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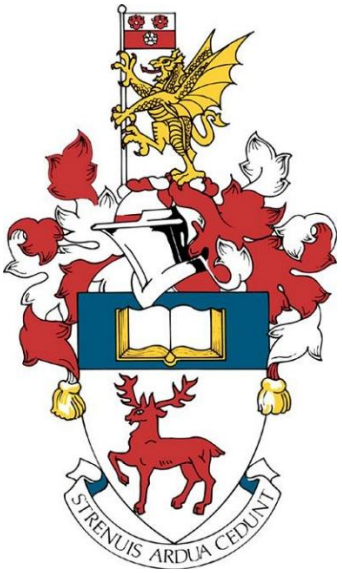
LEGAL RESEARCH AND DEVELOPMENT

SOUTHAMPTON STUDENT LAW REVIEW
2026 VOLUME 16, ISSUE 1

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SHOWCASING EXCELLENCE IN RESEARCH

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2026 VOLUME 16, ISSUE 1



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AKRAM ALASGAROV and MECNUN ÖZLEM
Editors-in-Chief, Southampton Student Law Review
September 2026

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Foreword

The Southampton Student Law Review, now in its 16th year, goes from to strength to strength. Under the editorship of Akram Alasgarov and Mecnun Özlem, there is demonstrable evidence that the journal has been in good hands in the 2025-26 academic year. To the present volume, to which they have done me the honour of entrusting to me the writing of this foreword, they have brought not one but two innovations. For the first time, the possibility of submitting contributions to it is open not only to students of Southampton Law School, but also to those studying at the University of Winchester. Secondly, in addition to the usual eclectic mix of notes and articles, a dissertation appears in its pages. The breadth of the subject matter of the contributions attests to the central role that the discipline of law, often unseen, plays in the public of a modern polity such as the United Kingdom and its intricate yet constantly changing connections with the world beyond its shores, patrolling the boundaries separating the legitimate from the illegitimate on issues, circumstances and events both mundane and momentous reflecting the ever more troubling challenges to the rule of law and also the relentless march of technology. Our Law School's academic staff cannot pretend to know the answers to most of these conundrums, but we can teach students to ask the right questions and techniques of advocating for preferred solutions, and the contributors are to be congratulated for having dared to do exactly that. They, and the editors-in-chief, have set an exacting standard for their successors to match.

Leading off is ***Charlotte Bumpus's*** comments on *Watteau v. Fenwick*, a landmark judgment on agency law setting a controversial precedent that agents who exceed their authority can nonetheless bind their principals that departs from the foundational reasoning of earlier agency law cases. The piece goes on to discuss the policy reasons behind the court's decision and how it was critical for protecting both good business practice within the UK and the vulnerable position of innocent third parties.

Next, ***Taha Malik*** critically evaluates the UK's surrogacy framework, arguing that the governing statutes, the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Act 2008, have become counterproductive through the judicial decisions made on them, exacerbating the risks they sought to prevent.

Callum Puxty then mounts a stout defence of legal positivism against its critics such as Fuller and Dworkin who faulted it for failing to account accurately for the moral aspects of law. His article does this by showing that law, a social fact, has no necessary connection to morality at all, the distinction between them allowing positivism to define the moral aspect of law.

Using a fictitious case, ***Emily Mable Willis*** critiques ChatGPT's explanation of vicarious liability, showing how large language models tend to present a definitive response to legal questions in areas of the law where novel scenarios often lead to disagreements among judges thanks to their scope for interpretation, policy influence and contestation. Its underplaying of uncertainty, fact sensitivity, and policy analysis obscures the awkward reality that there is seldom a single answer to a legal problem.

Thomas Atkin tests the proposition that regulating warfare is impossible and that suffering in armed conflict is inevitable in the light of the legal issues surrounding the introduction of gamified military systems, with particular reference to Ukraine's "Army of Drones" initiative. Finding a serious risk of violating distinction and proportionality principles central to international humanitarian law, he discusses how recent reforms in Ukraine's legal framework can minimise the inevitable brutality and suffering and mitigate the challenges faced by drone operators in an already fast-paced and psychologically challenging environment.

Analysing the Supreme Court's abolition in *Versloot Dredging* of the fraudulent devices rule, ***Michelle Williams*** surveys what it portends for modern-day insurance claims and defends the abolition as a proportionate response to changes in information asymmetry, while critically analysing the reasoning behind the judgment, asking if the Supreme Court has gone too far in legitimising concealment of information from insurers.

Aishwariyaa Angelina Stephen evaluates the potential for a pan-Asian human rights system through a comparative analysis of European, Inter-American and African regional frameworks against the background of Asia's lack of a comprehensive binding mechanism. The study argues that Asia's political diversity, strong emphasis on sovereignty and uneven normative convergence pose significant obstacles to the direct transplantation of other regional models. Hence, however normatively desirable, for a pan-Asian system to emerge it will require a gradual, adaptive design that strengthens institutional capacity, cultivates political

commitment and balances regional diversity to achieve sustainable and effective protection of human rights.

Georgina MacInnes criticises the international community's inadequate response to the unfolding armed conflict in Rwanda that led to the 1994 genocide. She explores the United Nations bureaucratic structure and its inefficiency alongside the international community's lack of commitment, action and dismissal of repeated warnings that, if heeded, might have prevented the genocide, highlighting the shortcomings of the principle of state sovereignty, coupled with the reluctance to intervene, in preventing mass atrocities. Her conclusion is not that regulating armed conflict is impossible or pointless, but that the endeavour requires political will if it is to succeed.

Rounding off the volume, ***Jake Ellis Aurora*** takes issue with the Unitary Executive Theory embraced by the US Supreme Court in upholding President Trump's campaign since regaining office to exert control over independent agencies, confirming that the President possesses the constitutional power to remove agency heads at will. This LLB dissertation relies on the text and Founding-era history behind Article II of the US Constitution to support the constitutionality of independent agencies, debunking the Court's theory of an illimitable removal power pursued behind the mask of formalism. Contextualising the Court's hostility to the administrative state in *Trump v. Wilcox* and *Trump v. Slaughter*, it argues that the emergency stay orders in *Slaughter*, allowing Trump to irreversibly remove an agency head, effectively predecided the case against agency independence.

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CASE COMMENT

A Precedent Without Principle: The Uncertain Authority of *Watteau v Fenwick*

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ABSTRACT. This case comment discusses the landmark agency law case of *Watteau v Fenwick* and how it set a controversial precedent that principals can be legally bound by an agent's actions beyond the agent's authority. The comment discusses how these precedents lack clear common-law authority and, remarkably, contradict previous judges' foundational reasoning in agency law cases. Although this precedent has been hard to integrate into modern commercial law, the essay goes on to discuss the policy reasons behind the court's decision and how this decision was critical for protecting both good business practice within the UK and the vulnerable position of innocent third parties.

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Introduction

The *Watteau v Fenwick* case is an old case that continues to cause controversy within the English legal system and amongst academic scholars. This case set a new and distinctive precedent in agency law, which has arguably not yet been fully accepted or understood. Throughout this case comment, I will delve into the details of the case to investigate the facts and reasoning behind the decision, as well as look into the state of agency common law both before and after the *Watteau v Fenwick* ruling to fully understand why it has been so controversial and difficult for the courts and academic scholars to accept.

[†] Final Year LLB Student, University of Southampton.

1. Background to the *Watteau v Fenwick* case

Within the case of *Watteau v Fenwick*,[1] Fenwick bought a pub previously owned by a man called Humble. When Fenwick bought the pub, he kept Humble on as the pub manager and granted Humble actual authority to buy only bottles of ale and water. Humble exceeded his actual authority when he entered a contract with Watteau to buy cigars. It is important to note that Humble had owned this pub for many years, and the business licence was still in his name. When Watteau entered the contract with Humble, he was unaware that he was acting as an agent for the true pub owner, Fenwick. When Fenwick was made aware of the contract, which was made beyond Humble's authority, he refused to pay, and Watteau launched proceedings for the full price of the goods.

The Court's outcome was that Fenwick is bound by the contract made between Humble and Watteau and is liable for the full price of the goods. Judge Wills J came to this conclusion as Humble was acting within his apparent authority as a pub manager, although forming the contract was out of his actual authority.[2] This therefore set the precedent that undisclosed principals can be liable for their agents' actions, even when acting outside their given authority, if they are acting within the usual authority of a person in that specific job role. This decision alters the law by taking a paternalistic approach, providing stronger protection for innocent third parties who were unaware that the person was acting as an agent for a principal.

A key issue with this reasoning is that scholars, such as Hornby, argue that Humble did not have apparent authority to form the contract, as for an agent to have apparent authority, they must be known to be an agent acting on behalf of a principal, which was not the case here.[3]

Moreover, the English High Courts justified this decision by comparing the case to partnership law. The judges compared it to a partnership between a dormant and an active partner, stating that even where there are private restrictions on authority between the partners, an innocent third party would not be aware of them, especially if they were within a partner's usual authority.[4]

2. Authority for the new *Watteau v Fenwick* precedent

A key area of controversy in this case for many scholars, such as Hornby[5] and Rogers,[6] is that the decision has little authority in light of previous case law. A

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[1] *Watteau v Fenwick* [1893] 1 QB 346.

[2] ibid 348–349.

[3] J A Hornby, 'The Usual Authority of an Agent' (1961) 19(2) *Cambridge Law Journal* 239, 241.

[4] *Watteau v Fenwick* (n 1) 349.

[5] Hornby (n 3) 241.

[6] Kevin M Rogers, 'A Case Harshly Treated? Watteau v Fenwick Re-Evaluated' (2004) 2(2) *Hertfordshire Law Journal* 26, 27.

prime example of this is the case of *Miles v McIlwraith*,[7] where the courts established the principle that if an undisclosed agent acts beyond his apparent authority, the principal is not liable for the agent's actions, but rather, the agent is personally liable. This precedent was generally accepted, as it enforces a law that prioritises commercial efficacy by not holding principals accountable for an agent's unauthorised actions, thereby further encouraging trade.

As a result, this significant shift, arising from *Watteau v Fenwick*, creates confusion for the courts and businesses and acts as a disincentive for principals to employ agents to improve trade efficacy. Moreover, dramatic shifts in judicial reasoning that are not fully understandable or comprehensible call into question the rule of law, which demands clarity and consistency in the law.[8] Directly, this makes the decision a difficult one for both legal professionals and principals to understand.

3. Putting the uncertain precedent into practice

A significant factor that highlights the difficulty and controversy of the *Watteau v Fenwick* precedent is the courts'[9] unwillingness to apply the reasoning to modern agency cases.[10]

For example, in *Freeman & Lockyer v Buckhurst Park Properties Ltd*,[11] an agent entered into a contract for services with the understanding that it would be paid for on credit, to be repaid later. When the principal did not pay this back, the courts were faced with the issue of whether the principal would be liable under the contract. The courts found that the agent had no actual authority to form the contracts but had apparent authority.[12] They then set out the criteria for apparent authority, stating that an agent can only have apparent authority where the principal represents them as having actual authority. For this, the agent must be disclosed.[13]

This reasoning directly contradicts the reasoning in *Watteau v Fenwick*, where Judge Wills J stated that Humble had apparent authority even though Fenwick did not present him to, and Watteau was not even aware that he was acting as an agent.[14]

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[7] *Miles v McIlwraith* (1883) 8 App Cas 120 (PC).

[8] Tom Bingham, *The Rule of Law* (Allen Lane 2010) 35.

[9] *Freeman & Lockyer v Buckhurst Park Properties Ltd* [1964] 2 QB 480 (CA).

[10] *Rhodian River Shipping Co SA v Halla Maritime Corp (The Rhodian River)* [1984] 1 Lloyd's Rep 373, 379; *Sign-O-Lite Plastics Ltd v Metropolitan Life Insurance Co* (1990) 73 DLR (4th) 541, 548; *Jerome v Bentley* [1952] 2 All ER 114.

[11] *Freeman & Lockyer* (n 9).

[12] ibid 509 (Diplock LJ).

[13] ibid 506.

[14] *Watteau v Fenwick* (n 1) 348–349.

Beyond this, in more modern cases,[15] judges have further questioned *Watteau v Fenwick*. This was evident when Lord Bingham warned that the decision in *Watteau v Fenwick* is 'hard to perceive and has no authority'.[16] He even went as far as to question whether the precedent set by *Watteau v Fenwick* even exists in modern law.[17] The concept that learned Supreme Court judges, such as Lord Bingham, does not fully understand or 'perceive' the nature or application of the *Watteau v Fenwick* principle draws attention to the perplexing difficulty business owners and legal advisors face when trying to apply the principle effectively in everyday business practice.

Alongside this, the lack of protection for business owners and the vulnerable position of principals which can arise when hiring agents could be seen as a barrier to improving and encouraging trade, further fuelling controversy over the precedent.

4. Rationale for the *Watteau v Fenwick* principle

Although this case has created difficulties for the common law, it is important to examine and understand the necessities that led the courts to reach this conclusion, and the implications if the case were to go the other way.

For example, legal scholar Cohen discussed how the decision in *Watteau v Fenwick* was essential to protecting public welfare, economic activity, and trade.[18] She highlighted how, if the courts were to find the principal not liable for the agents' unauthorised actions, then this would open a door to principals 'hiring insolvent agents who form contracts, then claim no authority and split the profits'.[19] As a result, the courts could be seen as taking a public policy approach by protecting businesses from potential future bad business practices.

Moreover, the decision made by the judges in this case has been controversial because the court favoured greater protection for third parties contracting with the agent rather than the principal, leaving the principal in a vulnerable position. However, as legal scholar Roger discussed, the principal is the person taking a calculated risk when hiring an agent to act on their behalf, and if they do not exercise sufficient diligence over the agent's actions, then it should be them at a loss, not the innocent third party.[20]

Legal Scholar Tettenborn reinforced this when he made the important argument that where a principal employs an agent in a way which makes it so covert

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[15] *The Rhodian River* (n 10) 379; *Sign-O-Lite Plastics Ltd* (n 10) 548; *Jerome v Bentley* (n 10).

[16] *The Rhodian River* (n 10).

[17] ibid 379.

[18] George M Cohen, 'The Collusion problem in agency law' (2000) University of Virginia School of Law Legal Studies Working Paper No 00-2, 44.

[19] ibid 53.

[20] Rogers (n 6) 4.

that he is an agent and not the business owner himself, it is essential for liability for the agent's actions to fall on the principal, and not to leave the innocent sellers at a loss.[21]

Conclusion

To conclude, the *Watteau v Fenwick* has resulted in significant controversy and has inevitably caused difficulty for both the courts in applying the precedent and for business owners in understanding the decision. Alongside this, the lack of authority or application in *Watteau v Fenwick* further highlights the case's difficulties. However, many scholars claim that the decision was correct, both to protect innocent third parties and to prevent the courts from opening the door to poor business practices. Lastly, to protect the rule of law and the clarity of regulations in commercial trade, if the courts face a case involving a similar issue, they should seek to clarify the law on undisclosed agents.

[21] Andrew Tettenborn, 'Agents, Business Owners and Estoppel' (1998) 57(2) *Cambridge Law Journal* 274.

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SHORT ARTICLE

Sleepwalking into a No Man's Land: The Judicial Rescue of the UK's Obsolete Surrogacy Regime

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ABSTRACT. This article critically evaluates the UK's surrogacy framework, arguing that the governing statutes, the Surrogacy Arrangements Act (SAA) 1985 and the Human Fertilisation and Embryology Act (HFEA) 2008, are no longer fit for purpose. By examining the 'judicial stretching' of time limits, consent requirements, and payment authorisations, the author posits that the courts have become involuntary facilitators of a regime that exports the very risks it sought to prevent. With the April 2025 deferral of the Law Commission's reforms, this piece argues that the UK has entered a period of legislative abdication, leaving families in a jurisdictional 'no man's land'.

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Introduction

Surrogacy is a lawful and increasingly utilised route to parenthood in the UK,[1] widely recognised as a method of 'enabling childless couples to experience the joy and fulfilment of parenthood'.[2] Yet, as Horsey and Sheldon observed a decade

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[1] Jo Deahl, '*Surrogacy is absolutely what I want to do'* (BBC News, 22 September 2021) <https://www.bbc.co.uk/news/uk-58639955> accessed 23 December 2025.

[2] *CW v NT* [2011] EWHC 33 (Fam), [1] (Baker J).

ago, the governing framework remains 'still hazy after all these years'.[3] While Parental Orders (PO) ensure the child's security and identity as lifelong members of the Intended Parent's (IPs) family,[4] the statutory scheme, principally the Surrogacy Arrangements Act (SAA) 1985 and the Human Fertilisation and Embryology Act (HFEA) 2008, convey that neither piece of legislation was 'rationally constructed'.[5] The former a response to a moral panic with the surrogate cast as a moral scapegoat, the latter a reactive response driven by political urgency rather than coherent regulatory design. As a result, rigid requirements, inter alia, relating to application time limits, consent and payments frequently place IPs in a state of legal uncertainty, forcing the courts to adopt strained, purposive interpretations to avert injustice to children.

This piece agrees with the view that neither the SAA 1985 nor the HFEA 2008 was rationally constructed for its purpose and that the cumulative effect of their deficiencies renders the acquisition of legal parenthood unnecessarily difficult. It further argues that this domestic restrictiveness predictably drives IPs towards insecure international arrangements, a legal 'no man's land' marked by jurisdictional conflict and heightened risk.[6] This essay will first outline the statutory framework governing surrogacy and POs, before critically examining the key doctrinal difficulties arising from rigid eligibility requirements (albeit not limited to), including time limits, consent and payments. It will then analyse how the courts have become institutional facilitators in driving international arrangements, before concluding that these judicial interpretative manoeuvres expose the need for principled legislative reform.

1. The Legislative Foundations of UK Surrogacy Law

The regulation of surrogacy in England and Wales is trapped within a framework driven by historical moral anxiety rather than principled design, exposing inherent tensions between prohibition and practicality. The SAA 1985, a reactive measure following the Baby Cotton case,[7] widely labelled as a 'baby-for-

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[3] Kirsty Horsey and Sally Sheldon, 'Still hazy after All These Years: The Law Regulating Surrogacy' (2012) 20 Medical Law Review 67, 87.

[4] *J v G* [2013] EWHC 1432 (Fam), [27] (Theis J).

[5] M Freeman, 'Does Surrogacy Have a Future After Brazier?' (1999) 7 *Medical Law Review* 1, 20.

[6] Natasha Slabs, 'The Pitfalls of Surrogacy Arrangements' (LexisNexis Blog, October 2015) <https://www.lexisnexis.co.uk/blog/family-law/the-pitfalls-of-surrogacy-arrangements> accessed 25 December 2025.

[7] *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846 (Fam).

cash' arrangement.[8] It criminalised commercial surrogacy,[9] banned advertising[10] and made agreements unenforceable,[11] embodying the Warnock Report's fears of commodification and exploitation.[12] Yet, this deterrent model persists amid evolving reproductive technologies and shifting family norms, ironically fostering rather than curbing the practice.

Legal motherhood vests in the surrogate at birth.[13] Parenthood transfers only retrospectively through parental orders.[14] However, access to this is gated by strict statutory requirements, including genetic connection,[15] free consent after six weeks,[16] payments confined to 'reasonable expenses' unless authorised[17] and a six-month time limit.[18] These collective hurdles risk eternal legal limbo for children, underscoring a structural rigidity that prioritises policy symbolism over familial reality.

The 2010 Regulations[19] intensified this tension by importing lifelong welfare paramountcy from s 1 Adoption and Children Act 2002. As Hedley J noted in *Re L,* refusal of a PO will be 'only in the clearest abuse of public policy' where welfare supports its making.[20] However, as Lady Hale later said in *Whittington,* this creates an inherent contradiction: 'welfare considerations will always point towards making a PO but make it difficult for the court to police even the requirements of s 54, let alone to enforce any public policy against commercial arrangement'.[21]

This has rendered the framework as 'incoherent', reliant on judicial

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[8] BBC, '1985: Inquiry over "Baby-for-Cash" Deal' (BBC On This Day, 4 January 1985) <http://news.bbc.co.uk/onthisday/hi/dates/stories/january/4/newsid_2495000/2495857.stm> accessed 23 December 2025.

[9] Surrogacy Arrangements Act 1985, s 2.

[10] ibid s 3.

[11] ibid s 1(b).

[12] Committee of Inquiry into Human Fertilisation and Embryology, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd 9314, 1984) ch 8, para 46.

[13] Human Fertilisation and Embryology Act 2008, s 33.

[14] ibid ss 54, 54A.

[15] ibid s 54(1)(b).

[16] ibid s 54(6)–(7).

[17] ibid s 54(8).

[18] ibid s 54(3).

[19] Human Fertilisation and Embryology (Parental Orders) Regulations 2010, SI 2010/985, Sch 1, para 1.

[20] *Re L (A Child) (Parental Order: Foreign Surrogacy)* [2010] EWHC 3146 (Fam), [10] (Hedley J).

[21] *Whittington Hospital NHS Trust v XX* [2020] UKSC 14, [17] (Lady Hale).

discretion that undermines legislative intent.[22] Such incoherence in the law not only makes legal parenthood unnecessarily demanding but also incentivises 'reproductive tourism' to permissive jurisdictions.[23]

2. The Deficiencies of Surrogacy Law

The Temporal Trap: Section 54(3) and the Purposive Rescue

Section 54(3) HFEA 2008 mandates PO applications within six months of birth. On its face, this imposes an absolute deadline. Late applications risk barring IPs from legal parenthood indefinitely, leaving children in a legal vacuum. This rigidity proves especially stringent in international surrogacy, where IPs are often unaware of UK requirements and bureaucratic delays abound, prolonging uncertainty over citizenship and identity.[24]

Initially, Courts adopted a strict literal interpretation. In *J v G*, Theis J held the limit mandatory and non-extendable, irrespective of welfare considerations.[25] Hedley J in *Re X and Y* described it as 'non-extendable', a view echoed in *JP v LP*, where King J refused an order for a 33-week-old child whose parents were ignorant of the rule, prioritising Parliament's presumed intent for swift regularisation over the child's best interests. This approach ensured certainty but at the cost of potentially permanent parentlessness.

The turning point came in *Re X (A Child),* where Munby P overruled prior authority, adopting a purposive construction.[26] Confronting a 19-month delay, he rejected a literal reading as 'almost nonsensical', asking rhetorically, 'Can Parliament really have intended that the gate should be barred forever if the application is lodged even one day late?'[27] Finding parliamentary intent as opaque, Munby P drew on the interpretative obligation under s 3(1) Human Rights Act 1998 to read s 54(3) as directory rather than mandatory, permitting extensions where welfare demanded. He went further to explain even if the courts were to adopt a literal approach, Article 8 ECHR would provide the courts another avenue for compatibility. This level of readiness to invoke the human rights principles conveys the extent to which the statutory framework is misaligned with lived surrogacy practices, compelling the courts to strain orthodox interpretation to prevent injustice.

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[22] Horsey and Sheldon (n 3) 67.

[23] ibid 89.

[24] Re X and Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam).

[25] *J v G* (n 4), [30].

[26] Re X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135 (Fam).

[27] ibid [55].

Subsequently, PO's have been issued after delays of three years,[28] five years,[29] and even 23 years.[30] As Trimmings warns, while this flexibility averts injustice, it exposes deeper constitutional tensions, how far may courts rewrite clear statutory language before encroaching on Parliament's domain, if they already haven't?[31]

The Consent Paradox: Autonomy vs. Legal Limbo.

The consent requirement in s 54(6)-(7) HFEA 2008, demanding free, unconditional, fully informed consent no earlier than six weeks post-birth, stands as the framework's most inflexible barrier. Designed to protect surrogate autonomy, its rigid enforcement frequently sacrifices child welfare, identity and legal certainty, exemplifying how the law prioritises formalism over function.

It is important to acknowledge that Parliament's insistence on an absolute consent requirement reflects a legitimate normative commitment to surrogate autonomy. By preserving a post-birth veto, the statutory scheme seeks to ensure that consent remains both meaningful and revocable.

Dispensation of consent is permitted only where the surrogate cannot be located or lacks capacity. In *Re D & L*, Hedley J invoked this narrowly, granting an order despite invalid early consent in an international commercial arrangement, refusal would have rendered the children 'legal orphans'.[32] Where consent is actively withheld, however, courts treat it as an absolute veto, admitting no welfare override. In *H v S*[33] and *C & D v E & F*,[34] Orders were refused despite the IPs being primary (and, in the latter, biological) carers. Theis J described absent consent bringing proceedings to a juddering halt, forcing reliance on child arrangement orders, impermanent, identity-eroding alternatives that fail to extinguish the surrogate's legal motherhood.

The rigidity reached appellate confirmation in *Re C*, where the Court of Appeal quashed an order made without valid consent, holding the requirement jurisdictional and sealed to Article 8 ECHR proportionality.[35] Welfare may be

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[28] *A v B and C* [2016] EWFC 61.

[29] *Re D* [2015] EWHC 911 (Fam).

[30] *X v Z* [2022] EWFC 26.

[31] Katrina Trimmings, 'Six Month Deadline for Applications for Parental Orders relaxed by the High Court' (2015) 37 *J Social Welfare & Family L* 243.

[32] *Re D & L (Minors) (Surrogacy Arrangement)* [2012] EWHC 2631 (Fam) [4].

[33] *H v S (Surrogacy Arrangement)* [2015] EWFC 36.

[34] *C & D v E & F* [2016] EWFC 49.

[35] *Re C (Surrogacy: Consent)* [2023] EWCA Civ 1164 [61].

mitigated via Children Act remedies,[36] but permanent legal parenthood remains unattainable. *X v G* underscores the enduring harm, lifelong caregiving yields no formal recognition, fracturing the child's legal identity.[37]

Unlike time limits or payments, consent permits no judicial flexibility, exposing the regime's deepest incoherence. Intended as a safeguard, it entrenches insecurity and most clearly demonstrates how statutory rigidity defeats lifelong interests.

3. The International Consequences of Domestic Restriction: Reproductive Tourism and Legal Insecurity

The statutory prohibition on commercial surrogacy exposes the law's core paradox, driving international arrangements while undermining its objectives. Domestically, agreements are unenforceable, brokering criminalised, and payments limited to undefined 'reasonable expenses'. This has created a sparse altruistic market with few surrogates and uncertainty, predictably propelling IPs towards overseas jurisdictions offering professional services, transparent payments, and parenthood at birth.

Judicial responses reveal this prohibition's lack of 'legal teeth'.[38] Early domestic cases, welfare trumped parliamentary hostility. In *Re C*, excess payments were authorised to avoid harm to the child's welfare.[39] This pragmatism solidified in international cases. In *Re X and Y*, Hedley J approved £25,000 paid to a Ukrainian surrogate, plainly commercial, acknowledging that denial would 'almost inevitably gravely compromise' lifelong welfare. The now familiar judicial questions set out by Hedley J concerning proportionality, good faith, and moral taint have become doctrinal facades that do little in practice to restrict commercial surrogacy.[40] To date, a PO has never been refused strictly on the grounds for exceeding 'reasonable payments' despite payments ranging from $23,000[41] and $53,000.[42] As Brown argues, the regime lacks a 'principled basis' for its approach to payments, leaving unresolved whether surrogacy involves informal work deserving recognition or exploitation requiring prohibition.[43]

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[36] Children Act 1989 s 8.

[37] *X v G* [2024] EWHC 2182 (Fam).

[38] Horsey and Sheldon (n 3) 87.

[39] *Re C (Application by Mr and Mrs X)* [2002] EWHC 157 (Fam).

[40] *Re X and Y* (n 24) [21].

[41] *Re S* [2010] 1 FLR 1156 (Fam).

[42] *J v G* [2014] 1 FLR 297.

[43] A Brown, 'Surrogacy Law Reform in the UK: The Ambiguous Position of Payments to the Surrogate' (2021) 33 *Child and Family Law Quarterly* 25.

This judicial permissiveness, however, entrenches rather than resolves the paradox and reveals commercial surrogacy is no longer viewed as an 'intrinsic wrong' in English Law.[44] By upholding domestic restrictions while routinely validating overseas commercialism, the law actively incentivises cross border arrangements, pushing IPs into a jurisdictional 'no man's land' rife with uncertainness over consent, domicile, nationality, and child status.

Human Rights case law has further fuelled this tension, in *Mennesson*[45] and *Labassee*,[46] the Strasbourg court held that non-recognition of lawful foreign parent-child relationships violates the child's Article 8 rights to identity and private life. English courts have internalised this, as in *Z (Foreign Surrogacy)*, granting an order despite serious foreign illegality.[47] Yet *Re Z* starkly illustrates judicial limits, absent a genetic link, profound welfare concerns could not override s 54 jurisdiction, leaving children 'permanently State-less and legally parent-less' until adoption.[48]

Courts rely on creative interpretation to secure welfare outcomes, undermining the law's altruistic foundations and exposing Parliament's policy failure. The prohibition thus both obstructs legal parenthood and exports the risks it's aimed to prevent.

4. Beyond Judicial Stretching: The case for Legislative Reform

Judicial stretching of parental order requirements, extending time limits, neutralising consent, and authorising payments, exposes a defect beyond interpretative cure. Strict compliance would undermine child welfare, leaving families in limbo, as Theis J observed, IPs often 'sleepwalk into an uncertain legal future'.[49] This systemic failing demands legislative action.

The Law Commission's 2023 report authoritatively confirms the framework 'does not work in the best interest of any of the people involved'.[50] Pinpointing the retrospective model as the source of insecurity and judicial over-reliance on welfare discretion.

Its core proposal is a regulated pathway conferring parenthood at birth, conditioned on pre-conception safeguards; mandatory counselling, independent

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[44] C Fenton-Glynn, 'Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements' (2016) 24 *Medical Law Review* 59.

[45] *Mennesson v France* App No 65192/11 (Judgement) (ECtHR, 26 June 2014).

[46] *Labasse v France* App No 65941/11 (Judgement) (ECtHR, 26 June 2014).

[47] Re Z (Foreign Surrogacy) [2024] EWFC 304.

[48] *Re Z (Unlawful Foreign Surrogacy)* [2025] EWHC 339, [35] (McFarlane P).

[49] *Re C and D (Children)* [2016] EWFC 41.

[50] Law Commission, *Building Families through Surrogacy: A New Law* (Law Com No 411, 2023) [1.17].

legal advice, and approved by a regulated body.[51] This shift from post hoc rescue to prospective certainty, directly countering Hedley J's concern that welfare paramountcy renders refusal 'almost impossible'.

On payments, Recommendation 52 replaces indeterminate 'reasonable expenses' with a statutory specification of permissible categories, applicable uniformly.[52] By imposing transparency, it curbs ex post facto authorisation, reduces judicial manipulation, and eliminates incentives for international commercialism, while retaining anti-exploitation protections.

Yet government inaction persists, implementation deferred indefinitely in April 2025 amid competing priorities. Such apathy suggests a regime where judicial creativity masks legislative abdication. The Commission's proposals offer essential modernisation, not innovation. Until enacted, surrogacy law will remain dysfunctional, exporting risks Parliament sought to contain and prioritising outdated prohibitions over child security.

Conclusion

As Horsey, Mahmoud, and Wade observe, 'many aspects of the existing law on surrogacy are either outdated or unsustainable'.[53] Though lawful and growing in use, the framework, anchored in the SAA 1985's prohibitive roots and the HFEA 2008's rigid retrospective model, makes legal parenthood unnecessarily difficult. Cumulative barriers in time limits, consent, and payments generate persistent uncertainty, compelling courts to employ the strained purposive interpretations and Human Rights Act tools simply to prevent serious harm to children. This judicial pattern reflects not judicial overreach but legislative failure.

Domestic restrictiveness, scarce altruistic surrogacy and ambiguity over 'reasonable expenses' therefore predictably drives IPs into international agreements, a legal 'no man's land' marked by jurisdictional conflict and exploitation risk. Far from deterring commercialisation, the law exports it.

Despite the Law Commission's 2023 proposal for a regulated pre-conception pathway, government inaction, evident in the April 2025 deferral, has kicked reform 'into the long grass'.[54] The law remains a map for a vanished landscape. Until Parliament replaces retrospective fragility with prospective

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[51] ibid [2.3].

[52] ibid Recommendation 52.

[53] Kirsty Horsey, Zaina Mahmoud, and Katherine Wade (eds), *Future Directions in Surrogacy Law: Law and Policy Reform in the UK and Beyond* (Bristol University Press 2025) 10.

[54] Natalie Sutherland, 'Something must be done about surrogacy' (*Law Gazette*, 23 May 2025) <https://www.lawgazette.co.uk/practice-points/something-must-be-done-about-surrogacy/5123395.article> accessed 17 December 2025.

regulation, families will remain dependent on judicial rescue. Reform is not forthcoming; it is overdue.

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ARTICLE

A Matter of Fact: How Legal Positivism Accounts for Law Without Recourse to Morality

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ABSTRACT. This article responds to the criticism that, whilst legal positivism can account for the institutional aspects of law, it fails to accurately account for the moral aspects. In response, the article argues legal positivism can make sense of both the institutional and moral aspects of law. This is because the article aims to show that law has no necessary connection to morality at all. By considering law to be a social fact, legal positivism can accurately define the moral aspect of law simply by showing that law is distinct from morality. To make this claim, the article first explores how legal positivism can use a rule of recognition system to outline the institutional aspect of law. Then, the article turns to reason why law is distinct from morality, defending this claim against those of Fuller and Dworkin.

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Introduction

Legal positivism is a theory which, amongst other things, has been developed in an attempt to provide an account of what it is that makes, and what is included in law. One of the claims, despite disagreement, that is often attributed to legal positivism is that law can exist independently of merit. Across a variety of nuanced conceptions, a common thread amongst positivist theorists is that law's existence is a matter of social fact.[1] If so, this independence raises several pertinent questions.

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[1] John Austin, *The Province of Jurisprudence Determined* (Wilfrid E. Rumble ed, Cambridge University Press 1995) 18; Joseph Raz, *The Authority of Law: Essays on Law and Morality*

Does theorising about law in this way mean that legal positivism can account for the institutional aspect of law? If doing so does not require an attachment to merit, then how can legal positivism account for the morality of law? What *is* the 'morality' of law, if there is one at all?

In answer, I will argue that legal positivism, in some of its conceptions, can cogently account for the institutional aspect of law by accounting for law's existence as a social fact. I will also argue that legal positivism provides a cogent account of the moral aspect of law. This is because I will reject claims that law has an inner or intrinsic morality, or a necessary connection to morality. If law has no necessary moral aspect, accounting for morality merely requires disproving its necessary presence within an institutional framework and outlining the external sense in which morality can be applied to law.

It must be clarified that I acknowledge that questions of law and morality may be answered differently if one assumes the existence of a divine legal order or divinely given reasoning capacities. This essay exists independently of that view.

To make this argument, I will begin by highlighting legal positivism's ability to cogently account for the institutional aspect of law, by accounting for law as a 'social fact'. I then propose an interpretation of legal positivism which argues there is no necessary connection between law and morality. By arguing morality is not an intrinsic element of law, it will be possible to show that legal positivism accurately accounts for the moral aspect of law through an understanding of morality as an external concept.

1. Legal Positivism and the Institutional Aspect of Law

'Institutional' will be interpreted here as including the bodies responsible for making, applying, and interpreting the law, and other requirements for making a rule become law. Where legal positivism can account for these elements, it can cogently account for law's institutional aspect.

It is important to first address Austin's positivist account, which does not account for the institutional aspect of law. This will highlight some key aspects of law's institution which must be accounted for and separate this essay's argument from positivist theories which may obscure the central point. Austin thinks that positivism accounts for law's existence as a fact without the need for recourse to an evaluation of merit.[2] Austin accounted for law as an order backed by the threat of sanction, a command, from a political superior. [3] To Austin, 'superior' means the power to affect 'others with evil or pain, and of forcing them, through fear of that

(Clarendon Press 1979) 36; HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press 1994) 103.

[2] Austin (n 1) 20.

[3] ibid 18.

evil, to fashion their conduct to one's wishes'.[4] Accordingly, the command is 'said to be enforced by the chance of incurring the evil'.[5] This will be referred to as the 'command theory'. This cogency in the historical context is shown by Aethelberht's Code. Section 8 states 'If the King summons his people to him and a person does any harm to them there, 2 [-fold] restitution and 50 shillings to the king'.[6] The rest of the code is made up simply of rules structured in similar, or precisely this, fashion. Assuming the Code's enforceability, here we can see that there is an intelligent being, the King, who presumably has superiority as he has power to require restitution. A command against harm is backed by a threat of sanction. We might accept that this is all law requires if the primitive system means the subject will, more often than not, obey in light of the threat, if all rules within the King's system align with a similar pattern of command backed by a punishment, and if it is accepted that the King is the only person capable of making law.

However, more is required to account for a developed legal system. In modern systems, as Hart argues, there can be a different content and range of laws, and mode of origin.[7] Firstly, rules considered law go beyond commands backed by threats. For example, failing to follow the instructions of creating a trust correctly might mean the trust is not created, yet no 'evil' occurs, simply a nullity.[8] Secondly, laws include duties, and powers create legal obligations. The law enables us to enter into enforceable contractual relations, but it does not command entry.[9] How can the command theory account for this, when there is no command? Thirdly, all laws cannot be commands from the sovereign when custom can become law.[10] Furthermore, there may not just be one person or body who has all the attributes of a sovereign. Constant debate occurs in the UK, for example, such that some principles of judicial review can call into question whether there is a truly 'sovereign' parliament. A more encompassing theory is therefore required to account for the institutional aspect of law.

Nevertheless, Hart's alternative positivist framework of the institutional aspect of law can make up for the shortcomings of Austin's theory, without introducing considerations of merit. Hart argues law is the 'union of primary and secondary rules'.[11] Primary rules confer duties, sanctions, rights and possibly powers. Secondary rules include rules about how primary rules ought to be

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[4] ibid 30.

[5] ibid 22.

[6] Laws of Aethelberth, s 8, translated in Lisi Oliver, *The Beginnings of English Law* (University of Toronto Press 2002) 63.

[7] Hart (n 1) 26–49.

[8] ibid 33.

[9] ibid 35.

[10] ibid 44.

