, enslaved people were *legible* when compared to the stateless Europeans. Even the enslaved person could be legally recognized as having existed by the state in which they reside.

[157] Ibid., 287.
[158] Ibid., 279.
[159] Douglass, "What to the Slave is the Fourth of July?".

However, state laws that banned literacy among enslaved populations actively remove the rights to opinion and to action, the loss of which Arendt finds fundamental to the condition of rightlessness.[160] Furthermore, by declaring that people of African descent could not sue in federal court and were not "persons" under the 5th Amendment, the *Dred Scott* decision excluded all Black people, including the manumitted and the free-born, from due process, the essence of rights-bearing.[161] This exclusion occurred despite the rhetorical contortions that the founding fathers made in order to avoid naming chattel slavery directly in the Constitution. We must ask: What good does legibility produce for the individual if said legibility does not enable the exercise of rights or protection under the law? The extent to which enslaved Africans were within the pale of the law prior to *Dred Scott* was severely limited, as they could not testify in court against a white person nor serve on juries. But they were removed from the pale entirely if they ever chose to run away. As mentioned in the third section, the only way for an enslaved person to contest their subjugation was through illegal means.

Fugitive slaves provide an interesting case study with regard to Arendt's comparison between the stateless and the lawfully imprisoned criminal. Arendt claims that a stateless person could improve their situation by committing a crime because, once they do, the stateless person *enters* the purview of the law and "will not be treated any worse than another criminal."[162] In this assessment, Arendt neglects to consider the social identities and forces which make differences between citizens and rightless people salient. In the case of American slavery, those forces were economic exploitation and white supremacy. On the one hand, criminality, specifically running away, *could* improve the condition of the enslaved person—but only if it resulted in the enslaved person gaining their emancipation *and* not getting caught. Otherwise, criminality could easily

[160] Arendt, "The Decline of the Nation-State and the End of the Rights of Man," 296.
[161] Taney, Dred Scott v. Sandford, 60 U.S. 393.
[162] Arendt, "The Decline of the Nation-State and the End of the Rights of Man," 286.

worsen the enslaved person's condition because they would be wholly subject to their slaveholder's wrath without any protection from the law. Escaped slaves carried the labels of "stolen property" and "wanted criminal," on top of being racialized as a foreigner. These labels denied protection for the slave's personhood, and the mark of criminality certainly would not yield access to counsel or the right to a jury. An enslaved person's position is incomparable to that of a white criminal, regardless of whether the arrest of either is lawful. To successfully transgress the law, fugitive slaves relied upon their proximity to free states to gain freedom. Even then, aforementioned fugitive slave acts impeded success. Engaging in criminality can hardly be seen as a choice for enslaved people, when that "choice" was made under the pain of death.

Conclusion

Through the letter of the law and extreme economic deprivation, the white slaveholding class rendered Africans rightless and racialized them as "Black" in order to curb any attempts they made to enter the American polity. Patterson's natal alienation allows us to understand the statelessness that afflicted enslaved Africans generationally. The enslaved African's statuses as property, worker, and foreigner created a trifecta wherein they could never be recognized as human by the political community enslaving them. This extreme unbelonging did not end upon manumission. The American Colonization Society's project and similar proposals made during the 1850s to expel free Afro-descended people to the West Indies make Arendt's claim that imperialism was "the one great crime in which America was never involved" woefully ahistorical.[163] The expulsion campaign proved that the socioeconomic subjugation of the enslaved was mutually constitutive with the political domination of the citizen, who, after the *Dred Scott* ruling, was unambiguously the free-born white man. In that ruling, the Supreme

[163] Guyatt, "The American Colonization Society"; Arendt, "Reflections on Little Rock," 46.

Court confirmed the longstanding belief that Black citizenship was incompatible with the future of the United States as a white nation-state. This belief persisted in the white American consciousness well after the Civil War. Due to the failure of Reconstruction, the condition of statelessness for African-Americans did not end with formal abolition. Arendt should have known this because she was living in Jim Crow America while writing *Origins*. Her unwillingness to consider enslaved people of African descent as stateless leads her to miss the *de facto* statelessness that was occurring right under her nose.

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