[11] ibid 79.

recognised, changed, and adjudicated. Fundamentally, Hart provides for a secondary rule of recognition. If the requirements of the rule of recognition are satisfied, then a rule becomes a valid law.[12] Hart states that, for the most part, the requirements of the rule of recognition are not stated, but its existence is shown in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers.[13] Therefore, law exists as a social fact in that it encompasses those rules recognised and applied by officials within that given system. In this regard, Hart distinguishes himself from Austin by arguing that a law is valid because the officials recognise that rule as valid, not merely because the sovereign created it. This theory accounts for the issues faced by Austin's theory in two central ways. It avoids the restriction of the type of rules to only those in the command theory, by accommodating any type of primary rule provided that it fulfils the requirements of the rule of recognition. It also solves Austin's difficulty with finding the sovereign by allowing for those who enforce, interpret and experience the law to be the source of identification of the rules under the given system. Beyond this, Hart's rule of recognition enables the account of institutional aspects of law to be transferred to different systems of law. Recognised law in modern England and Wales is, amongst other things, that which is applied by the courts or recognised by parliament. A recognised law in Aethelberht's kingdom would have been that which he enacted, and his courts applied. Both types of legal system have their institutional aspects clearly accounted for by Hart's positivist theory.

Even from those who may be considered positivists, Hart's theory has seen objection in that it doesn't fully account for the exercise of authority by ignoring whether exercise of authority over people in enforcing that law is justified.[14] If one thinks that a justification for authority is an element of the institutional aspect of law, then it may be accepted that legal positivism cannot fully account for the institutional aspect of law in this sense. However, if it were impossible to have law without the existence of a justification of the exercise of authority, all systems which exercise authority unjustly must be no legal system at all. This is irreconcilable with the fact, which will be discussed in the next chapter, that such systems can still be followed indistinguishably from so-called 'justified' systems. Agreement or disagreement with the justification of the authority of a legal system is a different matter to its existence. Justification in this sense is a moral question. Therefore, this objection does not detract from Hart's theory. There is no need to find a justification of authority to account for the institutional aspect of law when legal positivism accounts for law as a social fact. Legal positivism does give a cogent account of law's institutional aspect.

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[12] ibid 103.

[13] ibid 101.

[14] Raz (n 1) 2–27.

2. Legal Positivism and Morality

Legal positivism can also cogently account for the 'moral aspect of law'. It can do so because, I argue, there is no internal morality of law. Where so, a cogent account requires only delineating the difference between law and external ideas of morality. Legal positivism does this in its account of law as a social fact. Morality is, of course, a divisive issue requiring definition.[15] In this article, morality will be taken to concern evaluative ideas that, regardless of one's conviction of their inherent truth, assess the directions given by the law, or the way in which the law is construed, as to their level of 'goodness' or 'desirability'.

3. The Divergence of Law and Morality

Positivist accounts such as that of Hart's *The Concept of Law*, prior to his postscript, are able to account for the morality of law by outlining the differences between law and morality.[16] If law and morality are separate, or not necessarily connected, accounting for them simply requires showing this difference. This separation of law and morality can be first illustrated through law's compatibility with iniquity. Laws with immoral consequences are often recognised. This is true across time periods. In modern Saudi Arabia, 347 state-authorised executions have been carried out as of the time of writing.[17] An older example of this divergence between law and morality can be seen with the powers of the Oprichniki police force under Ivan IV of Russia. The officials had permission to kill and torture thousands of Russian inhabitants.[18] In both examples, the state rule maker is exercising its power as the dominant force to enact rules of great injustice and violence. Yet, where the officials of the legal systems have enforced such rulemaking as the law of the land, it is difficult to argue anything other than that these immoral decisions are law under each respective state's rule of recognition. This argument might be questioned, depending on understandings of morality. If one argues for subjective morality, it could be said that this argument fails because there may be a moral justification for such rules with respect to their time. For example, iniquitous exercise of law may be justified in accordance with moral views subjective to Saudi Arabia, and the Oprichniki to 1500s Russia. Yet, this doesn't appear to be the case when the above examples are exercises of power at the benefit of a small group at the expense of great suffering of others. Furthermore, if one believes in the existence of certain divine or natural rules providing an objective code of morality, it may be argued that these rules adhere to some natural code. Whilst there is not space to address the latter claim here, it would seem a

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[15] Hart (n 1) 171.

[16] ibid 174.

[17] Caroline Hawley, 'Rights Groups Condemn New Record Number of Executions in Saudi Arabia' *BBC News* (London, 21 December 2025) <https://www.bbc.co.uk/news/articles/cg5m49j14pyo> accessed 4 January 2026.

[18] Nancy Kollman, *Crime and Punishment in Early Modern Russia* (Cambridge University Press 2012) 311.

perverse natural code to any central moral good to provide law which permits the activities of the Oprichniki. It is clear that on broader questions of morality, law and morality are not necessarily connected, where law is compatible with iniquitous ends.

It might be contended in opposition that, in Hart's *The Concept of Law*, he mentions the 'minimum content of natural law' as survival,[19] so doesn't he mean that there must be at least some connection between law and morality? However, a closer examination of Hart's claim only furthers the strength of the lack of necessary connection between law and morality. Hart explains that we must distinguish between the rational connection between natural facts and the content of legal and moral rules, 'because it is both possible and important to inquire into different forms of connection between natural facts and legal or moral rules.'[20] By the minimum content of natural law as survival, Hart does not mean that it is necessary to have laws which are moral because they require a connection with survival. Rather, Hart is saying that there is likely a correlation between survival and the law because otherwise people would not wish to follow the laws. If humans have an innate desire for survival, then it would make sense that more often than not the law at least allows for survival, as otherwise it may be much more difficult to compel humans to comply with the law. However, this does not mean that law *must* be connected to survival, rather it shows a correlation through a rational reasoning process which is distinct from the question of the mechanism of law itself. Accordingly, it seems at the outset that there is not a necessary connection between law and morality. This is the first point in advancing the claim that positivism accounts for the morality of law by explaining that it has no intrinsic morality.

In response, Fuller claims that although law might diverge from some matters of morality, it cannot diverge from all.[21] Fuller claims law has an intrinsic morality. Setting out eight desiderata, including that law must be public and not be retroactive, Fuller states that a complete failure in adherence to any of these principles fails to achieve a legal system.[22] This is because, for Fuller, there is a 'morality of order' distinct from 'good order'.[23] Fuller claims that if the rulemaker does not follow the desiderata, for example by making laws that are not public such that subjects cannot use them to guide their conduct, it will be impossible for the rulemaker to achieve their ends. Thus, he claims, there is an internal morality of law.[24]

The first problem with Fuller's claim is that it is not clear such requirements

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[19] Hart (n 1) 193.

[20] ibid 171.

[21] Lon L Fuller, *The Morality of Law* (rev edn, Yale University Press 1977) 33–94.

[22] ibid 39.

[23] Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630, 644.

[24] ibid.

are necessary at all. Notably, Hart acknowledges that *if* social control is to be a goal of law, then law must necessarily be 'intelligible', in general 'not be retrospective', and capable of being obeyed for the most part.[25] Yet, what happens if the purpose of the law is not social control? If, in a hypothetical scenario, the purpose of law is for the wider public to live in a system of near anarchy, it would be possible to have three private laws. The first would provide for a legislative rule of recognition and the relevant bodies, the other two could be 'only the judiciary, legislature and other relevant administrative officials must adhere to the law', and 'there are to be no more laws passed'. Only the relevant officials must know of the law in order to adhere to the law, but the rule of recognition would still be satisfied provided that law was passed in accordance with it. The officials will be able to enforce the law against themselves without the public knowing of it. Fuller's requirements simply may not be necessary if there is no goal of social control. Therefore, law can still exist without a moral connection.

Furthermore, it is not clear Fuller's order is required to achieve social control. Let us assume, in a fictional kingdom, the legal system provides only for a system of legal officials who follow one rule of validity that, 'The King's command will be enforced as law'. Let us also assume the King possesses massive wealth, power, and extreme coercive force. If the law is known only to the King and those responsible for administering the system, it may still be possible to achieve their ends. In this situation, the King and all those responsible for administering the rule have knowledge of the rule and therefore are capable of enforcing it using their extensive power. It would seem that, regardless of whether the wider subjects of the kingdom know of the precise rule itself, they would experience the consequences of not adhering to the wishes of the King. It is highly likely that, in order to avoid such consequences, they will nevertheless do his bidding. However, to achieve this, there was no need to make public the law, and the King may make retroactive decisions if it is his command. The possibility of compliance is not even necessary if we wish simply to attempt to enforce the King's command. Fuller might respond that 'Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him'.[26] Yet, in the theory of legal positivism seen in our interpretation of Hart, such moral obligation is not required for law to exist. This is because there is no necessary connection between the two. Therefore, legal positivism is able to give a cogent account of the moral aspect of law by showing that law itself is a distinct concept from morality.

4. Counterpoints and Criticisms

The argument raised so far against law's necessary connection with morality has come under critique in different regards. In particular, Dworkin suggests that the argument is problematic because law is in fact necessarily connected to

[25] Hart (n 1) 206.

[26] Fuller (n 21) 39.

morality. Whilst Dworkin has a far more elaborate theory than it is possible to entirely set out here, the part I wish to take issue with is Dworkin's claim that 'Law... is effectively integrated with morality: lawyers and judges are working political philosophers of a democratic state'.[27] Dworkin thinks this is because the judges decide cases as part of an interlocking web of legal principles and decisions where each decision flows from the last. Accordingly, the judge must 'think of their decisions as part of a long story'.[28] To do so, Dworkin argues the judge may base some decisions, particularly in hard cases where there is no clear legal precedent to follow, on moral or political values. An example of this might be found in the law of England and Wales, in tort case law. Although to varying degrees, a web of cases takes 'policy considerations' as a factor in deciding whether or not to impose a duty of care in novel situations in which it has been contested that one has arisen.[29] Finding a duty of care is necessary to establish liability in a negligence claim in tort. If it is necessary to continue the web of case law using these moral principles, Dworkin argues, then law and morality are necessarily intertwined. Thus, there is further discussion to be had if we are to truly find that law and morality are separate.

Yet, this article still maintains the separation between law and morality and legal positivism's ability to account for this. The first point which is necessary to be made in making this argument is that there is a difference between moralising about a thing, using a thing in a moral or immoral way, and the thing being inherently immoral. Assume a man is walking through a desert, with a cup of water, and is completely hydrated. He comes across two people stranded. He might resort to moral reasoning to decide how best to distribute the water, or whether it is moral to distribute it at all. However, it is a different thing altogether to ask whether the item of the cup of water itself is inherently moral. Seemingly, it would not make sense to ask whether water possesses free-standing moral characteristics. It just exists. Dworkin's theory makes this mistake, however. In his claim that law is necessarily moral or in some way connected to morality because the judge must make this kind of moral decision in the hard case, Dworkin fails to consider that this is moralising about how the law should be used or how the law ought to achieve some end. It is not a question of the law itself. Similarly, Raz has made the point that Dworkin fails to distinguish between statements 'of law' and statements 'about the law'.[30] Dworkin makes this mistake by suggesting law is intertwined with morality simply because moral principles may become a necessary way to answer disputes. However, this only answers how we ought to use the law in that given case. It says nothing about the internal morality of law itself.

It might still be argued that, whilst the above critique breaks down any claim

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[27] Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 414.

[28] ibid 239.

[29] *Donoghue v Stevenson* [1932] AC 562; *Anns v Merton LBC* [1978] AC 728; *Caparo Industries plc v Dickman* [1990] 2 AC 605, 618; *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [29].

[30] Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 *Yale Law Journal* 823, 828.

to an intrinsic morality of law, it doesn't refute the claim that law is necessarily intertwined with morality. Yet, this may be done on a different ground. Dworkin's theory does not lend itself to attempts to migrate such a theory to a tyrannical or authoritarian system. Kramer has explained that, 'Dworkin swerves back and forth between speaking about *law* and speaking about *the law*; that is, he equivocates between speaking about a general type of institution and speaking about one instance of that general type'.[31] In a one-party state, assuming the party's power to legislate is valid under the rule of recognition, in a situation involving a 'hard case' such a party might exercise legislative powers simply to benefit themselves or their own interests. There may be no recourse to morality. Going further than this, even if it is conceded that in a democratic state with a common law system judges do sometimes exercise their discretion with intertwined moral reasoning, this may not even be possible in a system without the common law. Imagine a state with a streamlined system of rules confined to a singular code and advanced surveillance such that matters of evidence become inconsequential. That singular code has rules which simply afford yes or no answers. That code can be recognised under the rule of recognition as a matter of fact. If the answers are yes or no, then there is no need to require any reasoning at all. Yet, merely because this does not operate in the same way as a common law system, it does not mean this is not in fact the law where it is recognised as such. Therefore, there is no necessary connection between law and morality. Where so, legal positivism is able to account for the morality of law simply by showing that the existence of law is not dependent upon any moral factors.

Conclusion

This essay has shown that, whilst positivism in the Austinian sense might be too narrow to fully account for the institutional complexities of a modern legal system, Hart's more encompassing theory is able to do so through the rule of recognition. Such a theory allows for a range of different types of rules and more encompassing sources of law befitting the modern legal system, whilst not excluding the possibility of a myriad of different legal structures across time and space. Accordingly, it is correct to say that legal positivism can give a cogent account of the institutional aspect of law.

Beyond this, I have also shown that legal positivism can account for the 'morality of law'. Legal positivism does this when it highlights the lack of necessary intrinsic or internal morality of law, contrary to the arguments raised by Fuller and Dworkin. By highlighting such a divergence between law and morality, even where they often overlap, legal positivism accounts cogently for the 'morality of law' by showing precisely that considerations of morality are external considerations to understanding the social fact of law.

As a result of the arguments raised in this article, further questions about the

[31] Matthew Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (Oxford University Press 2003) 144.

utility of legal positivism may arise. If law is separate from morality, what is the use of legal positivism beyond a descriptive understanding of law? How should we utilise law to achieve the best ends? It is hoped that, by understanding law as a social fact without a necessary internal morality, greater focus can be had on answering these questions through debate about moral ideas that are external to the question of law itself.

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ARTICLE

The Single-Answer Fallacy: Why ChatGPT's Legal Reasoning Falls Short of Judicial Practice

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ABSTRACT. This article critiques ChatGPT's explanation of vicarious liability and its application to the fictional case of *Martin v Fleet*, showing how large language models (LLMs) tend to present a definitive response to legal questions in areas of the law that have scope for interpretation, policy influence, and contestation. It highlights the strengths in ChatGPT's summary but also where its weaknesses lie, particularly in its under-representation of uncertainty, fact sensitivity, and policy analysis. In contrast, the judiciary frequently disagrees – even more so in novel scenarios. This is primarily due to the 'open texture' of legal rules, the coexistence of competing judicial philosophies, and varied weights given to policy considerations. The result is that there is seldom a single answer to a legal problem. A fictitious case study (Fleet) is used throughout this analysis to demonstrate this tension in the context of platform work and vicarious liability.

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Introduction

Martin has been a regular user of Fleet, a UK-based platform that connects passengers with drivers for longer rides. When rail services to Basingstoke were disrupted, Martin, who is from Southampton, took a Fleet ride with Tony to his place of work. A conversation on politics soon turned sour, with sharp disagreements about the merits of immigration. Whilst Martin tried to end the

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conversation as soon as it became heated, Tony drove into a service station near Winchester and, when Martin refused to get out, pushed him from the car, breaking his arm. Martin now seeks to hold Fleet vicariously liable for Tony's wrongdoing. This fictional dispute provides a lens for examining how AI tools such as ChatGPT reason about legal problems, compared with how real judges decide cases.

When asked for a 400-word summary of vicarious liability and its application to this fictitious case, ChatGPT produced a generally accurate response, finding that Fleet would likely not be held vicariously liable. Yet ChatGPT's reasoning oversimplifies the realities of legal decision-making, where a variety of factors influence reasoning, and outcomes are often unclear, with judges adopting contrary stances on the appropriate result. This discussion examines this paradox by providing a critique of ChatGPT's legal reasoning, followed by an account of why judges reach distinct conclusions and why there is rarely one right answer, particularly in novel scenarios, using Fleet as an ongoing case study.

1. ChatGPT's Summary of Vicarious Liability and Its Application to Fleet[1]

Vicarious liability is a principle of strict liability under which one party, usually an employer, is held responsible for the torts of another where there exists a relationship sufficiently close and the tort is committed in the course of that relationship. Modern law has evolved through key judicial statements focusing on two essential elements: the nature of the relationship between the defendant and the tortfeasor, and the connection between that relationship and the wrongful act.

In *Various Claimants v Catholic Child Welfare Society*, Lord Phillips articulated the current two-stage test: first, whether the relationship between the defendant and wrongdoer is one capable of giving rise to vicarious liability, and second, whether the wrongful act is so closely connected with that relationship that it is 'fair, just and reasonable' to impose liability.[2]

First stage – the relationship test: In *Cox v Ministry of Justice*, Lord Reed explained that vicarious liability may arise where the relationship is 'akin to employment', meaning the tortfeasor carries out activities integral to the defendant's business and for its benefit, creating a risk of wrongful acts.[3] In contrast, in *Barclays Bank plc v Various Claimants*, Lady Hale reaffirmed that vicarious liability does not apply to 'true independent contractors' conducting business on their own account.[4] However, in *Uber BV v Aslam*, the Supreme Court held that Uber drivers were 'workers' due to the high degree of control exercised

[1] OpenAI ChatGPT response to prompt (December 2025).

[2] *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56.

[3] *Cox v Ministry of Justice* [2016] UKSC 10.

[4] *Barclays Bank plc v Various Claimants* [2020] UKSC 13.

by Uber, showing that platform-based work may satisfy the 'akin to employment' test.[5]

Second stage – the close connection test: In *Mohamud v WM Morrison Supermarkets plc*, Lord Toulson asked whether the employee's acts were within the 'field of activities' assigned to him and whether there was a sufficient connection to the wrongful act.[6] In *Bellman v Northampton Recruitment Ltd*, the Court of Appeal held that a violent assault after a work event was unconnected to the employee's role, emphasising that personal acts of violence motivated by private reasons fall outside the course of employment.[7]

Application to Fleet: Fleet's potential liability turns on these two stages. If Fleet exerts control over Tony—setting fares, allocating rides, and enforcing conduct standards—the relationship could be 'akin to employment' under *Cox* and *Uber*. However, Tony's assault on Martin arose from a personal disagreement about politics, entirely outside the 'field of activities' Fleet entrusted to him—driving passengers safely. Following *Bellman*, this act was a personal 'frolic' unrelated to Fleet's business.[8] Although Fleet's relationship with Tony is capable of satisfying the first limb, the second limb fails. The wrongful act was not sufficiently connected to his duties, and it would not be 'fair, just and reasonable' to impose vicarious liability on Fleet.

2. Strengths in ChatGPT's Response

ChatGPT's answer effectively responds to the prompt and employs a methodical and logical structure, which makes it easy to read. It explains vicarious liability clearly, identifies its main applicability to employment relationships, and refers to various relevant cases, including the precedent of *Uber BV v Aslam*.[9] The judgment in *Uber* is a particularly salient example: the Supreme Court upheld the employment tribunal's finding that Uber drivers were 'workers' rather than self-employed contractors, and were therefore entitled to rights available to workers, including the national minimum wage.[10] ChatGPT's response accurately recalls this, noting the high degree of control the company had over its drivers, which was highlighted by Lord Leggatt, who gave the unanimous judgment.[11] Alongside this,

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[5] *Uber BV v Aslam* [2021] UKSC 5.

[6] *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11.

[7] *Bellman v Northampton Recruitment Ltd* [2018] EWCA Civ 2214. [ChatGPT generated] [Inaccurate].

[8] ibid [ChatGPT generated] [Misleading].

[9] *Uber BV v Aslam* (n 5).

[10] ibid.

[11] ibid [98]–[99].

ChatGPT's answer deploys judicial language, such as 'akin to employment'.[12] While the application of the law to the facts of the Fleet scenario could have been better integrated throughout the discussion, the response is still assertive and persuasive.

ChatGPT's response also correctly refers to *Various Claimants v Catholic Child Welfare Society* and Lord Phillips' two-stage test.[13] While its two dimensions could have been presented more explicitly, the test for vicarious liability is explored. This includes exploration of the second limb, which asks if there was a 'close connection' between that task (or relationship) and the tort committed, such that it would be 'fair and just' to impose vicarious liability.[14]

ChatGPT's answer proceeds to accurately cite Lord Toulson's judgment in *Mohamud* v *WM Morrison Supermarkets plc*, where he expressed the court's need to look at the functions or 'field of activities' entrusted to an employee.[15] This approach was clarified in *WM Morrison Supermarkets plc v Various Claimants*, although the court returned to a more confined formulation.[16] Reference is also made to *Bellman v Northampton Recruitment Ltd,* a relevant authority illustrating the fact-sensitive nature of the close connection test.[17] In addition, the discussion notes the legal implications of being an independent contractor, with reference to *Barclays Bank plc v Various Claimants.*[18]

3. Weaknesses in ChatGPT's Response

Conversely, ChatGPT's explanation lacks depth and nuance in some areas. Most significantly, the close connection element of vicarious liability is not explored in detail, especially its development. This oversight could be explained by the 400-word limit; however, it is still notable given that the law has undergone 'significant change and expansion' since *Lister v Hesley Hall Ltd*.[19] Before the emergence of the close connection test, the courts applied 'the Salmond test' instead, which considered whether the tort was committed 'in the course of employment' (or 'within the scope of employment').[20] While representing old law, the Salmond test was not referred to in ChatGPT's summary of vicarious liability.

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[12] *Various Claimants v Catholic Child Welfare Society* (n 2).

[13] ibid [34]–[35], [62].

[14] ibid [62].

[15] *Mohamud v WM Morrison Supermarkets plc* (n 6) [44]–[45].

[16] *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12; Kirsty Horsey and Erika Rackley, *Tort Law* (9th edn, OUP 2025) 627.

[17] *Bellman v Northampton Recruitment Ltd* [2018] EWCA Civ 2214.

[18] *Barclays Bank plc v Various Claimants* (n 4).

[19] Jenny Steele, *Tort Law* (5th edn, OUP 2022) 641; *Lister v Hesley Hall Ltd* [2002] 1 AC 215 (HL).

[20] Steele (n 19) 263; Sir John Salmond, *The Law of Torts* (Stevens & Haynes 1907) 83.

Further oversights arise in the response. For example, it focuses immediately on whether Tony is in a relationship 'akin to employment', overlooking the possibility that Tony is an employee. Reference here could have been made to section 230, paragraph 1 of the Employment Rights Act 1996, which identifies an employee, and section 230, paragraph 2, which articulates 'a contract of employment'. Moreover, attention is not given to whether Tony engaged in conduct classified, in law, as a tort. A tort must be committed by the employee for there to be vicarious liability.[21] The answer does not assess whether Tony committed a tort when he pushed Martin, nor classify what tort he committed, for example, battery. It could be noted that an employer can also be vicariously liable for an 'employee's intentional acts, including battery' as established in *Mattis* v *Pollock (t/a Flamingos Nightclub*).[22] Notably, ChatGPT misstates *Bellman v Northampton Recruitment Ltd* by suggesting that the Court of Appeal treated the assault as unconnected to the employee's role.[23] In fact, the Court of Appeal held the employer vicariously liable, finding a sufficiently close connection between the managing director's position of authority and the assault.[24] This weakens ChatGPT's subsequent conclusion that Tony's conduct could be interpreted as a personal 'frolic' outside of Fleet's business. More broadly, ChatGPT's presentation of *Bellman* illustrates the potential for generative AI tools to confuse judgments at different levels of the court hierarchy, as ChatGPT appears to rely on the first-instance decision of *Bellman* rather than the subsequent Court of Appeal judgment.[25]

Finally, the LLM's answer may be too categorical and clear-cut. Although the two-stage test is 'easy to state', applying it has been 'far harder'.[26] There could be room for judicial discretion, for example, where the court believes Fleet failed to carry out appropriate staff vetting. This could lead to liability if Fleet breached a duty of care.[27] There is also ambiguity in the case law; for example, while Uber drivers have been held to be workers, it is unclear how far this classification extends to other platform workers for the purposes of vicarious liability.[28] This tendency of AI to reach a singular, confident conclusion reflects a significant limitation in using AI in law, which Legg and Bell note in light of fuzzy or indeterminate rules, 'hard cases', and the role of values and policy in legal decision-making.[29] This helps

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[21] Horsey and Rackley (n 16) 609.

[22] ibid ch 20; *Mattis v Pollock (t/a Flamingos Nightclub)* [2003] EWCA Civ 887.

[23] *Bellman v Northampton Recruitment Ltd* (n 17).

[24] ibid [25], [32], [35] (Lady Justice Asplin).

[25] ibid; *Bellman v Northampton Recruitment Limited* [2016] EWHC 3104 (QB).

[26] Horsey and Rackley (n 16) 631.

[27] See Tony Weir, *An Introduction to Tort Law* (2nd edn, OUP 2006) ch 6.

[28] *Uber BV v Aslam* (n 5).

[29] Michael Legg and Felicity Bell, *Artificial Intelligence and the Legal Profession* (Hart Publishing

elucidate why ChatGPT's analysis underplays legal uncertainty.

In summary, ChatGPT's answer is well-structured, applies relevant precedents, and reaches a logical determination. However, it would benefit from greater critical engagement and depth. In particular, more discussion and analysis of the close connection test and its historical context would be welcomed, as well as a more accurate representation of *Bellman*.[30] The inclusion of policy considerations, including justifications for extending or limiting vicarious liability, may have also enhanced the analysis. Nonetheless, in light of the restrictive four-hundred-word limit, the response is strong, persuasive and effectively addresses the question.

4. Why Judges Disagree - Especially in Novel Scenarios - and Why There Is Rarely a Single Right Answer

Judges frequently disagree on how a case should be decided. This is in contrast to the tendency of ChatGPT to give a determinative resolution to a legal problem question. Legal reasoning is based upon a 'syllogistic framework', wherein a legal issue engages a rule, which is then applied to the facts, and a conclusion is reached.[31] However, this process is not confined to the 'mechanical application' of rules.[32] Hard cases arise where the outcome is unclear due to the imperfect nature of rules, coupled with their 'open texture'.[33] While this openness allows the law to be flexible and capable of delivering justice in a variety of cases, it can generate legal uncertainty. Owing to the indeterminacy of rules, judges may move beyond mechanical rule application, which creates space for deeper interpretive judgments. It is within this setting that reasonable minds may differ, creating judicial divergence.

The interplay of theoretical perspectives on judicial reasoning underscores this.[34] Judges may subscribe to legal formalism, placing greater value on external rules. Others might be legal realists, taking a more pragmatic stance, placing greater emphasis on non-legal factors in judicial reasoning.[35] In addition, judges may take different approaches to interpreting legislation, such as a textual or purposive approach. These divergent approaches can precipitate judicial disagreement.

2020) 76.

[30] *Bellman v Northampton Recruitment Ltd* (n 17).

[31] Emily Finch and Stefan Fafinski, *Legal Skills* (10th edn, OUP 2025) 273.

[32] ibid 274.

[33] James Holland and Julian Webb, *Learning Legal Rules: A Students' Guide to Legal Method and Reasoning* (11th edn, OUP 2022) 367–368; HLA Hart, *The Concept of Law* (3rd edn, Clarendon Press 2012) 124ff.

[34] Finch and Fafinski (n 31) ch 12.

[35] Finch and Fafinski (n 31) 279.

Questions of morality and ethics intensify this plurality, particularly in sensitive cases such as *Re A (Children)(Conjoined Twins)*.[36] *Re A (Children)* raised the difficult question of whether the court could lawfully authorise the separation of conjoined twins, without the parents' consent, where separation was necessary for the survival of the stronger twin but would inevitably result in the death of the weaker twin.[37] *R* (*Nicklinson)* was another morally complex case, concerning whether the law relating to assisted suicide infringed the European Convention on Human Rights and whether the code published by the Director of Public Prosecutions on the prosecution of those alleged to have assisted suicide was lawful.[38] Advocates of natural law, who consider law and morality inherently connected, are likely to adopt different reasoning in these cases than legal positivists.[39] Similarly, in novel and hard cases such as these, policy judgments may also carry greater force, with more weight given to social justice, fairness, or practicality considerations. Judges unavoidably balance such principles and policy considerations differently, adding greater subjectivity to judicial analysis.[40] The Fleet scenario shows this dynamic. The phrase 'scope of employment' allows for multifaceted interpretations. Where there is ambiguity, a judge's decision could be shaped by policy; holding Fleet liable could promote enhanced supervision of drivers, delivering better protection for passengers.

Crucially, the adversarial nature of the legal system in England and Wales reinforces the diversity in judicial analysis. As the law is grounded in argument, there cannot be only one 'right' answer.[41] In *Donoghue v Stevenson*, the House of Lords ruled in Mrs Donoghue's favour by a 3-2 majority.[42] Lord Atkin's 'neighbour principle' contrasted with the dissenting judges' narrower judgments.[43] While the majority view prevailed, the minority's reasoning was not inherently 'wrong'. *R (Miller) v Secretary of State for Exiting the European Union* continued this pattern (8-3), despite the judges applying the same principles of constitutional law.[44] Similarly, in *YL v Birmingham City Council and Others*, the majority held that a care home was not a public authority due to its contractual relationship with the

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[36] *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961.

[37] ibid.

[38] *R (on the application of Nicklinson and another) v Ministry of Justice* [2014] UKSC 38 [1] (Lord Neuberger PSC).

[39] Finch and Fafinski (n 31) 276–277.

[40] Holland and Webb (n 33) ch 11.

[41] Finch and Fafinski (n 31) 282.

[42] *Donoghue v Stevenson* [1932] AC 562.

[43] ibid [44].

[44] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

Council.[45] However, Baroness Hale and Lord Bingham disagreed, contending that a narrow application of the function test risks undermining the purpose of the Human Rights Act (HRA 1998), which is to protect vulnerable individuals.[46] Together, these cases show how the law is rarely clear-cut and can give way to different interpretations.

Values also influence judicial reasoning, as demonstrated by *Gregg v Scott*.[47] In this case, the House of Lords was divided, with judges prioritising issues in distinct ways as shaped by their interpretation, values, and view of the judicial role.[48] Differences in values, such as flexibility versus legal certainty, can lead judges to contrasting results. Conversely, AI tends to propose a singular solution to a problem and cannot be as creative or pioneering as judges can.

The fictitious case of the Speluncean explorers aptly demonstrates the adaptability of legal reasoning.[49] Here, the five judges, each a 'distinct personality,' arrive at distinct conclusions.[50] This shows the effect of opposing legal philosophies and the inevitable prioritisation of conflicting principles and values. Simultaneously, it reveals the flexibility of legal interpretation, in which a variety of arguments coexist.

Conclusion

ChatGPT's output offers a useful entry point for analysis, but it fails to adequately reflect the interpretive terrain within which judges decide cases. This contrast derives from what LLMs are programmed to do – to predict the most likely single answer – whereas judicial reasoning allows for multiple, reasonable outcomes to be drawn from the same facts. While accurate and well-structured, the LLM's output overlooks the uncertainty, fact-sensitivity, and interpretive scope in deciding legal disputes.

Disagreement among the judiciary is inevitable. Because legal rules are open-textured and unable to anticipate every scenario, they may offer limited guidance in novel cases. Divergence also arises from the interpretive nature of law, where judges' values and competing jurisprudential philosophies can culminate in heterogeneous conclusions. The adversarial nature of the legal system in England and Wales reinforces this plurality, as evidenced by divided judgments. Unlike AI's propensity to present one assured, single answer, judicial decision-making is

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[45] *YL v Birmingham City Council and Others* [2007] UKHL 27.

[46] ibid [1] – [2], [4] – [5] (Lord Bingham).

[47] *Gregg v Scott* [2005] UKHL 2.

[48] ibid; Finch and Fafinski (n 31) ch 12.

[49] Lon Fuller, 'The Case of the Speluncean Explorers' (1949) 62 *Harvard Law Review* 616.

[50] Raymond Wacks, *Understanding Jurisprudence* (6th edn, OUP 2020) 8.

characterised by various possible interpretations: there is seldom a definitive position in hard cases.

The practical implication of this discussion is that AI can only offer a starting point for legal analysis. In legal disputes, multiple outcomes are often arguable, even if one ultimately proves most persuasive, and it is in navigating this plurality that judicial decision-making diverges from AI.

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ARTICLE

War Without Presence: Gamification and Its Interaction with International Humanitarian Law

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ABSTRACT. This article examines and analyses the statement that regulating warfare on the ground is impossible and that suffering in armed conflict is inevitable, addressing the quietly growing legal issues around the introduction of gamified military systems, in particular Ukraine's 'Army of Drones' initiative. It argues that a lack of structure and International Humanitarian Law (IHL) consideration creates a serious risk of violating distinction and proportionality principles that are central to IHL's core function. The article finishes by discussing how recent reforms in Ukraine's legal framework can work to minimise the inevitable brutality and suffering as expressed by the statement and mitigate the challenges that will be faced by drone operators in an already fast-paced and psychologically challenging environment.

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Introduction

International Humanitarian Law (IHL) regulates the conduct of war through principles that aim to reduce unnecessary suffering (*Jus in bello*) without prohibiting war itself (*Jus ad bellum*) by balancing humanitarian concerns against military necessity. Since the late nineteenth century, with the Hague Conventions

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and further with the Geneva Conventions in 1949, states have committed to rules protecting non-combatants like prisoners of war, civilians and medical personnel. Many of these rules in use today have stemmed from the Nuremberg trials, post-WWII, which brought key Nazi figures to justice and is regularly referred to as the 'foundation' of International Criminal Justice as a primary enforcement mechanism of IHL.[1] Doubts about the effectiveness of these rules have accompanied IHL, as the ICRC observes, 'since the ink on the 1864 Geneva Convention was barely dry'[2] this paper contends that the gamification of drone warfare represents a modern extension of those concerns. This statement echoes the concerns of influential academic Dinstein, stating that 'it is not enough to enact and reiterate the law: to be meaningful, norms must be adhered to in reality'.[3] The statement goes further still, implying that no legal or practical framework can truly restrain the inherent brutality of war.

This essay examines this claim using the case study of Ukraine's 'Army of Drones' initiative, featuring 'e-points', digital scoreboards, reward systems and FPV (First Person View) strike footage, illustrating how modern armed conflict is increasingly resembling video games. Such systems risk what I refer to as the Psychic-Distancing effect,[4] creating an emotional detachment from the act of killing through dehumanisation. This paper argues that gamification strains the two foundational principles of IHL: distinction and proportionality, whilst also examining the various mechanisms that Ukraine has already, and continues to, put in place to ensure compliance with IHL.

Whilst this paper acknowledges that modern technology has magnified existing weaknesses in IHL enforcement, particularly regarding real-time accountability and the subjective nature of proportionality, the argument that regulation is 'impossible' is too broad, failing to reflect other enforcement mechanisms. Ukraine's adoption of the 'I Want to Live' surrender programme and the creation of the Military Ombudsman demonstrate that even under conditions of existential conflict, states continue to internalise IHL norms. Regulation must adapt as technology evolves, but this adaptation is not failure. This paper begins by examining the conceptual framework of IHL, focusing on its objectives and core

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[1] 'Legacy of the Nuremberg and Tokyo Tribunals in International Criminal Justice' (The Law Institute, 21 February 2024) <https://thelaw.institute/understanding-ihl/legacy-nuremberg-tokyo-tribunals-international-justice/> accessed 2 December 2025, individual criminal responsibility.

[2] Ellen Policinski, 'War's long legacy: the continued importance of the Geneva Conventions 75 years later' (International Committee of the Red Cross, 8 August 2024) <https://blogs.icrc.org/law-and-policy/2024/08/08/wars-long-legacy-the-continued-importance-of-the-geneva-conventions-75-years-later/> accessed 4 December 2025.

[3] Yoram Dinstein, *The conduct of hostilities under the law of international armed conflict* (Cambridge University Press 2010) 295.

[4] Peter Biles, 'War and Peace, and Advent' (*Dappled Things,* 2022) <https://www.dappledthings.org/deep-down-things/war-and-peace-and-advent> accessed 10th December 2025.

principles on which it is based. It then explores the concept of gamification and its role in dehumanising adversaries, highlighting the serious challenges it poses to the application of IHL principles and finally assessing how Ukraine has sought to balance emerging drone incentive systems with its IHL obligations, including the structural and financial limitations that effort reveals.

1. Conceptual Framework

To critically analyse this statement, it is important to first clarify what IHL aims to do, and more importantly, what it does not aim to do. IHL is not a pacifist project; the Conventions were drafted in the knowledge that war is a persistent human practice, and rather, it was drafted to prohibit 'unnecessary suffering caused to combatants'[5] and to avoid harming non-combatants where realistic. As the ICRC, intertwined with IHL and credited as a 'sponsor' in the Conventions,[6] consistently emphasises, the law aims to 'limit the barbarity of war',[7] not eliminate it. To achieve this aim, IHL relies on two 'cardinal'[8] principles that make up the foundations of the Conventions: Distinction and Proportionality.

One of the main aims of the Conventions is to separate civilians, medical personnel and other non-combatants from legitimate military targets. To do this, IHL relies upon the 'distinction' principle[9] contained within the Conventions. This requires parties to distinguish between civilians and combatants, limiting attacks to military objectives and prohibiting direct or indiscriminate attacks on civilian or civilian objects. The ICJ has recognised the principle as 'intransgressible',[10] with Mexico noting that this principle 'cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis'.[11]

Proportionality, on the other hand, permits a certain level of civilian collateral harm only where it is not 'clearly excessive in relation to the concrete and

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[5] Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, para 78.

[6] International Committee of the Red Cross, *The Geneva Conventions of 12 August 1949*, Preliminary Remarks.

[7] International Committee of the Red Cross (ICRC), 'The Geneva Conventions and their Commentaries' (ICRC) <https://www.icrc.org/en/law-and-policy/geneva-conventions-and-their-commentaries> accessed 7 December 2025, introduction.

[8] Advisory Opinion (n 5) 78.

[9] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, art 48.

[10] Advisory Opinion (n 5) 78.

[11] Mexico, 'Statement at the Diplomatic Conference leading to the adoption of the Additional Protocols' (ICRC Customary IHL Database) <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule1#Fn_3E28356C_00005> accessed 11 December 2025.

direct overall military advantage anticipated'.[12] This standard is intentionally flexible, balancing 'military necessity and incidental harm',[13] with ICRC commentary emphasising that 'unrealistic rules do not protect anyone and undermine the credibility of other, realistic rules of IHL'.[14] IHL avoids over-regulation because it depends on state consent and military feasibility. If IHL encroaches into *jus ad bellum* by prohibiting military action simply because it may cause any collateral damage, it risks a chilling effect on its own authority and may undermine the legitimacy of existing customary law.

2. Dehumanisation: Psychic Distancing and Gamification

The effectiveness of these foundational principles depends not only on their legal formulation, but the conditions in which combatants apply them. Dehumanisation represents the overarching threat that modern warfare tactics pose to IHL compliance. Where combatants cease to perceive adversaries as human, the moral and legal reasoning that distinction and proportionality demand becomes structurally compromised. Two distinct mechanisms drive this outcome in drone warfare: psychic distancing, which is the baseline condition created by the technology itself and gamification, which compounds and accelerates that condition by replacing traditional moral reasoning with competitive reward logic.

These modern warfare tactics, specifically as seen in war zones like Afghanistan with large scale deployment of drones, reduces the need for combatants to share the same geo-physical space to wage war, creating a 'psychic distancing' effect. Drone operators, often hundreds if not thousands of miles away, describe targets as 'black blobs'[15] comparing killing to 'stepping on ants'.[16] Research has shown that as 'drones anonymise the enemy, leading to a partial dehumanisation whereby the humanity of a person is masked, blurred, or faded… leads to a reduced resistance to killing and a greater willingness to engage'.[17] This anonymisation and blurring of military targets through intentional dehumanisation and gamification most directly strikes at the principle of distinction and where the operator perceives

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[12] International Committee of Red Cross, 'ICC Statute, Article 8(2)(b)(iv)' (ICRC Customary IHL Database) <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule14#Fn_BA32BB92_00007> accessed 11 December 2025.

[13] Won Jang, 'For whom the bell of proportionality tolls: Three Proposals for Strengthening Proportionality Compliance' (2021) International Review of the Red Cross No 914, 629.

[14] 'Non-international Armed Conflict' (International Committee of the Red Cross) <https://casebook.icrc.org/law/non-international-armed-conflict> accessed 8 December 2025.

[15] Ed Pilkington, 'Life as a drone pilot: Ever step on ants and never give it a second thought?' (The Guardian, 18 November 2015) <https://www.theguardian.com/world/2015/nov/18/life-as-a-drone-pilot-creech-air-force-base-nevada> accessed 6 December 2025.

[16] ibid.

[17] Sharief Salah Rajab, 'The Dehumanisation of Drone Warfare: Scrutinising the Legal Response to the Proliferation of UAVs in Contemporary Armed Conflict' (The University of Leeds, 2020) <https://etheses.whiterose.ac.uk/id/eprint/27400/> accessed 1 December 2025, abstract.

targets as anonymous, featureless objects, the capacity to verify combatant status before engagement is compromised at the most basic perceptual level.

Whilst drone warfare evidently has the effect of distancing soldiers from their actions, combined with game-like scoring systems dubbed 'gamification', often compared to 'a killstreak in Call of Duty',[18] there also comes a serious risk of substituting moral/legal reasoning with competitive motivation, potentially distorting points incentives with the military advantage analysis in proportionality. The competition created by gamification compresses the time between identification and strike, undermining the proportionality and distinction analysis required by the conventions, reward incentives often prioritise destructive outcomes,[19] not necessarily lawful ones, and point-based systems are dehumanising the adversary, eroding the humane principles that IHL depends upon. The question is not whether IHL applies but whether soldiers on the ground under gamified conditions can reliably perform the legal reasoning required by IHL.

Ukraine's drone programme represents the most extensive rollout of small, relatively inexpensive FPV drones in any conflict to date.[20] The Army of Drones initiative, part of Ukraine's Ministry of Digital Transformation, provides units with strike drones, weapons, and other equipment, rewarding confirmed kills and destruction with 'e-points'. These points allow units to obtain more drones and equipment through the Brave1 procurement platform, dubbed by the designers as Ukraine's 'Amazon for war'.[21] Monthly leaderboards publicly rank units by score, creating a visible competition in lethality, encouraging other units to increase their scores. This initiative creates a clear link between online video games and real-world combat.

The attempt to link video games and warfare is clear beyond just Ukraine. Both the UK and US have used various tactics like advertising to gamers, more specifically, through Esports,[22] finding that 'The sort of skills that drone pilots have

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[18] Paul Adams, 'Kill Russian soldiers, win points: Is Ukraine's new drone scheme gamifying war?' (*BBC,* 18 July 2025) <https://www.bbc.co.uk/news/articles/c80p9k1r1dlo> accessed 28 November 2025.

[19] 'Ukraine's drone war gets gamified: Why 'Bonus points for kills' is more than a morale booster' (Ukraine Today, 8 June 2025) <https://ukrainetoday.org/ukraines-drone-war-gets-gamified-why-bonus-points-for-kills-is-more-than-a-morale-booster/> accessed 11 December 2025: 'We're rewarding the elimination of cannon fodder, not the enemy's most lethal capabilities'.

[20] Aakash Palathra, 'Drones and the Gamification of War' (*The Journal of Foreign Affairs at Carolina*, September 2023) <https://jfacunc.org/blog/drones-and-the-gamification-of-war> accessed 25 November 2025.

[21] 'Brave1 Market – Ukraine's New Online Marketplace for Drones, Kit & Equipment' (Armourer's Bench, 12 May 2025) <https://armourersbench.com/2025/05/12/brave1-market-ukraines-new-online-marketplace-for-drones-kit-equipment/> accessed 1 December 2025.

[22] Adam Stone, 'Game On: The Army Leverages Esports to Boost Recruitment' (FedTech, 17 March 2020) <https://fedtechmagazine.com/article/2020/03/game-army-leverages-esports-boost-recruitment> accessed 5 December 2025.

are many of the same skills as some of our best console warriors'[23] and that those 'who play Call of Duty in their bedrooms could be the ideal new recruit for drone warfare'.[24] Whilst the reasoning is often the cyber-skills that come with such video games it creates a dangerous obfuscation between real people and video game characters. This link erodes the protective ethos on which IHL depends; if people are not thinking of adversaries as human, they may not think about the cardinal principles so important when dealing with human lives.

Creating competition-based motivation and adding the extra pressure of e-points into an already stressful environment, soldiers risk compressing their decision-making time below an already time-constrained IHL analysis window. With the time between sight and strike getting shorter as drones get faster, it is surely impossible to say that the soldier has considered distinction and proportionality before taking human lives. Proper IHL analysis requires a cool-headed harm assessment, remembering that where doubt exists as regards to distinction, it should not be targeted. Gamification challenges these, disincentivising caution and rewarding rapid engagement. Al Jazeera has also covered this, stating 'how it can encourage risky behaviour from soldiers to gain more points or soldiers might prioritise points over mission objectives'.[25] This prioritisation is a clear shift away from the proportionality of legitimate military objectives that might be expected on a modern battlefield in line with IHL principles.

A primary justification given for gamification is that 'this helps us stop the enemy',[26] whilst that may be true, it is important to look at some of the statistics of the Ukraine-Russia war to see how the civilian populace have been affected so far. The UN Human Rights Monitoring Mission in Ukraine (HRMMU) reported, from 2022-2025, that FPV drones have caused significant civilian casualties, more than any other weapon.[27] One of the key arguments put forward by the US, to tactically shift towards increased drone usage through its 'over-the-horizon' strategy, is that they offer a clearer picture and allow a more informed decision, therefore assisting the distinction and proportionality analysis.[28] In fact, a study by the Center for

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[23] Imogen Rogers, 'If you're a gamer – your country needs you, says Healey as he seeks more cyber recruits' (Forces News, 23 September 2024) <https://www.forcesnews.com/politics/if-youre-gamer-your-country-needs-you-says-healey-he-aims-boost-cyber> accessed 1 December 2025.

[24] ibid.

[25] Al Jazeera 'How Ukraine gamifies war | Digital Dilemma' (*YouTube*, 26 November 2025) <https://www.youtube.com/shorts/yG-aQkgXzk4> accessed 11 December 2025.

[26] Kim Barker and Oleksandra Mykolyshyn, 'Ukraine Gamifies the War: 40 Points to Destroy a Tank, 12 to Kill a Soldier' (*NYT*, 31 October 2025) <https://www.nytimes.com/2025/10/31/world/europe/ukraine-war-drone-game.html> accessed 3 December 2025.

[27] 'Protection of Civilians in Armed Conflict – August 2025' (United Nations Human Rights, August 2025) <https://ukraine.ohchr.org/en/Protection-of-Civilians-in-Armed-Conflict-August-2025> accessed 10 December 2025.

[28] Erol Yayboke and Christopher Reid, 'Counterterrorism from the Sky?' (*Center For Strategic and*

Naval Analyses found that drones were 'ten times more deadly to civilians than crewed aircraft during one year in Afghanistan',[29] a figure absent of any gamification incentive system. This baseline is significant not because it indicts drone warfare alone but because it established the floor from which gamification operates. If operators already misidentify and fail to verify targets under normal drone conditions, as this figure suggests, then layering competitive point-scoring incentives further accelerates the risk of rapid engagement without proper identification.

During this argument, it is important to recognise Ukraine's context, fighting a defensive war against a larger aggressor while suffering severe resource constraints. This partially explains the adoption of cheap FPV drones and gamification as force multipliers, allowing resources to be allocated where points are being scored the most. But IHL applies irrespective of strategic disadvantage. When asked whether Mr Federov (Minister of Digital Transformation) thought gamification might be dehumanising, he stated that 'What is inhumane is starting a full-scale war in the 21st century',[30] not denying the dehumanising effect but excusing it.

3. Structural Limitations of IHL

The proportionality principle is recognised as having a 'high degree of generality'.[31] Its broad scope, combined with balancing the anticipated military advantage against expected civilian harm, without any clear indication of what constitutes 'excessive', creates a significant risk that the threshold may be impossible to ascertain in practice, particularly given its dependence on the judgment of the individual and their circumstances. As spoken about previously, this poses a significant risk of operators blurring military advantage with points incentives. Allowing an operator to act 'in good faith and not in accordance with subjectivity',[32] with proportionality 'left solely to the unfettered discretion of the combatants',[33] is a particularly low bar, especially when handling civilian lives.

International Studies, May 2022) <https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/220523_Yayboke_OvertheHorizon_Drones.pdf?VersionId=gXYdg.pqJTNolPIH.IyaGKXijny2lppH> accessed 12 December 2025.

[29] 'Drone Strikes: Civilian Casualty Considerations' (Joint and Coalition Operational Analysis, 18 June 2013) <https://info.publicintelligence.net/JCOA-DroneStrikesSummary.pdf> accessed 15 December 2025.

[30] Barker and Mykolyshyn (n 26).

[31] Anaïs Maroonian, 'Proportionality in International Humanitarian Law: A Principle and a Rule' (Lieber Institute West Point, 24 October 2022) <https://lieber.westpoint.edu/proportionality-international-humanitarian-law-principle-rule/> accessed 11 December 2025.

[32] LC Green 'Aerial Considerations in the Law of Armed Conflict' (1980) 5 *Annals of Air and Space Law* 89, 104. But these two factors are not mutually exclusive. The attacker must act in good faith, yet subjectivity inevitability colours judgement.

[33] T M Franck, 'On Proportionality of Countermeasures in International Law' (2008) 102 *AJIL* 715,

Another key criticism is that, despite its attempt to provide relief in times of war, the Convention lacks real-time enforcement, only acting retroactively rather than proactively to prevent violations. Salebaigi-Tse goes in depth about IHL's continuing financial constraints, political pressures, geographical limitations and cultural factors,[34] impeding the IHL's mandate and creating massive delays. This real-time enforcement also becomes clear in relation to the Ukrainian war, despite an arrest warrant out for Putin[35] and over 179,802 war crimes registered by the Prosecutor General of Ukraine,[36] there seems to be no end in sight for these crimes. Carpenter likewise argues that because of IHL's real-time enforceability, it is 'typically disregarded in favour of military objectives'.[37] This is evident in gamification, which is designed not to promote compliance but to maximise lethal efficiency and the destruction of targets.

Throughout history, technology has played a pivotal role in shaping warfare. From lasers to atomic bombs, today's conflicts are defined by technology that was unimaginable just a few decades ago. Dinstein observes that 'there are increasing concerns that numerous normative provisions of [IHL] can barely cope with the continuous revolution in high technology'.[38] Whilst technology has exposed IHL's reliance on human judgement and compliance, it does not make IHL obsolete. Whilst the IHL principles of today appear ineffective, with 'the yawning gap between agreed rules and the reality on the ground'[39] noted by the ICRC, it does not make regulation impossible. Today's IHL landscape is scattered with 'awful but lawful' tactics that undermine the humanitarian principles that the Conventions were built upon. Regulation is not an issue of impossibility but rather whether there is enough political capital to make it happen.

The increase usage of drones could, in fact, prove to be a good thing for distinction. Whilst it was pointed out in a previous section that civilian deaths are

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[34] Sabba Salebaigi-Tse, 'Justice Delayed: Unpacking Inefficiency in the International Criminal Court' (2024) 5(2) *Journal of International Criminal Law* 67.

[35] Kevin H Platt, 'Putin, Who Can Now Be Arrested In 125 Nations, Curtails Global Travel' (*Forbes,* 5 July 2025) <https://www.forbes.com/sites/kevinholdenplatt/2025/07/05/putin-who-can-now-be-arrested-in-125-nations-curtails-global-travel/> accessed 12 December 2025.

[36] Dr Ewelina U Ochab, 'War Crimes Trials in Ukraine and The Pursuit Of Justice As The War Continues' (*Forbes*, 28 September 2025) <https://www.forbes.com/sites/ewelinaochab/2025/09/28/war-crimes-trials-in-ukraine-and-the-pursuit-of-justice-as-the-war-continues/> accessed 18 November 2025.

[37] Nicolette Carpenter, 'The Unenforceable Nature of International Humanitarian Law' (Harvard Undergraduate Law Review, Fall 2024) <https://hulr.org/fall-2024/the-unenforceable-nature-of-international-humanitarian-law> accessed 11 December 2025.

[38] Dinstein (n 3) 296.

[39] Cordula Droege, 'War and what we make of the law' (International Committee of the Red Cross, 18 July 2024) <https://blogs.icrc.org/law-and-policy/2024/07/18/war-and-what-we-make-of-the-law/> accessed 6 December 2025.

reportedly higher in drone strikes in Afghanistan, drones may, in the future, strengthen distinction. A drone's ability to monitor and survey for minutes, hours and potentially days[40] allows a clear distinction between combatants and non-combatants, especially as the footage might be reviewed over a longer period than that of the instantaneous decision-making required on the ground. Whilst distinction with drones is still questionable, especially with the reported figures of civilian casualties, as technology improves and IHL principles become more aligned with advancements, it is likely these reported figures may become the same, if not better than, typical ground operations. However, it is nonetheless clear that there are serious limitations to the application of IHL and it is important to identify potential and ongoing reforms that aim to address these limitations, particularly in regard to the increasing use of gamified systems.

4. Domestic Legal Integration

Due to the retrospective nature of international mechanisms, like the ICC and the general lack of real-time enforcement, integrating the principles of IHL has always been vital to upholding humane practices at war. However, the gamification of drone warfare has further compounded this problem, compressing decision time as discussed in section two and further undermining the effectiveness of usual supervision, such as military legal advisors or higher-ranking officers. As a result, ensuring compliance increasingly depends on further integration of IHL principles into their military doctrine, training and operational culture. Ukraine's domestic reforms must therefore be understood not merely as general IHL compliance measures, but as a direct response to the specific pressures that gamification and drone warfare have created over the past few years.

Lord Sumption recognises that IHL is 'built into the military manuals of pretty much all civilised states and are taken seriously by soldiers on the spot'.[41] We have seen Ukraine's National Guard work, in partnership with the ICRC, to create a simplified and practical serviceman's handbook on IHL[42] and the codification of IHL into Ukraine's criminal code[43], making it enforceable in domestic courts rather than relying upon the slow-turning cogs of the ICC. As Dinstein observes, this incorporation within military doctrine and training is 'the

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[40] 'The 10 longest range unmanned aerial vehicles (UAVs)' (Airforce Technology, 19 June 2019) <https://www.airforce-technology.com/features/featurethe-top-10-longest-range-unmanned-aerial-vehicles-uavs/?cf-view> accessed 8 December 2025.

[41] Law and Disorder Podcast, 'Israel and international law (with Jonathan Sumption)' (8 November 2025) <https://podfollow.com/law-and-disorder/episode/ba826a585a6298c423050fe7788c20bfa20f30a0/view> accessed 10 November 2025, 42:45.

[42] 'The National Guard, with the support of The Ukrainian Red Cross, presented the handbook on IHL' (Red Cross, 28 February 2025) <https://redcross.org.ua/en/news/2025/02/106666/> accessed 11 December 2025

[43] Criminal Code of the Republic of Ukraine Article 438 'Violation of rules of the warfare'.

only way to ensure that no gap will develop between legal norms and reality'[44] and he stresses that such training must occur 'in advance, namely, already in peacetime'.[45] This sits uneasily with Ukraine's reliance on FPV drone volunteers, many of whom operate outside traditional military structures, lacking precisely the kind of pre-conflict IHL conditioning Dinstein considers essential, especially with real-time supervision having been effectively eliminated by the speed of FPV strikes.

The power of domestic incorporation is also clear in its convictions, where Aksamitowska, from the University of Swansea, confirms that 'the majority of convictions for war crimes… are delivered by domestic courts and not by international criminal tribunals'.[46] Ukraine goes further in updating its laws to suit new technology, through its 'I Want to Live' program,[47] described as 'technologically enabled surrender',[48] allowing soldiers to surrender to drones. These measures demonstrate an active attempt to regulate conduct even amidst technological change.

Alongside these domestic legal integrations, we have also recently seen Ukraine put in place a new Military Ombudsman office run by Reshetylova, made to protect the rights of everyone, including foreign combatants. We have also seen Ukraine's Military Prosecutors' Office, an office systematically disbanded since 2019,[49] being replaced by the State Bureau of Investigation,[50] reinstating the responsibility to prosecute war crimes as a major step towards compliance with the Conventions. The integration of IHL principles into domestic practice could further encompass gamification and whilst the points-based system creates serious contention, and potential risk, with the Conventions, the opposite can also be true.

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[44] Dinstein (n 3) Preface, xiii.

[45] ibid.

[46] Karolina Aksamitowska, 'The Importance of IHL Dissemination and Domestic War Crimes Prosecutions in Ensuring Respect for International Humanitarian Law' (*OpinioJuris*, 1 June 2021) <https://opiniojuris.org/2021/06/01/the-importance-of-ihl-dissemination-and-domestic-war-crimes-prosecutions-in-ensuring-respect-for-international-humanitarian-law/> accessed 11 December 2025.

[47] 'About the project "I want to live"' (Coordination Headquarters on the Treatment of Prisoners of War) <https://hochuzhit.com/en/> accessed 1 December 2025.

[48] David A Wallace, Shane R Reeves and Christopher J Hart, 'Technologically Enabled Surrender Under the Law of Armed Conflict' (2023) 2 *Chicago Journal of International Law Online* 69 <https://cjil.uchicago.edu/online-archive/technologically-enabled-surrender-under-law-armed-conflict> accessed 10 December 2025.

[49] Tatiana Kraevskaya, 'Whether Ukraine plans to restore the military prosecutor's office and military courts-said the committee on law enforcement' (UNN, 26 June 2024) <unn.ua/en/news/whether-ukraine-plans-to-restore-the-military-prosecutors-office-and-military-courts-said-the-committee-on-law-enforcement> accessed 28 August 2025.

[50] ibid.

An introduction of a multiplier for capturing, as opposed to killing,[51] is likely to make a soldier think twice before striking. Whether this be for tactical gain or in line with IHL principles, it ultimately saves lives, aligning with the aims of the Convention. If specific rules around gamification can be created to ensure that targeting is for a legitimate and necessary aim, it could be used to reduce suffering. This is something that has already been in force since the beginning of Ukraine's point scheme, with Volodia, a Ukrainian analyst, stating that 'if you capture [a Russian] you multiply it by 10'.[52] However, due to the constantly adapting points, changing dependant on the objective and value to the military, it may not stay the case permanently. Further, the motive behind the points, namely, to be 'used in future deals over prisoner exchanges',[53] does not necessarily reflect the aforementioned humanitarian principles. Since the motive remains opaque and more centred around prisoner exchanges, which are fragile and as recently seen may not always work out,[54] whether the points system will prioritise capture over killing remains a serious concern.

5. The Limits of Safeguards and the Resilience of IHL

Gamification is the result of brutal efficiency in a country with one of the highest GDP: Military spending in the world.[55] Reshetylova noted that the Ombudsman responsible for IHL is 'understaffed, which leads to delays in prosecuting war crimes…' and that '…hundreds of complaints daily with the resources I have is simply unsustainable'.[56] These institutions cannot realistically monitor drone strikes at scale, and it is entirely up to the unit or individual to ensure they are IHL-aligned, leaving much of the enforcement to the integrated training and military doctrine as discussed previously.

Whilst there remains value in typical training and traditional military doctrine, enshrining the principles of distinction and proportionality still leaves a real risk of being overwhelmed by the dopamine-driven reward mechanics of gamification. IHL, dedicated to, and focusing on, humane principles, could still be blurred by the geo-physical distance between operators and potential aggressors, making them more targets than human. Deffenbaugh notes that dehumanisation is 'the lowering or removing of inhibitions that normally keep humans from harming

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[51] Adams (n 18).

[52] ibid.

[53] ibid.

[54] Daryna Vialko, 'Russia dragging out 1,000-for-1,000 prisoner swap, Ukraine's ombudsman says' (RBC Ukraine, 12 May 2026) <https://newsukraine.rbc.ua/news/russia-dragging-out-1-000-for-1-000-prisoner-1778614174.html> accessed 13 May 2026.

[55] Olena Goncharova, 'Ukraine recorded the world's highest military burden in 2024, think tank reports' (*The Kyiv Independent,* 28 April 2025) <https://kyivindependent.com/ukraine-recorded-the-worlds-highest-military-burden-in-2024-think-tank-reports> accessed 4 December 2025.

[56] Kraevskaya (n 49).

each other',[57] often resulting in 'direct violence, increasing support for conflict, violence, torture or retribution'.[58] Whilst dehumanising the enemy might help with both morale and psychiatric suffering of operators, Deffenbaugh notes that 'the practice can be taken too far',[59] resulting in violations where operators might focus on military objectives rather than preserving human life.

The introduction of the Military Ombudsman as a civilian reflects the concern. As Reshetylova observes, 'When death is constant, the instinct to preserve life dulls'.[60] Appointing a civilian helps offset the dehumanising effects associated with exposure to both gamification and combat in general but might not go far enough in appealing to the 'humane' element of IHL.

6. Brutality, Inevitability, and the Limits of IHL

Dinstein offers crucial insight for addressing the statement posed at the beginning of this essay, observing that 'some people, no doubt animated by the noblest humanitarian impulses, would like to see warfare without bloodshed. However, this is an impossible dream… almost by definition, [war] entails human losses, suffering and pain'.[61] The 'inherent ugliness of war'[62] is a reality deeply embedded in IHL, particularly within the principle of proportionality. IHL does not concern itself with *jus ad bellum* but instead assumes the reality of armed conflict and seeks to limit its human cost, directing violence towards combatants and acknowledging that collateral damage, while inevitable, must be strictly confined to what is necessary 'to achieve a military goal in the most effective way'.[63]

Despite this inevitable suffering, IHL has had an instrumental role in pulling the moral standards of modern militaries and, as Dinstein observes, through its distinction and proportionality principles, IHL has separated collateral, indiscriminate and direct attacks on civilians,[64] creating a clear distinction between

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[57] Natalie Deffenbaugh, 'De-humanization: practicing humanity' (International Committee of the Red Cross, 27 June 2024) <https://blogs.icrc.org/law-and-policy/2024/06/27/de-dehumanization-practicing-humanity/> accessed 20 August 2025.

[58] ibid.

[59] ibid.

[60] Oleksiy Tarasov, 'Reshetylova: Ukraine's army needs cultural shift to protect soldiers' rights' (*The New Voice of Ukraine*, 15 March 2025) <https://english.nv.ua/nation/ukraine-s-military-ombudsman-on-abuse-command-resistance-and-long-overdue-reform-50514074.html> accessed 29 August 2025.

[61] Dinstein (n 3) Preface, xii.

[62] Mark Gilchrist, 'War Isn't Precise or Predictable – It's Barbaric, Chaotic, and Ugly' (*The Strategy Bridge*, 24 August 2017) <https://thestrategybridge.org/the-bridge/2017/8/24/war-isnt-precise-of-predictable-its-barbaric-chaotic-and-ugly> accessed 27 August 2025.

[63] International Committee of the Red Cross, 'Methods and means of warfare' <https://www.icrc.org/en/law-and-policy/methods-and-means-warfare> accessed 11 December 2025.

[64] Dinstein (n 3) 127.

what is wrong and what might be excused by military necessity.[65] The impact of IHL is also noted by Dinstein, stating that 'once it was believed that when the cannons roar, the laws are silent. Today, everybody knows better'.[66] Whilst its global impact might be downplayed, IHL principles are now mandatory training for many of the world's largest militaries,[67] showing that the regulation of warfare has been at least somewhat successful in preventing the 'inevitable suffering' that the statement suggests.

Conclusion

The statement that warfare is too brutal, and suffering too inevitable to be regulated, captures a deep historical cynicism about the nature of war. This essay has sought to show that whilst this cynicism is not unfounded, particularly considering developments such as drone warfare, the effects of psychic-distancing and the gamification of killing, it still fails to acknowledge the extent and importance of the frameworks that do operate, however imperfectly, in reality. Initially, this paper finds that the rise of UAVs, points-based rewards systems and video-game interfaces presents new risks that challenge the core IHL principles of distinction and proportionality whilst undermining IHL's key focus on the preservation of the human element of war. The next section explored two different types of dehumanisation: psychic distancing and gamification, finding that by distancing combatants psychologically from those they target, places the overarching human element, emphasised by the Convention, on a lower footing than the points that these systems have introduced. Further, this paper found that due to the time constraints placed on FPV drones in general, particularly now with a focus on points, the decision-making window necessary for a meaningful IHL assessment is compressed, risking the erosion of the fundamental principles that form IHL and the Conventions.

Whilst the effects of these technologies continue to stress IHL frameworks, it does not mean, as the statement implies, that regulation is impossible. The aims of IHL were never to eliminate all suffering in war, but to make deliberate and principled efforts to limit it. The fourth section explores this, finding that despite serious structural limitations of IHL, specifically the lack of real-time enforcement, evidence from Ukraine: military manuals, training initiatives, domestic criminal provisions and the establishment of the Military Ombudsman, demonstrates how far the country has gone to counteract these limitations and give meaningful effect to the Conventions.

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[65] Justin Salhani, ''Clearly an excuse': Does Netanyahu really want Hamas gone?' (*Al Jazeera*, 8 June 2025) <https://www.aljazeera.com/news/2025/6/8/clearly-an-excuse-does-netanyahu-really-want-hamas-gone> accessed 9 December 2025.

[66] Dinstein (n 3) Preface, xii.

[67] Chris Jenks, 'The Efficacy of the U.S. Army's Law of War Training Program' (Lieber Institute West Point, 14 October 2020) <https://lieber.westpoint.edu/efficacy-u-s-armys-law-of-war-training-program/> accessed 27 August 2025.

Further, this section finds that the fact that domestic courts, rather than international tribunals, deliver the majority of war-crime convictions further demonstrates that regulation does not necessarily depend upon distant and slow international bodies. Instead, it operates most effectively when embedded in its military culture, doctrines and domestic law, just as we have seen in Ukraine. Evidence supports that, even during a budget crisis, a chunk of funding is still put aside for these IHL programmes, displaying Ukraine's commitment to these key principles and regulating new technology with old foundations.

War will continue to be brutal, and suffering will continue to be inevitable. New technologies will continue to challenge the very foundation on which IHL sits. The persistence of violence does not negate the possibility, or necessity, of restraint, and if anything, the gamification of war strengthens the need for robust, legal and ethical institutional safeguards. Regulation may not eliminate the inherent brutality of war, but without it, brutality would be the only organising principle of armed conflict, leading to similar conflicts, like WWII, which would only go on to set in motion a renewed effort towards the Conventions.

With the increasing implementation of gamified technology, as seen in Ukraine, and the soaring use of FPV drones by militaries across the world, ensuring that, despite the effects of dehumanisation, warfare still aligns with IHL principles and civilian risk-analysis is now more important than ever. This paper has discussed the various issues surrounding gamification in Ukraine and how the implementation of IHL principles within its military doctrine can help it avoid the pitfalls of long-distance warfare with points-based systems. Further, applying this to the question, using Ukraine's continued commitment to embedding IHL, even in its new technologies, helps prove that IHL has had a significant effect on how warfare is conducted and targets analysed in the modern era. There remain many open questions about the future of gamified warfare, specifically around how militaries can ensure IHL compliance whilst still taking advantage of the cost-efficient nature of drone warfare. The legal framework surrounding drone warfare remains frustratingly underdeveloped and the Conventions, though broad and all-encompassing, do not squarely address the realities of long-distance, remote warfare. One can only hope that the international community finds the political willpower to regulate this modern technology before a catastrophic event forces its hand.

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ARTICLE

Is it now 'Legitimate' to Lie in an Insurance Claim? An Analysis of the Supreme Court's Abolition of the Fraudulent Devices Rule in *Versloot Dredging*

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ABSTRACT. This article aims to give an overview of what the abolition of the fraudulent devices rule means for modern-day insurance claims. Specifically, the article argues that it is a proportionate response considering the changes in information asymmetry. To demonstrate it is a proportionate response, the article analyses the historical function of good faith and information asymmetry within insurance (a key foundation in the reasoning of the initial enforcement of the fraudulent devices rule). The paper then explores what constitutes a 'fraudulent claim' within insurance law, which is necessary in order understand the context of the 'fraudulent devices rule' and the reasons for its abolishment in *Versloot Dredging*. Finally, the paper critically analyses the reasoning behind the judgement, asking if the Supreme Court has gone 'too far' and if concealment of information from insurers is now legally 'legitimate'.

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Introduction

The doctrine of 'utmost good faith', or *uberrimæ fidei*, it was established in *Carter v Boehm*.[1] Here, the court held that the insurance policy was voidable for non-disclosure, as Carter knew and knowingly withheld material information from the insurer. Lord Mansfield's judgement explains that insurance contracts should incorporate 'utmost good faith' rather than merely 'good faith', which other forms of contract require. This is due to the nature of the insurance contract being one of 'speculation', the insurer is reliant upon the information provided to him by the assured, which can result in him being unfairly induced to estimate a risk in a particular way. It is a regulation in insurance law, which aims to combat the informational asymmetry suffered by the insurer. Discussion of a 'fraudulent device' can be found in Mance LJ's *obiter dictum* in *the Aegeon*[2] and describes a fraudulent device to be a claim based on a genuine loss whilst supported by some form of 'embellishment of facts' which can culminate in false documents or statements.[3] In a marked departure from this approach, the Supreme Court subsequently abolished the fraudulent devices rule in *Versloot Dredging*,[4] with Lord Sumption explaining in his judgement that while 'the lie is dishonest, but the claim is not'.[5] Lord Mance's dissent agrees with the notion that this creates a legal loophole to lie for the assured, that the assured may pursue a bad, exaggerated, or questionable claim with virtual impunity.[6] Despite this, Lord Mance's opinion was the minority, thus the rule was abolished, resulting in insurers no longer being able to retrospectively repudiate claims where a fraud was committed whilst the claim is true.

Lord Mance's view subscribes to the jurisprudential approach that assureds can now 'legitimately' conceal information from insurers, which this article argues is an overstated viewpoint – in reality, the court is aiming to secure a more balanced approach, ensuring there is neither disproportionate favouring towards insurers nor assureds. To demonstrate this, this article provides an historical context for utmost good faith and information asymmetry. It then analyses the position of fraudulent claims within insurance law and the historical context of the fraudulent devices rule. Next, the paper explores the decision in *Versloot Dredging*, whilst also considering modern developments which impact insurance law and public policy. This article concludes that, whilst historically information asymmetry was prevalent in

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[1] *Carter v Boehm* (1766) 97 ER 1162.

[2] *Agapitos v Agnew (The Aegeon)* (No 1) [2002] 2 Lloyd's Rep 42.

[3] ibid 49–50.

[4] *Versloot Dredging BV and another v HDI Gerling Industrie Versicherung AG and others* [2016] UKSC 45.

[5] ibid [26].

[6] ibid [128].

insurance law, which the fraudulent devices rule attempted to rectify, modern approaches have rectified this asymmetry. Therefore, the abolition of the fraudulent devices rule seeks to rebalance the position between the insurer and the assured and bring the insurance contract more in line with modern contract law, rather than providing a legal loophole for the assured to lie to insurers.

1. The Historical Function of Good Faith and Information Asymmetry within Insurance

This section will examine the historical relationship of both the doctrine of good faith and information asymmetry, and how these principles originally justified the development of outcomes which favoured the insurer. The functions of good faith and information asymmetry have an entwined history within insurance law, hence their combination in this section. *Carter v Boehm* is widely regarded as having established the doctrinal foundations of 'utmost good faith' and is set out above in the introduction. The key point from Lord Mansfield's *obiter* in this case is that an insurance contract is inherently different to other contracts.[7] The assumption of risk taken by the insurer based on the facts provided by the assured puts the insurer into a particularly vulnerable position. If the assured provides false facts, the insurer could wrongly calculate the risk to the insurer's financial detriment. It is because of the reliance on this information, and the informational asymmetry within the relationship between insurer and assured, that Lord Mansfield emphasises the need for 'utmost good faith'. This was codified by the Marine Insurance Act 1906, which provides that 'a contract of marine insurance is a contract based upon the utmost good faith, and if utmost good faith is not observed by either party, the contract may be avoided by the other party'.[8] This not only provides a harsh remedy for a lapse in good faith (*ab initio* repudiation of the contract) but also requires both the insurer and assured to act in good faith. However, in practice, the requirements for good faith seem to be placed on the assured, despite the assured also suffering an 'informational disadvantage' in their acquisition of insurance. As Ostrowska explains, the assured is unlikely to have the expert knowledge or experience necessary to make an informed decision about insurance products.[9] Both contractual parties experience a level of informational asymmetry, yet the onus of good faith rests mainly on the assured, despite the statute providing for a duty of good faith by both parties. This demonstrates the weight of good faith, favouring the insurer rather than the assured.

The post-contractual application of utmost good faith can be seen in the

[7] *Carter v Boehm* (n 1) 1165.

[8] Section 17 of the Marine Insurance Act 1906 was heavily amended by s 14(3)(a) of the Insurance Act 2015, which explicitly omitted the remedy of avoidance (*ab initio* repudiation). This came into force in August 2016.

[9] Marta Ostrowska, 'The Impact of Technology on Information Asymmetry in Insurance. What Does It Mean for the Pre-contractual Duty of Disclosure?' in Cristina Poncibo and Piotr Tereszkiewicz (eds), *European Insurance Law within the Digital Age* (Springer 2025) 123.

Litsion Pride.[10] Here, a vessel was struck by a missile in the Persian Gulf, but due to the inherent risk of entering the region, an additional premium and notice were required by the insurer. This notice was withheld by the assured until after the vessel was damaged by a missile, the assured then disclosed the passage into the Persian Gulf but dated the notice of passage wrongly before the missile strike. Hirst J's *obiter* set out that the pre-contractual good faith disclosure rules were the same post-contractually,[11] it was held that this was fraud and the contract was repudiated.[12] However, subsequent cases demonstrate a marked movement away from the post-contractual duty of utmost good faith, as illustrated in *The Star Sea*.[13] Here, whilst the assureds were making a claim, they failed to disclose information which suggested that the ship's managers knew of problems with the firefighting equipment. The insurers claimed that this lack of a disclosure breached the requirement for 'utmost good faith' and subsequently sought to repudiate the contract. The court ruled unanimously in favour of the assured. Lord Scott distinguishes between the varying levels of obligation of good faith involved in both the pre-contractual and post-contractual stages.[14] This demonstrates the narrowing of the judicial interpretation of utmost good faith, and how it should manifest as the contract progresses. Post-contractually, there should be a duty of honesty, not of disclosure. This is advocated for by Lord Clyde who also states that a solution for the post-contractual application of s. 17 is 'past praying for'.[15] However, Lord Hobhouse does raise the important policy consideration that the fraudulent insured must not be allowed to think 'if the fraud is successful, then I will gain, if it is unsuccessful I will lose nothing'.[16] This case demonstrates that fraud should not be interpreted so broadly within insurance law so as to capture every post-contractual lapse in honesty from the assured. It would be unfair to then allow the insurer to repudiate the contract on this basis. This case encapsulates the court's hesitation to apply utmost good faith strictly post-contractually and foreshadows legislative reform to rectify the weight of good faith being placed disproportionately on the assured.

Academic discourse before the enactment of the Insurance Act 2015 heavily critiqued post-contractual good faith. The notion of utmost good faith had issues to begin with. Rose highlights the mismatch between insurance law and general contract law, as there is no general doctrine of good faith in English contract law.[17]

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[10] *Black King Shipping Corporation and Wayang (Panama) SA v Mark Ranald Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep 437.

[11] ibid 510.

[12] ibid 518–519.

[13] *Manifest Shipping Company Limited v Uni-Polaris Shipping Company Limited and Others (The Star Sea)* [2001] UKHL 1.

[14] ibid [95].

[15] ibid [6].

[16] ibid [62].

[17] FD Rose, 'Informational Asymmetry and the myth of good faith: back to basics' [2007] LMCLQ

While this has been implemented due to informational asymmetry, Rose also points out that this is not unique to insurance.[18] He also claims that s. 17, has been misconstrued due to its placement above disclosure (s. 18-19) and misrepresentation (s. 20) within the Marine Insurance Act 1906. Bennett agrees with Rose that the doctrine of good faith has become overstretched and now lies entirely outside s.17.[19] Both articles were written before the expansion of AI and digital algorithms,[20] which ensure insurers no longer suffer from informational asymmetry. This development particularly strengthens Rose's argument and further highlights the previously 'overstretched' nature of good faith. Bennett,[21] Rose,[22] and Eggers[23] argued that the automatic repudiation of a contract after a post-contractual breach of good faith, and have argued that instead, remedies should be determined by policy, proportionality, and judicial discretion. While it could be argued that repudiation was aligned with policy, as it upheld what was outlined above by Lord Hobhouse,[24] that the fraudulent insured is able to 'get away' with an attempt at fraud, it certainly is not a proportionate remedy.

Additionally, Rose and Bennett both argued for the severing of s. 17 from post-contractual duties, stating that it would bring insurance law more in line with English contract law.[25] This foreshadowed the enactment of the Insurance Act 2015, and the decision in *Versloot Dredging*,[26] which created greater uniformity and certainty in insurance and contract law. Therefore, the modern stance of good faith in insurance has corrected the historical favouring of the insurer in matters of utmost good faith, which had been criticised, particularly in its post-contractual application. Contention surrounding the modern-day application and justifications of utmost good faith and how information asymmetry manifests itself in contemporary insurance practice thus manifested in the abolition of the fraudulent devices rule. The next section will address what this rule is, and how it differs from a fraudulent claim.

2. Fraud within Insurance and the Fraudulent Devices Rule

Within insurance law, the relevant criminal offences under the Fraud Act

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181, 183.

[18] ibid 194.

[19] Howard N Bennett, 'Mapping the doctrine of utmost good faith in insurance contract law' [1999] LMCLQ 165, 221.

[20] ibid 170.

[21] ibid 197.

[22] Rose (n 17) 191.

[23] Peter MacDonald Eggers, 'Remedies for the failure to observe utmost good faith' [2003] LMCLQ 249, 263.

[24] *The Star Sea* (n 13).

[25] Rose (n 17) 214 and Bennett (n 19) 219.

[26] *Versloot Dredging* (n 4).

2006 would be s. 2 (dishonestly making a false statement) and s. 3 (dishonestly failing to disclose). These offences are linked with the tort of deceit,[27] where the court defined fraudulent misrepresentation to be where the defendant makes a false statement which they either knew to be false, did not have belief in its truth, or was reckless as to whether it was true or false.[28]

Despite this overlapping framework between insurance law and criminal law, it remains legally ambiguous within insurance law as to when an insurance claim should be regarded as a 'fraudulent claim'. Hjalmarsson points out that 'there is no generally valid legal definition of a 'fraudulent claim'.[29] Mance LJ's statements in the *Aegeon*[30] are the most accepted on the matter. With regards to a fraudulent claim, this exists where 'the insured claims knowing he has suffered no loss or a lesser loss than that which he claims'[31] and a fraudulent device is 'used if the insured believes that he has suffered the loss claimed but seeks to improve or embellish the facts surrounding the claim, by some lie'. The difference between the two is that a fraudulent claim is entirely fraudulent, and a fraudulent device is where the claim is genuine, but the circumstances surrounding it may have been embellished. Case law before *Versloot Dredging* demonstrates the harsh stance courts took on fraudulent claims and devices in insurance. In the case of *Orakpo v Barclays*,[32] where a claim for a rental property was 'grossly exaggerated', this case was found for the insurer, and the contract was repudiated. The reasoning was laid out by Sir Roger Parker[33] to be one of policy – it would ultimately be unfair for the assured to then make a genuine claim when he has previously attempted to gain more than what is owed to him by exaggerating his loss *prima facie*. While Parker takes a firm and harsh stance, Hoffmann LJ's *obiter* interestingly promoted taking a subjective approach to insurance fraud. He argued that 'one should not readily infer fraud' from a 'doubtful or exaggerated claim'.[34] This demonstrates the juxtaposition between proportionality and policy, and the judiciary being less willing to impose draconian rules in favour of the insurer in the name of 'good faith'.[35] Although this reasoning signalled a greater concern for proportionality, it did not displace the policy-driven approach to fraudulent claims. This is illustrated

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[27] *Derry v Peek* (1889) 14 App Cas 337.

[28] ibid 337.

[29] Johanna Hjalmarsson, *Fraudulent Insurance Claims: Legal Definition and Judicial Consequences* (PhD Thesis, University of Southampton 2016) 37.

[30] *The Aegeon* (n 2).

[31] ibid 20.

[32] Orakpo v Barclays Insurance Services [1995] LRLR 443.

[33] ibid 452.

[34] ibid 451.

[35] James Davey, 'Unpicking the Fraudulent Claims Jurisdiction in Insurance Contract Law: Sympathy for the Devil?' [2006] LMCLQ 223, 235.

in the *Aegeon*,[36] in this case, the claim amount itself was not embellished, but the insured relied on false documents to support the claim. The Court, despite the absence of any exaggeration of the loss, held that the fraudulent device defeated the entire claim. Here, policy continued to be the main reasoning for the judgement - but it created an advantage for the insurer who no longer needed to challenge the evidence or prove a full case of fraud. Case law indicates the stringent upholding of policy in judgements, which then resulted in the repudiation of the contract. Public policy and repudiation of the contract is often beneficial to the insurers, as they do not have to pay out for the claim (even if a part of it is genuine). This demonstrates how the post-contractual doctrine of good faith was unfairly weighted in favour of insurers before *Versloot*.

The fraudulent devices rule demonstrates how policy can also aim to function as a deterrent. The deterrent nature is outlined by Mance LJ in *AXA General Insurance v Gottlieb*,[37] who stated that 'the policy of the rule is to discourage any feeling that the genuine part of the claim can be regarded as safe'.[38] The protection of insurers is also highlighted by Christopher Clarke LJ's *obiter* in the Court of Appeal case of *Versloot*,[39] who highlights that deterrence is necessary to protect insurers who may suffer from the asymmetry of information.[40] There is argument that the policy of deterrence is not within the ambit of civil law, and that it instead should be left to the criminal law to enforce such measures, with civil law remaining focused on determining parties' intention and proportionate remedies.[41] This is the position of both Lord Neuberger and Lord Sumption in *Versloot*, with Sumption saying it is not the 'purpose' of civil law.[42] However, the Law Commissions of England and Wales, and Scotland,[43] when exploring the case for reform of the problems created by s. 17 of the Marine Insurance Act 1906, have argued that the civil courts are able to play an important part in deterring fraud, as criminal prosecutions for insurance fraud are relatively rare.[44] Civil law can and should provide an element of deterrence, but it should not become the overriding

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[36] *The Aegeon* (n 2).

[37] *AXA General Insurance Ltd v Gottlieb* [2005] EWCA Civ 112.

[38] ibid [31].

[39] *Versloot Dredging BV and another v HDI Gerling Industrie Versicherung AG and others* [2014] EWCA Civ 1349.

[40] ibid [75].

[41] P J Rawlings and J P Lowry, 'Insurance Fraud and the Role of the Civil Law' (2017) 80 (3) *MLR* 525, 538.

[42] *Versloot Dredging* (n 4) [26].

[43] Law Commission and Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* (Law Com No 353, Scot Law Com No 238, Cm 8898, 2014) <https://assets.publishing.service.gov.uk/media/5a7eef25e5274a2e87db2d21/41872_Cm_8898_Print_Ready.pdf> accessed 2 July 2026.

[44] Rawlings and Lowry (n 41) 537.

justification for imposing disproportionate contractual consequences. The primary function of the Court must be to provide a proportionate remedy after analysing the behaviour and contractual agreements between both parties, and this should operate alongside deterrence. This article asserts that the harsh remedy of repudiation for a fraudulent device is not 'proportionate' and is a harsh deterrent which unfairly benefits the insurer. This cannot be reconciled with the overarching aims of the civil courts. This section demonstrates that pre-*Versloot* authority was predominantly driven by policy considerations of deterrence, and the protection of insurers – often at the expense of proportionality. The next section will examine how the Supreme Court reassessed these underlying policy objectives and concluded that the rule could no longer be justified.

3. The Supreme Court's Abolition of the Fraudulent Devices Rule in Versloot Dredging

Versloot Dredging[45] attempted to answer the question 'what makes claim fraudulent?'. Is it only where the whole claim is fabricated, or is it also where there is a genuine claim, but the information to support it is embellished? Here, the vessel was lost at sea due to an ingress of seawater, which manifested due to crew negligence of the maintenance of pipes. When making the claim the assured fraudulently stated that the crew failed to investigate due to poor weather when the bilge alarm sounded. At first instance,[46] it was held that the cause of loss was 'perils of the sea' for which the vessel was insured, making the lie told by the assured irrelevant. Despite the irrelevance of this lie to the claim, the claim was nonetheless forfeited, and the Court of Appeal agreed with this decision. In the Court of Appeal, Christopher Clarke LJ admitted that the fraudulent devices rule was draconian but said it was necessary as removing the rule would encourage lying.[47] Previous rulings were steeped in the doctrine of post-contractual good faith, and the protection of insurers who were said to suffer from information asymmetry at the claims stage.

The Supreme Court concluded that the use of fraudulent devices should not amount to a fraudulent claim. This meant that the assureds claim was not forfeited. Lord Sumption's reasoning was that while 'the lie is dishonest, the claim is not',[48] insinuating that as the lie is immaterial to the claim it should not restrict the claim from being made. Sumption refutes Christopher Clarke LJ's earlier argument that a collateral lie might lead the insurers to make irrelevant inquiries. The fraudulent claims rule was to deter the assured from making dishonest claims, not to save insurers from wasted effort.[49] Sumption also took a narrower construction of 'good

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[45] *Versloot Dredging* (n 4).

[46] *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2013] EWHC 581 (Comm).

[47] *Versloot Dredging* (n 4) [75].

[48] ibid [26].

[49] Rawlings and Lowry (n 41) 529.

faith' than previous judges; potentially influenced by the narrowing of good faith by the Insurance Act 2015, he detailed the differences between pre-contractual and claims stages which would be reflected by differences in duty of disclosures. In Lord Hughes' *obiter* he reasons that as the lie is immaterial to the claim, then refusing the claim is a disproportionate remedy.[50] This links in with previous arguments made that the civil law's responsibility is to be proportionate rather than to deter wrongdoing in a retributionist way. It also reflects academic calls from Bennett[51], Rose,[52] and Eggers[53], made before this case and the Insurance Act 2015, for changing the remedy to be proportionate rather than complete repudiation. However, this is not a unanimous decision, and Lord Mance vehemently dissented from the outcome. Lord Mance reiterates his alignment with the doctrine of good faith and fair information, and that this should be upheld throughout each stage of the relationship between the insurer and assured.[54] He also reinforces that the fraudulent devices rule acts as a deterrent and will impact the behaviour of the assured – without which, lies can be told with virtually no recourse.[55] While Lord Mance makes fair points, they are less persuasive than those of his colleagues, as they rely on outdated policy arguments of informational asymmetry and the continuation of good faith into post-contractual claims. Overall, the court's decision aimed to cease the disproportionate remedy of repudiation for fraudulent devices, which unfairly favoured insurers. It also highlighted the narrowing judicial interpretation of good faith within insurance contracts, encouraged by the Insurance Act 2015 reforms of the Marine Insurance Act 1906.

Academics have supported this decision, many of whom also supported the outcome *Versloot Dredging*, and a move towards proportionality since before even the reforms laid out in the Insurance Act 2015. Eggers particularly highlighted the problematic nature of post-contractual repudiation, the remedy for fraudulent devices before *Versloot Dredging*, explaining that it did not promote a coherent and proportional framework within the legal system.[56] Jordan[57] takes a parallel view to Lord Mance's dissenting opinion in *Versloot Dredging,* that where there is a lie, the claim is 'tainted by dishonesty' thus, it is appropriate that it is repudiated. From the perspective of the insurance companies, the judgement was unsurprisingly not seen favourably and thought to be 'a blow for honest customers'.[58] While dishonesty

[50] *Versloot Dredging* (n 4) [97].

[51] Bennett (n 19).

[52] Rose (n 17).

[53] Eggers (n 23).

[54] *Versloot Dredging* (n 4) [125].

[55] ibid [128].

[56] Eggers (n 23) 263.

[57] Zachary Jordan, 'Assessing Fraudulence in Insurance Claims – A Comprehensive Analysis of an Evolving Concept and Regime' (2024) 14 (1) *SSLR* 157, 167.

[58] Rawlings and Lowry (n 41) 531.

should not be encouraged, the dishonesty in fraudulent devices supports a genuine claim, and inherently has little effect on the claim. Lord Mance fails to consider other contracts within English contract law where post-contractual dishonesty that supports existing contractual obligations would not constitute repudiation. The law in this area has been inconsistent and disproportionate, which contravenes ideals of certainty in English contract law. Therefore, the courts abolishment of the fraudulent devices rule does not go 'too far', instead, ensuring proportionate and uniform outcomes between insurance law and other areas of contract law. Its abolition has prompted continuing debate as to whether the law now affords excessive latitude to dishonest assures, the following section examines those concerns.

4. Does the Abolition go 'Too Far'? Can Assureds Now 'Legitimately Conceal' from Insurers?

The principal criticism of *Versloot Dredging*[59] is that it weakened the deterrence for dishonest conduct, permitting assureds to conceal information without consequence. This section considers whether that criticism withstands scrutiny in light of the remaining legal and contractual protections available to insurers.

Firstly, *Versloot* distinguished between fraudulent claims and collateral lies as part of a fraudulent device. As there is no statutory definition for 'fraudulent claim' in the Insurance Act 2015, the ruling that collateral lies and fraudulent devices did not constitute a 'fraudulent claim' ensures assureds can no longer lose their claim because of it. A crucial note to consider is that this ruling does not prevent the insurer from introducing terms into the contract during the pre-contractual stage to ensure there is disclosure of particular things the insurer deems appropriate at the post-contractual stage. Hjalmarsson states[60] that 'the insurer can only blame itself for not insisting upon such features when it had the opportunity'. Another thing to consider is that the ruling does not allow for assureds to bring fraudulent claims whereby they exaggerate the quantity of the claim or provide dishonest information that is directly relevant to the claim – that would still ensure a repudiation of the contract. This demonstrates that this ruling does not allow for assureds to behave in any manner they please. Their claims must still be genuine and not exaggerated lest they suffer serious consequences.

As previously mentioned, Lord Mance's dissent which follows the rhetoric that assureds can now legitimately conceal any information from insurers, is simply not the case. This chain of reasoning conflates concealment and collateral lies; however, concealment could still amount to a fraudulent claim – which as discussed above, is not allowed, and would result in repudiation. Concealment and non-

[59] *Versloot Dredging* (n 4).

[60] Hjalmarsson (n 29) 54.

disclosure was more the focus of *The Star Sea,*[61] the facts of which have already been dealt with. The House of Lords held that lack of disclosure post-contractually does not give the right for the insurer to avoid the policy unless it amounts to a fraudulent claim. This paved the way for the Court to have a narrower interpretation of 'good faith' in the judgement of *Versloot Dredging*, which dealt with collateral lies. Whilst non-disclosure is passive and collateral lies are an active decision, both manifest as slightly misleading to the insurer, although certainly not so much that it would justify a complete repudiation of the contract. This demonstrates the shift taken to limit the repudiation of contracts attempted by insurers over arguably 'small' matters. Despite all this, insurers remain protected against fraudulent concealments. As mentioned previously, the fraudulent claims doctrine remains unaffected, this is where, if a concealment is large enough that it constitutes as fraud - the claim will be lost; as is the appropriate remedy under s. 12 of the Insurance Act 2015. Additionally, the Fraud Act 2006 and the tort of deceit[62] remain options for insurers who believe the assured have committed a fraudulent act. However, one thing this case does not do, is propose an alternative remedy other than repudiation for a fraudulent device - despite a lie being told. As the Insurance Act 2015 is not applied retrospectively and is only applied to contracts formed after the act's enactment in 2016, it will be interesting to see the approaches and remedies suggested by judges for fraudulent devices to these contracts in the future. To ensure uniformity with law made thus far, the remedy should be more proportionate to the offence than repudiation. Therefore, assureds cannot 'legitimately conceal any information from insurers', considerations such as contract terms, and whether the concealment amounted to a fraudulent claim would be considered by the courts when analysing the assureds' omissions.

The abolishment of the fraudulent devices rule does not go 'too far'. Post-contractual repudiation from a lack of disclosure or misrepresentation stems from the 'utmost good faith' requirement, previously found in the Marine Insurance Act 1906. This itself was policy founded in ideas of information asymmetry disadvantaging the insurer, which has been previously established within this paper. These ideas are also popular foundations for dissenting arguments, as seen in the likes of Mance LJ's dissent in *Versloot Dredging*.[63] There is an argument that these policy ideas are outdated, and insurers in the modern-day no longer suffer from the same informational disadvantage. Ostrowska goes into detail about modern day informational asymmetry, reiterating the thesis perpetuated by de Jong[64] that with risk calculation algorithms, insurers know accident probabilities better than policy holders themselves. Also, modern informational resources give insurers access to data that used to be private knowledge of the assured. When taking this into account, it is hard to see how collateral lies as defined in *Versloot Dredging* worsen

[61] *The Star Sea* (n 13).

[62] *Derry v Peek* (n 27).

[63] *Versloot Dredging* (n 4) [128].

[64] Ostrowska (n 9) 131.

asymmetry neither impact the information the insurer can collect. This makes the *Versloot Dredging* ruling appear even more rational. Current policy appears to revolve around uniformity and proportionality within the law, a case which reflects proportionality considerations seen outside of insurance is *Patel v Mirza*.[65] In this case, the court ruled that a claimant could recover money even if there was illegality involved in their conduct, if denying the claim would be a disproportionate response. This demonstrates that illegal or unethical conduct which previously would ensure there is no claim, now is assessed based on public policy violations and proportionality. Therefore, *Versloot Dredging* does not go 'too far', instead it reflects modern day policy positions, and brings insurance law in line with other areas of English contract law. Ensuring proportionality and uniformity within the legal system and rectifying a rule which if it were to continue, would continue to favour the insurer within insurance contracts.

Conclusion

To conclude, the viewpoint that the abolishment of the fraudulent devices rule allows for assureds to 'legitimately conceal' information, does not fully encapsulate modern English law. The author agrees that the doctrine of good faith was weighted in favour of insurers, hence the establishment of the rule in the first place. 'Utmost good faith', as detailed in the Marine Insurance Act 1906, was enacted in order to protect insurers, who were at a disadvantage when it came to information asymmetry. Information asymmetry can affect how insurers calculate risks and how they set their premiums, a lack of protection in this area could lead to insurers being less willing to provide insurance, as it could lead to more risk being taken on than initially thought - which would impact profits. As insurance provides social benefit, the objective to protect insurers made sense. However, as modern information gathering techniques developed with the rise of technology and risk calculating algorithms,[66] information asymmetry has lessened. The insurers continued to disproportionately benefit from the doctrine of good faith, whilst no longer suffering from the disadvantage of a lack of information, being able to repudiate contracts after a lapse in post-contractual good faith (a remedy not available within other areas of contract law). In light of this, the *Versloot* ruling[67] and the abolishment of the fraudulent devices rule does not go 'too far'. Instead, it corrects previous precedent centred around out of date considerations of information asymmetry and ensures proportionality and uniformity within English contract law. This ruling does not allow for the assured to 'legitimately conceal' from the insurer, but it does mean that a claim will not be lost if a collateral lie is told. If the lie or omission amounts to a 'fraudulent claim' then repudiation as a remedy will still be available, as per the Insurance Act 2015. Indeed, this ruling also does not prevent insurers from contracting for specific informational disclosures

[65] *Patel v Mirza* [2016] UKSC 42.

[66] Ostrowska (n 9) 130.

[67] *Versloot Dredging* (n 4).

during the claims process, which would provide a remedy if broken. One critique of *Versloot Dredging* is that it does not detail a remedy for a fraudulent device. A fraudulent device is still a lie, which goes against the core of insurance law, and more widely English contract law, despite there being no specific requirements for 'good faith' generally. Overall, the doctrine of good faith was weighted in favour of insurers, and the insurers previously were at an informational disadvantage – but in modern times, this is less of a problem, thus the doctrine of good faith should be more balanced. With that in mind, *Versloot Dredging* does not go 'too far', abolishing the fraudulent devices rule makes for a more proportional response, which reflects current policy aims and ensures uniformity within English contract law – as this remedy is not available for post-contractual omissions in other areas. Finally, the assured is not able to 'conceal' from the insurer, they will still be under duty to disclose what they are contractually required to and make statements which do not amount to a 'fraudulent claim'.

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ARTICLE

A Pan-Asian Human Rights System? Comparative Lessons from Europe, the Americas, and Africa

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ABSTRACT. This article evaluates the potential for a pan-Asian human rights system through a comparative analysis of European, Inter-American, and African regional frameworks. While Europe demonstrates strong judicial enforcement, the Americas emphasize remedial and transformative jurisprudence, and Africa integrates socio-economic and collective rights into its normative architecture, Asia remains without a comprehensive binding mechanism. Existing Asian instruments, such as ASEAN's Human Rights Declaration and the AICHR, rely on consensus and soft-law approaches, limiting enforcement and access to justice. This study argues that Asia's political diversity, strong emphasis on sovereignty, and uneven normative convergence pose significant obstacles to the direct transplantation of other regional models. Consequently, a pan-Asian system is normatively desirable but must adopt a gradual, adaptive design that strengthens institutional capacity, cultivates political commitment, and balances regional diversity to achieve sustainable and effective protection of human rights.

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Introduction

A line from Star Trek suggests 'infinite diversity in infinite combinations'.[1] This quote understates the notion that while human rights are commonly understood as universal moral entitlements, this universality does not entail uniformity in the institutional mechanisms through which they are protected.[2] The effectiveness of the mechanisms designed to protect human rights still relies heavily on political legitimacy, collective acceptance and sensitivity to socio-political contexts. Europe, Africa and the Americas have developed distinct regional frameworks for the protection of human rights albeit varying in their institutional design, normative foundations, and mechanisms of enforcement. By contrast, Asia remains the only major world region without a comprehensive and binding regional human rights system.

This article examines whether there should be a pan-Asian human rights system through a comparative analysis of the European, Inter-American and African regional mechanisms. The central argument advanced is that while Asia does need a regional human rights system, any pan-Asian mechanism modelled too closely to other regional systems would face significant structural and political obstacles.[3] Instead, a pan-Asian human rights system would mean an adaptive and

[1] Ralph Senensky, 'Is There in Truth No Beauty?' in *Star Trek: The Original Series* (NBC, 18 October 1968) Season 3, Episode 5.

[2] Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran and David Harris, *International Human Rights Law* (3rd edn, Oxford University Press 2017) 430.

[3] Christof Heyns, David Padilla and Leo Zwaak, 'A Schematic Comparison of Regional Human

incremental design that reflects Asia's diverse legal traditions, sovereignty-centered regionalism, and uneven political landscape.

1. Why Has Asia Not Developed a Comprehensive Regional Human Rights System?

Before considering whether a pan-Asian human rights system should be established, it is necessary to understand why Asia remains the only major region without a comprehensive binding mechanism. Unlike Europe, the Americas and Africa, whose regional institutions emerged from shared historical experiences and relatively coherent political projects, Asia is characterised by significant political diversity, sovereignty-centred regionalism and fragmented institutional development. These structural characteristics have impeded the development of a common regional vision capable of supporting binding supranational institutions, distinguishing Asia from other regions where greater political convergence facilitated the emergence of regional human rights mechanisms.

1.1. Asia's Fragmented Historical and Political Foundations

Unlike the other regions, Asia has not experienced a shared single historical rupture capable of generating consensus around a unified regional human rights project.[4] Instead, the Asian experience is characterized by multiple and divergent historical trajectories, such as colonialism, military authoritarianism and unresolved territorial disputes, this pluralism has prevented the emergence of a common political identity analogous to post-war Europe or post-dictatorship Latin America. Decolonization in Asia occurred earlier and more unevenly than in Africa, producing states with hugely different constitutional traditions and governance models. As a result, regional cooperation has prioritized non-interference and regime stability over supranational legal accountability. This is reflected in ASEAN's foundational principles, particularly the norm of non-intervention enshrined in the 1967 ASEAN Declaration (ADHR) reaffirmed in the ASEAN Charter.[5]

A further structural limitation lies in the absence of a shared regional identity capable of sustaining supranational legal authority. In contrast to Europe, where post-war reconstruction fostered a collective commitment to liberal democratic values, and the Americas, where shared experiences of authoritarianism generated a regional rights discourse centered on accountability, Asia remains politically and ideologically fragmented. This fragmentation is not merely cultural but institutional, which is reflected in the coexistence of liberal democracies and authoritarian states within the same regional sphere.

Rights Systems: An Update' (2006) 3(4) *SUR - International Journal on Human Rights* 163.

[4] Tae-Ung Baik, *Emerging Regional Human Rights Systems in Asia* (Cambridge University Press 2012) 46.

[5] Dakota Jones, 'Asean's Human Rights Conundrum: An Analysis of the Failures of the ASEAN System for Promoting Human Rights' (BA thesis, University of Pennsylvania 2019) 15.

1.2. Shared Historical Experience as a Foundation for Regional Protection: Lessons from Europe

Europe occupies a distinctive position in the development of regional human rights protection due to its historical paradox.[6] It was both a principal site of liberal political modernization and the center of the most systematic human rights violations of the twentieth century. Europe developed its regional human rights framework following the Second World War. The shared experience of totalitarianism generated a constitutional consensus favouring supranational human rights oversight, culminating in the establishment of the Council of Europe and the European Convention on Human Rights.[7] In the second half of the twentieth century, European states increasingly converged around a common institutional model defined by democracy, the rule of law and enforceable human rights standard.[8] The European Convention on Human Rights (ECHR) was thus conceived not merely as declaratory instrument, but as a preventive and quasi-constitutional mechanism designed to act as an early warning system against democratic backsliding.[9] Unlike Europe, Asia lacks a comparable post-war constitutional consensus capable of legitimising supranational human rights oversight.

1.3. Democratic Transition and Accountability: Lessons from the Americas

The Inter-American human rights system emerged from prolonged periods of military dictatorship, enforced disappearances and systematic repression across Latin America.[10] Accordingly, the establishment of the Inter-American Commission on Human Rights (IACHR)[11] in 1959 was followed by the Inter-American Court of Human Rights (IACtHR) in 1979, reflecting a gradual process of institutionalization corresponding to uneven democratic transitions within the region.[12] Accordingly, the American Convention of Human Rights (ACHR) was orientated primarily towards protecting individuals against state violence and

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[6] Moeckli and others (n 2) 464.

[7] Burns Weston, Robin Lukes and Kelly Hnatt, 'Regional Human Rights Regimes: A Comparison and Appraisal' (1987) 20 *Vanderbilt Journal of Transnational Law* 585, 592.

[8] Katrazyna Piątkowska, 'To What Extent Do Regional Human Rights Systems Contribute to the Promotion and Protection of Human Rights Globally?' (Uniwersytet Wrocławski) 9.

[9] Wolfgang Benedek, 'Are the Tools of the Council of Europe Sufficient to Protect Human Rights, Democracy and the Rule of Law from Backsliding?' (2020) 1 *European Convention on Human Rights Law Review* 151.

[10] Katherine M Beall, *New Regional Authorities: Self-Determination and the Global South* (Cambridge University Press 2026) 88–117.

[11] Charter of the Organization of American States 1948 (adopted 30 April 1948, as amended by the Protocol of Buenos Aires 1967) art 106; Statute of the Inter-American Commission on Human Rights (approved 25 May 1960).

[12] Moeckli and others (n 2) 445–449.

ensuring accountability for gross human rights abuses.[13] For Asia, the Inter-American experience demonstrates that regional human rights institutions may emerge incrementally from periods of political transition and need not depend upon the existence of a single shared constitutional moment, unlike Europe.

1.4. Sovereignty and Regionalism: Lessons from Africa

The African regional human rights systems emerged from a post-colonial context, focused on liberation and development against colonial domination and economic underdevelopment. These priorities were institutionally embedded in the Organization of African Unity (OAU), established in 1963 to promote unity, development, and international cooperation, which shaped the adoption of the African Charter on Human and People's Rights in 1981 (African Charter). Reflecting OAU-era sensitivities, the African Charter initially relied on the African Commission on Human and People's Rights (ACHPR) rather than a judicial body, which reflected a cautious approach to supranational adjudication, motivated by concerns over external interference. However, the vision of an 'integrated and peaceful Africa' facilitated the establishment of the African Court on Human and People's Right (ACtHPR).

These regional experiences suggest that effective human rights systems emerge through particular historical and political conditions rather than solely through legal design. Any future framework must therefore derive legitimacy from Asia's own political and historical realities rather than replicating external models.

2. Scope of Rights: What Is Missing from Existing Asian Frameworks?

The effectiveness of a regional human rights system depends not only on institutional design but also on the breadth and adaptability of the rights it protects. Existing Asian instruments recognise many civil, political and socio-economic rights but provide only limited mechanisms for their enforcement and development.

2.1. Asia: Broad Codification but Limited Protection

As Alan Watson notes, 'a rule, once transplanted, is different in its new home'.[14] In Asia, the scope of rights is deeply shaped by the 'Asian values' discourse which emphasizes social harmony, community, developmental priorities over individual autonomy.[15] Universal norms cannot simply replace local norms; they must pass through a filtering process to survive domestically.[16] This is illustrated in political leaders such as Lee Kuan Yew in Singapore and Malaysia's

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[13] Christina M Cerna, *Regional Human Rights Systems* (Routledge 2016) 15.

[14] Alan Watson, *Legal Transplants and European Private Law* (University of Belgrade 2000) 3.

[15] Jiyoung Song, 'Human Rights in Asia and the West' (*Carnegie Council,* 28 January 2016) <https://www.carnegiecouncil.org/media/series/gen/human-rights-in-asia-and-the-west> accessed on 8 January 2026.

[16] Baik (n 4) para 3.2.2.

Mahatir who have framed Asian interpretation of human rights as context-sensitive and relational rejecting the universalist approach.[17]

Most Asian regional instruments do enumerate civil, political and socio-economic rights, formally codifying ECSR protections, unlike Europe and the Americas, where such rights primarily emerge through judicial interpretation.[18] The ADHR sets out an extensive list of rights corresponding in form to those recognised under international human rights law, including civil and political rights, as well as economic, social and cultural rights. However, the ADHR frames the enjoyment of these rights as inseparable from duties to the community and subjects their content to considerations of national and regional context. This results in a conception of rights that is relational rather than absolute, with individual claims situated within broader social and political frameworks. Similarly, the ASEAN Intergovernmental Commission on Human Rights (AICHR) remains a political treaty and not a binding human rights instrument, which has shaped its design as consensus-based prioritising promotion over protection.[19] In South Asia, the South Asian Association for Regional Cooperation (SAARC) Social Charter adopts a developmental vocabulary, prioritising social progress and poverty reduction over rights-based claims, and largely omits civil and political freedoms from its scope.[20]

The Asian codification is also heavily qualified: rights are subject to domestic law, morality and social value. As demonstrated by the Arab Charter on Human Rights (Arab Charter) which recognises a wide range of civil, political, economic and social rights, drawing explicitly on international human rights treaties but it is circumvented by references to domestic law, public morality, and prevailing social values.[21] As an example, Article 32 provides for the 'right to information and freedom of opinion' but also qualifies this with 'respect to morals'.[22] Similarly, the inclusion of rejection of racism and Zionism combines with provisions concerning death penalty for minors and differential treatment of women has prompted the UN High Commissioner for Human Rights to conclude the Arab Charter to be in non-compliance of international human rights standards.[23]

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[17] ibid.

[18] American Declaration on the Rights and Duties of Man, OAS Res XXX (adopted 2 May 1948) arts 6 and 7.

[19] Vitit Muntarbhorn, 'Regional Mechanisms for Human Rights Protection in Asia and the Pacific: Contextuality, Actuality, Opportunity' (Paper presented at the Asia-Pacific Regional Dialogue for Human Rights 75, Bangkok, 11 October 2023) 3.

[20] SAARC Social Charter (adopted 2004) paras 3–6, objectives I–III.

[21] Muntarbhorn (n 19) 4.

[22] Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) (Unofficial Translation) <https://www.ohchr.org/sites/default/files/Documents/Issues/IJudiciary/Arab-Charter-on-Human-Rights-2005.pdf> accessed 9 January 2026, art 32(2).

[23] Sultan Sooud Al Qassemi, 'Revisiting the Arab Charter for Human Rights' (*Sultan Sooud Al Qassemi*, 18 April 2023) <https://sultanalqassemi.com/articles/revisiting-the-arab-charter-for-human-rights/> accessed 9 January 2026.

Beyond that, growing regional concerns in Asia have shown that codification alone does not ensure protection. The imposition of Hong Kong's National Security Law (NSL) demonstrates that even when legal rights are formally recognized, political priorities and state control can severely curtail their enjoyment, particularly civil and political rights.[24] While Hong Kong retains a written constitutional framework recognizing fundamental rights, the NSL introduced broadly defined offences related to secession, subversion and collusion with foreign forces which affected freedom of expression, assembly and judicial independence.[25] In addition to this, there are no binding adjudicatory mechanisms in the Asian regional sphere. Enforcement and judicial expansion of rights are minimal, and protection relies on dialogue, reporting and state compliance.

2.2. Judicial Development of Rights: Lessons from Europe and the Americas

The limitations of existing Asian instruments become more apparent when compared with systems that permit rights to evolve through authoritative judicial interpretation. Europe prioritizes the protection of individual civil and political rights primarily through the ECHR. This focus has enabled the ECtHR to develop a coherent and authoritative body of jurisprudence addressing systemic violations, such as in *D.H and Others v Czech Republic*[26] where the ECtHR addressed the systemic discrimination against Roma children in education. Similarly, in *Opuz v Turkey*,[27] where the applicant and her mother suffered years of severe domestic violence by the applicant's husband, ultimately culminating in the murder of her mother, the ECtHR found violations linked to gender and condemned discrimination against women through domestic violence.[28] In its 2024 climate change jurisprudence, particularly in *Verein KlimaSeniorinnen v Switzerland*,[29] the ECtHR recognized that Article 8 ECHR may impose positive obligations on states to take regulatory measures to mitigate climate change, although other related applications were declared inadmissible on standing and jurisdictional grounds.[30] However, it is submitted that this expansion remains contingent on judicial

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[24] BBC News, 'China's New Law: Why Is Hong Kong Worried?' (22 May 2020) <https://www.bbc.co.uk/news/world-asia-china-52765838> accessed 9 January 2026.

[25] HM Government, 'Country Policy and Information Note: Hong Kong National Security Legislation, China (April 2025)' (30 January 2026) <https://www.gov.uk/government/publications/china-country-policy-and-information-notes/country-policy-and-information-note-hong-kong-national-security-legislation-china-april-2025> accessed 24 June 2026.

[26] *D H and Others v Czech Republic* (App no 57325/00) (ECtHR, 13 November 2007) paras 175–195, 193–198, 209–210.

[27] *Opuz v Turkey* (App no 33401/02) (ECtHR, 9 June 2009).

[28] ibid paras 128–149, 159–176, 191–202, 200–210.

[29] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (App no 53600/20) (ECtHR, 9 April 2024).

[30] ibid paras 416–436, 538–573, 573–640, 641–657.

willingness rather than explicit treaty provisions. This is because the ECHR does not expressly codify comprehensive socio-economic rights, requiring the ECtHR to derive protection indirectly through provisions such as Articles 8 and 14.

The Inter-American system also emphasizes civil and political rights as anchored primarily in the ACHR, supplemented by the American Declaration on the Rights and Duties of Man and additional protocols.[31] Similar to Europe, the ACHR does not initially provide a comprehensive treatment of ECSR; instead, Article 26 of the Convention commits member states to the progressive realization of such rights rather than immediately enforceable entitlements which is distinguished from Africa's integrated and indivisible rights framework.[32]

A strength of both the Europe and the Americans system lie in its adaptability to changing global contexts through judicial interpretation. The IACtHR and IACHR have extended protections to vulnerable groups, [33] including sexual minorities, forced labour victims and individuals with HIV[34] through judicial rulings. Further, the IACtHR recognized novel rights in *Members of José Alvear Restrepo Lawyers' Collective vs. Colombia*[35], IACtHR considered allegations of unlawful state surveillance against human rights lawyers, engaging the right to privacy under Article 11 of the American Convention. The IACtHR held that privacy protection extends to personal data and informational autonomy, requiring strict safeguards against arbitrary state interference.[36] This demonstrates the IACtHR dynamic interpretation of the Convention, expanding privacy into the digital sphere through judicial development.[37] While Asian systems may also protect privacy, the Inter-American approach illustrates a more developed supranational articulation of informational self-determination. More recently, the IACtHR reframed environmental protection as a human rights obligation. The opinion clarified that states have reinforced due diligence to prevent irreversible harm to the climate system by recognizing the individual and collective dimensions

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[31] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 arts 3–25; American Declaration on the Rights and Duties of Man (n 18) arts I–XXVIII; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (adopted 17 November 1988) OAS Treaty Series No 69.

[32] American Convention on Human Rights (n 31) art 26.

[33] Universal Rights Group, *A Rough Guide to the Regional Human Rights Systems* (Universal Rights Group 2019) <https://www.universal-rights.org/human-rights-rough-guides/a-rough-guide-to-the-regional-human-rights-systems/> accessed 6 January 2026.

[34] The Swedish Foundation for Human Rights, On Human Rights Protection in Africa and the Americas: A Guide to Why Regional Human Rights Systems Are Important and How They Can Be Supported (The Swedish Foundation for Human Rights 2019) 28.

[35]Member of "José Alvear Restrepo" Lawyers' Collective v. Colombia (IACtHR, 18 October 2023) Series C No 506.

[36] ibid paras 113–117, 129–131.

[37] ibid paras 119–124, 159–165, 173–176.

of the right to a healthy environment.[38] Thus, while the Americas rely on judicial expansion to adapt rights to evolving social and global challenges, ECSR protections remain derivative and dependent on judicial involvement, which gives rise to a dynamic and evolving scope of rights.

These systems demonstrate that judicial interpretation enables regional rights protection to evolve beyond treaty text, an important feature currently absent from Asian mechanisms.

2.3. Context-Specific Rights and Collective Protection: Lessons from Africa

Africa presents a different model. The African Charter integrates civil, political and ECSR rights into a single, indivisible framework and explicitly recognizes collective rights.[39] Regional systems need not choose between universal human rights norms and regional specificity. Rather, regional instruments may strengthen protection by adapting universal principles to local realities while maintaining legal enforceability. Regional instruments such as the Maputo Protocol on the Rights of Woman in Africa (Maputo Protocol) address context-specific violations, such as female genital mutilation and expanded access to legal abortion in defined circumstances. [40]

For Asia, this lesson is particularly important. Existing Asian instruments already recognise a broad range of rights but often lack mechanisms capable of translating those rights into effective protection. If a pan-Asian human rights architecture were to emerge, it would plausibly draw upon the African model with reference to its recognition of collective and people's rights. A comparable need exists in Asia as illustrated in the honor killings and gender-based mass atrocities in South Asia.[41] In India and Pakistan, 'honor' crimes continue to disproportionately target females often sanctioned by local customs despite clear violations of human rights laws.[42] Similarly, historical and ongoing campaigns against women in conflict zones, framed as gender genocide, expose gaps in the enforcement of universal human rights treaties such as the Convention on the Elimination of All

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[38] OHCHR, 'UN Experts Hail Landmark Inter-American Court Opinion on States' Extensive Duties to Protect the Climate' (11 July 2025) <https://www.ohchr.org/en/press-releases/2025/07/un-experts-hail-landmark-inter-american-court-opinion-states-extensive> accessed 9 January 2026.

[39] Muntarbhorn (n 19) 8.

[40] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) arts 5(b), 14(2)(c).

[41] Human Rights Watch, 'Item 12 - Integration of the Human Rights of Women and the Gender Perspective: Violence against Women and "Honor" Crimes' (6 April 2001) <https://www.hrw.org/news/2001/04/05/item-12-integration-human-rights-women-and-gender-perspective-violence-against-women> accessed 6 January 2026.

[42] Aisha K Gill, '"Honour", "Honour"-Based Violence and "Honour" Killings' (*European Human Rights Advocacy Centre (EHRAC),* 25 November 2019) <https://ehrac.org.uk/en_gb/blog/honour-honour-based-violence-and-honour-killings/> accessed 9 January 2026.

Forms of Discrimination Against Women (CEDAW).[43] A pan-Asian framework could similarly articulate enforceable protections while also incorporating stronger mechanisms for judicial development similar to those found in Europe and the Inter-American system by tailoring universal norms to the specific cultural and legal contexts of Asia.

3. Institutional Structure and Enforcement: Why Existing Asian Mechanisms Lack Effective Enforcement

While many Asian instruments recognize human rights principles, their effectiveness is limited by institutional weakness rather than normative absence. This section examines the structural limitations of existing Asian mechanisms before comparing the institutional models adopted in Europe, the Americas and Africa.

3.1. Asia's Consensus-Based Model and Its Enforcement Deficit

Asia's regional human rights architecture is markedly different. Regional human rights instruments exist in largely aspirational or advisory form. Bodies such as ASEAN, SAARC, the Arab League, the Pacific Islands Forum, and the Asia-Pacific Forum of National Human Rights Institutions exist primarily to pursue political, economic or cultural objectives rather than human rights enforcement.[44] Further, most of these bodies operate at a sub-regional level, meaning there is no regional or sub-regional organization in Asia specifically tasked with promoting and enforcing human rights.[45] More importantly, institutional enforcement mechanisms are extremely limited: the AICHR's negotiation and adoption of the ADHR represents a significant normative milestone by marking the first formal codification of international human rights norms into an ASEAN instrument.[46] However, the practical impact remains limited as this normative acceptance has not translated into binding regional commitments or adjudicatory mechanisms. Unlike any other regional system, Asia's pivotal deficiency is the absence of regional human rights courts and states are under no binding obligation to implement recommendations.[47] In contrast to the Council of Europe, which combines a binding human rights convention, a permanent regional court, and political supervision of judgments by the Committee of Ministers, Asia's regional architecture remains fragmented and largely advisory. The Rohingya crisis in Myanmar provides a stark illustration of the effects of Asia's institutional enforcement deficit. Despite widespread allegations of ethnic cleansing and crimes

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[43] Rangita De Silva De Alwis and M West, 'Policy Paper on Conflict-Related Sexual Violence and Accountability' (Penn Carey Law School 2024) 31–32.

[44] Muntarbhorn (n 19) 17.

[45] ibid.

[46] Jones (n 5) 23.

[47] Mathew Davies, 'An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia' (2014) 33 *Journal of Current Southeast Asian Affairs* 107.

against humanity, the regional response remained constrained by ASEAN's foundational commitment to non-interference.[48] In the absence of any regional enforcement mechanism, accountability is displaced to international fora, such as the International Criminal Court (ICC) and the International Court of Justice (ICJ) for state and individual responsibility.[49]

This structural absence explains why formal commitments, such as the ADHR or Arab Charter, lacks teeth and underscores the extreme enforcement challenges any pan-Asian system would face. Asia represents an extreme case where rights are codified but structurally unenforceable which emphasis the importance of institutional authority in translating legal commitments into actual protection for victims.

3.2. Compulsory Jurisdiction and Political Supervision: Lessons from Europe

Europe presents the most institutionalized model of regional human rights enforcement. The ECHR adopted under the CoE is enforced by the full-time European Courts of Human Rights (ECtHR) where compulsory jurisdiction applies uniformly to all Council of Europe member states.[50] Similar to the Americans and Africa, the ECtHR operates as a residual safeguard under the doctrine of subsidiarity which means domestic remedies must be exhausted before regional mechanisms intervene.[51] The ECtHR also applies the 'margin of appreciation', granting states contextual deference in interpreting their domestic obligations.[52]

The Committee of Ministers (COM) that acts as a political supervisory body further strengthens enforcement by supervising the execution of ECtHR judgments, monitoring state compliance and applying political pressure to ensure remedies are implemented.[53] Democratic backsliding in states such as Poland and Hungary illustrates the limits of judicial authority when confronted with deliberate domestic defiance.[54] In *Reczkowicz v. Poland*, [55] reforms to the judiciary which includes the establishment of a Disciplinary Chamber capable of sanctioning judges for the content of their rulings illustrated findings of violations by the ECtHR for

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[48] OHCHR, 'Myanmar's Civilians Demand Justice amid Worsening Crisis' (03 October 2025) <https://www.ohchr.org/en/stories/2025/10/myanmars-civilians-demand-justice-amid-worsening-crisis> accessed 8 January 2026.

[49] Baik (n 4) para 5.2.1.

[50] Heyns and others (n 3) 1.

[51] ibid.

[52] *Handyside v United Kingdom* (App no 5493/72) (ECtHR, 7 December 1976) para 48.

[53] Moeckli and others (n 2) 471.

[54] Arndt Wonka, Markus Gastinger and Michael Blauberger, 'The Domestic Politics of EU Action against Democratic Backsliding: Public Debates in Hungarian and Polish Newspapers' (2023) 32(2) *Journal of European Public Policy* 498–521.

[55] *Reczkowicz v Poland* (43447/19) [2021] ECHR.

undermining judicial independence.[56] While judgements were issued and supervision was initiated by the COM, compliance by Poland remains partial and delayed, exposing the structural reality that enforcement ultimately depends on political willingness.[57] These examples demonstrate Europe's effectiveness does not lie in coercive enforcement but in sustained reputational pressure and the long-term internalization of human rights norms within domestic legal cultures.[58] Nevertheless, while political will remains crucial, the ECtHR and COM demonstrate that formal institutional authority combined with political oversight, even if imperfect, significantly strengthens rights and protection.

For Asia, the European experience demonstrates that institutional effectiveness derives not simply from the existence of a court but from the interaction between judicial authority and political supervision. The absence of comparable structures within existing Asian mechanisms explains why regional commitments often fail to translate into practical accountability.

3.3. Transformative Remedies and Protective Measures: Lessons from the Americas

The Inter-American system operates a two-tiered system through a Charter-based IACHR and the treaty-based IACtHR.[59] The IACtHR decisions are binding against consenting states and can order remedies including legal and policy changes, as well as symbolic reparations.[60]

Unlike Europe, the Inter-American system lacks a permanent political supervisory body but compensates through precautionary and provisional measures designed to prevent irreparable harm.[61] Additionally, the IACtHR places particular emphasis on symbolic forms of reparation, such as public acknowledgements and memorialization.[62] Despite these mechanisms, enforcement ultimately relies on state compliance and the absence of universal ratification means compliance is uneven.[63] Compared to Europe, it remains vulnerable to political unwillingness.

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[56] ibid paras 260–281, 276–280.

[57] Marcin Szwed, 'Hundreds of Judges Appointed in Violation of the ECHR?' (*Verfassungsblog*, 29 July 2021) <https://verfassungsblog.de/hundreds-of-judges-appointed-in-violation-of-the-echr/> accessed 9 January 2026.

[58] A Burcu Bayram, Eric Keels and Efe Tokdemir, 'Enforcement of International Human Rights Law: A Comparative Exploration of Alternative Public Opinion Channels' (2025) 27(4) *The British Journal of Politics and International Relations* 1385, 1387–1390.

[59] Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3 art 106; American Convention on Human Rights (n 31) arts 33–51; Statute of the Inter-American Commission on Human Rights (adopted 1979).

[60] Moeckli and others (n 2) 451.

[61] The Swedish Foundation for Human Rights (n 34) 21.

[62] ibid 21.

[63] ibid 25–26.

Nevertheless, the Inter-American experience illustrates that even where compliance is imperfect, regional institutions can influence domestic reform through transformative remedies and precautionary measures. This highlights the extent to which existing Asian institutions remain limited by their exclusively consultative functions.

3.4. Hybrid Enforcement and Collective Oversight: Lessons from Africa

Enforcement under the ACHPR operates through a two-tier institutional structure comprising of the ACHPR and ACtHPR. The ACHPR issues non-binding recommendations that depend upon political willingness.[64] Although the ACtHPR issues binding judgments, enforcement remains dependent upon state consent. The limited ratification further weakens enforcement credibility.[65]

Collectively, these regional experiences suggest that effective enforcement requires a combination of legal authority, institutional oversight and political acceptance. Europe illustrates the benefits of compulsory jurisdiction and political supervision, the Inter-American system demonstrates the value of flexible remedial powers, and Africa highlights the possibilities and limitations of gradual institutional development. For Asia, these comparisons suggest that immediate adoption of a fully judicialised regional court may be politically unrealistic. However, they also demonstrate that the current reliance on soft law and consensus alone is insufficient to ensure effective protection. A future pan-Asian framework would therefore require incremental institutional strengthening if regional commitments are to become practically meaningful.

4. Access to Justice: Can Individuals Meaningfully Enforce Rights in Asia?

Access to justice is central to the effectiveness of any regional human rights system. Existing Asian mechanisms largely exclude individual participation and rely on intergovernmental dialogue, creating significant accountability gaps. Comparative regional experience therefore provides valuable guidance for designing future access mechanisms.

4.1. Asia's Structural Barriers to Justice

Unlike Europe, the Americas, and Africa, Asia lacks both a regional human rights court or a system of individual petitions. Access to regional human rights mechanism, if any, is primarily consultative and state-centered.[66] Further, mechanisms such as the AICHR are designed mainly to promote human rights through dialogue, cooperation and consensus rather than through legal

[64] Piątkowska (n 8) 17.

[65] ibid. Only 34 Member States have currently ratified the Protocol. Out of these, only eight States have filed the Declaration under Article 34(6) of the Protocol by which the accept the competence of the ACtHPR to consider applications filed by individuals and NGOs.

[66] Muntarbhorn (n 19) 4.

adjudication.[67] While it must be noted that proposals for an Arab Human Rights Court to function alongside a reporting-based committee signal growing normative ambitions, both proposed features do not include an individual complaint mechanism.[68] The Philippines' 'war on drugs' demonstrates the consequences of this institutional gap. Despite thousands of alleged extrajudicial killings, victims and their families lacked credible domestic and regional avenues for redress, leaving the ICC's preliminary investigation and subsequently its formal investigation as one of the few available accountability mechanisms.[69] Without regional courts or petition mechanisms, affected persons must instead rely on UN Special Procedures, which lack binding enforcement powers.[70]

Where individuals are excluded from participation, enforcement becomes entirely state-centric, reinforcing the very sovereignty concerns that regional systems are intended to mitigate. Moreover, the absence of individual complaints procedures removes an important avenue for exposing systemic violations that domestic institutions may be unwilling or unable to address. As a result, access to justice in Asia is not merely procedurally limited but structurally constrained, preventing the emergence of a rights-based culture in which individuals can meaningfully invoke legal protections.[71] This reinforces the broader conclusion that without mechanisms for individual engagement, regional human rights commitments are unlikely to translate into effective protection in practice.

4.2. Direct Individual Access: Lessons from Europe

The ECtHR provides direct individual access after exhaustion of domestic remedies.[72] This structure affords a clear and streamlined pathway to redress and ensures that the ECtHR can hear cases that might otherwise be blocked by state-controlled mechanisms.[73] Protocol 14 streamlined admissibility criteria and allowed smaller panels to handle lower-priority cases to improve efficiency[74] and

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[67] Jones (n 5) 36.

[68] Muntarbhorn (n 19) 4.

[69] Office of the Prosecutor, Situation in the Republic of the Philippines: Request for Authorisation of an Investigation pursuant to Article 15(3) (ICC-01/21, 15 September 2021) paras 2–6, 94–101; Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in the Philippines (29 June 2020) UN Doc A/HRC/44/22 paras 8–15, 23–30.

[70] Office of the United Nations High Commissioner for Human Rights (OHCHR), 'What are Communications?' <https://www.ohchr.org/en/special-procedures-human-rights-council/what-are-communications> accessed 1 August 2026.

[71] Muntarbhorn (n 19) 2.

[72] Joint Committee on Human Rights, *Protocol No. 14 to the European Convention on Human Rights* (2004–05, HL Paper 8, HC 106) arts 33–34.

[73] European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5 arts 13, 34 and 35.

[74] Moeckli and others (n 2) 477.

access, something the Inter-American Commission struggles with. Europe therefore offers the most accessible regional mechanism. This level of accessibility contrasts sharply with existing Asian mechanisms, where individuals remain largely excluded from regional processes and must rely on domestic institutions or universal mechanisms for redress.

4.3. Commission-Based Filtering: Lessons from the Americas

Individuals first petition the IACHR before cases may proceed to the IACtHR.[75] Unlike the European system, individuals do not enjoy direct standing before the IACtHR. This institutional filter places the IACHR at the centre of the access pathway and gives it considerable discretion over which cases proceed to judicial determination. Although less accessible than the European model, the Inter-American system nevertheless recognises individuals as active participants within the regional human rights framework. This represents a significant difference from Asia's state-centred approach.

4.4. Hybrid Access Models: Lessons from Africa

Access is primarily Commission-based, with only limited direct access to the Court.[76] The ACtHPR allows direct access only for state parties to its protocol, whereas individuals can otherwise access the ACtHPR through a referral by the ACHPR.

The comparative analysis demonstrates that different procedural models may achieve accessibility through different institutional designs. Europe prioritises direct individual access, while the Americas and Africa rely on commission-based filtering mechanisms. Despite these differences, all three systems recognise individuals as participants in regional human rights protection. Asia remains exceptional in largely excluding individuals from regional enforcement processes. Consequently, any future pan-Asian framework seeking to improve human rights protection would ultimately require some mechanism through which individuals can engage directly or indirectly with regional institutions.

Conclusion

Overall, regional human rights systems in Europe, the Americas and Africa demonstrate the normative value of supranational protection, their effectiveness is contingent upon enforcement capacity, access to justice and sustained political will. Applied to Asia, these comparisons suggest that a pan-Asian human rights system would face significant challenges, particularly in enforcement and compliance given the strong sovereignty and political diversity. The absence of a shared historical rupture and the vastly diverse regional politics would mean that a court-centric pan-Asian system modelled closely on either of the regional systems would

[75] The Swedish Foundation for Human Rights (n 34) 19–20.

[76] Moeckli and others (n 2) 496.

face significant structural resistance. Nevertheless, it would be misleading to characterise Asia as normatively hostile to human rights protection. Most Asian states have ratified core international human rights treaties,[77] indicating a degree of normative convergence at the international level. Moreover, ongoing regional and sub-regional dialogues suggest the emergence of institutional engagement albeit without adjudicatory enforcement. These developments point to a gradual rather than an immediate readiness for the transplantation of other regional models.

As such, while a pan-Asian human rights system is normatively desirable and it is argued that there should be one in the future, comparative experience demonstrates that its effectiveness would not depend on the immediate creation of a regional system but on the gradual consolidation of political commitment, institutional trust and enforcement, as my very own Asian father always said, slowly but surely.

[77] Baik (n 4) 25.

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ARTICLE

Is Regulating Armed Conflict a Practically Impossible and Pointless Endeavour? A Critical Analysis of the Rwandan Genocide

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ABSTRACT. This research paper critically examines the international response timeline in attempting to regulate the rising armed conflict in Rwanda. It explores the United Nations' bureaucratic structure and its inefficiency to respond and regulate armed conflict. Following this, the paper highlights an example of the result of the lack of international response which left a large proportion of civilians unprotected and victims to fear tactics and brutality through gender-based violence. From there, examining the international community's lack of commitment, action and dismissal of repeated warnings, including General Dallaire's Genocide Fax, which directly contributed to the failure to regulate the 1994 Rwandan Genocide. Then concluding on how the Rwandan Genocide illustrated the shortcomings of the principle of state sovereignty when it comes to preventing mass atrocities and the hesitance to intervene. Overall, it argues that the Rwandan Genocide is not an example that regulating armed conflict is impossible nor pointless, but the endeavour becomes impossible with the failure of international commitment.

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'*We come here today partly in recognition of the fact that we in the United States and the world community did not do as much as we could have and should have to try and limit what occurred in Rwanda'.*[1]

– PRESIDENT BILL CLINTON

Introduction

As recognised by President Clinton, the international community failed in regulating the rising armed conflict in Rwanda, which led to the 1994 Genocide. A genocide in which 800,000 people died, and rape was used as a tactic of warfare, due to the lack of action and inefficiency of the United Nations and its member states. This paper argues that regulating armed conflict is not pointless but with the UNs structural limitations within its bureaucratic framework, prioritisation on state sovereignty and significantly with the absence of international commitment. Consequently, the endeavour to regulate the genocide became impossible.

This article illustrates this core issue through the Rwandan Genocide by firstly examining the international response timeline in its endeavours to regulate the rising armed conflict before the 1994 genocide, highlighting the failure of effective preventative action being taken. Moving to why the international communities lacked the capacity to intervene by investigating the limitations of the UN that were made prominent through the genocide, preventing effective control over the conflict. The paper further considers the implications of gender-based violence used as a tactic of warfare and demonstrating how the failure to regulate left many civilians unprotected, highlighting an impact of a lack of regulation on innocent citizens.

The critical analysis section examines the international community's effectiveness to respond to the warning signs years before the genocide, focusing on the International Humanitarian Law breaches, the underrepresented process, and both the implementation of the Arusha peace agreement and then their response after the signing in 1993. Additionally, the article analyses the dismissal of the forewarnings in the months leading to the Genocide that highlighted the continued rising violence in Rwanda. This supports the central argument by demonstrating the failure of preventative regulation caused an impossible endeavour to regulate the 1994 genocide. With this, discussing the principle of state sovereignty in regulating internal armed conflict, bringing forward the argument that the colonizers set the foundation for the civil war decades before the 1994 Genocide, and the international community's failure to intervene and regulate quicker, made the endeavours to control the armed conflict in 1994 impossible.

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[1] Roger Winter, 'U.S. Failed to Stop Rwandan Genocide' (*Los Angeles Times*, 5 April 1999) <https://www.latimes.com/archives/la-xpm-1999-apr-05-me-24334-story.html> accessed 30 July 2026.

1. International response timeline in attempting to regulate the armed conflict

This section examines the implementation of the Arusha Peace Agreement to the international response timeline during the genocide. It argues that the lack of regulation started before the armed conflict began and rather than the failure of control being rooted in the lack of a legal framework but rather the absence of international commitment.

The United Nations' involvement in Rwanda began in late 1993,[2] when the talks of the Arusha Peace Agreement led to the signing in August 1993. The Rwandan government and the Rwandan Patriotic Front asked the UN for assistance in Arusha's implementation, which aimed for 'a democratically elected government and provided for the establishment of a broad-based transitional Government until the elections, in addition to repatriation of refugees and integration of the armed forces of the two sides'.[3] In October 1993, the UN Assistance Mission for Rwanda was established to assist the implementation, however, the international community's poor contribution meant that it took five months to reach the authorized strength of 2,548.[4]

The ineffective regulation of Arusha led to internal conflict rising, when on April 6th, 1994, a plane carrying President Habyarimana was shot down, leading to Hutu militia groups rapidly slaughtering Tutsis. The killings spread quickly with the Prime Minister, cabinet ministers and UNAMIR peacekeepers being some of the first victims,[5] causing the withdrawal of UNAMIR troops.

During the Genocide, the international community remained on the sidelines, highlighted by the UN Security Council vote in April 1994, which led to the withdrawal of most of the UN peacekeeping operations.[6] By 21 April 1994, reduced UNAMIR's strength from 2,548 to 270.[7] With the Genocide spreading, the Security Council called for urgent international action and successfully increased UNAMIR's strength to up to 5,500 troops,[8] although unsuccessfully it took nearly six months for Member States to provide the troops,[9] this being after the Genocide

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[2] United Nations, 'Outreach Programme on the Rwanda Genocide and the United Nations' (*United Nations*) <https://www.un.org/en/preventgenocide/rwanda/historical-background.shtml> accessed July 30, 2026.

[3] ibid.

[4] ibid.

[5] ibid.

[6] Amanda Onion, 'Rwandan Genocide – Facts, Response & Trials' (*HISTORY*, 14 October 2009) <https://www.history.com/topics/africa/rwandan-genocide> accessed 14 November 2024.

[7] United Nations, 'UNAMIR' (*Peacekeeping United Nations*) <https://peacekeeping.un.org/en/mission/past/unamirS.htm> accessed 14 November 2024.

[8] ibid.

[9] ibid.

ended.[10] A French intervention intervened in June but limited their intervention to a 'Humanitarian Zone'.[11] The Genocide ended when RPF forces took control and committed to the 1993 Arusha Agreement.

The international response and regulation in Rwanda were a failure. As U.N. Secretary General Boutros Boutros-Ghali stated, 'the failure of Rwanda is 10 times greater than the failure of Yugoslavia. Because in Yugoslavia the international community was interested, was involved. In Rwanda nobody was interested'.[12]

2. Limitations of the UN

This chapter examines the structure of the UN and analyses how its framework limits the effectiveness of regulating armed conflict due to its international reliance. This is central to my argument as the Rwandan genocide highlighted the failure in the UN's ability not only to regulate the armed conflict but also to provide preventative action in the first place.

The UN comprises six principal organs from the General Assembly comprised of all Member States' representatives, to the UN Secretariat that carries out the daily work and supports the other principal organs like the Security Council, which is primarily responsible for the maintenance of international peace and security.[13] The Economic and Social Council deals with economic, social and environmental challenges, and the Trusteeship Council was established to supervise 11 Trust Territories to ensure adequate implementation.[14] The International Court of Justice is a fundamental judicial organ within the United Nations.[15] Collectively, these components of the United Nations work in unison to achieve their objectives, including, peacekeeping and security, human rights advocacy, economic development and humanitarian assistance.[16]

However, the implementation and success of the UN rely on the international commitment. Additionally, as identified by Santos, diplomatic dialogue is central to achieving its objectives, which can be hindered success and cooperation by political division and differing ideologies.[17] As further identified by Jordan Layne, 'The United Nations has been criticized for its bureaucratic

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[10] ibid.

[11] Onion (n 6).

[12] ibid.

[13] United Nations, 'UN Structure' <https://www.un.org/en/model-united-nations/un-structure> accessed 24 June 2026.

[14] ibid.

[15] ibid.

[16] Edmarverson A Santos, 'United Nations: Structure and Challenges' (*Diplomacy and Law*, 27 November 2023) <https://www.diplomacyandlaw.com/post/united-nations-structure-and-challenges> accessed 26 June 2026.

[17] ibid.

structure',[18] with its inefficiency and slow progress in critical time, highlighted by the lack of timely and decisive action during the Rwandan Genocide. This raises the issue of sovereignty v intervention, with how there is unclarity on when the international community should intervene and regulate armed conflict in another state's civil affairs. Another major limitation is the reliance on states for both funding and troops, meaning, the UN is only as powerful as the states will let it be, impacting the ability to effectively control armed conflict.

The overall limitations of the UN were shown during the Genocide with the failure to act strongly and quickly, which led to a weak regulation of the armed conflict, causing 800,000 deaths and many innocent civilians being subjected to psychological torture and degrading acts. Ingvar Carlsson[19] concluded that, '…there is one overriding failure which explains why the UN could not stop or prevent the genocide, and that is a lack of resources and a lack of will - a lack of will to take on the commitment necessary to prevent the genocide'.[20] Nevertheless, with stronger state commitments and rapid decisions, successful outcomes for international affairs will show that regulating armed conflict is not pointless or impossible and the UN can be committed to global justice.

3. Gender-based violence

This chapter analyses how the international community's failure to commit to both preventing and regulating Rwandan Genocide resulted in the widespread use of gender-based violence. Despite the legal frameworks being in place to protect the civilians during warfare without the international commitment both contributed and allowed the continuance of victimisation of both woman and girls during a genocide that became impossible to control.

The principle of distinction is codified in Article 48 of the Additional Protocol 1 (AP 1) to the Geneva Conventions,[21] where attacks may be directed only against combatants and military objects and never against civilians or civilian objects. The gender-based violence became a tactic of warfare, and rape was used to generate fear and humiliate women. A journal by Scott Straus estimated that '250,000 to 500,000 rapes were perpetrated during the Rwandan Genocide'.[22] The unregulated violence during this armed conflict was not only a violation of Article

[18] Luxwisp, '20 Pros and Cons of the United Nations' <https://www.luxwisp.com/pros-and-cons-of-the-united-nations/#Cons_of_the_United_Nations> accessed 30 July 2026.

[19] Former Swedish Prime Minister.

[20] Nicole Winfield, 'UN Failed Rwanda' (Global Policy Forum, 16 December 1999) <https://archive.globalpolicy.org/component/content/article/201-rwanda/39240.html> accessed 16 November 2024.

[21] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 art 48.

[22] Scott Straus, 'Rwanda and Darfur: A Comparative Analysis' (2006) 1(1) *Genocide Studies and Prevention* 41, 44.

48 of AP 1,[23] with innocent civilians being targeted, but also a breach of Article 51 of AP1[24] which states that indiscriminate attacks are prohibited,[25] and which prohibits acts designed to spread terror amongst the civilian population[26]. Survivor Marie Louise Niyobuhungiro, wrote 'for two weeks, I hid myself during the day and walked during the night. I ate nothing and hid in the bushes'.[27] Marie not only survived in a state of terror but was also a victim of many sexual offences. Another survivor, Pascasie Mukasakindi said 'almost fifty men raped me in one day…after they were done raping me, they shoved a nailed club into my vagina'.[28] These acts were committed on Pascasie by the Rwandan forces who she thought would protect her. During the Rwandan Genocide many of the articles and principles to the Geneva Convention were breached and continued to be violated, with the international community remaining absent.

The number of victims that were subjected to indiscriminate acts and degrading treatment highlighted the failure to regulate. Additionally, Human Rights Watch, reported in 1993 that, 'Rwandan soldiers frequently rape women…women know that to accuse soldiers is futile and may well lead to further harassment or even death'.[29] Indicating that it had been previously reported about the sexual offences being committed, yet there was no effective response.

Due to the community's inefficiency, many women and girls underwent acts including rape, gang rape, sexual slavery, forced incest, forced marriage and amputation or mutilation of victims.[30] And shockingly, some of the rapes were committed by UN soldiers, notably the French, under ironically a UN mandate called Operation Turquoise to supposedly establish and maintain a 'secure humanitarian area'.[31] Marie Jeanne Murekatete, was repeatedly a victim of rape by the people she thought were there to provide safety, she says 'there was no escaping the French soldiers. They came into the camp looking for women to rape'.[32] Thus, in the endeavours to regulate armed conflict and provide safety for civilians, who

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[23] Protocol I (n 21) art 48.

[24] ibid art 51(4).

[25] ICRC, 'Article 51 - Protection of the Civilian Population' (IHL Database) <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-51?activeTab=1949GCs-APs-and-commentaries> accessed 17 November 2024.

[26] Protocol I (n 21) art 51(2).

[27] Anne-Marie de Brouwer and Sandra Ka Hon Chu, *The Men Who Killed Me: Rwandan Survivors of Sexual Violence* (D & M Publishers 2010) 33.

[28] ibid 75.

[29] Nharaunda-Makawa Rejoice and Kurebwa Jeffrey, 'Sexual Violence against Women during the Rwandan Genocide: A Narrative Review' (2021) 12(2) *International Journal of Peace and Development Studies* 71.

[30] de Brouwer and Ka Hon Chu (28) 15.

[31] ibid 17.

[32] ibid 47.

had not already left, stayed, and just like the combatants they were fighting against, they both mutually, humiliated and tortured women, whilst committing degrading acts of sexual violence. Article 76 of the AP1[33] states that 'Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault',[34] and during the Rwandan Genocide, the international community failed to protect hundreds of thousands of innocent girls and women due to a lack of regulation.

4. Critical Analysis of the failure of international regulation to prevent nor regulate the Rwandan Genocide

This section critically analyses the failure to enforce the international humanitarian law in preventing and regulating the Rwandan Genocide even when the crimes against humanity that took place fell within its jurisdiction. Rwanda was failed by the unrepresented process, pushing for Arusha and then not providing assistance for its implementation, whilst ignoring the forewarnings of the rising tensions. This supports the central argument of the failure of international statutes and agreements are powerless without member states commitment.

International humanitarian law seeks to minimise harm suffered during conflict, governing the laws surrounding humanitarian violations and the regulation of armed conflict. The Geneva Conventions were shown to be repeatedly violated during the Rwandan Genocide. AP 1 to the Geneva Conventions, Part IV[35] extends protection to the civilian population against the effects of hostilities and provides protocols to ensure regulation of the armed conflict for the safety of civilians, and during the Genocide, the international community failed to effectively contribute into seeing the warfare regulated and the civilians safe. Even though crimes against humanity and genocide, fell within the jurisdiction of international law, no action was taken. Wheeler concluded that, 'having failed to prevent the Genocide, the Security Council could have determined that the violations of human rights justified enforcement action under Chapter VII'.[36]

Without effectively following through with the set protocols, the conventions and their international statutes are powerless and ultimately inconsequential, and their articles will continue to be violated until the rules and regulations around armed conflict are made and shown to be a deterrent. The

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[33] Protocol I (n 21) art 76.

[34] ICRC, 'Article 76 - Protection of Women' (IHL Database) <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-76?activeTab=1949GCs-APs-and-commentaries> accessed 17 November 2024.

[35] ICRC, 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977' (IHL Database) <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977?activeTab=1949GCs-APs-and-commentaries> accessed 17 November 2024.

[36] Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2003) 238.

regulation in Rwanda was not just shown as impossible previously with the unrepresented process and pushing for the Arusha peace agreement and then not adequately assisting in the implementation. Before the signing in August 1993, when deliberation of Arusha was active, it can be argued that it was destined for retaliation due to the lack of representation of the majority of Rwandan civilians. James Gasana, who spoke about the view of the agreement from Kigali said, 'The farming community and the youth represented more than 60% of the population, but they were not presented at Arusha'.[37] The theme of underrepresentation was repeated through Arusha's process of distributing powers, Gasana states, 'There were parties not represented in the multi-party government that had become stronger than some parties who were in the government'.[38] In a country with violence and strong divides, representation for the people at the centre of the conflict is important to ensure a fair success and to strengthen Rwanda's ability to avoid further conflict. The feeling of exclusion from the peace process only created a negative impact on the already high-pressure impacting Rwanda's.

With prioritisation being the implementation of Arusha, the warning signs of warfare were overlooked. In August 1992, Joyce Leader,[39] wrote 'we can anticipate a new wave of internal insecurity, in some form or another, as peace talks proceed'.[40] She went further to warn of the future threat of violence, saying, 'it threatens the very fabric of the society by stirring hatreds that will be difficult, if not impossible to calm',[41] pre-empting the difficult task of regulating the conflict.

The physical implementation of Arusha included the disarmament, demobilisation and reintegration program,[42] which needed funding secured to be effective, yet the international community, 'struggled to come up with the funds'.[43] As Edwin Wuadom Warden wrote, 'a lack of commitment in a difficult environment invariably means failure of peace implementation'.[44] In Rwanda, Hutu Extremists

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[37] The National Security Archive, 'International Decision-Making in the Age of Genocide: Rwanda 1990-1994' (June 2014) <http://web.archive.org/web/20220128223926/https://nsarchive2.gwu.edu/NSAEBB/NSAEBB508/docs/Rwanda%20Final%20Transcript%20Day%201.pdf> accessed 18 November 2024, 19.

[38] ibid.

[39] US Embassy's Deputy Chief of Mission in Rwanda.

[40] Joyce Leader, Deputy Chief of Mission, 'Communication to US Secretary of State' (August 1992) National Security Archive, Electronic Briefing Book No 469 <https://web.archive.org/web/20220129134543/https:/nsarchive2.gwu.edu/NSAEBB/NSAEBB469/docs/DOCUMENT%204.pdf> accessed 18 November 2024, 2.

[41] ibid 13.

[42] Emily Willard, 'Rwanda: The Failure of the Arusha Peace Accords' (National Security Archive, Electronic Briefing Book No 469, 21 May 2014) <http://web.archive.org/web/20220405081610/https:/nsarchive2.gwu.edu/NSAEBB/NSAEBB469/> accessed 18 November 2024.

[43] ibid.

[44] Edwin Wuadom-Warden, 'Why Waning Wars Wax: A Relook at the Failure of Arusha Peace Accord, the Peace Agreement-Implementation Gap and the Onset of the Rwandan Genocide' (2016)

within the government did not agree with the terms discussed in Arusha, and, behind the peace process, the violence had spread rapidly, and during its signing, it was reported that the violence had leaked into the streets of Rwanda, linking the tense political discussions to outbreaks of violence.[45]

The challenges of Arusha were highlighted many times through its process, yet after the signing, the international community repeatedly refused to acknowledge and regulate the continuous threats. In 1993, Leader warned that 'although leaders of both sides have signed the peace accord, neither side trusts the intentions of the other'.[46] Highlighting that even after the signing the tension was still there, and, in order to be able to effectively regulate the armed conflict it needed; funding, the size increase of OAU's military observer group, political confidence, and, the UN and international commitment in the implementation. Yet, the international hesitance led to poor regulation and an increase of internal political tensions in Rwanda.

In January 1994, reports were being sent by the UNAMIR and the US Embassy with concern about the current position of Rwanda and even reported the beginning of civilians being distributed weapons and voiced concerns, 'Annabi is concerned that the combination of increasing covert activities, and a stalemated political process could produce a potentially explosive atmosphere'.[47] Hedi Annabi, who was responsible for overseeing the UNAMIR was urgently requesting assistance from the US to resolve the emerging crisis, but the constant requests for help were continuously dismissed. This weakness was exploited as the global support was seen as weak and the conflict progressively got worse. Annabi supports that Rwanda was failed by the ineffective commitment from the international community in regulating the armed conflict with how he never wavered from the view that the genocide could have been avoided with the implementation of timely reinforcements had been provided to the Canadian Force Commander, Lt-General Romeo Dallaire.[48]

Failure to prevent and regulate was highlighted with the dismissal of the 'Genocide fax' sent by Dallaire in January 1994, which included information on the

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4(1) *Journal of Global Peace and Conflict* 33, 45.

[45] Willard (n 42).

[46] Joyce Leader, Deputy Chief of Mission, 'Communication to US Secretary of State' (August 1993) National Security Archive, Electronic Briefing Book No 469 <https://web.archive.org/web/20220319180448/https:/nsarchive2.gwu.edu/NSAEBB/NSAEBB469/docs/DOCUMENT%2018.pdf > accessed 18 November 2024, 8.

[47] US Mission to the United Nations, 'UN concern over Rwanda' (January 1994) National Security Archive, Electronic Briefing Book No 469 <https://web.archive.org/web/20220128222426/https:/nsarchive2.gwu.edu/NSAEBB/NSAEBB469/docs/DOCUMENT%2025.pdf> accessed 18 November 2024, 1.

[48] Linda Melvern, 'Hédi Annabi: Head of the United Nations Stabilisation Mission in Haiti' *The Independent* (21 January 2010) <https://www.independent.co.uk/news/obituaries/hedi-annabi-head-of-the-united-nations-stabilisation-mission-in-haiti-1873958.html> accessed 18 November 2024.

planned Genocide that then took place 3 months later. Dallaire had requested to change the approach by raiding Interahamwe weapon caches, however, the UN rejected his request of action, instructing an approach of consulting government leaders instead, a decision which could have potentially prevented 800,000 deaths. And as written by the National Security Archive, 'It was one of several turning points when the United Nations, backed by the United States and other powers, failed to take action that might have prevented the Genocide'.[49] The Genocide Fax has become a symbol of failure with it highlighting the lack of action and the weakness of our international community's ability to regulate armed warfare before the worst has come.

The regulation of the armed conflict that took place between April 7th and July 19th, 1994, with the continuous breach of the humanitarian law and the lack of action in both controlling the warfare and preventing the Genocide displayed the endeavour as impossible and pointless. Nicholas Wheeler supported that 'The peace process was doomed from the outset, since its implementation depended upon the extremists within Habyarimana's clique compromising with the RPF'.[50] Furthermore, the highlighted limitation of the international community was the inability to effectively contribute into the regulation and even withdrawing troops after a few weeks. A report on the actions of the UN stated: *'*One should not forget the responsibility of the great majority of United Nations Member States, which were not prepared to send any troops or materiel at all to Rwanda'.[51] The international community's lack of commitment, action, and dismissal of forewarnings led to the inability to regulate, which leaves the question of whether sovereignty versus intervention is a repeated issue and knowing when to intervene in a country that's undergoing civil armed conflict.

5. Sovereignty v intervention

The final chapter examines the theory that the tension and inequality began in the colonial heritage and that the international communities impossible endeavour to regulate the genocide waws rooted in its prioritisation in state sovereignty. This is central to my argument due the continuing damaging effect the principle has as illustrated in not only Rwanda but in the Congo and Sudan.

The Rwandan Genocide illustrated the shortcomings of the principle of state sovereignty when it comes to preventing mass atrocities and the hesitance to intervene. Some adhere to the theory that the colonizers set the foundation for a

[49] National Security Archive and U.S. Holocaust Memorial Museum, 'The Rwanda "Genocide Fax": What We Know Now' (Michael Dobbs and Emily Willard eds, *The National Security Archive* Electronic Briefing Book No 452, 9 January 2014) <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB452/> accessed 19 November 2024.

[50] Wheeler (n 36) 212.

[51] Ingvar Carlsson, Han Sung-Joo and Rufus Kupolati, *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda* (*ReliefWeb*, 15 December 1999) <https://reliefweb.int/report/rwanda/report-independent-inquiry-actions-united-nations-during-1994-genocide-rwanda> accessed 29 July 2026.

civil war, traditional systems in Africa were already victim of inequality, therefore more prevalent to gain control. Supported by Noam Schimmel who wrote about the Belgium rule saying: 'They built upon Germany's racist policies in Rwanda, and, by cultivating division and hate in Rwandan society; employing a divide and conquer strategy of invasion, conquest, discrimination and persecution, helped lay the groundwork for mass murder and genocide'.[52]

Nevertheless, the increase of tensions and inequality due to the colonial heritage, led to a 1959 uprising aiming to overthrow the Tutsi monarchy. Wheeler wrote, 'During the 1959 uprising, it is estimated that 20,000 were killed and 160,000 fled to neighbouring states'.[53] Further armed conflict included the 1963 massacres, which Bertrand Russell described as 'the most horrible and systematic human massacre we have had occasion to witness since the extermination of the Jews by the Nazis'.[54] This again questions the international community's failure to regulate the previous armed conflict in Rwanda and prevent the 1994 Genocide.

There is an emerging debate as to the current approach in civil war intervention, with its priority on a state's sovereignty, instead of focusing on successful regulation of armed conflicts. As referenced by Sara Hylton, during the Rwandan Genocide the inaction from the international community was defended, on the grounds that state sovereignty trumped the responsibility held by the international community's responsibility to protect the victims.[55] Supporting that controlling armed conflict in Rwanda was an international failure and further expanding the analysis with how sovereignty can influence effective regulation.

Recent developments show a shift from prioritising a state's sovereignty, including the humanitarian military intervention debate, the Responsibility to Protect doctrine, the roles of the International Criminal Tribunal for Rwanda and the International Criminal Court.[56] Yet, Hylton criticises the progress, suggesting 'the need to re-define state sovereignty',[57] cases like the Democratic Republic of Congo, Darfur and Sudan, have displayed the need for reform with the continued inefficiency in endeavours in regulating non-international armed conflict.

The genocide in Bosnia, starting in April 1992, began with Bosnian Serbs' intention to ethnically cleanse the Bosnian Territory.[58] Similarly to the 1994

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[52] Noam Schimmel, 'A Postcolonial Reflection on the Rwandan Genocide Against the Tutsi and Statement of Solidarity with Its Survivors' (2021) 4(2) *Journal of Victimology and Victim Justice* 179.

[53] Wheeler (n 36) 210.

[54] ibid.

[55] Sara Hylton, 'Rwanda's Genocide and the Theory of State Sovereignty' (2012) 5 *Glendon Journal of International Studies* 78.

[56] ibid 80.

[57] ibid.

[58] Holocaust Museum Houston, 'Genocide in Bosnia' (*Holocaust Museum Houston*, 2 August 2023)

Rwandan genocide, gender-based violence was a prevalent feature, when Bosniaks were forced into concentration camps, resulting in women and girls being systematically gang-raped and others tortured, starved and murdered.[59] It was not until a year after in April 1993, the United Nations Security Council adopted Resolution 819, declaring Srebrenica a 'safe area'.[60] However, as proved in 1995 when the Serbs committed the largest massacre in Srebrenica, detaining and slaughtering 8,000 men and an estimated 23,000 women, children and elderly people were transferred.[61]

The failure to provide adequate protection further highlighted the lack of commitment and the need for structural change within the United Nations. Not to mention, before the disaster in July 1995, there were numerous indications that Bosnian Serb forces were planning a summer offensive against the safe area.[62] Despite the deliberate tactics to weaken the enclaved population, highlighting the warning signs of rising tensions before July 1995 and the Bosnian Serbs' restriction of replacement troops should have been a sign that quick commitment was needed to ensure regulation of the upcoming armed conflict.[63] As supported by Human Rights Watch, the massacre in Srebrenica made a mockery of the international community's professed commitment to safeguard regions.[64]

It was clear from Rwanda that warning signs needed addressing, commitment needed to be secured, and intervention needs to be implemented quicker to prevent and regulate mass atrocities. Similarly, the Bosnian conflict demonstrated the same weakness within the United Nations and the lack of effectiveness in preventing the 1995 Massacre in Srebrenica. As discussed by Cooper Scherr, 'In the aftermath of Bosnia and Rwanda, it was clear that the United Nations, as a slow, reactionary bureaucracy, failed to effectively combat the genocides'.[65] As a result of the disasters, including Rwanda[66] and Srebrenica,[67] as mentioned, reform included a judicial response to Rwanda and a new ethos of

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<https://hmh.org/library/research/genocide-in-bosnia-guide/> accessed 29 June 2026.

[59] ibid.

[60] International Residual Mechanism for Criminal Tribunals, 'Srebrenica: Timeline of Genocide' (*IRMCT*) <https://www.irmct.org/specials/srebrenica/timeline/en> accessed 29 June 2026.

[61] Holocaust Museum Houston (n 58).

[62] Human Rights Watch, *The Fall of Srebrenica and the Failure of UN Peacekeeping* (Human Rights Watch 1995) Vol 7, No 13, 11.

[63] ibid 12–13.

[64] ibid 1.

[65] Cooper Scherr, "Why the United Nations Cannot Stop Genocide" (2019) 23 Historical Perspectives: Santa Clara University Undergraduate Journal of History, Series II <https://scholarcommons.scu.edu/cgi/viewcontent.cgi?article=1171&context=historical-perspectives> accessed 30 July 2026.

[66] Rwandan Genocide 1994.

[67] Srebrenica Genocide 1995.

'responsibility to protect', with the goals to assist in regulation and protection by a rapid expansion of peacekeeping.[68]

Alex J. Bellamy addresses the genocides, including in Rwanda and Srebrenica, exposing 'the hollowness of legal responsibilities in the face of governments and armed groups willing and able to use mass civilian suffering to achieve their objectives'.[69] He further supports that the international community was initially ill-prepared to respond and the crises exposed the limitations of the international community's capacity and willingness to protect populations.[70] Bellamy further supports the notion that due to these failures the international agencies began to realise the need for structural reform and develop new concepts with a theme of adopting the Responsibility to Protect.[71] A number of regional organisations including Article 4(H) of the Constitutive Act of the African Union adopted in 2000, gave the organisation a right to intervene in the Member States' affairs in matters relating to genocide and crimes against humanity.[72] Humanitarian Organisations like Oxfam and CARE, adopted protection as one of their core goals with a growing recognition of the negative impact of armed conflict on vulnerable groups.[73] Bellamy further links the failures in Rwanda and Srebrenica and the increase in the protection roles and responsibilities of UN peacekeepers, with the Security Council employing Chapter VII of the UN Charter to authorise peacekeepers to use 'all necessary means' to protect civilians'.[74] Further, in 2006 with Resolution 1674 and in 2009 with Resolution 1894, the Council reaffirmed the Responsibility to Protect in resolutions on the protection of civilians in armed conflict.[75]

Nonetheless, following the 1994 Rwandan Genocide and the 1995 Srebrenica massacre, there has been an increase in recognition for the need for structural reform to protect civilians during armed conflict, which is fundamental for preventing gender-based violence during armed conflict. Yet, with Bellamy's points raised on the international developments since, it really only focuses on a states' responsibility to recognise when they need help and progression within humanitarian aid, not the development of preventing, intervening nor regulating

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[68] Chris McGreal, 'What's the Point of Peacekeepers When They Don't Keep the Peace?' *The Guardian* (17 September 2015) <https://www.theguardian.com/world/2015/sep/17/un-united-nations-peacekeepers-rwanda-bosnia> accessed 29 June 2026.

[69] Alex J Bellamy, *The Responsibility to Protect: Towards a 'Living Reality'*(United Nations Association–UK 2013) <https://una.org.uk/wp-content/uploads/2025/12/The-Responsibility-to-Protect-Towards-a-Living-Reality-Professor-Alex-Bellamy-1.pdf> accessed 29 June 2026, 6.

[70] ibid.

[71] ibid 7.

[72] ibid.

[73] ibid.

[74] ibid.

[75] ibid 8.

armed conflict itself. Which without proper committed regulation, providing adequate humanitarian aid is a therefore a difficult endeavour.

Although developments including the endorsement of the principle of the 'responsibility to protect' have been addressed positively by Gareth Evans, albeit one of the architects of the proposal, he also acknowledges the limits of successful reform within the UN.[76] From issues of implementation to Member States wanting to retain state sovereignty. And as Evans addressed in 2005, the UN system desperately needed major changes, especially to secure international commitment.[77]

Additionally, academics, including Elizabeth More in 2007, argued that we had learnt little from the failure of the international community in the 1994 Rwandan Genocide despite recognising the need for reform. More even acknowledges academics Gareth Evans and Mohamed Sahnoun, emphasising a responsibility to protect rather than a right to intervene, but unlike Bellamy, who highlights the developments that came from that ideology, More criticises the adoption of Responsibility to Protect where she states, 'it is not clear how much attention the UN has paid to this advice'.[78]

As the principle of Responsibility to Protect was being developed, the Genocide in Darfur was exposing the devastating consequences of inaction yet again.[79] As addressed by Juliette Paauwe although R2P[80] has faced challenges with implementation and mobilising collective action, it has shaped the international responses to atrocities and reinforced the principle that sovereignty is limited when it comes to harm being placed on civilians.[81] With the lack of response to the Darfur genocide in 2003 to 2005, and as More quotes, 'The crisis in Darfur reveals how little we seemed to have learned from the Rwandan genocide about using IHL/IHRL effectively in humanitarian intervention'.[82]

A common theme has been the lack of timely intervention from the international community to better prevent, regulate and protect. The bureaucratic structure of the United Nations continued to expose its weaknesses after Rwanda in the 1995 Srebrenica massacre and in the Darfur genocide in the early 2000s. Albeit

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[76] Gareth Evans, 'The Reform of the United Nations' (*Gareth Evans*, 24 October 2005) <https://www.gevans.org/speeches/speech215.html> accessed 29 June 2026.

[77] ibid.

[78] Elizabeth More, 'International Humanitarian Law and Interventions—Rwanda, 1994' (2007) 2(2) *Genocide Studies and Prevention* 155, 164.

[79] Juliette Paauwe, 'Twenty Years of the Responsibility to Protect and the Unfulfilled Promise in Darfur' (*Global Centre for the Responsibility to Protect*, 22 April 2025) <https://www.globalr2p.org/publications/twenty-years-of-the-responsibility-to-protect-and-the-unfulfilled-promise-in-darfur/> accessed 29 June 2026.

[80] Responsibility to Protect.

[81] Paauwe (n 79).

[82] More (n 78) 165.

the development of R2P has shown a shift of ideology from a prioritisation of a state's sovereignty, its practical success relies on international commitment, which can be argued decades on from the implementation of the principle has shown to be the biggest challenge of success. And as supported by More, despite the adoption of the principle, the UN has not reformed to the point of success in providing adequate and timely protection and regulation.

And as argued by Paauwe the failure of the international community to ensure accountability, both criminal and political, and continued lack of prevention led to a further eruption of tension in April 2023.[83] For the international community to successfully intervene to either prevent or regulate armed conflict to protect civilians means sacrificing state sovereignty to provide commitment when needed. Developments that have already been attempted including, the R2B principle can still be effective but as Paauwe recognised only by political courage and a genuine commitment to act in real-time.[84] Reform in shifting from prioritisation of a state's sovereignty is needed, and the developments since Rwanda have proven to not be enough to regulate and prevent armed conflict, let alone provide adequate protection for civilians. Two decades since the 2003 to 2005 genocide[85] and Darfur is again the site of mass atrocities, as Sudan's conflict enters its third year,[86] showing the continued need for structural reform.

Conclusion

To conclude on whether regulating armed conflict is, in practice, impossible and, therefore, a pointless endeavour, this article has sought to critically analyse the failure of the international community in response to the Rwandan Genocide, which needed efficiency and support in bringing back peace. After examining the international response timeline and highlighting the limitations of the UN that were demonstrated through the failure to regulate the Rwandan Genocide; the lack of commitment and resources was fundamental in being able to achieve justice and secure a successful endeavour, as supported by Ingvar Carsson. Furthermore, after analysing the inefficient action taken, even with continuous breaches of Additional Protocol 1, highlighted the failure to regulate allowing both physical and psychological abuse of Rwandan women who were raped and stripped of their humanity. Furthermore, the dismissal of forewarnings symbolised the failure to prevent and take effective action, from Joyce Leader highlighting the need for international assistance when implementing Arusha, to, Dallaire's Genocide fax requesting the raid of weapon caches being denied. Notwithstanding, the argument that the Rwandan Genocide showed the priority on sovereignty, limiting effective regulation of the internal armed conflict.

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[83] Paauwe (n 79).

[84] ibid.

[85] Darfur Genocide.

[86] Paauwe (n 79).

The Rwandan conflict displayed the international community's limitations in sustainably regulating armed conflict, however, with better commitment and quicker responses, effective endeavours would be possible. As Sara Hylton wrote, 'The Genocide in Rwanda acted as a significant determinant in forcing a re-evaluation of the principles of state sovereignty and non-interference'.[87] Reforming sovereignty principles could ensure quicker action is taken to regulate. Correspondingly, with reaffirming the international community's commitment would assist in controlling armed conflict, as Ban Ki-Moon stated '…urgent reform is a vital process to ensure the UN remains relevant. The Security Council is too often paralysed during urgent crises such as the situation we are seeing in Ukraine and Gaza'.[88] Rwanda displayed the failure of the international community; however, it should be taken as a lesson learnt, and, for that reason, reforming and creating solid, consistent and effective endeavours would ensure the regulation of armed conflict is neither impossible nor pointless.

[87] Hylton (n 55) 64.

[88] King's College London, 'Urgent UN Reform Needed to Avoid Paralysis on Crises, Says Former Secretary-General' (King's College London, 2 May 2024) <https://www.kcl.ac.uk/news/urgent-reform-of-un-needed-on-humanitarian-crises> accessed 14 July 2026.

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DISSERTATION

From Formalism to Fish Soup: A Constitutional Reappraisal of Independent Agencies and Presidential Removal Power in the United States

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ABSTRACT. Following Donald Trump's re-election as President of the United States in 2024, he has engaged in an unprecedented campaign control to independent agencies. This dissertation examines the constitutionality of agency independence in the US, specifically answering whether the President possesses an illimitable power to remove agency heads at-will. While the Supreme Court embraced the Unitary Executive Theory, granting the President an illimitable removal power in the June 2026 merits decision in *Trump v Slaughter*, this dissertation disproves that view. Instead, it shows how the text and Founding-era history behind Article II of the US Constitution support the constitutionality of independent agencies. By debunking the Court's illimitable theory of removal, this dissertation shows how it has simultaneously pursued an expansive view of presidential power behind the 'mask of formalism'.

This dissertation explores this in three chapters. First, it examines the historical basis for the removal power, showing how the so-called 'Decision of 1789' was an unsettled series of decisions, rather than a mandate for an illimitable removal power. Second, an analysis of the text and history of Article II demonstrates how the Appointments, Vesting and Take Care Clauses do not provide the President with an illimitable removal power. Instead, they show how the Necessary and Proper Clause permits legislative qualification of the removal power. Finally, it concludes by contextualising the Court's hostility to the administrative state in *Trump v Wilcox* and *Slaughter*. It argues that the Court's emergency stay orders, allowing Trump to irreversibly remove agency heads, effectively decided the case in *Slaughter*.

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† LLB at University of Southampton. I would like to thank Evan Rosevear for his invaluable advice and guidance throughout this project. Any errors remain my own. This dissertation is all my own work. Reference to, quotation from, and discussion of the work of any other person has been correctly acknowledged within the work.

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'[I]n order to safeguard its independence of political domination it is necessary and proper to enact legislative standards which the President must follow…. We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of [independent agency] officers.'

– *Humphrey's Executor v United States*, 295 U.S. 602, 611, 629 (1935)

'Functionalism of the sort the Court practices today will systematically favor the unitary President over the plural Congress…. It is certain that, in the long run, it will erode the structure of separated powers that the People established.'

– *Zivotofsky v Kerry*, 576 U.S. 1, 80 (2015) (Scalia J, dissenting)

'Though it's easy to turn an aquarium into fish soup, the reverse operation is impossible. So, the allowing Trump to turn the blender on while waiting for an answer about the soup decides the case.'

– Professor Kim Lane Scheppele, *The Contrarian* (15 July 2025)

Introduction

Since returning to office on 20 January 2025, President Trump has engaged in an unprecedented campaign to dismantle independent agencies (IAs).[1] For the first time in US history, Trump asserted via Executive Order (EO) that IAs are subject to the President's direct 'supervision and control'.[2] In turn, the EO ends their traditional independence from the executive branch. Since then, Trump has fired dozens of IA heads to challenge their statutory removal protections (see Appendix A). This summer, the US Supreme Court in *Trump v Slaughter* will decide whether the for-cause removal protections for agency heads are compatible with Article II of the US Constitution, which sets out the basic structure of the executive branch.[3]

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[1] See eg, Sophie Cai, Megan Messerly and Myah Ward, 'Trump Hits Independent Agencies, Spares the Big Stuff – for Now - POLITICO' (10 February 2025) <https://www.politico.com/news/2025/10/02/trump-independent-agencies-shutdown-00592237> accessed 18 February 2026; Michael Sainato, 'Trump "Usurping Rule of Law" after Agency Firings, Say Former US Labor Watchdogs' *The Guardian* (31 January 2025) <https://www.theguardian.com/us-news/2025/jan/31/trump-firings-nlrb> accessed 18 February 2026.

[2] Donald J Trump, 'Executive Order 14215—Ensuring Accountability for All Agencies' (*National Archives and Records Administration*, 18 February 2025) <https://www.govinfo.gov/app/details/DCPD-202500277> accessed 22 February 2026.

[3] This dissertation was authored and submitted before the US Supreme Court released its merits decision on June 29, 2026. As such, any reference to decisions before that time, including *Slaughter, Cook* and *Wilcox*, refer to their preliminary and stay orders, rather than any final decision made by the Court on or after June 29, 2026. Additionally, the dissertation has not been updated, either in tone, tense or substance, to reflect the Court's decision post-*Slaughter.* This is because any

In doing so, the Court will also decide whether to overturn or qualify its 90-year-old precedent in *Humphrey's Executor v United States*, which originally upheld the constitutionality of for-cause protections.[4]

Defining what constitutes an IA is complex because many founding statutes do not explicitly label these agencies as 'independent'.[5] In the absence of express definitions, implicit indicia, like for-cause protections, fixed-term tenures and bipartisan membership, have all been interpreted to indicate agency independence.[6] Nevertheless, both the literature and Supreme Court precedent recognise for-cause protections as *the* key indicator of agency independence.[7] Therefore, this dissertation will answer whether IAs are constitutional by re-examining the historical and constitutional justifications for the President's removal power.[8] This dissertation argues that IAs are constitutional because there is no historical or textual mandate for absolute presidential control over IAs. Rather, evidence exists to the contrary.

Chapter one establishes the historical and doctrinal foundations of IAs. By establishing the tension between formalism and functionalism, it explores how these interpretative methods shape the Court's separation of powers analysis. This chapter re-examines the 'Decision of 1789' and its historically weak basis for the President's supposedly illimitable removal power.[9] It then identifies the first regulatory commissions as antecedents to modern-day IAs, demonstrating that administrative independence is a long-standing constitutional tradition.[10] Lastly, it

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amendments would be extensive and substantially alter the arguments made, relied upon, and rebutted, in this dissertation. It is, however, apt to mention that all predictions made in this dissertation were borne out upon the release of the Court's final *Slaughter* decision.

[4] *Humphrey's Executor v United States*, 295 US 602, 624 (1935).

[5] See eg, Adrian Vermeule, 'Conventions of Agency Independence' (2013) 113 *Columbia Law Review* 1163, 1165–1166; Richard L Revesz and Kirti Datla, 'Deconstructing Independent Agencies (and Executive Agencies)' (2013) 98 *Cornell Law Review* 769, 772–773.

[6] Marshall Breger and Gary Edles, 'Established by Practice: The Theory and Operation of Independent Federal Agencies' (2000) 52 *Administrative Law Review* 1111, 1134. See also, Revesz and Datla (n 4) 784–808. See eg, *Free Enterprise Fund v Public Company Accounting Oversight Board*, 561 U.S. 477, 521 (2010) (Breyer J, dissenting).

[7] See respectively, Jacob E Gersen, 'Designing Agencies' *Research Handbook on Public Choice and Public Law* (Edward Elgar 2010) 347; Breger and Edles (n 5) 1138. See eg, *Free Enterprise Fund v Public Company Accounting Oversight Board* (n 5) 483, 501–504.

[8] See generally, Cass R Sunstein and Adrian Vermeule, 'Presidential Review: The President's Statutory Authority Over Independent Agencies' (2021) 109 *Georgetown Law Review* 637, 638–43; Breger and Edles (n 5) 1112–1117.

[9] See generally, Jed H Shugerman, 'The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity' (2023) 171 *University of Pennsylvania Law Review* 753.

[10] See respectively, Leah Litman, 'Debunking Antinovelty' (2017) 66 *Duke Law Journal* 1407, 1421; *Free Enterprise Fund v Public Company Accounting Oversight Board* (n 5) 496; *Seila Law LLC v Consumer Financial Protection Bureau*, 591 U.S. ___ (2020) (slip op 2–3); *Collins v Yellen*, 594 U.S. ___ (2021) (slip op 26).

outlines the modern shift towards the Unitary Executive Theory (UET) and how it has jeopardised the constitutionality of IAs.

Chapter two examines how the Necessary and Proper, Vesting, Take Care and the Appointments Clauses should be interpreted in favour of agency independence. This chapter explores scholarly claims about the Roberts Court's functionalist turn in presidential power cases, demonstrating that the Court's use of functionalism is inconsistent with its commitment to originalism.[11] It identifies the irony in the Court decrying the concentration of power in IAs as a threat to liberty, while finding it acceptable to concentrate that same power in a singular President. Thus, exposing the Court's paradoxical desire to expand presidential power in the absence of historical and textual support.

Chapter three contextualises the Supreme Court's hostility towards IAs as part of a broader campaign against the administrative state.[12] This chapter explores the normative and doctrinal consequences following the likely demise of *Humphrey's Executor*. It analyses how the Court's approach to the preliminary and remedial stages of *Slaughter* reflects a predetermined outcome against agency independence. To use Professor Kim Scheppele's metaphor, the Court's decision to overturn the lower court's stay and allow Trump to continue firing agency heads while *Slaughter* is ongoing, is akin to making 'fish soup'.[13] By allowing the President to irreversibly remove agency heads before a final ruling, the Court's stay order allows the President to blend up the administrative aquarium. Allowing Trump to do so in the knowledge that once fired, these agency heads cannot be restored, effectively decides the case in *Slaughter*. Therefore, the dismantling of *Humphrey's Executor* by the Court exposes a functionalist desire for a unitary executive that lacks any historical or textual justification.

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[11] Gillian E Metzger, 'Disqualification, Immunity, and the Presidency' (2025) 138 *Harvard Law Review Forum* 112, 137–1338; Thomas A Koenig and Benjamin R Pontz, 'The Roberts Court's Functionalist Turn in Administrative Law' (2023) 46 *Harvard Journal of Public and Public Policy* 221, 249–250.

[12] See eg, Neil M Gorsuch, *A Republic, If You Can Keep It* (1st edn, Crown Forum 2019) 60–69.

[13] Kim Lane Scheppele, 'The Supreme Court Orders Fish Soup' (*The Contrarian*, 15 July 2025) <https://www.contrariannews.org/p/the-supreme-court-orders-fish-soup> accessed 29 March 2026.

1. Historical and Doctrinal Foundations of Agency Independence

Introduction

An examination of the historical foundations of IAs is essential as the Court increasingly relies on cherry-picked history to dismiss them as novelties.[14] This chapter demonstrates how the Court's understanding of agency independence in the Founding-era is flawed. First, the Court has cherry-picked history to justify their claim that an illimitable removal power existed at the Founding.[15] Second, the Court's historical cherry-picking to enhance presidential power demonstrates a functionalist approach to the separation of powers.[16] This chapter concludes that IAs were deeply rooted in American history and tradition at the Founding and are therefore constitutional.

1.1. Formalism, Functionalism and Why They Matter

Formalism and functionalism are alternative theories that outline the degree of separation each branch should maintain (see Appendix B).[17] Formalism stresses that the three branches of government should be 'kept as distinct as possible' by promoting 'bright line rules' to separate each branch's functions.[18] The question for formalists is therefore whether one branch 'invade[s] the province of the other…'.[19] On the other hand, functionalism is more concerned with the *degree* to which one branch trespasses into the other's province. For functionalists the question is whether the breach enters the *core* of the branch's powers.[20] Therefore, functionalism offers greater interpretative flexibility than formalism.[21] In turn, functionalism should theoretically provide a lower separation of powers hurdle for IAs to overcome. Instead, this chapter demonstrates how the Court misuses history

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[14] *West Virginia v Environmental Protection Agency*, 597 U.S. ___ (2022) (slip op 20–24, 30) Collins v Yellen (n 9) 26; *Seila Law LLC v Consumer Financial Protection Bureau* (n 9) 18–21; *Free Enterprise Fund v Public Company Accounting Oversight Board* (n 5) 496–497.

[15] Christine Chabot, 'Interring the Unitary Executive' (2022) 98 *Notre Dame Law Review* 129, 134. See also, Ganesh Sitaraman, 'The Political Economy of the Removal Power' (2020) 134 *Harvard Law Review* 352, 387 n 278. See eg, *Myers v United States*, 272 U.S. 52, 142–176 (1926).

[16] Metzger, 'Disqualification, Immunity, and the Presidency' (n 10) 137. See also, Jodi Short and Jed Shugerman, 'Major Questions About Presidentialism: Untangling the "Chain of Dependence" Across Administrative Law' (2024) 65 *Boston College Law Review* 511, 576–80.

[17] William N Eskridge, 'Relationships between Formalism and Functionalism in Separation of Powers Cases' (1998) 22 *Harvard Journal of Public and Public Policy* 21, 29; Peter L Strauss, 'Formal and Functional Approaches to Separation-of-Powers Questions – A Foolish Inconsistency?' (1987) 72 *Cornell Law Review* 488, 489.

[18] Harold J Krent, 'Separating the Strands in Separation of Powers Controversies' (1988) 74 *Virginia Law Review* 1253, 1254. See also, Eskridge (n 17) 21; Maurice Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Liberty Fund 1969) 322–330.

[19] *Massachusetts v Mellon*, 262 U.S. 477, 488 (1923).

[20] Koenig and Pontz (n 11) 244; Krent (n 18) 1255; *Cromwell v Benson*, 28 US 22, 53 (1932).

[21] Eskridge (n 17) 21.

and functionalism's flexibility to advance its own expansive view of presidential power.

The Roberts Court's conservative tilt reflects the impact of partisan sorting since 1991, which has altered its approach to separation of powers questions.[22] Appendix C depicts this by showing the widening gap between the most conservative and most liberal members of the Court.[23] Ordinarily, a philosophically conservative Court would also be a formalist Court,[24] and by all accounts the Roberts Court is prima facie a formalist Court.[25] Despite this, the Roberts Court's unique responsiveness to partisan attempts to expand presidential power contextualise the Court's use of functionalism to create a unitary executive.[26] While Chief Justice Roberts may have once been the institutionalist 'swing' vote, attempting to maintain the balance between all factions of the Court and shunning extreme outcomes, the appointment of three strong conservative picks by President Trump have led to a rightward lurch on the Court.[27] As a result, the decisions in the Court's administrative law cases will no longer be decided by a pragmatist like Roberts. Rather, he will likely be part of the conservative supermajority that deals the final blow to agency independence.

1.2. The Historical Foundations of Independent Agencies

Modern IAs are protected by statutory for-cause protections which insulate agency heads from presidential removal.[28] These statutes commonly only permit removal 'for-cause', a general term that requires the President to provide a specific justification for removal. The most common for-cause protection only permits removal for 'inefficiency, negligent or malfeasance' (INM).[29] Other statutes like the Federal Reserve Act simply permit removal 'for-cause', which has been understood to provide a lower level of protection when compared to the INM standard.[30]

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[22] Lee Epstein, 'Partisanship "All the Way Down" on the U.S. Supreme Court' (2024) 51 *Pepperdine Law Review* 489, 498–502, 512.

[23] In this context, the use of 'conservative' and 'liberal' refer to the justices' philosophical approaches to judging, rather than their political affiliation.

[24] Gillian Metzger, 'The Roberts Court and Executive Power' (2024) 713 The Annals of the American Academy 88, 99.

[25] Gillian Metzger, 'The Roberts Court and Administrative Law' (2020) 2019 *Supreme Court Review* 1, 40–47. See also, Rosamond Thalken and others, 'Modeling Legal Reasoning: LM Annotation at the Edge of Human Agreement' (2023) 9259–60 <https://doi.org/10.48550/arXiv.2310.18440>.

[26] Rebecca L Brown and Lee Epstein, 'Is the US Supreme Court a Reliable Backstop for an Overreaching US President? Maybe, But Is an Overreaching (Partisan) Court Worse?' (2023) 53 *Presidential Studies Quarterly* 234, 244.

[27] Metzger (n 25) 28–29.

[28] Gersen (n 7) 347.

[29] Breger and Edles (n 6) 1144–1145.

[30] Cass Sunstein and Lawrence Lessig, 'The President and the Administration' (1994) 94 *Columbia Law Review* 1, 110–11. See eg, *Bowsher v Synar*, 478 U.S. 714, 729 (1986).

Throughout this dissertation, the term 'for-cause' is a reference to *any* removal restriction, *including* the INM standard.

To address the constitutionality of these provisions the Court has focused on two questions. First, whether Founding-era antecedents to modern IAs existed.[31] Second, whether the President historically possessed an illimitable removal power.[32] The Court has answered both questions, asserting that historical antecedents did not exist at the Founding and that the President possessed an illimitable removal power.[33] This section disproves the Court's assertions by analysing the same Founding-era history it relies upon.

1.2.1. The (In)decision of 1789 and Its Historical Importance

The Decision of 1789 serves as the primary historical basis for the claim that an illimitable removal power existed at the Founding.[34] Establishing this, the Supreme Court in *Myers v. United States*, relied on the First Congress' debates where it debated the creation of the Departments of Foreign Affairs, War and the Treasury.[35] From this, formalists posit that a *final* decision in favour of an illimitable removal power was made.[36] However, this view of an illimitable removal power was short lived. Less than a decade later, the Court in *Humphrey's Executor* held that Congress could restrict the President's removal power. Since then, subsequent cases have reaffirmed this central holding, but on different grounds.[37] Recently, the Roberts Court has returned to the *Myers* view of an illimitable removal power, while still relying on the Decision of 1789 as the *historical* source for the President's removal power.[38] This section argues that the outcome of the debate was unsettled, ambiguous and the statute's text 'probably did not mean the same thing to all'.[39] Instead, it reflected a compromise to pass both houses of Congress, rather than a

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[31] *Seila Law LLC v Consumer Financial Protection Bureau* (n 9) 2–3; *Shurtleff v United States*, 189 U.S. 311, 316 (1903).

[32] *Myers v United States* (n 15) 106.

[33] *Seila Law LLC v Consumer Financial Protection Bureau* (n 9) 13, 21; *Free Enterprise Fund v Public Company Accounting Oversight Board* (n 6) 505; *Trump v Wilcox*, 605 US ___ (2025) (slip op 1–2) (application for stay).

[34] Saikrishna Prakash, 'New Light on the Decision of 1789' (2006) 91 *Cornell Law Review* 1021, 1023–1028; Shugerman, 'The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity' (n 9) 755–765.

[35] *Myers v United States* (n 15) 151.

[36] Prakash, 'New Light on the Decision of 1789' (n 34) 1075–1076; *Free Enterprise Fund v Public Company Accounting Oversight Board* (n 6) 483; *Seila Law LLC v Consumer Financial Protection Bureau* (n 10) 29.

[37] *Humphrey's Executor v United States* (n 4) 626–632. See eg, *Morrison v Olson*, 487 U.S. 654, 676–688 (1988).

[38] See eg, *Trump v Wilcox* (n 32) 1–2; *Trump v United States*, 603 U.S. ___ (2024) (slip op 8); *Collins v Yellen* (n 9) 27–29; *Seila Law LLC v Consumer Financial Protection Bureau* (n 9) 2, 12; *Free Enterprise Fund v Public Company Accounting Oversight Board* (n 6) 513–514.

[39] *Myers v United States* (n 15) 194 (McReynolds J, dissenting).

conclusive and principled decision.[40]

On 19 May 1789, the First Congress opened the debate as to whether executive officials 'ought to be removable [at-will] by the President,' revealing four distinct theories of removal: *presidential*, *congressional*, *senatorial* and *impeachment*.[41] Consistent with the formalist account of these debates, a majority emerged in favour of *presidential* removal, thereby rejecting the requirement for *senatorial* consent. However, there was no specific consensus in the *presidential* majority about the way removal should take place.[42] Instead, two competing theories of removal arose.[43] The first theory posited that Congress had to delegate the removal power to the president (*congressionalist* theory). The second theory proposed that Article II impliedly vested the removal power in the President (*presidentialist* theory). Importantly, neither theory suggested that this was an *illimitable* power of removal, meaning there was no settlement among members as to which theory should prevail.[44]

The evidence of a single and uniform decision coming from these debates is further contradicted by Senator William Maclay's diary, detailing the opposition the presidentialist theory faced in the Senate.[45] This opposition led Representative James Madison to delete the House-approved presidentialist clause, re-proposing a more 'cryptic' clause in its place, in order to pass it in the Senate.[46] Tellingly, House members had largely subscribed to a congressionalist theory by the end of the debate, thereby accepting that the removal power was neither implied nor absolute.[47] On the other hand, the Senate shifted from clear opposition to a tie, which would later be broken by the Vice President.[48] However, Maclay's diary suggests that the Senate shifted largely due to pro-administration lobbying on

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[40] ibid.

[41] Charlene B Bickford, Kenneth R Bowling and Helen E Veit (eds), *Documentary History of the First Federal Congress of the United States of America, March 4, 1789 - March 3, 1791*, vol 10 (John Hopkins University Press 1992) 725 (as cited in Shugerman (n 9) 776 fn 111). See also, Edward S Corwin, *The President's Removal Power Under the Constitution* (1st edn, New York City: National Municipal League 1927) 12–13.

[42] Shugerman (n 9) 761.

[43] ibid 759.

[44] Bickford, Bowling and Veit, *Documentary History of the First Federal Congress of the United States of America, March 4, 1789 - March 3, 1791* (n 41) 730; Shugerman, 'The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity' (n 9).

[45] Charlene B Bickford, Kenneth R Bowling and Helen E Veit (eds), *Documentary History of the First Federal Congress of the United States of America, March 4, 1789 - March 3, 1791*, vol 9 (John Hopkins University Press 1988) 84 (as cited in Shugerman, 'The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity' (n 9) 763 fn 39).

[46] Shugerman (n 9) 783.

[47] ibid 795; ibid 807–808.

[48] Shugerman (n 9) 809–819.

'proto-partisan lines', rather than definitively settling on either theory.[49] Therefore, Madison's retreat reflects a practical, rather than principled, understanding that 'he knew he only had the votes in the Senate for ambiguity'.[50]

The Court's portrayal of the First Congress' debate as representing a uniform and well-settled decision is further undermined by the Founders' explicit rejection of the English Crown as a blueprint for executive power.[51] Considering the Crown could not remove its own officers at-will, the attribution of a greater power to the President demonstrates the Court's functionalist view of presidential power.[52] The omission of Maclay's diary is particularly telling, having previously been cited by the Court's formalists as a reliable source for Founding-era events.[53] Therefore, the House's congressionalist consensus, combined with the Senate's tie and the Founders' republicanism, hardly suggest a *decision,* let alone a *settled* one, had been made. In turn, these factors squarely contradict the Court's suggestion that the power of removal was understood to be illimitable at the Founding.

1.2.2. Historical Antecedents to Modern Independent Agencies

Formalists on the Court have suggested that IAs are also unconstitutional because they are novel and modern creations.[54] This section will prove IAs did exist at the time of the Founding and are therefore not constitutionally novel. It will also demonstrate that the existence and acceptance of removal protections at the Founding further undermine the Court's claim.

a) Interstate Commerce Commission

While the Interstate Commerce Commission (ICC) has long been heralded as the 'basic organizational model for the modern [multimember] independent agency', this obscures the true origins of agency independence at the Founding.[55] Relying on the ICC's creation in 1887, formalists have jumped onto the bandwagon

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[49] ibid 815.

[50] ibid 802.

[51] Bickford, Bowling and Veit, Documentary History of the First Federal Congress of the United States of America, March 4, 1789 - March 3, 1791 (n 41) 721–722; Charlene B Bickford, Kenneth R Bowling and Helen E Veit (eds), Documentary History of the First Federal Congress of the United States of America, March 4, 1789 - March 3, 1791, vol 11 (John Hopkins University Press 1992) 852, 890–892, 977 (as cited in Shugerman (n 9) 822 fn 395).

[52] Jed Shugerman, 'Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism' (2022) 33 *Yale Journal of Law & the Humanities* 125, 143–144.

[53] *Trump v Vance*, 591 U.S. ___ (2020) (slip op at 4) (Thomas J, dissenting). See also, *Clinton v Jones*, 520 U.S. 681, 695 (1997).

[54] See eg, Collins v Yellen (n 10) 26; *Free Enterprise Fund v Public Company Accounting Oversight Board* (n 6) 496.

[55] James M Landis, 'Significance of Administrative Commissions in the Growth of the Law' (1937) 12 *Indiana Law Journal* 471, 472. See also, Robert L Rabin, 'Federal Regulation in Historical Perspective' (1986) 38 *Stanford Law Review* 1189, 1194; Revesz and Datla (n 5) 776; Breger and Edles (n 6) 1128–1136.

to make broad assertions that '[t]here were…no independent agencies in…eighteenth century…North America'.[56] However, this section will reject that premise altogether on the basis that the ICC was *not* the first IA, nor does it share any significant similarities with modern-day IAs.[57]

Rather than a symbol of administrative independence, the ICC was a mechanism for Congress to extract campaign contributions from the railroad industry.[58] The repeal of the 1867 Tenure of Office Act in the same session that the ICC was created supports this argument. Not least because repealing the 1867 Act would have expanded, not limited, the President's removal power.[59] For Congress to have expanded the President's removal power, while at the same time creating the ICC to limit his removal power, seems highly unlikely. Indeed, anti-railroad members of Congress warned of the ICC's use as a congressional tool to extract campaign contributions from the railroad industry.[60] The ICC's lack of genuine administrative independence, combined with the congressional record, suggest that the ICC was never intended to be an IA in the modern-day sense.[61] So why do formalists consistently parade the ICC as the first independent commission? Most probably because the ICC's lack of structural independence and high-level of executive control allows formalists to construct a strawman argument from the outset. In doing so, formalists can claim that high levels of presidential control over IAs were the historical norm. This selective use of the ICC's so-called independence makes it necessary to identify the true historical antecedents to modern-day IAs, to fully expose the Court's historical cherry-picking.

b) Sinking Fund Commission

The 1790 Revolutionary War Debt Commission, also known as the 'Sinking Fund Commission', is the first historical example of a truly independent regulatory commission.[62] The Sinking Fund Commission (SFC) was established as a five-person board where members were appointed ex officio. The SFC's membership included: the Treasury Secretary, Secretary of State, Vice President, Attorney General and Chief Justice. Treasury Secretary Alexander Hamilton established the SFC in the hope that, unlike previous sinking funds in England, it would not be

[56] Steven Calabresi and Gary Lawson, 'The Depravity of the 1930s and the Modern Administrative State' (2018) 94 *Notre Dame Law Review* 821, 859.

[57] Jed Shugerman, 'The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Tenure of Office Act, and the Rise of Modern Campaign Finance' (2015) 31 *Journal of Law & Politics* 139, 144.

[58] ibid 165.

[59] ibid 147–148.

[60] ibid 147.

[61] ibid 146.

[62] Christine Kexel Chabot, 'Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies' (2020) 96 *Notre Dame Law Review* 1, 5.

raided by politicians.[63] Instead, its sole purpose would be to pay down the debt. To reaffirm this administrative and structural independence, the President could not disperse funds without approval from three members of the Commission.[64] This 'inviolable' sphere of independence therefore reflected a Founding-era desire for executive officials to check each other's conduct.[65] As a result, the establishment of the SFC as an independent commission, alongside other Founding-era bodies, like the Patent Board and the Mint, demonstrates that IAs are not historical or constitutional novelties.[66] To the contrary, they were central to the early Republic's structure.

Formalists assert that because three of the five Commission members were removable from their cabinet positions by the President, the President maintained implicit control over the Commission.[67] However, this ignores the two important restrictions which suggest that presidential control was *intentionally* limited. First, the President could not distribute funds without the consent of a majority of the Commission.[68] Second, the Senate's advice and consent role in confirming future cabinet successors served as a deterrent against arbitrary removals.[69] Additionally, the fact that the President implicitly had some level of control does not undermine the SFC's independence, because the aim of agency independence is to dilute, rather than eliminate, presidential control over IAs. Therefore, both restrictions undermine the formalist claim and reaffirm the centrality of independence to the SFC's functioning.

In light of the SFC's structure, the formalist assertion that no Founding-era statute 'hint[ed]' at agency independence is unpersuasive.[70] Since then, formalists have retreated to a narrower position, claiming that Founding-era statutes never explicitly described these commissions 'as being independent'.[71] However, this argument is also unpersuasive. During the early congressional debates, it was understood that an executive official who undermined the SFC's independence

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[63] Chabot, 'Interring the Unitary Executive' (n 15) 172–173; Chabot, 'Is the Federal Reserve Constitutional?' (n 63) 37–38.

[64] Chabot (n 63) 53.

[65] Alexander Hamilton, 'Report on a Plan for the Further Support of Public Credit' (*Founders Online*, 16 January 1795) <http://founders.archives.gov/documents/Hamilton/01-18-02-0052-0002> accessed 8 April 2026.

[66] Chabot, 'Interring the Unitary Executive' (n 15) 175; Chabot, 'Is the Federal Reserve Constitutional?' (n 62) 27–28.

[67] Steven G Calabresi and Christopher S Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (Yale University Press 2008) 53.

[68] Chabot, 'Interring the Unitary Executive' (n 15) 174–75.

[69] See generally, Chabot, 'Is the Federal Reserve Constitutional?' (n 62) 37 fn 240.

[70] Steven G Calabresi and Saikrishna Prakash, 'The President's Power to Execute the Laws' (1994) 104 *Yale Law Journal* 541, 661.

[71] Calabresi and Lawson (n 56) 859.

'would merit impeachment.'[72] This reflects a striking similarity to today as the President may *in theory* remove principal officers but is often restrained by political convention. For example, the President is widely understood to possess the power to fire the Federal Reserve Chair at-will, yet no President has done so. Primarily because the political and economic consequences of doing so restrain him.[73] Even in Trump's recent onslaught against Fed independence, the administration has not challenged its statutory independence for this reason.[74] As a result, the SFC's protections demonstrate that the removal power was limitable by both convention and law at the Founding.

1.2.3. The Modern Shift Towards the Unitary Executive Theory

Article II of the US Constitution declares that '[t]he executive Power shall be vested in a President of the United States…'.[75] Unitary executive theorists (unitarians) have seized upon this to mean that the President must have 'direct control' over *everyone* performing executive functions.[76] Therefore, unitarians assume that because law execution is an executive function, all IAs exercise executive powers and must in turn be removable by the President.[77]

As a result, the unitary executive theory (UET) creates a hierarchy where the President sits at the apex of the administrative state.[78] In *Seila Law v. Consumer Financial Protection Bureau*, the Supreme Court explicitly endorsed the UET by declaring that 'all of' the executive power is vested in the President.[79] This holding was significantly expanded in *Trump v. United States,* where the Court held that the removal power was 'unrestricted' and constituted a 'conclusive and preclusive' power.[80] Two subclaims flow from this theory of presidential power. First, the President can supervise, direct and remove executive officials.[81] Second, for-cause

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[72] Victoria Nourse, 'The History of Multi-Member Commissions at the Founding, 1789-1840: New Evidence on Independent Agencies' [2026] *Duke Law Journal* (Forthcoming) 1, 19 fn 129 <https://dx.doi.org/10.2139/ssrn.5628110>.

[73] Vermeule (n 5) 1166; Victoria Guida, 'The Real Reason Trump Won't Try to Fire Jay Powell' (*POLITICO*, 12 November 2024) <https://www.politico.com/news/magazine/2024/11/12/why-trump-wont-fire-fed-chair-00188867> accessed 6 April 2026.

[74] *Trump v Cook* (2026) (application for stay, No 25A312).

[75] US Const, art II, § 1, cl 1.

[76] Steven G Calabresi and Kevin H Rhodes, 'The Structural Constitution: Unitary Executive, Plural Judiciary' (1992) 86 *Harvard Law Review* 1155, 1165; Calabresi and Prakash (n 70) 595.

[77] See eg, *Arlington v Federal Communications Commission*, 569 U.S. 290 (2012); *Free Enterprise Fund v Public Company Accounting Oversight Board* (n 6).

[78] Calabresi and Yoo (n 67) 3–4; Neomi Rao, 'Removal: Necessary and Sufficient for Presidential Control' (2014) 65 Alabama Law Review 1205, 1209; Calabresi and Prakash (n 70) 544.

[79] *Seila Law LLC v Consumer Financial Protection Bureau* (n 10) 1.

[80] *Trump v United States* (n 38) 8, 20; 4 (Sotomayor J, dissenting).

[81] Saikrishna Bangalore Prakash and Aditya Bamzai, 'The Executive Power of Removal' (2023) 136 *Harvard Law Review* 1758, 1830 fn 536.

protections which frustrate this power are unconstitutional.[82] Logically, with *all* the executive power being vested in the President, and an illimitable removal power flowing from that, IAs 'lose all constitutional foundation except bare stare decisis.'[83]

The UET also stands in direct opposition to the two constitutional justifications for agency independence laid out in *Humphrey's Executor*. In *Humphrey's*, the Court held that IAs exercise 'quasi-judicial' and 'quasi-legislative' rather than purely executive power, and that the President's removal power is not 'illimitable'.[84] Unitarians reject both justifications. Ironically, by stating that the Federal Trade Commission did not exercise executive functions, the Court in *Humphrey's* indirectly drew formalist 'bright lines' between each branch, implicitly conceding that executive officials could be removed at-will.

The Roberts Court's embrace of the UET reflects a broader functionalist desire to create and facilitate a muscular presidency. Incremental exertions of policy and budgetary control have facilitated a slow creep of presidential control over the administrative state.[85] In turn, this has reshaped the Court's vision of presidential power, with it now seeking to provide a doctrinal basis for this practical shift.[86] These conventions of indirect control over IAs have effectively 'changed the psychology of government', embedding the UET into the very *concept* of the modern-day presidency.[87]

Unlike previous administrations, Trump has exacerbated this previously slow creep by asserting that he must constitutionally have *direct* presidential oversight over IAs.[88] This has primarily been through the removal of agency heads but has also included the closure of administrative agencies.[89] By shredding the convention of only exerting *indirect* presidential control, Trump has leapfrogged from his predecessor's practices onto the UET lily pad.[90] Ironically, the Court's pursuit of a unitary executive engages in what Justice Scalia critiqued as an

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[82] Saikrishna Bangalore Prakash, 'Too Unitary' (2026) 135 *Yale Law Journal Forum* 533, 548.

[83] Blake Emerson, 'The Existential Challenge to the Administrative State' (2025) 113 *The Georgetown Law Review* 1263, 1287.

[84] *Humphrey's Executor v United States* (n 4) 624, 626–629.

[85] Elena Kagan, 'Presidential Administration' (2001) 114 *Harvard Law Review* 2245, 2274–2280.

[86] Saikrishna Bangalore Prakash, The Living Presidency: An Originalist Argument against Its Ever-Expanding Powers (Belknap Press 2020) 5, 51–52, 91.

[87] Peter L Strauss, 'Presidential Rulemaking' (1997) 72 *Chicago Kent Law Review* 965, 986.

[88] Kagan (n 85) 2285–2289.

[89] 'Trump Administration Attempts to Close the CFPB, Block Agency's Work' (*Economic Policy Institute*, 16 January 2026) <https://www.epi.org/policywatch/trump-administration-closes-the-cfpb/> accessed 2 April 2026.

[90] Prakash (n 82) 546–547.

'adverse-possession theory' of executive power.[91] In entertaining this 'adverse-possession theory' of executive power, the Court implicitly relies upon the President having incrementally increased his power over time, with the legislature's acquiescence. By constitutionalising this modern interpretation of presidential power, the Court is creating a unitary executive without any Founding-era basis.[92]

Conclusion

This chapter has demonstrated how a re-examination of the 'Decision of 1789', alongside the structural origins of the ICC and SFC, prove that IAs are not historical or constitutional novelties. Indeed, these antecedents reflect a Founding-era understanding of the benefits of administrative independence and diffused power across the executive branch. This chapter also explored the Roberts Court's shift towards the UET, demonstrating how the Court has cemented the slow creep of presidential power in both law and practice. Having illustrated the Court's selective use of history, the next chapter will explore how the Court uses the mask of formalism to facilitate this.

[91] *National Labor Relations Board v Noel Canning*, 573 US 513, 570 (2014) (Scalia J, concurring in judgment).

[92] Prakash (n 82) 548–556.

2. Constitutional Foundations of Agency Independence and the Mask of Formalism

Introduction

This chapter argues that the Court's embrace of the UET is a functionalist pursuit rather than a textual necessity. It asserts that the Constitution's structure and text support the constitutionality of agency independence. By analysing the Appointments, Take Care, Vesting and Necessary and Proper Clauses, this chapter demonstrates how IAs are constitutionally compatible with Article II. This chapter also proves how agency independence is compatible with an originalist interpretation of the Constitution, despite the Court's best protestations. From *Myers* onwards, this chapter shows how the Roberts Court's interpretation of the text and history of Article II evidence its functionalist pursuit of a unitary executive—all behind the mask of formalism.

2.1. Constitutional Foundations of Independent Agencies

While formalism and functionalism have been presented as the dominant approaches to separation of powers issues until now, a majority of the Court use this alongside the constitutional interpretative theory of originalism.[93] As originalists this means the Court interprets the Constitution according to its 'original public meaning'. Originalists are often formalists, and are treated as so in this dissertation, as both rely on a rigid interpretation of the Constitution.[94] However, while Founding-era history reveals a non-unitary presidency, the UET relies on an expansive and modern vision of presidential control.[95] Consequently, a tension arises between the Court's use of originalism and the UET, which imputes a modern interpretation of presidential power to Article II.[96]

2.1.1. Appointments Clause

The Appointments Clause serves as the primary battleground for the theory of presidential removal. As established in chapter one, the 'Decision of 1789' constituted a series of indecisions rather than an outright victory for the UET. While the First Congress adopted a presidential removal theory, it did not agree on it being illimitable, let alone inherent. Instead, the existence of the common law rule of symmetry at the Founding proves Congress could regulate tenures of office, thus

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[93] Metzger (n 25) 49–51.

[94] Gary Lawson, 'Territorial Governments and the Limits of Formalism' (1990) 78 *California Law Review* 853, 859; Calabresi and Prakash (n 70) 551.

[95] See eg, Shugerman (n 9) 757; Jed Shugerman, 'Vesting' (2022) 74 *Stanford Law Review* 1479, 1485; Jane Manners and Lev Menand, 'The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence' (2021) 121 *Columbia Law Review* 1, 20; Julian D Mortenson, 'The Executive Power Clause' (2020) 168 *University of Pennsylvania Law Review* 1269, 1278.

[96] Christine K Chabot, 'Rejecting the Unitary Executive' (2025) 2025 *Utah Law Review* 1001, 1003–1006.

supporting the constitutionality of IAs.[97] This is historically supported by Madison's identification of three types of tenure in Federalist No 39: at-will, for a limited period and during good behaviour, with no constitutional preference given to any single one.[98] By recognising that the legislature could regulate tenure, the Founders implicitly signalled for-cause protections were a constitutional exercise of legislative power.

The seminal case of *Marbury v Madison* reinforces the limitability of the President's removal power, by contradicting the unitary claim that removal is incident to appointment.[99] The Court held that Marbury's five-year fixed term would have barred the President from removing him before his term expired, absent the jurisdictional issue with the case.[100] In turn, the Court rejected the unitarian assumption that removal was incident to appointment and that the President could illimitably remove those he appointed at-will.[101] Additionally, Madison's understanding that '[t]he tenure of ministerial offices generally, will be a subject of legal regulation...' further proves that removal was understood to be limitable at the Founding.[102] Indeed, this likely explains why President Jefferson and Secretary Madison chose to deprive Marbury of his commission ex ante, because once in office they knew Jefferson could not remove Marbury ex post. Therefore, the Appointments Clause cannot be interpreted as a source of an illimitable and incidental removal power, rather it is better understood as a restraint on the removal power.

2.1.2. Take Care Clause, Vesting Clause and the Myth of the Unitary Executive

The UET relies on three pillars: Article II's Vesting Clause, Take Care Clause and the Decision of 1789.[103] Having dissected and rejected the so-called 'Decision of 1789', this section focuses on the constitutional provisions that underpin the UET. It will demonstrate how the Take Care and Vesting Clauses support, rather than undermine, the constitutionality of agency independence.

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[97] Lev Menand and Jane Manners, 'Slaughter, the Symmetry Rule, and What the Decision of 1789 Actually Decided' (*Yale Journal on Regulation*, 15 January 2026) <https://www.yalejreg.com/nc/slaughter-the-symmetry-rule-and-what-the-decision-of-1789-actually-decided-by-jane-manners-lev-menand/> accessed 6 February 2026.

[98] James Madison, 'The Federalist Number 39' (*Founders Online*, 16 January 1788) <http://founders.archives.gov/documents/Madison/01-10-02-0234> accessed 8 April 2026.

[99] *Myers v United States* (n 14) 186–87. See also, Aditya Bamzai and Saikrishna Prakash, 'How to Think About the Removal Power' (2024) 110 *Virginia Law Review Online* 159, 168, 174–175; Andrea Scoseria Katz and Noah Rosenblum, 'Becoming the Administrator-in-Chief: Myers and the Progressive Presidency' (2023) 123 *Columbia Law Review* 2153, 2201.

[100] *Marbury v Madison*, 5 U.S. (1 Cranch) 137, 173 (1803).

[101] ibid 157; ibid 162.

[102] Madison (n 98).

[103] Shugerman (n 9) 755.

a) Vesting Clause

The interpretation of the Vesting Clause as a grant of power is the most contentious claim of the UET.[104] Unitarians expansively read the Vesting Clause to create presidential powers that are exclusive and legislatively indefeasible, thereby creating an *illimitable* removal power.[105] However, as the two points below will address, this theory fails to account for the restrictive and fiduciary understanding of 'the executive Power' at the Founding.

First, the 'executive Power' vested in the President is more accurately described as a ministerial duty to enforce the laws, rather than a grant of discretionary power.[106] Unitarians suggest that the Vesting Clause is a power grant begins where a previous power ends.[107] However, in doing so, they undermine their own claim, because if the Vesting Clause is defined by its boundaries (where it ends) rather than its substance (what it is) then it no longer resembles a *source* of power. Instead, it becomes a mandate for the respective agent (ie, the President) to *follow*.[108] As Justice Holmes famously noted in *Myers,* the President's duty does not 'require him to achieve more than Congress sees fit to leave within his power'.[109] As a result, it is impossible for the removal protections to conflict with Article II if the President's sole prerogative is to enforce the laws Congress have passed. Therefore, because the power of law execution is subordinate to the power of law creation, the President cannot claim for-cause protections conflict with his constitutional powers.

Second, the etymology of the Vesting Clause indicates that the word 'vest', absent modifiers like 'exclusive', 'all' or 'sole' is non-exhaustive and can be legislatively qualified.[110] The word 'vest' has been long assumed to connote a maximalist approach to presidential power, with judges and scholars alike consistently adding 'all' and 'complete' to the clause.[111] However, an originalist interpretation reveals that these interpretations cannot be reconciled with the

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[104] See respectively, US Const, art II, § 1, cl 1; Steven G Calabresi, 'The Vesting Clauses as Power Grants' (1994) 88 *Northwestern University Law Review* 1377, 1388–1398 fn 88.

[105] Shugerman (n 95) 1481. See eg, *Morrison v Olson* (n 37) 705 (Scalia J, dissenting).

[106] Julian D Mortenson, 'Article II Vests the Executive Power, Not the Royal Prerogative' (2019) 119 *Columbia Law Review* 1169, 1173–74. cf. Calabresi (n 104) 1389–93.

[107] Calabresi (n 104) 1391.

[108] Alexander Hamilton and James Madison, *The Pacificus-Helvidius Debates of 1793-1794: Toward the Completion of the American Founding* (Morton J Frisch ed, Liberty Fund 2007) 54. See generally, Gary Lawson and Guy Seidman, *'A Great Power of Attorney': Understanding the Fiduciary Constitution* (University Press of Kansas 2017) 47.

[109] *Myers v United States* (n 15) 177 (Holmes J, dissenting).

[110] Shugerman (n 95) 1505–1521; Shugerman (n 52) 127.

[111] See eg, *Morrison v Olson* (n 37) 705 (Scalia J, dissenting); *Seila Law LLC v. Consumer Financial Protection Bureau* (n 10) 1; *Clinton v Jones* (n 53) 710 (Breyer J, concurring). See also, Calabresi and Prakash (n 69) 568–69; Calabresi and Yoo (n 67) 3–4. cf. Shugerman (n 95) 1487.

'original public meaning' of the Vesting Clause.[112] Instead, the understanding of 'vest' implying legislative indefeasibility is the result of modern imputations of meaning to the word 'vest'.[113] The modern understanding of the word 'vest' as a power grant, combined with the muscular modern presidency as seen in section 1.2.3, have been self-legitimising. Indeed, the original public meaning of 'vest' was understood to be nothing more than the formal allocation of power.[114] It was never understood to limit the legislature's ability to choose how that power could be exercised. The absence of the word 'all' in the Executive Vesting Clause, but presence of 'all' in the Legislative Vesting Clause, further suggests that this absence was an intentional drafting choice. As a result, the absence of the word 'all' in the Executive Vesting Clause, combined with original public meaning of 'vest' at the Founding, prove Congress could qualify the President's removal power at the Founding.

b) Take Care Clause

Unitarians have suggested that the Take Care Clause should be interpreted as providing an expansive power of presidential oversight and thus removal power.[115] The Framers were aware that the President himself would not execute the laws and would instead delegate this task to his inferior officers.[116] From this Clause, unitarians make two claims. First, they suggest that without an illimitable removal power, the President would not be able to remove officers who fail to *faithfully* execute the law, thus frustrating his obligation.[117] Second, unitarians also conveniently claim that the Clause allows the President not to enforce laws which he believes unconstitutionally interfere with his Article II powers.[118] Both assertions fail because they treat the Take Care Clause as outlining something more than just the *manner* of law execution.

The existence of for-cause protections, like the INM standard, facilitate rather than frustrate this duty. Unitarians regularly argue that the Take Care Clause imposes a positive obligation on the President and for-cause protections frustrate

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[112] Peter M Shane, 'The Originalist Myth of the Unitary Executive' (2016) 19 *Journal of Constitutional Law* 323, 344–44; Shugerman (n 95).

[113] Shugerman (n 95) 1483, 1567–1570.

[114] Shugerman (n 95) 1538–1539.

[115] US Const, art II, § 3, cl 1.

[116] John C Fitzpatrick (ed), *The Writings of George Washington from the Original Manuscript Sources 1745-1799*, vol 30 (United States Government Printing Office 1939) 334. See also, Saikrishna Bangalore Prakash, 'Hail to the Chief Administrator: The Framers and the President's Administrative Powers' (1993) 102 *Yale Law Journal* 991, 993; Andrew Kent, Ethan Leib and Jed Shugerman, 'Faithful Execution and Article II' (2019) 132 *Harvard Law Review* 2111, 2178–2190.

[117] *Seila Law LLC v Consumer Financial Protection Bureau* (n 10) (slip op at 2) (Kagan J, concurring in part and dissenting in part). See also, *Free Enterprise Fund v Public Company Accounting Oversight Board* (n 6) 484, 492–498; Calabresi and Prakash (n 70) 583.

[118] Calabresi and Prakash (n 70) 582–584, 589–590, 616–617.

this duty.[119] However, as Justice Kagan pointed out in *Seila Law*, most for-cause protections facilitate the President's duty to see that the laws are faithfully executed, by specifying the removal of those who fail to do so.[120] The inclusion of 'inefficiency' to the traditional (I)NM standard further bolsters this point. As the last section established, the Vesting Clause simply directs that the President execute the laws. Properly understood, the Take Care Clause regulates the *way* he may exercise the power of law execution (ie, in good faith).[121] Therefore, the current for-cause regime enables the President to see that the laws are executed *faithfully*, while simultaneously not allowing him to turn his duty of law enforcement into a discretionary choice.

2.1.3. Necessary and Proper Clause

The Necessary and Proper Clause vests Congress with the significant power to 'make all Laws which shall be necessary and proper' to structure the government.[122] The Clause's broad grant of Power effectively places Congress at the apex of the constitutional structure by pre-emptively limiting the Executive.[123] Despite being the constitutional source of *all* for-cause protections, it has received little academic and judicial attention in the IA debate. For example, if the Court were truly interested in avoiding a complicated separation of powers kerfuffle, it could simply decide whether the for-cause protections were 'necessary and proper' in furtherance of Congress' specific legislative objective.[124] Indeed, the Supreme Court could have entirely avoided the unitarian debate in *Slaughter* by only allowing briefing on whether for-cause protections are consistent with the Necessary and Proper Clause.[125] So why would the Court *not* do that? There are two likely reasons, one doctrinal and one normative.

First, Necessary and Proper jurisprudence is largely functionalist. For example, the Supreme Court in *McCulloch v Maryland* interpreted the Clause for the first time, to decide whether Congress could create the First Bank of the United

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[119] Gillian E Metzger, 'The Constitutional Duty to Supervise' (2015) 124 *Yale Law Journal* 1836, 1874.

[120] Manners and Menand (n 95) 69; *Seila Law LLC v Consumer Financial Protection Bureau* (n 10) 25.

[121] Gary S Lawson and Christopher D Moore, 'The Executive Power of Constitutional Interpretation' (1996) 81 *Iowa Law Review* 1267, 1313; Metzger, 'The Constitutional Duty to Supervise' (n 119) 1878.

[122] US Const, art I, § 8, cl 18.

[123] See respectively, Gary Lawson and others, *The Origins of the Necessary and Proper Clause* (Cambridge University Press 2010) 1–14; Michael W McConnell, *The President Who Would Not Be King: Executive Power Under the Constitution* (Princeton University Press 2020) 67–68.

[124] Ilan Wurman, 'The Necessary and Proper Clause and the Law of Administration' (2025) 93 *The George Washington Law Review* 1196, 1233.

[125] *Arlington v Federal Communications Commission* (n 77) 305.

States.[126] Chief Justice John Marshall explained that the Clause's broad grant of authority reflected a functionalist desire by the Founders not to overly constrain 'the means by which government should, in all future time, execute its powers'.[127] Reading the Clause in line with a functionalist interpretation, Marshall adopted a separation of powers model that provided broad constitutional deference to Congress' laws.[128] This construction of the Clause has been held to afford Congress broad authority to establish and structure government offices 'as it chooses'.[129] Therefore, as a matter of existing doctrine, any analysis of for-cause protections under the Clause would likely be upheld, frustrating the Court's vision for an expansive presidency. This therefore explains why the Court has avoided engaging in Necessary and Proper analysis.

Second, due to the Clause's dominant functionalist interpretation, engaging it would likely jeopardise the Court's mask of formalism. The Court's pursuit of functionalism is not intended to be overt, because there is prima facie a conflict between originalism (as a constraining doctrine) and the UET (as an expansive doctrine). By maintaining its prima facie adherence to bright line rules, rather than analysing Congress' historical exercises of discretion, the Court maintains its image as a neutral arbiter rather than an advocate of expansive presidential power.

2.2. The Mask of Formalism: The Removal Power from *Myers* to Today

This section examines the development of the removal power in the Supreme Court from *Myers* to today. It explores how the Roberts Court uses selective precedent and history, to avoid reevaluating historically dubious decisions like *Myers*. In doing so, it shields its unitarian account of the Founding from challenge. By treating these historical accounts as foreclosed, the Court reveals a mask of formalism that prioritises unitarian outcomes over a genuine originalist commitment to establish the 'original public meaning' of the Constitution.

In *Myers* the Court found the President possessed an illimitable removal power over executive officials, relying on the now demonstrably flawed interpretation of the Decision of 1789. Just 9 years later in *Humphrey's Executor*, the Court upheld a for-cause protection which prohibited removal except for 'inefficiency, neglect of duty, or malfeasance in office'.[130] Although the decision provided a functionalist outcome, the Court's reasoning adopted a formalist tone. The opinion stated that the FTC *only* exercised quasi-judicial and quasi-legislative functions, creating two conundrums. First, it implicitly conceded the formalist

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[126] *McCulloch v Maryland*, 4 Wheat 316 (1819).

[127] ibid 415.

[128] John F Manning, 'Separation of Powers as Ordinary Interpretation' (2011) 124 *Harvard Law Review* 1939, 1941.

[129] *Buckley v Valeo*, 424 U.S. 1, 138 (1976).

[130] Federal Trade Commission Act (15 U.S Code § 41). See also, *Humphrey's Executor v. United States* (n 4) 628.

argument by refusing to confirm that the FTC's powers could constitutionally be 'executive' in nature. Instead, it characterised the FTC's functions as quasi-legislative and quasi-judicial, likely to avoid expressly overruling *Myers*. Second, it relied on broad delegations of legislative power being constitutional, a premise Justice Gorsuch challenged in *Slaughter*'s oral argument.[131]

Since *Humphrey's*, the Court has qualified the holding that IAs exercise quasi-legislative and quasi-judicial powers. In *Morrison v Olson*, the majority seemingly rejected *Myers* and *Humphrey's* formalism by focusing on whether the independent counsel's functions justified the level of encroachment on the President's 'executive power'.[132] By doing so, the Court adopted a functionalist reading of the separation of powers. However, Justice Scalia's influential dissent in *Morrison,* seen as the high-water mark of the UET, has reemerged as a strong basis for the Roberts Court to dismantle agency independence.[133]

Since then, the Roberts Court has gravitated towards Scalia's prima facie formalist vision. In *Free Enterprise Fund*, the Court severed the for-cause removal restrictions of the PCAOB. It held that these protections unconstitutionally insulated the PCAOB inside the Securities and Exchange Commission's (SEC) structure.[134] The Court's striking down of the PCAOB's for-cause protection was widely regarded as a symbolic victory, as the President could still not remove the SEC commissioners without cause.[135] The Court stated that their decision did not revisit previous precedents, thereby suggesting *Humphrey's* remained good law.[136] However, the logic of *Free Enterprise Fund* challenged the very basis of *Humphrey's* because the decision 'separate[d] independence from independent agencies'.[137] Properly understood, the decision was a warning shot against agency independence that demonstrated the Court's ability to achieve its unitarian outcomes without practical or doctrinal fallout. Chief Justice Roberts also avoided having to defend the Court's dubious historical account of the removal power, instead generally citing *Myers* for historical propositions.[138] By deferring to *Myers* contested history, the Court shielded the basis of its unitarian logic from challenge, as it did not have to open the historical Pandora's box. This strategic adherence to

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[131] *Trump v Slaughter* (Oral Argument, US Sup Ct, December 2025) <https://www.supremecourt.gov/oral_arguments/audio/2025/25-332> accessed 8 March 2026 (Gorsuch J, 44-47).

[132] *Morrison v Olson* (n 37) 691.

[133] ibid 699.

[134] *Free Enterprise Fund v Public Company Accounting Oversight Board* (n 6) 496–497.

[135] Neomi Rao, 'A Modest Proposal: Abolishing Agency Independence in *Free Enterprise Fund v PCAOB*' (2011) 79 *Fordham Law Review* 2541, 2548–2549.

[136] *Free Enterprise Fund v Public Company Accounting Oversight Board* (n 6) 483.

[137] Rao (n 136) 2544.

[138] *Free Enterprise Fund v Public Company Accounting Oversight Board* (n 6) 483; ibid 492–493; ibid 509.

Humphrey's and *Myers*, while achieving a symbolic unitarian victory, was the beginning of the end for agency independence.

In *Seila Law*, the Court struck down the removal protections of the Consumer Financial Protection Bureau, focusing heavily on its single-headed structure, with its funding and litigatory powers being described as *purely* executive functions. By doing the latter, the Court expressly stated what *Humphrey's* implicitly conceded: IAs may not exercise executive functions. Despite Justice Thomas's protestations, the Court asserted that *Humphrey's* remained good law.[139] Although the Court did not technically overrule *Humphrey's*, its finding that the CFPB's functions were executive in nature logically confirmed the end of agency independence, as all IAs possess these powers.[140] By maintaining *Humphrey's* was good law, the Court used the perception of its fidelity to precedent to mask its functionalist lurch towards a unitary executive. Ultimately, the Court's strategic use of *Free Enterprise Fund* and *Myers* as precedent in *Seila Law* further legitimised the Court's decision, again avoiding Pandora's box of contested unitarian history.

The Supreme Court in *Collins v. Yellen* continued this pattern of hostility and struck down for-cause protections for the Federal Housing Finance Agency, citing the same reasons given in *Seila Law* (ie, novelty).[141] Although *Seila Law* and *Collins* would suggest that the Court only has a constitutional issue with 'novel' single-headed agencies, this seems highly unlikely considering the Court's recent emergency stay order in *Trump v. Wilcox*.[142] In *Wilcox*, the Court essentially confirmed that *Humphrey's* was no longer good law, allowing for the termination of dozens of agency heads since.[143] Therefore, the Court's strategic invocation and omission of precedent since *Free Enterprise Fund* illustrates its doctrinal hostility to agency independence.

Conclusion

In conclusion, this chapter has analysed the history and text of the Article II provisions that unitarians claim support an illimitable removal power. In doing so, it has proven that agency independence is not contradicted, and is instead supported by, the text of Article II. By analysing the Vesting and Take Care Clauses, they prove that 'the executive Power' was historically understood as being akin to a fiduciary duty, not a power grant.[144] The intentional absence of the word 'all' in the Appointments Clause, along with the fixed-term rule seen in *Marbury*, also

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[139] See respectively, *Seila Law LLC v Consumer Financial Protection Bureau* (n 10) (slip op at 1) (Thomas J, dissenting in part); 16–17.

[140] Vermeule (n 5) 1174, 1221. See also, *Free Enterprise Fund v Public Company Accounting Oversight Board* (n 6) 513–14.

[141] *Collins v Yellen* (n 10) 26.

[142] *Trump v Wilcox* (n 33) 1–2.

[143] ibid (slip op at 2–3) (Kagan J, dissenting).

[144] See generally, Mortenson (n 95).

confirms Congress could qualify tenures of office at the Founding, under the Necessary and Proper Clause.[145]

The Roberts Court's use of the mask of formalism, combined with its selective picking of precedent exposes its functionalist pursuit of a unitary executive.[146] By protecting the demonstrably flawed history in *Myers* from scrutiny, the Court has placed its pursuit of a unitary executive above any genuine originalist inquiry. Therefore, this chapter proves that for-cause protections are historically and textually compatible with Article II, facilitating rather than frustrating the President's duties.

[145] See generally, Shugerman (n 95).

[146] Metzger (n 24) 101.

3. The Future of Agency Independence in the Unitary Era and the Slipping Mask of Formalism

Introduction

The Roberts Court, in contrast to its predecessors, 'stands out as both political and aggressive' in its assertion of judicial control over the administrative state.[147] It has moved beyond Justice Scalia's strict formalism to achieve its goal of dismantling the administrative state's independence. By shifting away from Scalia's 'original public meaning' and towards a more malleable 'history and tradition' standard, the Court engages in selective functionalism, most recently seen in its approach to Fed independence.

The slipping mask of formalism is most notable in the Court's procedural leapfrogging in both *Wilcox* and *Slaughter*. By issuing stays permitting at-will removal before final judgment, the Court has turned the aquarium of administrative agencies into fish soup. This shift is consolidated by its use of severability to impute an intention to Congress that favours the Court's preferred outcome of a unitary executive. Therefore, the Court ironically replaces the democratic deficit and tyranny supposedly inherent in agency independence with centralised control in the President, and failing that, an unelected judiciary.

3.1. The Roberts Court and the Unitary Executive

3.1.1. The Spectre of Scalia

Before exploring Scalia's contemporary influence on the Court, it is necessary to revisit *why* the Court uses the mask of formalism in the first place and Scalia's role in that. Originalism is in tension with functionalism because originalism promotes rigid, bright line rules, something Scalia championed in his formalist writings.[148] Since then, originalism has become the dominant method of constitutional interpretation.[149] Justice Kagan's regularly misrepresented statement that 'we are all originalists now' is indicative of a far wider and more important premise. Originalism's appeal to 'original public meaning' relies on history being and accepted as an objective truth. By relying on this premise, the Court's reasoning

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[147] Brown and Epstein (n 26) 247–249. See eg, Brett M Kavanaugh, 'Fixing Statutory Interpretation' (2016) 129 *Harvard Law Review* 2118, 2150–51; Gorsuch (n 12) 75–83; *Michigan v Environmental Protection Agency*, 576 U.S. 743, 760 (2015) (Thomas J, concurring). See also, Joan Biskupic, 'Neil Gorsuch Has a Grudge Against Federal Agencies. He Holds Their Fate in His Hands' (*CNN*, 17 January 2024) <https://www.cnn.com/2024/01/17/politics/supreme-court-epa-neil-gorsuch-chevron> accessed 28 March 2026.

[148] See eg, *Plaut v Spendthrift Farm*, 514 U.S. 211, 239 (1995); *Mistretta v United States*, 488 U.S. 361, 416–422 (1989) (Scalia J, dissenting); *Morrison v Olson* (n 37) 705 (Scalia J, dissenting).

[149] William Baude, 'Is Originalism Our Law?' (2015) 115 *Columbia Law Review* 2349, 2353. cf. Pamela S Karlan, 'Constitutional Law as Trademark' (2009) 43 *University of California Davis Law Review* 385, 400; See also, 'Clip: Kagan Confirmation Hearing, Day 2, Part 1' (26 February 2026) <https://www.c-span.org/clip/no-category/user-clip-clip-kagan-confirmation-hearing-day-2-part-1/2924010> accessed 27 March 2026.

gains a level of legitimacy that shields it from substantive criticism. As a result, it uses this perception of objectivity—as it uses Scalia's legacy—as a stepping stone to reach its own desired functionalist outcomes. Therefore, the mask of formalism allows the Court to expand presidential power while presenting itself as merely following the neutral dictates of the past.

The impact of Scalia on the Court today cannot be understated.[150] He is regularly referred to as the supreme originalist authority and is cited second only to Chief Justice Roberts in Supreme Court briefs.[151] Scalia is also the most frequently cited justice by the Solicitor General and Big Law advocates before the Court and the justices themselves regularly pay homage to Scalia in oral arguments.[152] In turn, a broad generalisation of the data would suggest that Scalia remains hugely influential on the Court, especially in matters of interpretative theory and the separation of powers. The Court's use of the mask of formalism therefore looks like a strategic *necessity*. Not least because if Scalia's legacy is one of strict formalism, the Court cannot openly engage in functionalism while at the same time paying homage to his great formalist intellect.[153] Therefore, it is unsurprising that the Roberts Court has engaged in something akin to 'bright-line-rule fetishism' in separation of powers cases, to compensate for this contradiction.[154]

Recent cases from the Roberts Court suggest it has shifted away from Scalia's use of originalism as a textually restraining doctrine, thus providing the Court greater flexibility to pursue its functionalist goals.[155] Scalia understood that to decipher the 'original public meaning' of the Constitution one should look to the text, often relying upon Founding-era dictionaries to attribute meaning to the text.[156] However, the Roberts Court has silently shifted away from Scalia's 'original public meaning' and towards a more malleable 'history and tradition' standard.[157] In the

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[150] John CP Goldberg and Benjamin C Zipursky, 'The Roberts Court Paradox' (2025) 94 *Fordham Law Review* 1, 43–48.

[151] Adam Feldman, 'The Biggest Names on the Briefs' (*SCOTUSblog*, 17 March 2026) <https://www.scotusblog.com/2026/03/the-biggest-names-on-the-briefs/> accessed 8 April 2026.

[152] Richard Re, 'Justice Scalia's Uncertain Legacy' (*SCOTUSblog*, 24 March 2026) <https://www.scotusblog.com/2026/03/justice-scalias-uncertain-legacy/> accessed 26 March 2026; Feldman (n 151).

[153] Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 *University of Chicago Law Review* 1175, 1184. See also, John F Manning, 'Justice Scalia and the Idea of Judicial Restraint' (2017) 115 *Michigan Law Review* 747, 749–750. cf. Steven G Calabresi and Gary Lawson, 'The Rule of Law as a Law of Law' 90 *Notre Dame Law Review* 483, 488–489; Randy E Barnett, 'Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism' (2012) 75 *University of Cincinnati Law Review* 7, 12.

[154] Goldberg and Zipursky (n 150) 54.

[155] Re (n 152).

[156] See eg, *District of Columbia v Heller*, 544 U.S. 570, 578–598 (2010). See also, Gary S Lawson, 'Command and Control: Operationalizing the Unitary Executive' (2023) 92 *Fordham Law Review* 441, 447–448; Shugerman (n 95) 1505–1529.

[157] Koenig and Pontz (n 10) 226; *Dobbs v Jackson* (2022) 597 US ___ (US Sup Ct) 5; ibid 15–35;

lower courts, this shift has increased rather than limited judicial discretion,[158] because it enables judges to be 'amateur historians' and engage in the type of cherry-picking that this dissertation has identified and Justice Stevens cautioned about.[159] The justices' reverence for Scalia's strict formalism is therefore treated as a tool to leapfrog from, in order to constitutionalise the Court's disdain for the administrative state.[160]

In other respects, the Court clambers onto Scalia's interpretative approach, where it assists its vision for expansive presidential control over the administrative state. For example, Scalia's interpretation of originalism gave no particular regard to stare decisis because, in his view, judicial doctrines could not frustrate courts pronouncing on the proper interpretation of the Constitution.[161] This means that *Humphrey's* and all other removal precedents are undeserving of precedential respect, theoretically facilitating an easier demise of agency independence.[162] Therefore, by shifting away from Scalia's 'original public meaning' and towards the malleable 'history and tradition' standard, the Court will likely use the originalist objection to precedent to dismantle *Humphrey's* and finally end agency independence in *Slaughter*.

3.1.2. Judicialisation of the Administrative State

The Roberts Court's hostility to the administrative state reached a climax in *Loper Bright v. Raimondo*, which overruled the Court's 40-year-old *Chevron* doctrine.[163] *Chevron v. NRDC* established judicial deference to an agency's 'reasonable' interpretation of statutory ambiguity.[164] As a result, agency regulations may now be challenged in court, with judges having the final word on the

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New York State Rifle & Pistol Association v Bruen (2022) 597 US ___ (US Sup Ct) 12–13; *McDonald v Chicago* (2010) 561 US 742 (US Sup Ct) 767–777.

[158] Rebecca L Brown, Lee Epstein and Mitu Gulati, 'The Constraining Effect of "History and Tradition": A Test' (2024) 713 *The Annals of the American Academy* 200, 208–214; ibid 215–216.

[159] *McDonald v Chicago* (n 157) 910 (Stevens J, dissenting). See, Chad Squittieri, 'Who Determines Majorness?' (2021) 44 *Harvard Journal of Law and Public Policy* 463, 477–478; Peter J Smith and Thomas Colby, 'Living Originalism' (2009) 59 *Duke Law Journal* 239, 312–313.

[160] Metzger (n 24) 2–6; Jeff Neal, 'Was Antonin Scalia Originally an Originalist?' (*Harvard Law School*, 26 October 2022) <https://hls.harvard.edu/today/was-antonin-scalia-originally-an-originalist/> accessed 5 April 2026.

[161] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Amy Gutmann ed, Princeton University Press 1997) 138–140.

[162] Gary S Lawson, 'The Rise and Rise of the Administrative State' (1994) 107 *Harvard Law Review* 1231, 1232–49. See generally, Frank B Cross, *The Failed Promise of Originalism* (Stanford University Press 2013) 114–118, 155; Amy Coney Barrett, 'Stare Decisis and Due Process' (2003) 74 *University of Colorado Law Review* 1011, 1012; Gary S Lawson, 'The Constitutional Case Against Precedent' (1994) 17 *Harvard Journal of Law and Public Policy* 23, 24.

[163] *Loper Bright Enterprises v Raimondo*, 603 U.S. ___ (2023) (slip op at 18); *Chevron v Natural Resources Defence Council*, 467 U.S. 837 (1984).

[164] *Chevron v Natural Resources Defence Council* (n 163) 844.

interpretation of these regulations. Notably, Justice Scalia was a proponent of *Chevron* deference before later becoming a sceptic, mirroring the wider partisan shift against the modern administrative state.[165] Since *Loper Bright,* agency regulations have failed in court 84% of the time, with the lower courts seizing on this opportunity to undermine the statutory authority of agencies themselves.[166] Subsequently, a range of Supreme Court opinions have curtailed the power of the administrative state, further demonstrating the Court's hostility to IAs.[167]

The judicialisation of the administrative state has led to an unavoidable paradox. Facially, there is no *necessary* contradiction between the Court deferring to agencies on questions of fact and intervening in questions of law. Not least because it is the 'province and duty of the judicial branch to say what the law is'.[168] The contradiction instead arises because the Court's intervention in the administrative process shows that the 'deep premises and attitude[s]' of the Court are 'inconsistent' with their stated objections to the administrative state.[169] For example, the Court castigates the administrative state for its democratic deficit, while simultaneously replacing its answerability to an unelected judiciary.[170] It uses the UET to concentrate control of administrative power in the presidency and a philosophically conservative Supreme Court.[171] By incrementally dismantling administrative independence, the Court ensures that the administrative state is either tamed by the President, or failing that, a conservative Court.

This doctrinal and partisan hostility to agency independence has effectively given the Court licence to judicialise the administrative state. For example, the Court regularly uses the democratic deficits of IAs as evidence of their threat of liberty.[172] Setting to one side that this is a functionalist consideration, this claim suffers from two defects.[173] First, it disregards recent and concerted efforts by all branches which have rendered the administrative state today weaker than it has ever

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[165] Antonin Scalia, 'Judicial Deference to Administrative Interpretations of Law' (1989) 1989 *Duke Law Journal* 511, 521.

[166] Robert K Craig, 'The Impact of Loper Bright v. Raimondo: An Empirical Review of the First Six Months' (2025) 109 *Minnesota Law Review* 2671, 2732–2734.

[167] *Corner Post v Board of Governors* 603 US ___ (2023); *Moyle v United States* (2023) 603 US ___ (US Sup Ct) 331–338; *Securities and Exchange Commission v Jarkesy* (2023) 603 US ___ (US Sup Ct); *West Virginia v Environmental Protection Agency* (n 14).

[168] Brown and Epstein (n 26) 250; *Marbury v Madison* (n 100) 177.

[169] Adrian Vermeule, Law's Abnegation: From Law's Empire to the Administrative State (Harvard University Press 2016) 28.

[170] Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd edn, Yale University Press 1986) 19–23; ibid 27–28.

[171] Metzger (n 24) 97.

[172] *Seila Law LLC v Consumer Financial Protection Bureau* (n 10) 21–22; *Collins v Yellen* (n 10) 20, (slip op at 4) (Gorsuch J, concurring in part).

[173] Metzger (n 24) 98.

been.[174] Second, it reveals a partisan view of what the Court believes the state's role should be.[175] By framing agencies as inherently dangerous the Court ignores (or altogether rejects) their ability to fight against special interests and thus protect the liberty of individuals from private domination, but only if properly insulated.[176] In turn, this ideological bias reveals the Court's more radical and functionalist desire to completely restructure the administrative state and presidency.

3.2. The Demise of Humphrey's Executor

The seminal *Slaughter* case is set to be decided this summer, with the Court widely expected to rule against IAs on formalist grounds.[177] This section explores how the Court has pursued a functionalist agenda from the start of the case and will likely continue to do so until the end. It examines how the Court's grant of certiorari (review) before judgment effectively constitutes a decision on the merits. Finally, it addresses the likely severability remedy and how it represents the Court's most substantive embrace of functionalism yet.

3.2.1. Fish Soup Please! Trump v. Slaughter

The Supreme Court's handling of *Slaughter* is most striking, not for its predictable hostility towards agency independence, but rather its handling before it even reached the merits docket. By issuing a stay pending final disposition and granting certiorari before judgment at the same time, the Court effectively leapfrogged the lower court, undermining its regular insistence that it is a court of *final*, not first review.[178] Combined with its stay order in *Wilcox*, where the Court effectively overturned what remained of *Humphrey's*, this procedural matter reaffirmed the end of agency independence.[179]

a) Stay Orders

While a stay ordinarily 'operates upon the judicial proceeding itself' to 'temporarily divest [the lower court's injunction] of enforceability,' its effect in

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[174] Graham Steele, 'The Real-World Realities Confronting the Court in Trump v. Slaughter' (*Yale Journal on Regulation*, 14 February 2026) <https://www.yalejreg.com/nc/the-real-world-realities-confronting-the-court-in-trump-v-slaughter-by-graham-steele/> accessed 29 March 2026.

[175] Laura K Field, *Furious Minds: The Making of the MAGA New Right* (Princeton University Press 2025) 225.

[176] K Sabeel Rahman, 'Anti-Domination and Administration' (2025) 100 *New York University Law Review* 1984, 2029–33; K Sabeel Rahman, *Democracy against Domination* (Oxford University Press 2017) 14.

[177] Adam White, 'Is Humphrey's Executor Headed for Slaughter?' (*SCOTUSblog*, 2 October 2025) <https://www.scotusblog.com/2025/10/is-humphreys-executor-headed-for-slaughter/> accessed 4 February 2026.

[178] Stephen I Vladeck, 'A Court of First View' (2024) 138 *Harvard Law Review* 533, 550–556; Stephen I Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (1st edn, Basic Books 2023) 24–25.

[179] *Trump v Wilcox* (n 33) 1–2.

Wilcox was enormous.[180] The *Wilcox* order effectively overruled *Humphrey's* by allowing the at-will removal of agency heads before a final judgment from the Court. By granting the stay in *Wilcox*, the Court agreed that it had met the three-pronged threshold test.[181] Namely, that the applicant must demonstrate that there is a 'reasonable probability' the Court will grant review, there is a 'fair prospect' the Court will reverse the judgment below and finally that there would be 'irreparable harm' absent a stay.[182] Having 'balance[d] the equities' the Court's decision cleared the path for unitarian control over the administrative state.[183]

The final prong of the stay test is most important to this section. The 'irreparable harm' requirement aims to protect the status quo. Traditionally, the status quo in this type of case would be to keep the official in place pending the Court's final judgment. Paradoxically, *Wilcox* flipped this on its head by stating that the government 'faces a greater risk of harm' from an agency head remaining in office (until the end of the case) than an agency head faces from unlawful removal.[184] Instead, by allowing the President to continue removing agency officials, the Court blessed the continuing disruption to the status quo, particularly since fired officials cannot easily be reinstated ex post under existing precedent.[185] Further demonstrating that the Court's hostility to administrative independence is part of a wider functionalist desire for unitary control over the administrative state.

b) Grant of Certiorari Before Judgment

The procedural irregularities in *Slaughter* and *Wilcox* represent a departure from the traditional expectations of a conservative court. As mentioned earlier, a traditionally formalist Court would assert that it is a court of *final*, not first review.[186] Indeed, it would typically *desire* percolation to build a proper factual record for the justices to later rely upon.[187] By circumventing this process in *Slaughter*, the Court risks the same factual misrepresentations that forced it to vacate its own stay recently in *Moyle v United States*, due to the lack of lower court fact-finding.[188] This emphasis on expediency reveals the Court's traditional

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[180] *Nken v Holder*, 556 U.S. 418, 428 (2009).

[181] *Hollingsworth v Perry*, 558 U.S. 183, 190 (2010).

[182] ibid.

[183] *Indiana State Police Pension Trust v Chrysler LLC*, 556 U.S. 960, 960 (2009) (citations omitted).

[184] *Trump v Wilcox* (n 33) 1.

[185] *In re Sawyer*, 124 U.S. 200, 212 (1888); *Bessent v Dellinger*, 604 U.S. ___ (slip op at 3–4) (Gorsuch J, dissenting) (2025); *Harris v Bessent* [2025] (DC Cir Ct) (application for stay) (slip op at 45–47).

[186] *Zivotofsky v Clinton*, 566 U.S. 189, 201 (2012) (citation omitted).

[187] *Trump v CASA* Oral Argument Transcript <https://www.supremecourt.gov/oral_arguments/audio/2024/24A884> accessed 30 March 2026. 64, 83. See also, Vladeck, 'A Court of First View' (n 178) 569–571.

[188] *Moyle v United States* (n 167) 331–338 (Barrett J, concurring) (dismissed as improvidently granted).

commitment to process and percolation is secondary to its functionalist ambition to dismantle agency independence.

By allowing Trump to dismantle IAs through emergency stays before a final decision is rendered, the Court has effectively applied Professor Kim Lane Scheppele's metaphor to the administrative state.[189] In *Slaughter*, the Court's procedural leapfrogging has turned the aquarium of agency fishes into a fish soup, as by the time a final ruling is issued the structures of agency independence will have been permanently destroyed. In knowing the consequences of a stay *and* granting certiorari before judgment, the Court's issuance of both effectively predetermines the outcome in *Slaughter.*

3.2.2. Normative and Doctrinal Implications of Slaughter

a) Reconciling Slaughter with Previous Precedents

The most significant doctrinal problem the Court will face in *Slaughter* is the inconsistency of its own precedents. In *Trump v United States,* the Court held the President's removal power to be 'conclusive and preclusive'.[190] In other words, it asserted that his power flows directly from Article II and is legislatively indefeasible. However, the Court's *Wilcox* order is in tension with this. It recognised the Fed as an exception to at-will removal because the Federal Reserve is a 'uniquely structured, quasi-private entity' rooted 'in the distinct historical tradition of the First and Second Banks of the United States'.[191] Therefore, in *Slaughter*, the Court will have to justify how both can be true at the same time, or rather, why *Trump* ought to be qualified less than 2 years after it was decided. Setting aside the regularly explored idiosyncrasies of the Court's 'shadow docket', the Court's increasingly underdeveloped and outcome-oriented decision-making strongly evidences the Court's slipping mask of formalism.

If *Wilcox* is any indication, the Court's 'history and tradition' standard will be used to carve-out an exception for the Fed in *Slaughter*. By citing the First and Second Banks of the United States as historical antecedents, the Court re-engages in historical cherry-picking of the highest order. Originalists like Calabresi and Yoo are the chief architects of the claim that the Fed closely resembles the First Bank of the United States.[192] However, Calabresi and Yoo remain doctrinally consistent when they argue that all IAs, including the Fed, are still unconstitutional.[193] In contrast, the Court adopts Calabresi and Yoo's claim but ignores their conclusion. In doing so, the Court ignores unfavourable history and their own doctrine, to protect an institution's independence they believe too important to undermine. Furthermore, the Court's lax reference to 'history and tradition', when comparing

[189] Scheppele (n 13).

[190] *Trump v United States* (n 38) 8; ibid 20.

[191] *Trump v Wilcox* (n 33) 2.

[192] Calabresi and Yoo (n 67) 54.

[193] ibid 6.

the Fed to the First and Second Banks is flawed. Alexander Hamilton established the First and Second Banks as fully private institutions which were unable to purchase government-backed securities, both of which are unique to the modern Federal Reserve.[194] The Federal Reserve's modern mandate to 'pay the Debts' and 'regulate the Value' of money as a public entity therefore render its functions historically unique.[195] These inaccuracies demonstrate that the Court's 'history and tradition' test is a malleable tool for it to achieve its functionalist endeavours. Here it is conveniently used to protect the Federal Reserve from the dire consequences the Court seeks to impose on IAs elsewhere.

The oral argument in *Cook v Trump* further exposes the Court's masked embrace of functionalism, where the justices displayed an unusual functionalist concern for economic stability. Unlike *Wilcox* and *Slaughter*, the Court's refusal to stay the lower court decision in *Cook* suggested a functionalist scepticism of doing so. During oral argument, Justices Barrett and Kavanaugh probed the 'real-world effect' of chipping away at Federal Reserve independence by making removal decisions by the President unreviewable.[196] Put simply, the justices seemed concerned about triggering a possible recession. This functionalist concern, rather than focusing purely on the text of Article II, supports the argument that the Court's 'history and tradition' rule is functionally, not doctrinally driven. Instead, the Court's selective functionalism to protect the Fed from unitary control reconfirms the Court's slipping mask of formalism.

b) Severability

Severability is the judicial remedy used to save the remainder of a statute after one of its provisions are deemed unconstitutional. In the context of agency independence before the Roberts Court, this means keeping the agency's structure and powers intact but transforming the agency head into an at-will presidential appointee.[197] In the absence of a severability clause, the Court imposes a presumption in favour of severability, only excising the affected portion 'unless there is strong evidence that Congress intended otherwise'.[198] By adopting a minimalist remedy through excision and 'saving' the agency structure, the Court creates two problems that, when combined, expose the Court's aggressive pursuit of expansive presidential power.

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[194] Chabot, 'Is the Federal Reserve Constitutional?' (n 62) 29.

[195] ibid 3, 34–35. See also, US Const, art I, § 8, cl 1; US Const, art I, § 8, cl 5.

[196] '*Trump v Cook,* Oral Argument Transcript' <https://www.supremecourt.gov/oral_arguments/audio/2025/25A312> accessed 30 March 2026, 17, 49–53.

[197] *Free Enterprise Fund v Public Company Accounting Oversight Board* (n 6) 495–496; ibid 509–510.

[198] *Alaska Airlines v Brock*, 480 US 678, 685–86 (1987).

First, the Court's use of severability reveals its functionalist desire to create a unitary presidency, rather than maintain doctrinal consistency.[199] While severability is usually a minimalist tool, only severing the for-cause removal protections from these statutes achieves a remarkably functionalist result. As Justice Sotomayor pointed out in *Slaughter*'s oral argument, the Court must make a judgment that Congress would have preferred an executive agency as opposed to no agency at all.[200] A judgment often made without any explicit statutory support.[201] However, if the agency's structure of independence is the constitutional problem, then a formalist approach would require the entire statute to come down.[202] However, the real-world implications of dissolving dozens of established IAs is clearly too daunting to the conservative majority, leading them to achieve a less radical and more unitarian outcome. Alternatively, if the Court were truly strict formalists, they could stay their final decision to allow Congress time to restructure the agencies accordingly.[203] But its refusal to do so in *Free Enterprise Fund, Seila Law* and *Collins* would suggest that the Court would not be inclined to do so in *Slaughter*. Instead, its refusal to do so evidences its functionalist desire to achieve a unitary executive with absolute control over the administrative state, at all costs.

Second, the Court's imputing of congressional intent to justify severance allows the Court's formalists to paradoxically engage in lawmaking. As Justice Gorsuch observed in *Collins*, the Court risks overstepping the formalist bright lines it supposedly defends when it excises provisions based on implied or imputed intent.[204] Thus, while the normative basis of severability rests in deferring to the elected branches, the Court's practice of imputing intention to Congress perverts this principle. The Court's choice to redesign the entire executive branch raises questions as to normative implications of doing so, re-emphasising the existence of a counter-majoritarian difficulty. Nevertheless, the Court's unlikelihood of issuing a final stay with their decision in *Slaughter* to allow Congress to correct this problem confirms that the Court's pursuit of a unitary executive has exposed its now slipping mask of formalism.

Conclusion

The Roberts Court's embrace of the UET has led to a shift away from Justice Scalia's strict formalism.[205] The shift from Scalia's understanding of 'original

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[199] Metzger (n 25) 47.

[200] 'Oral Argument Transcript in *Trump v Slaughter*' (n 130) 36–37.

[201] *Free Enterprise Fund v Public Company Accounting Oversight Board* (n 6) 509.

[202] 'Oral Argument Transcript in *Trump v Slaughter'* (n 131) 8; *Immigration and Naturalization Service v Chadha* (1983) 462 US 919 (US Sup Ct) 944.

[203] *Buckley v Valeo* (n 129).

[204] *Collins v Yellen* (n 10) 5–6.

[205] This is deserving of short qualification. Justice Scalia's strict formalism helped the Court maintain the mask of formalism whenever they paid homage to him in their decision-making process. However, like the Court today, Scalia was a proponent of the Unitary Executive Theory. So, the

public meaning' towards a more malleable 'history and tradition' standard demonstrates how the Court has let the mask of functionalism slip in favour of its selective functionalism. Procedurally, this shift is also evident in the *Wilcox* and *Slaughter* orders where the Court allowed irreversible removals to go ahead before a final judgment. In doing so, the Court permanently and intentionally destroyed the status quo of administrative independence that existed for over 90 years, with no historical or textual justification.

The Court's attempt to exclude the Federal Reserve for overtly functionalist reasons, in the absence of supporting text or history, further exposes the Court's unitarian pretences. The judicialisation of the administrative state also illustrates the paradox of agencies being replaced by a unitary President and unelected judiciary. Finally, as Scheppele's fish soup metaphor suggests, the dismantling of agency independence post-*Wilcox* and before the final *Slaughter* decision this summer has effectively already decided the case. All we await now is the Court's rationale.

Court's shift away from his 'original public meaning' towards a 'history and tradition' standard reflects a shift in doctrine, rather than a shift in outcome. Therefore, the emphasis is on doctrinal consistency as opposed to a presumptive difference in outcome.

Conclusion

This dissertation has re-examined the constitutionality of agency independence against the backdrop of a Supreme Court that is increasingly hostile to the administrative state, and increasingly favourable towards the UET.[206] It has explored the historical, textual and doctrinal foundations that unitarians rely on for an illimitable removal power. By doing so, it proves that agency independence is deeply rooted in American 'history and tradition' and should theoretically pass even this Court's looser interpretation of originalism. However, the Court has thus far avoided this conclusion due to its embrace of the mask of formalism.

The dissertation began with the formalist reliance on inaccurate and cherry-picked history. Most notably, the Court's reliance on the so-called 'Decision of 1789', where the debates in the First Congress revealed a series of indecisions and contradictions. It then explored the Sinking Fund Commission as the first true independent regulatory commission, disproving the Court's claim that IAs are historical novelties. These conclusions reaffirm that the President's power of removal at the Founding was never viewed as illimitable. Instead, they prove that the Founders valued the normative benefits agency independence, including the diffusion of executive power.

The dissertation then explored the specific constitutional provisions in Article II, all of which support agency independence. The historical understanding of the Appointments Clause, as evidenced by the Federalist Papers and *Marbury*, confirm Congress possessed the to regulate tenures of office at the Founding. A similar originalist interpretation of the history and text of the Vesting and Take Care Clauses support the claim that both clauses referred only to the executive power of law execution. By demonstrating how INM protections pass the constitutional muster of all these clauses, and the Necessary and Proper Clause, it is clear why the Court ignores this narrower way to resolve IA disputes. Because it allows the Court to maintain its mask of formalism while pursuing its functionalist vision of a unitary executive.

Finally, it contextualises the Court's likely decision in *Slaughter* amongst its broader campaign against the administrative state. By allowing the President to dismiss agency heads before the final judgment in *Slaughter*, the Court has granted Trump the power to create fish soup, before deciding he could do so in the first place. The Court's likely severability remedy, combined with the doctrinal paradoxes covered throughout this dissertation, demonstrate that the Court's pursuit of a unitary executive is a functionalist endeavour, with no support in either the text or history of the Constitution. In conclusion, the Court's decision to gut agency independence and reconstruct the entire administrative state will vindicate the unitarian project that has been decades in the making. However, the significant normative and doctrinal costs of doing so have yet to be realised.

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[206] Metzger (n 24) 101.

Appendix A

This table identifies independent agency heads that have been removed from office by President Trump since 20 January 2025. This table has been compiled from information compiled by the Citizens for Ethics in Government tracker which was last updated in November 2025.[207] This list is therefore non-exhaustive and additional firings have been added at the dissertation author's discretion.

Name	Agency role	Appointed by?	Removal protections	Date fired	Was the firing likely illegal?[†]
Travis LeBlanc	Privacy and Civil Liberties Oversight Board	Trump	No	23 January 2025	Unclear
Edward Felten	Privacy and Civil Liberties Oversight Board	Trump	No	23 January 2025	Unclear
Sharon Bradford Franklin	Privacy and Civil Liberties Oversight Board	Biden	No	23 January 2025	Unclear
Hannibal Michael Ware	Inspector General	Biden and Trump	No (Notification requirements)	24 January 2025	Yes[††]
Phyllis Fong	Inspector General	W Bush	No (Notification requirements)	24 January 2025	Yes
Robert Storch	Inspector General	Biden	No (Notification requirements)	24 January 2025	Yes

[207] Gabriella Cantor and Hannah Sobran, 'Tracking Trump's Unprecedented—Often Illegal—Firings of Political Appointees and Watchdogs' (*CREW | Citizens for Responsibility and Ethics in Washington*, 31 March 2025) <https://www.citizensforethics.org/reports-investigations/crew-reports/tracking-trumps-unprecedented-often-illegal-firings-of-political-appointees-and-watchdogs/> accessed 18 February 2026.

Name	Agency role	Appointed by?	Removal protections	Date fired	Was the firing likely illegal?†
Sean O'Donnell	Inspector General	Trump	No (Notification requirements)	24 January 2025	Yes
John Sopko	Special Inspector General	Obama	No (Notification requirements)	24 January 2025	Yes
Michael Missal	Inspector General	Obama	No (Notification requirements)	24 January 2025	Yes
Eric Soskin	Inspector General	Trump	No (Notification requirements)	24 January 2025	Yes
Mark Lee Greenblatt	Inspector General	Trump	No (Notification requirements)	24 January 2025	Yes
Jill Baisinger	Acting Inspector General	Biden	No (Notification requirements)	24 January 2025	Yes
Cardell Richardson	Inspector General	Biden	No (Notification requirements)	24 January 2025	Yes
Larry Turner	Inspector General	Biden	No (Notification requirements)	24 January 2025	Yes
Rae Oliver Davis	Inspector General	Trump	No (Notification requirements)	24 January 2025	Yes
Christi Grimm	Inspector General	Biden	No (Notification requirements)	24 January 2025	Yes

Name	Agency role	Appointed by?	Removal protections	Date fired	Was the firing likely illegal?[†]
Teri Donaldson	Inspector General	Trump	No (Notification requirements)	24 January 2025	Yes
Sandra Bruce	Inspector General	Trump	No (Notification requirements)	24 January 2025	Yes
Karla Gilbride	Equal Employment Opportunity Commission	Biden	No (General Counsel)	27 January 2025	No
Gwynne Wilcox	National Labor Relations Board	Biden	Yes (INM)	27 January 2025	Probably legal *Trump v. Wilcox*
Jennifer Abruzzo	National Labor Relations Board	Biden	No (General Counsel)	27 January 2025	Yes
Joceyln Samuels	Equal Employment Opportunity Commission	Trump	Yes (INM)	27 January 2025	Yes
Charlotte Burrows	Equal Employment Opportunity Commission	Obama	Yes (INM)	27 January 2025	Yes
Ellen Weintraub	Federal Election Commission	W Bush	Yes (INM)	30 January 2025	Yes
Rohit Chopra	Consumer Financial Protection Bureau	Biden	No *Seila Law v. CFPB*	1 February 2025	No
Hampton Dellinger	Office of the Special Counsel	Biden	Yes (INM)	7 February 2025	Unclear

Name	Agency role	Appointed by?	Removal protections	Date fired	Was the firing likely illegal?†
Colleen Shogan	National Archives and Records Administration	Biden	No (Notification requirements)	7 February 2025	No
Susan Tsui Grundmann	Federal Labor Relations Authority	Biden	Yes (INM)	10 February 2025	Unclear
Cathy Harris	Merit Systems Protection Board	Biden	Yes (INM)	10 February 2025	Probably legal *Harris v. Bessent*
David Huitema	Office of Government Ethics	Biden	Unclear (Fixed term)	10 February 2025	No
Paul Martin	Inspector General	Biden	No (Notification requirements)	11 February 2025	Yes
General Charles Q Brown Jr	Chairman of the Joint Chiefs of Staff	Biden	No	21 February 2025	No
George Moose	Institute of Peace	W Bush	Yes (Congressional approval)	14 March 2025	Unclear *USIP v. Jackson*
Alvaro Bedoya	Federal Trade Commission	Biden	Yes (INM)	18 March 2025	Probably legal *Trump v. Slaughter*
Rebecca Kelly Slaughter	Federal Trade Commission	Biden	Yes (INM)	18 March 2025	Probably legal *Trump v. Slaughter*

Name	Agency role	Appointed by?	Removal protections	Date fired	Was the firing likely illegal?[†]
Michelle Moore	Tennessee Valley Authority Board of Directors	Biden	No (Fixed term)	27 March 2025	No *Morgan v. TVA*
Tanya Otsuka	National Credit Union Administration	Biden	No (Fixed term)	15 April 2025	No
Todd Harper	National Credit Union Administration	Trump	No (Fixed term)	15 April 2025	No
Thomas Rothman	Corporation for Public Broadcasting	Biden	No (Fixed term and non-governmental)	28 April 2025	Unclear
Diane Kaplan	Corporation for Public Broadcasting	Biden	No (Fixed term and non-governmental)	28 April 2025	Unclear
Laura Ross	Corporation for Public Broadcasting	Trump	No (Fixed term and non-governmental)	28 April 2025	Unclear
Alvin Brown	National Transportation Safety Board	Biden	Yes (INM)	6 May 2025	Unclear
Alexander Hoehn-Saric	Consumer Product Safety Commission	Biden	Yes (INM)	8 May 2025	Probably legal *Trump v. Boyle*
Carla Hayden	Library of Congress	Obama	No (Fixed term)	8 May 2025	No

Name	Agency role	Appointed by?	Removal protections	Date fired	Was the firing likely illegal?†
Mary Boyle	Consumer Product Safety Commission	Biden	Yes (INM)	8 May 2025	Probably legal *Trump v. Boyle*
Richard Trumka	Consumer Product Safety Commission	Biden	Yes (INM)	8 May 2025	Probably legal *Trump v. Boyle*
Beth Geer	Tennessee Valley Authority Board of Directors	Biden	No (Fixed term)	10 June 2025	No *Morgan v. TVA*
Christopher Hanson	Nuclear Regulatory Commission	Biden	Yes (INM)	13 June 2025	Yes
Erika McEntarfer	Bureau of Labor Statistics	Biden	No (Fixed term and permits earlier removal)	1 August 2025	Yes
Billy Long	Internal Revenue Service	Trump	No (Fixed term)	8 August 2025	No
Lisa Cook	Federal Reserve Board of Governors	Biden	Yes (Fixed term and 'for cause')	25 August 2025	Probably illegal *Cook v. Trump*
Susan Monarez	Centers for Disease Control and Prevention	Trump	No	27 August 2025	No
Robert Primus	Surface Transportation Board	Trump	Yes (INM)	27 August 2025	Yes

Name	Agency role	Appointed by?	Removal protections	Date fired	Was the firing likely illegal?†
Parisa Salehi	Inspector General	Biden	No (Notification requirements)	15 October 2025	Yes

† Firings are judged to be illegal based solely on the relevant statute's provisions unless a court has expressly ruled to the contrary in respect of that agency.
†† A firing is treated as illegal if the law imposes a condition before removal may take place. For Inspectors General, their founding statutes require the President to transmit the reasons for their dismissal in writing to Congress. See eg, *Storch v. Hegseth* (2025) (DC District Court, Case No 25-CV-415 (ACR)).

Appendix B

Figure 1 and Figure 2 are diagrams of formalism and functionalism, respectively. Figure 1 depicts the formalist interpretation of the separation of powers, where each branch is siloed and separate from the other. Figure 1 demonstrates how the branches have clear and easily identifiable boundaries, which are capable of being transgressed. Figure 2 depicts the functionalist interpretation of the separation of powers, where each branch overlaps in some way. In Figure 2 this overlap is tolerable, so long as no branch intrudes into the highlighted 'core' power(s) of any other branch.

All images are created by, and credited to, the dissertation author.



Figure 1. Diagram of a formalist interpretation of the separation of powers in a tripartite government.

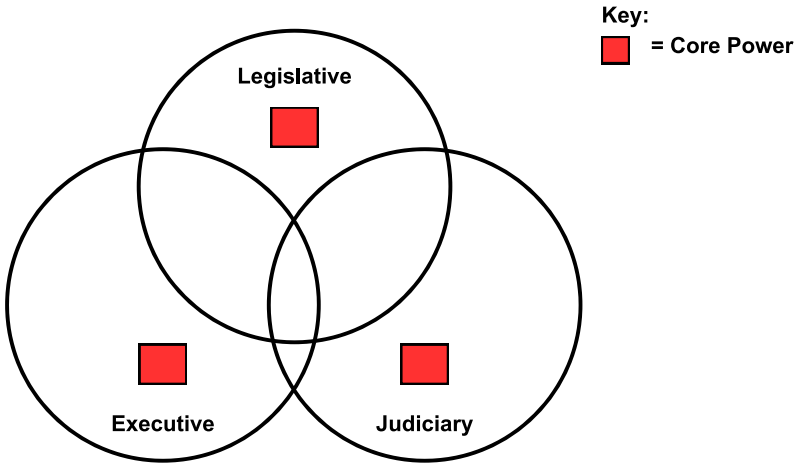


Figure 2. Diagram of a functionalist interpretation of the separation of powers in a tripartite government.

Appendix C

Figures 1 and 2 of this appendix are based on provisional data from the US Supreme Court's 2024 term compiled by Lee Epstein, Andrew D. Martin and Michael Nelson.[208]

All images are created by, and credited to, the dissertation author.

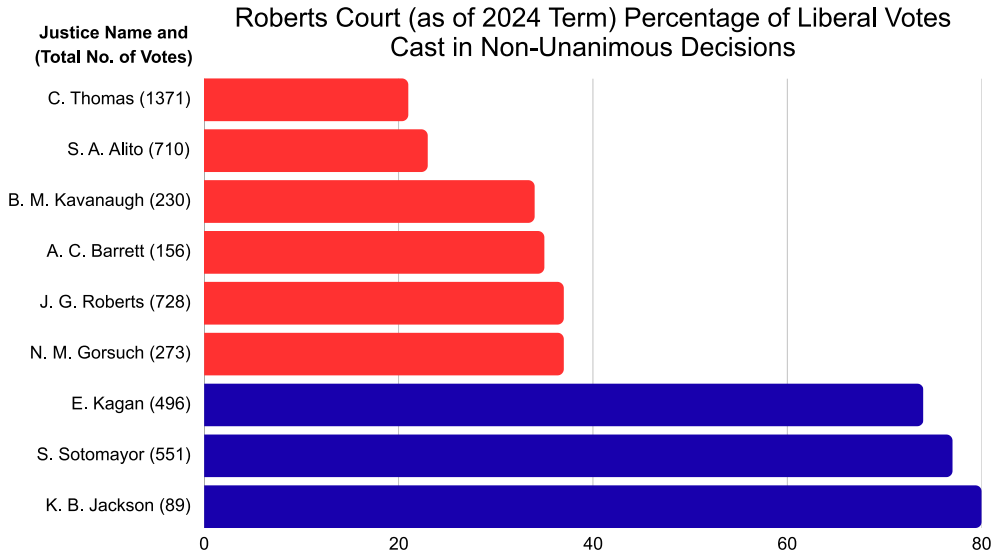


Figure 1. Percentage of liberal votes cast by each justice in the US Supreme Court since their appointment and up to 2024 term (provisional data).

[208] Lee Epstein, Andrew D Martin and Michael Nelson, 'Provisional Data Report: The 2024 Term of the U.S. Supreme Court' <https://epstein.wustl.edu/2024termdatareport> accessed 6 April 2026.

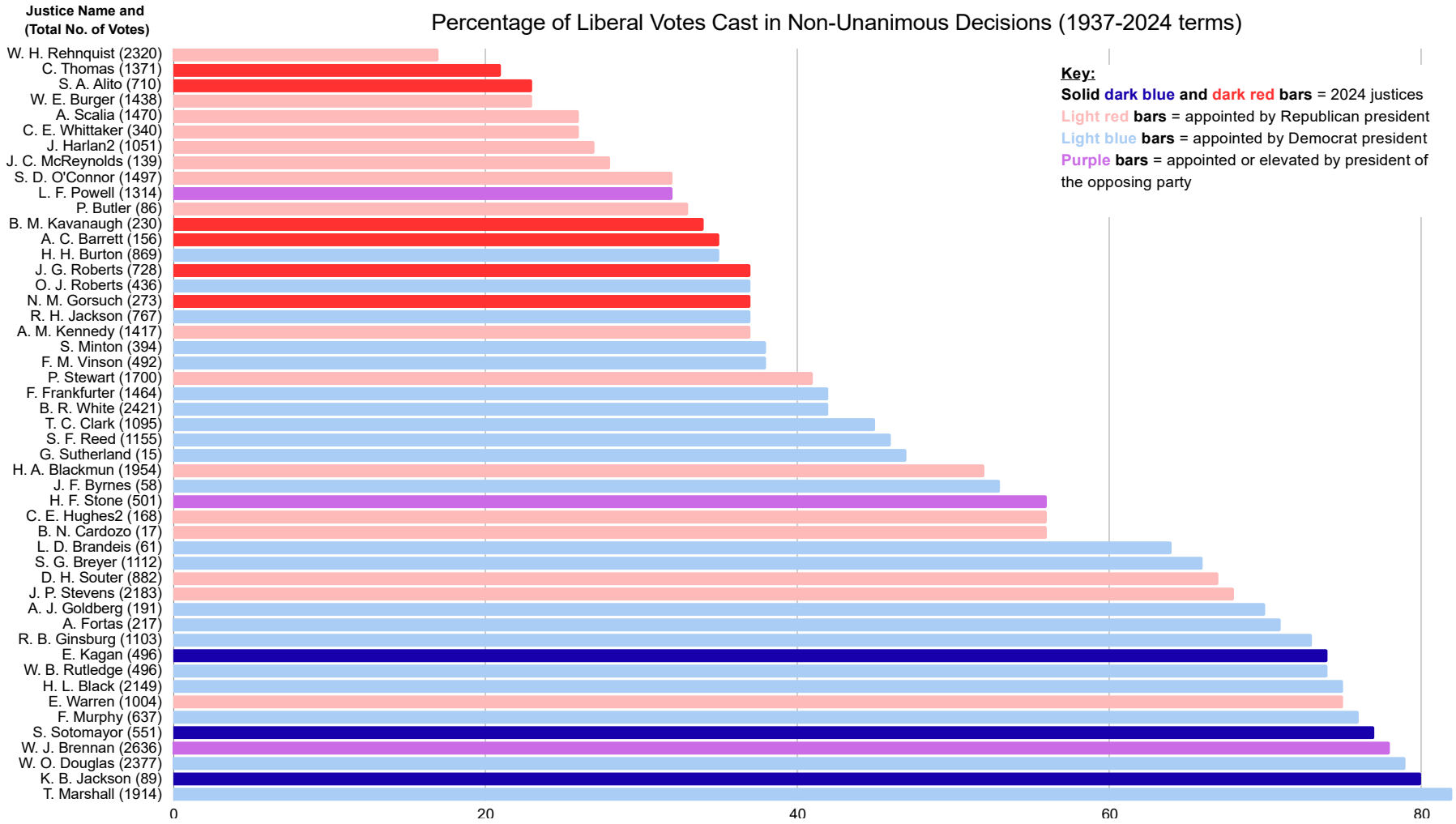


Figure 2. Percentage of liberal votes cast by each justice in the US Supreme Court from 1937 to the 2024 term (provisional data).